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CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

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CASES REPORTED.

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UNITED STATES *ex rel.* FOOTE *v.* COUNTY COURT OF HOWARD COUNTY.

(*Circuit Court, E. Div. of W. D. Missouri.* ——, 1880.)

LOCAL TAXATION FOR BENEFIT OF RAILROAD CORPORATION—STATUTES CONSTRUED.—The charter of a railroad company enacted in 1865, authorized the corporate authorities of any city, town, or county, to subscribe to its capital stock, issue bonds therefor, and levy a tax of not to exceed one-twentieth of 1 per cent. per annum on the taxable property of the municipality to pay same. A subsequent act, passed in 1868, authorized subscriptions by townships, in pursuance of a vote of the people, to the stock of any railroad company, building or proposing to build a railroad into, through, or near the township voting the subscription, and authorized taxes to be levied to meet the payments on account of such subscriptions. *Held*, that to pay the bonds issued under the latter act, the respondents were bound to levy whatever tax was necessary for that purpose, and were not restricted to one-twentieth of 1 per cent. per annum.

CONTRACT—LAWS IN FORCE WHEN CONTRACT WAS MADE—SUBSEQUENT LEGISLATION.—Laws in force when such bonds are issued, and which provide for taxation to pay them, enter into the contract between the bond holder and the state, and as against the former such laws cannot be repealed. Otherwise as to acts enlarging the taxing power passed after the issue of such bonds.

Demurrer to alternative writ of *mandamus*.

Henderson & Shields, for relator.

John D. Stevenson, for respondents.

McCRARY, C.J. The relator recovered judgment in this court, February 5, 1879, against Howard county, for $5,258.80. The judgment was upon coupons detached from bonds issued by said county July 1, 1869, under the provisions of "An act to facilitate the construction of railroads in the State of Missouri," approved March 23, 1868, known as the "Township Aid Act." The bonds were issued by said county in behalf of Chariton township, in pursuance of a vote of the people of that township, as provided by said act, and in payment for a subscription to the stock of the Missouri & Mississippi Railroad Company.

An alternative writ of *mandamus* was issued on the ninth of September last, commanding respondents to levy and cause to be collected, in the same manner as county taxes, a special tax on all the property, lying and being in said township, made taxable by law for such purposes. To the return of the respondents to this alternative writ a demurrer is interposed, which presents for our consideration the following questions:

First. Whether, under the act of 1868, above cited, the respondents are authorized to levy a tax of more than one-twentieth of 1 per cent. per annum for the payment of interest and principal of the aforesaid bonds.

Second. Whether such tax shall be levied upon real estate alone, or upon both real and personal property.

Upon the first question it is insisted, by counsel for the respondents, that the power of taxation conferred by the act of 1868 is limited and restricted, by section 13 of the act to "incorporate the Missouri & Mississippi Railroad Company," approved February 21, 1865. That section is as follows: "It shall be lawful for the corporate authorities of any city or town, the county court of any county desiring so to do, to subscribe to the capital stock of said company, and may issue bonds therefor, and levy a tax not to exceed one-twentieth of 1 per cent. upon the assessed value of taxable property for each year." Sess. Laws of 1865, p. 88.

It will be observed that this was a provision for subscriptions by counties and cities to the stock of that particular company without a vote of the people. It was, in my judgment, a limitation upon the power of taxation to pay subscriptions made under that act, and has no application to a subscription made under the act of 1868. This is reasonably plain upon the face of the section itself, for it authorizes the subscription, and at the same time prescribes the mode of levying taxes for its payment.

The one is evidently to be referred to the other; the taxation authorized is for the payment of the subscription provided for, and was not intended to be applied to subscriptions to be received by the company from other sources and under subsequent legislation. But if this question were doubtful under the terms of the original charter, it is made clear by reference to the act of 1868, under which the subscription was made.

Section 2 of that act is as follows: "In order to meet the payments on account of the subscription of the stock, according to its terms, or to pay the interest and principal on any bond which may be issued on account of such subscription, the county court shall, from time to time, levy and cause to be collected, in the same manner as county taxes, a special tax, which shall be levied upon all the real estate lying within the township making the subscription, in accordance with the valuation then last made by the county assessor for county purposes."

There is nothing in this language which indicates a purpose on the part of the legislature to limit the taxes to be levied to such as the charter of the company subscribed to might authorize. If such a purpose had existed, it would certainly have found expression in the act. The contrary is quite clearly expressed.

The act is complete in and of itself, and to incorporate into it the thirteenth section of the charter of the M. & M Railroad Company would only tend to render its terms confusing and contradictory. It makes no reference to any other act. Section 1 authorizes subscriptions to "any railroad

company in this state, building or proposing to build a railroad into, through or near" the township voting the subscription. The act was adopted as a new and independent means of facilitating "the construction of railroads in the state of Missouri." Besides, the tax was to be, "to meet the payments on account of the subscription to the stock according to its terms, or to pay the interest and principal on any bond which may be issued on account of such subscription." The plain meaning is that the tax shall be sufficient for these purposes. I am, therefore, of the opinion that the tax to be levied is not limited to one-twentieth of 1 per cent, but is a tax sufficient to pay relator's judgment.

It remains to consider the second question. The act of 1868, under which the bonds were issued, provides for a levy of taxes, to pay the same, upon real estate only. This act entered into and became part of the contract, and the legislature could not, by subsequent repeal, deprive relator of his rights under it. The provision of the constitution, that no state shall pass a law impairing the obligation of contracts, is a limitation upon the taxing power of a state, as well as upon all its legislation, whatever form it may assume. Therefore, a legislative act which assumes to repeal any tax law in force when relator's bond was issued, and under which he was entitled to enforce payment, is, as to him, unconstitutional and void. *Murray* v. *Charleston*, 96 U. S. 432.

This much is conceded. But, by an act of the general assembly of Missouri, approved March 10, 1871, (several years after the issue of the bonds in controversy,) it was provided that taxes to pay such bonds should be levied "on all real estate and personal property, including all statements of merchants doing business," within the township. Acts of 1871, p. 55.

It is claimed that this latter act has been repealed by being omitted from the Revised Statutes of Missouri recently enacted. It is not suggested by counsel for relator that this act is kept alive by any general saving clause of the Revised Statutes, and I assume that it is no longer in force; and that being so, the question is whether it was in its nature a contract between

the relator and the state, so that its repeal should be held to be, as to him, a violation of the federal constitution and therefore void. I know of no authority for the proposition that acts of the legislature passed after the issuance of the relator's bonds can be held to be a part of the contract with him, and upon the faith of which he invested his money. It is only the laws in force at the time the contract is made that enter into it. The subsequent enlargement of the taxing power was a matter of gratuity on the part of the state, for which there was no new consideration moving from him.

It does not appear that he purchased his bonds after the passage of the act of 1871, and relying upon its provisions. If it did the question would arise whether he had any right to rely upon any legislation as irrepealable, except that in force when the bonds were issued; and, as at present advised, I should hold that he was bound to know the law, which is that all acts not in force when the contract was made were subject to be altered, amended or repealed by the state.

It is unnecessary to discuss the other questions raised by the demurrer. The return is clearly insufficient.

The demurrer is sustained.

CHEW and others *v.* HENRIETTA MINING & SMELTING COMPANY and others.

(*Circuit Court, E. D. Missouri.* March 13, 1880.)

CORPORATE BONDS—NOTICE—AGENCY.—A purchaser takes corporate bonds at his peril, where he has notice that an authorized agent is disposing of such bonds to him for an unauthorized purpose.

SAME—SAME—OFFICER OF CORPORATION.—In the absence of notice, such purchaser may presume that an officer is acting within the scope of his authority when acting as the agent of such corporation.

MARRIED WOMAN—NOTICE TO HUSBAND.—In transactions relating to her separate estate, a married woman is only bound by notice given to her husband in so far as he acts as her agent.

CESTUI QUE TRUST—NOTICE TO TRUSTEE.—Notice to a trustee is not notice to the *cestui que trust*, where the trustee has no official relation to the transaction in controversy.

In Equity.

Hitchcock, Lubke & Player, for complainants.

M. B. Jonas, for respondents.

McCRARY, C. J., (*orally.*) This case is submitted upon exceptions to the report of the master. It is a bill filed to foreclose a mortgage upon 640 acres of land in this state, executed to secure 100 bonds issued by the defendant corporation. Several parties appear in this case, claiming to be owners of some of these bonds. The master has reported his conclusions with regard to the title of each of the claimants. The only questions presented relate to the title of the plaintiff Chew and the defendant Burch. Chew claims to be the owner of several of these bonds, and the master finds that he has no title. There is an exception to his finding. Burch claims to own a large number of them, and the master finds in his favor. There is an exception also to this finding. The bonds are negotiable, and, according to the repeated decisions of the supreme court of the United States, they have all the qualities of negotiable commercial paper. They were placed in the hands, a portion of them at least, of one Muir, with authority to negotiate them for the benefit of the corporation. I think the language of the resolution of the corporation was "for the purpose of raising money to develop the mines."

Muir held these bonds in New York as the agent of the corporation, with this authority, and no other. He placed some of them in the hands of a man by the name of Dever, who transferred them to plaintiff Chew, in order to raise money; not, however, for the corporation, but for Muir's private purposes. Of course the question here is, and the only question is, as to notice. Where a corporation places its bonds in the hands of an agent, with power to negotiate them, and puts them in that way upon the market before maturity, the purchaser has a right to presume that the agent is acting within the scope of his authority, and is not bound to inquire into the application he is to make of the proceeds of the sale. But if the purchaser is informed upon this subject, and has notice, then, of course, he takes them at his peril. The proof upon this

point, so far as Chew is concerned, is found in his testimony, quoted by the master, as follows:

"*Interrogatory 4.* Did said Dever state for whose account he applied for loans on said bonds? *Answer.* Yes. He said the bonds were owned by William Muir, or held by William Muir; that said Muir was the agent of the Henrietta Mining & Smelting Company, at New York; that $100,000 of said bonds had been prepared for issuance by said company, the proceeds of sale of which were applied to the purchase of machinery to work the mine, which he said was located near Potosi, in the state of Missouri; he said further that William Muir was pressed for funds, and had requested him to make loans for him (Muir) on the said bonds."

I agree with the conclusion of the master that upon that statement Mr. Chew was fully informed, not only as to the nature and extent of Muir's authority, but of the fact that he was violating it in so placing the bonds for the purpose of raising money for his own purposes, and not for the corporation; and, on that ground, the exception to the report, so far as that part of it is concerned, is overruled.

As to the other part of the case,—the title of the defendant Burch to the bonds represented by him,—I have had more difficulty. But in this case, as in the other, it is simply a question of notice; and I believe the rulings of the supreme court go so far as to hold that there must be something amounting to bad faith on the part of the purchaser before his title to negotiable paper of this kind, purchased in the open market, can be defeated. An important fact in the case, as bearing upon the question of good faith, is this: Mrs. Burch advanced money—the title of the present defendant being derived from Mrs. Burch, of course the question is as to her title—to the secretary of the company, and to her husband, for the purpose of paying a debt for which the corporation was liable in equity. The debt was created for the purchase of this very real estate which is now in controversy. It was taken in the name of Edgerton, the secretary of the company, and Burch, as a mere matter of convenience, I apprehend, and they advanced on the payment of the pur-

chase money something over $2,000, and then conveyed it to the corporation.

Now, it was to pay this money, by them advanced, that Mrs. Burch made the loan now in controversy. I say this has an important bearing upon the question of good faith, because it might well have been believed by Mrs. Burch that the secretary of the company had authority to use the bonds of the company for the purpose of raising money to pay this debt, which was a debt, in equity at least, against the corporation. Then, again, she received the bonds from the secretary of the corporation, and, I believe, it has been repeatedly held by the supreme court of the United States, and perhaps by other courts, that a purchaser of the bonds of a corporation may presume that an officer of the corporation, acting in the capacity of an agent of the corporation, is acting within his authority, unless actual or constructive notice is brought home to such purchaser. But it is said that the husband of this lady knew the facts, and that notice to the husband is notice to the wife. I think, however, that this is not true for all purposes. When a married woman is acting or contracting with reference to her separate estate, it is well settled that she is to be regarded as a *feme sole*.

In regard to such transactions, especially under the more modern and enlightened view of the subject, she is as independent of her husband as he is of her. She is bound, then, in such transactions, only by notice given to him in so far as he acts as her agent. The supreme court of Missouri has stated this doctrine in the sixty-seventh volume of the Missouri Reports, page 601, in the case of *Morrison* v. *Thistle*, as follows: "In equity, husband and wife are not, in a large number of cases, regarded as one and the same person. They, for this reason, may sue and be sued, contract and be contracted with, and become the creditor or debtor of each other with like effect, so far as regards equitable contemplation and rights, as if they had never become one flesh," citing numerous cases.

Now, there is no proof that Mrs. Burch had any information with regard to the authority of the secretary of this com-

pany, except that she was assured that the transaction was all right and proper, and acted upon the faith of that assurance. Her husband was, in this case, in no sense her agent; on the contrary, he dealt not for her but with her; was one of the parties asking the loan from her, and I think, therefore, that this is not a case in which the doctrine of notice to the husband is notice to the wife can have any force. It is also insisted that the trustee of Mrs. Burch, with respect to her separate estate, (De Cordova,) knew the facts, and that notice to him is notice to her; that is, that notice to the trustee is notice to the *cestui que trust.* The answer to that is that De Cordova, although her trustee with regard to her separate estate, was not her trustee with reference to this transaction at all. Holding as he did the naked title to her lands, and for her use and benefit, he joined with her in making the mortgage for the money to be loaned to these parties; but that was a separate transaction from the matter now in controversy, to-wit, the hypothecation of these bonds, and with that the trustee had nothing to do.

The result of my examination of the case is that the exceptions to the report of the master must be overruled.

RUNKLE *v.* THE LAMAR INSURANCE COMPANY.

(*Circuit Court, S. D. Ohio.* ——, 1880.)

JURISDICTION — FOREIGN INSURANCE COMPANY — REV. ST. § 739 — EX PARTE SCHOLLENBERGER, 96 U. S. 369.—A foreign insurance company is subject to the jurisdiction of a circuit court in a district other than that of which it is an inhabitant, when, in accordance with the statutory provision of the state in which such district is situated, it has duly authorized an agent of the company in that state to acknowledge service of process in such state for and on behalf of the company, and has consented that the service of process upon such agent shall be taken and held to be as valid as if served upon the company according to the laws of that or any other state or country.

Motion to set aside and quash the service of the summons.

Taft & Lloyd, for plaintiff.

John F. Follett and *J. M. Simon*, for defendant.

SWING, D. J. This action is brought by the plaintiff, a citizen and resident of the southern district of Ohio, against the defendant, whom the petition avers to be a corporation created by the laws of New York, and an inhabitant of that state, and who, it alleges, did, on the twentieth day of August, A. D. 1878, at the city of Cincinnati, Ohio, in consideration of the payment by the plaintiff to the defendant of a premium of $60, by its agent, duly authorized, there make its policy of insurance in writing, and delivered the same to the plaintiff, insuring certain property against loss by fire. That loss has accrued to the amount of $833.62, for which he claims judgment.

The command of the summons issued upon the petition is: "You are hereby commanded to summon the Lamar Insurance Company of New York, (John S. Taylor, agent,) citizen of and resident in the state of Ohio." Upon the summons the marshal returns: "Received this writ at Cincinnati, Ohio, November 24, 1879, and served the same, by true copy hereof, to John S. Taylor, agent of the Lamar Insurance Company of New York, at 2:35 P. M., November 25, 1879."

The defendant filed a motion to set aside and quash the service of the summons for the reasons:

First. That the said defendant is a corporation organized under the laws of the state of New York, and is a resident and an inhabitant of said state of New York, and is not a resident or inhabitant of the state of Ohio, or of the said southern district of Ohio.

Second. Said summons was issued against the said defendant as a citizen of and resident in the state of Ohio, which is not true.

Third. The defendant cannot be sued or required to answer in this court.

The question presented in argument, and intended to be raised by this motion, is whether this court can acquire jurisdiction of a foreign insurance company, doing business in this

district, by the service of a summons upon its agent, residing within this district.

The motion is based upon the seven hundred and thirty-ninth section of the Revised Statutes, which provides "that no civil suit shall be brought against an inhabitant of the United States in any other district than that of which he is an inhabtant, or in which he is found at the time of serving the writ."

The statutes of the state of Ohio in regard to suits against foreign insurance companies provide, (section 3658:) "Any such company desiring to transact any business by an agent in this state shall file, with the superintendent, a written instrument, duly signed and sealed, authorizing any agent of the company in this state to acknowledge service of process in this state for and on behalf of the company, consenting that service of process, mesne or final, upon such agent, shall be taken and held to be as valid as if served upon the company according to the laws of this or any other state or country."

Section 5030 provides "that in case of foreign insurance companies the suit may be brought in a county where the cause of action originated."

And section 5046 provides that "when the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent."

It is contended by the defendant that being, under the decisions of the supreme court of the United States, for the purposes of suit, a citizen of the state creating it, its habitation is fixed in that state, and it cannot be "found" outside of that state so as to be served with a summons in any other district than that in the state, which created it, and that the statutes of Ohio cannot have the effect to change this rule of law; and in support of this proposition we were referred by learned counsel to *Pomeroy* v. *N. Y. & N. H. R.* 4 Blatch. 220; *Myers* v. *Darse*, 13 Blatch. 22. These authorities certainly do sustain the proposition, as well as does that of *Stillwell et al.* v. *The Empire Fire Ins. Co.* 4 Central Law Journal, 463, decided by Judge Dillon. A different view, however, seems to have been held by Justice McLean, in *French* v. *The Lafayette*

Fire Ins. Co. 5 McLean, 461, and by Judge Woods, in *Knote* v. *Southern Life Ins. Co.* 2 Woods, 479.

But, whatever may have been the different decisions upon this question, and the reasons in support thereof, it is not now necessary to discuss, for the law upon the subject has been recently definitely settled by the supreme court of the United States, in *Ex parte Schollenberger*, 96 U. S. 369. In that case suit was brought in the circuit court of the United States for the eastern district of Pennsylvania, by a citizen of that district, against a foreign insurance company, and service of process was made upon its agent, who resided within the district. The company was doing business in Pennsylvania, under a license, under a statute which required that the company should file a written stipulation, agreeing that process issued in any suit brought in any court of that commonwealth having jurisdiction of the subject-matter, and served upon the agent specified by the company to receive service of process for it, should have the same effect as if personally served upon the company within the state.

The provisions of this statute are substantially those of the state of Ohio, *supra*. In that case Mr. Chief Justice Waite, after citing, in support of the jurisdiction, *Railroad Company* v. *Harris*, 12 Wall. 65; *Railway Company* v. *Whitton*, 13 Wall. 270; *Lafayette Insurance Co.* v. *French*, 18 How. 404; and *Ex parte McNeill*, 13 Wall. 236, says:

"A corporation cannot change its residence or its citizenship. It can have its legal home only at the place where it is located, by or under the authority of its charter; but it may, by its agents, transact business anywhere, unless prohibited by its charter, or excluded by local laws. Under such circumstances it seems clear that it may, for the purposes of securing business, consent to be 'found' away from home, for the purposes of suit growing out of its transactions. The act of congress prescribing the place where the person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive. If the

citizenship of the party is sufficient, a defendant may consent to be sued anywhere he pleases; and, certainly, jurisdiction will not be ousted because he has consented. Here the defendant companies have provided that they can be 'found' in a district other than that in which they reside, if a particular mode of proceeding is adopted, and they have been so 'found.' In our opinion, therefore, the circuit court has jurisdiction of the causes, and should proceed and try them.

"We are aware that the practice in circuit courts generally has been to decline jurisdiction in this class of suits. Upon an examination of the reported cases in which this question has been decided, we find that in almost every instance the ruling was made upon the authority of the late Mr. Justice Nelson, in *Day* v. *The Newark India-Rubber Manufacturing Co.* 1 Blatchf. 628, and *Pomeroy* v. *The New York & New Haven R. Co.* 4 Id. 120. These cases were decided by that learned justice, the one in 1850 and the other in 1857, long before our decision in *Railroad Co.* v. *Harris, supra,* which was not until 1870, and are, as we think, in conflict with the rule we there established. It may also be remarked that Mr. Justice Nelson, a member of this court, concurred in that decision."

In the cause now before the court, the plaintiff being a citizen of this district, and the defendant a citizen of the state of New York, the residence of the parties is such as to give this court jurisdiction; and the defendant having complied with the statutes of Ohio, thereby consented that it might be sued within this district, and that process might be served upon their agent; and suit having been brought in this court, and process having been served upon their agent, jurisdiction has been obtained of the defendant.

The motion to quash will, therefore, be overruled.

BAILEY *v.* THE NEW YORK SAVINGS BANK and another.

(*Circuit Court, S. D. New York.* April 24, 1880.)

REMOVAL—NECESSARY PARTY TO SUIT—SAVINGS BANK—ACT OF MARCH 3, 1875.—An action was brought by a widow residing in New York to recover moneys deposited by her late husband, as trustee, in a New York savings bank. On petition of the bank, under a statute of the state, (Laws 1875, *c.* 371, p. 401,) the alleged executor of the decedent, resident in Connecticut, was made a party defendant. The bank subsequently put in an answer, setting up that it could not ascertain which of the two claimants was entitled to the moneys; averred its readiness to pay them to the person lawfully entitled thereto; asked for a stay of proceedings until a legal representative of the estate of the decedent should be appointed and made a party to the action; and prayed that, when all the parties necessary to render the judgment of the court a protection to it should have been brought in, such parties might interplead and settle their rights among themselves, and that such bank might pay the moneys into court to await the final determination of the action, and be stricken out as a party to the action, and its liability for the said moneys thereupon cease. *Held*, that until the moneys had been paid into court, and its liability for the deposit had ceased, the bank was a necessary party to the suit; and, therefore, under the circumstances of the case, the cause could not be removed from the state court under section 2 of the act of March 3, 1875.

Motion to remand.

Francis N. Bangs, for motion.

Charles C. Beaman, Jr., contra.

BLATCHFORD, C. J. This suit was originally brought in the supreme court of New York by the plaintiff against the New York Savings Bank. The complaint put in in the state court demanded judgment against the bank for $25,000, and interest and costs. It prayed no other relief. The claim sued on was made under an alleged right of the plaintiff to moneys which her deceased husband, Benjamin Bailey, had on deposit in the bank at the time of his death in the name of "Benjamin Bailey, trustee."

The bank is a savings bank incorporated under the laws of New York. By section 25 of the act of the legislature of New York, passed May 17, 1875, (Laws 1875, *c.* 371, p. 408,) it is provided as follows: "In all actions against any savings bank, to recover for moneys on deposit therewith, if there be any

person or persons, whether husband or wife, or otherwise, claiming the same fund, who are not parties to the action, the court in which such action is pending may, on the petition of such savings bank, and upon eight days' notice to the plaintiff and such claimants, make an order amending the proceedings in said action by making such claimants parties defendant thereto; and the said court shall thereupon proceed to hear and determine the rights and interests of the several parties to said action in and to said funds. The said funds or deposits which are the subject of the said action may remain with such savings bank, upon the same interest as other deposits of like amount, to the credit of the action, until final judgment therein, and the same shall be paid by such savings bank in accordance with the order of the court, or the deposit in controversy may be paid into court, to await the final determination of the action; and, when so paid into court, the corporation shall be stricken out as a party to such action, and its liability for such deposits shall cease."

On a petition of the bank made under said statute, and on due notice to the plaintiff and to Lewis H. Bailey, the state court made an order, on the tenth of November, 1879, ordering that "Lewis H. Bailey, as executor of the last will and testament of Benjamin Bailey, deceased," be made a party defendant to the action, and that the pleadings and proceedings be amended accordingly, and giving leave to Lewis H. Bailey, "as such executor," to answer the complaint, and ordering "that the court will thereupon proceed to hear and determine the rights of the several parties to this action in and to the said fund or deposit." The order states that "Lewis H. Bailey appeared in court, on the application, by attorney," and "requested to be made a party defendant in this action," and that the counsel for the bank and the counsel for Lewis H. Bailey were heard in favor of the application, and the counsel for the plaintiff in opposition to it.

It appears by the petition that Benjamin Bailey left a will appointing his brother, Lewis H. Bailey, his sole executor; that proceedings for its probate were pending; that Lewis H. Bailey was one of the residuary legatees under it; that letters

testamentary had not been issued to him; and he claimed, as executor, and as belonging to said estate, the same moneys which plaintiff claimed. The bank put in an answer, in the state court, to the complaint, on the eleventh of December, 1879, setting up that they could not ascertain which of the two claimants was entitled to the moneys, and averring its readiness to pay them to the person lawfully entitled to them, and asking for a stay of proceedings in the action until a legal representative of the estate of Benjamin Bailey shall be appointed and be made a party to the action; and that when all the parties necessary to render the judgment of the court a protection to the bank should have been brought in, such parties might interplead and settle their rights among themselves, and the bank might pay the moneys into court to await the final determination of the action, and be stricken out as parties to the action, and the liability for the said moneys thereupon cease.

On the nineteenth of December, 1879, the state court, on the application of Lewis H. Bailey, and on notice to the plaintiff and against her opposition, made an order that the complaint be amended by inserting this allegation: "The plaintiff alleges, upon information and belief, that the defendant Lewis H. Bailey claims the several sums of money aforesaid, deposited with the said defendant, the New York Savings Bank, with the interest due thereon, as the executor of the last will and testament of Benjamin Bailey, deceased, and claims that said sums were the individual property of said Benjamin Bailey, deceased, in his life-time, and now, together with the interest due thereon, form and are a part of his personal estate." The answer of the bank was to stand as its answer to the complaint as amended. Lewis H. Bailey put in an answer on the nineteenth of December, 1879, setting forth that the probate of the will was opposed; that the moneys in the bank belonged to the estate; and that, until the will should be admitted to probate, he, "as the executor named therein, is charged with the duty of collecting and protecting the said deposits, and preventing any misapplication thereof."

Subsequently, Lewis H. Bailey took steps to remove the cause into this court.. His petition for removal set forth his own citizenship as of Connecticut, and the citizenship of the plaintiff and the bank as of New York; that the bank was a mere stake-holder of the fund in controversy, and had no interest in the controversy, which was wholly between the plaintiff and the petitioner, as representing the estate of the deceased. The state court made an order reciting that the suit is one in which there is a controversy "between a citizen of the state of New York and a citizen of the state of Connecticut," and removing "the said cause" into this court.

The plaintiff now moves to remand this cause to the state court. No order has been made that the bank pay into court the deposit in controversy, to await the final determination of the action, nor has it been paid into court, nor has the bank been stricken out as a party to the action, nor has its liability for the deposit ceased. On the contrary, the answer of the bank to the complaint expressly states that it does not propose to pay the moneys into court, or to be stricken out as a party, or to have its liability for the money cease, until a legal representative of the estate shall have been appointed and made a party to the action.

Under these circumstances, if the court should adjudge that the plaintiff is entitled to the moneys, and they are not in court, it must award to her execution against the bank to collect them. It cannot do that unless the bank is a party. So the bank is a necessary party as respects the plaintiff. She has brought the bank into court, and nothing that has been done has had the effect to take the bank out of court, or out of the suit. Adding Lewis H. Bailey as a defendant has had no such effect. On the complaint the bank is liable to the plaintiff. Showing that the bank, as the case stands, is not liable to Lewis H. Bailey, does not necessarily show that it is liable to the plaintiff. On the answer of the bank it has a right to be heard to defeat the claim of Lewis H. Bailey, because he is not the representative of the estate, and his acquittance will not protect the bank, and then to be heard

to defeat the claim of the plaintiff, on the ground that she makes out no title to the money. The bank is thus a proper and a necessary party, and, being a citizen of the same state with the plaintiff, the case is not a removable one, under section 2 of the act of March 3, 1875, (18 U. S. St. at Large, 470,) although the plaintiff and Lewis H. Bailey are citizens of different states.

There is not in this case, as it now stands, any controversy between citizens of different states to which a defendant, citizen of the same state with the plaintiff, is not a necessary party, so as to make a case within the first subdivision of section 2 of the act of 1875; nor any controversy which is wholly between citizens of different states, and which can be fully determined as between them without the presence of a defendant citizen of the same state with the plaintiff actually interested in such controversy, so as to make a case within the second subdivision of section 2 of the act of 1875. No case is cited where a removal has been allowed under section 2, under circumstances such as those which exist in the present case.

In *Wehl* v. *Wold*, in this court, (December 10, 1879,) and in *Healy* v. *Prevost*, 8 Reporter, 103, the original debtor had ceased to be a party, the money was in court, and the two remaining parties were of diverse citizenship.

The motion to remand the cause is granted, with costs.

THE CHICAGO, ST. LOUIS & NEW ORLEANS RAILROAD COMPANY *v.* MACOMB and others.

(*Circuit Court, S. D. New York.* April 27, 1880.)

BILL FOR DISCOVERY—SPECIAL DEMURRER.—A special demurrer to part of a bill must point out with certainty the part demurred to.

SAME—INTERROGATORIES.—Interrogatories are not to be framed and limited upon the theory that everything stated in the bill is precisely and in every detail true.

SAME—PRAYER FOR GENERAL RELIEF.—A prayer for general relief is a prayer for any relief the court can give, except by injunction, upon the facts averred in the bill.

SAME—DEMURRER.—A demurrer relies merely upon matter apparent on the face of the bill.

SAME—INTERROGATORY—ANSWER.—It is the special office of an exception, and not of a demurrer, to raise the question whether an answer to an interrogatory is sufficient.

Demurrers to bill for discovery.

F. N. Bangs, for defendant.

J. Emott, *Ashbel Green* and *J. F. Dillon*, for complainant.

CHOATE, D. J. The complainant, claiming to have succeeded to the rights of purchasers under a foreclosure sale in a certain railroad, has brought this bill for discovery and relief, in respect to certain bonds issued or alleged to have been issued under two earlier mortgages on parts of the road, praying, among other things, that certain of said earlier mortgage bonds, in the possession of the defendants, be delivered up to be cancelled. The bill also contains a prayer for general relief.

The defendant Macomb has filed an answer, in which he has answered part of the bill. He has also filed 32 demurrers to different parts of the bill, and the demurrers have been argued.

The first demurrer is to "so much and such part of said bill as in the fourth, fifth, sixteenth, eighteenth, twenty-first, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh and twenty-eighth interrogatories, or elsewhere, seeks that this defendant may answer and set forth the matters as to which he is thereby interrogated of and concerning said first mortgage bonds, etc., not therein and thereby referred to as having been issued without the consent of the trustees in said mortgage, or without the certificate of such trustees." And the special cause of demurrer alleged is that the plaintiff has not stated such a case as entitles it to such discovery.

An objection is taken to this demurrer that, even without the addition of the words "or elsewhere," the demurrer would be sufficiently certain, yet those words make the demurrer bad

because it does not point out with certainty the parts of the bill demurred to.

The rule, undoubtedly, is that a special demurrer to part of a bill must point out with certainty the part demurred to. This is not only necessary for reasons of convenience, but, unless the demurrer has this precision, there must be great uncertainty in the judgment, if a judgment is entered, sustaining the demurrer. *Atwell* v. *Terrett*, 2 Bl. C. C. 39. The defendant's counsel relies, however, on the case of *Claridge* v. *Hoar*, 14 Ves. Jr. 65, as an authority for rejecting the words "or elsewhere" as surplusage. That was not a case of a demurrer, but of a plea, and I think it has no relevancy to this question.

It would seem that if the demurrrer is sustained it must be sustained as a whole. And if that is so the judgment would evidently be uncertain as to what parts of the bill under the judgment on the demurrer the defendant would be excused from answering. But as both parties have also fully argued this demurrer on the merits, as if it were a demurrer to the discovery sought in the enumerated interrogatories only, I have examined it as if the words "or elsewhere" had been omitted or could be rejected.

The bill alleges that the first mortgage bonds to which these interrogatories relate are void in the hands of the defendant, on several grounds; and among other things alleged in respect to all of that class of bonds held by this defendant it is stated in the bill that they had not the certificate of the trustees to their genuineness, as required by the mortgage. This defect is alleged as one of the grounds for holding them void in the hands of the defendant, who is also alleged to hold them with notice of their invalidity, and without having parted with value for them.

The objection to these interrogatories is, as stated in defendant's brief, that "inasmuch as the bill only charges Macomb with holding *uncertificated* bonds, can the plaintiff have a discovery as to any other bonds?" It is also objected that the plaintiff is not entitled to any discovery as to any bonds not held by the defendant Macomb. The interroga-

tories referred to are undoubtedly broad enough to call for answers as to first mortgage bonds held by Macomb, other than uncertified bonds, and also as to bonds other than those held by Macomb, certified or uncertified. But I think the plaintiff is entitled to the discovery sought for in both particulars. It is true, it is alleged in the bill that the bonds held by this defendant are uncertified, but on this point the plaintiff may be misinformed; and, in fact, the defendant's bonds may be in part certified, and interrogatories are not to be framed and limited upon the theory that everything stated in the bill is precisely and in every detail true.

And, as to the other point, the bill shows such grounds of relief against this defendant and his associates, for alleged fraud in the disposition of these bonds generally, the rights of the complainant not being limited to those held by this defendant, that the interrogatories are proper for the purpose of discovering what disposition has been made of any of that issue of bonds. The point is also made that the prayer for relief is limited to the bonds held by the defendant. But the bill states a case larger than that, and the prayer for general relief is a prayer for any relief the court can give, except by injunction, upon the facts averred in the bill. Story Eq. Pl. 4041.

The second, third, fourth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, fifteenth, sixteenth, seventeenth, nineteenth and twentieth demurrers are clearly bad because they do not point out with certainty the parts of the bill demurred to.

The fifth demurrer is to "so much and such part of said bill as in the fifth, seventh, nineteenth, twenty-first, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh and twenty-eighth interrogatories, or elsewhere, seeks that this defendant may answer and set forth the matters, etc., concerning the payment or redemption of any second mortgage bonds, etc., not alleged in the bill, or appearing by this defendant's answer to have been at the time of the commencement of this suit or now to be in the hands and possession of this defendant. The ground alleged is that no such

case is stated in the bill as entitles the plaintiff to the discovery.

This demurrer is open to the same objection in matter of form as the first demurrer, and to this further objection, that it is not based upon what appears in the bill, but refers to averments in the answer for the purpose of defining the part of the bill demurred to. This is objected to as a fatal defect in the demurrer, and I think the objection is well taken. It violates the rule that a demurrer "relies merely upon matter apparent on the face of the bill." (Mitf. Eq. Pl. 249.) It also leaves the parts demurred to uncertain. But upon the merits I think the plaintiff is entitled to the discovery sought, and that the objection made to the bill, that the fraud alleged is not averred with sufficient certainty, is not well taken.

The thirteenth demurrer is to the discovery sought by the eleventh interrogatory as to the books and accounts of the "Mississippi Central Railroad Company." The grounds of demurrer are that that company has no interest in the cause; that the discovery is not material to the relief prayed for; and that the plaintiff has not stated such a case as entitles it to such discovery. The fourteenth demurrer is to the twelfth interrogatory, which seeks similar discovery as to the books and accounts of the "Southern Railroad Association." The same grounds of demurrer are alleged. The bill alleges, on information and belief, that the books of both said corporations are in the possession and under the control of the defendant Macomb, who is also alleged to be an officer of the first-named company, and the president of the second. It is alleged in the bill that these books and accounts were kept under the direction of the defendant, and contain very material evidence of the dealing of said companies with each other, and with this defendant and his associates, touching the redemption of the mortgage bonds, the subject-matter of the suit, and I can see no reason why the interrogatories should not be answered.

The eighteenth demurrer is to the seventh interrogatory, which seeks discovery as to whether the defendant holds or owns the bonds held by him in his own right, or holds them

for other parties or jointly with others, and if for or with others, for and with whom. The ground of this demurrer is that as to any bonds not held by the defendant he is a mere witness. But the interrogatory does not call for any discovery as to any bonds not held by the defendant, and as to those held by him it is averred that he has received them with notice and without consideration, from parties having no right to them, and he is asked to disclose what interest he has.

The remaining demurrers, which are to the discovery sought by particular interrogatories, seem not to be well taken. To many of these interrogatories the defendant has answered, and the object of the demurrers appears to be to obtain the opinion of the court whether he should answer further. If the interrogatories are too broad, and he has answered so far as the plaintiff has shown himself entitled by his bill to a discovery, a demurrer to the interrogatory is unnecessary and improper. If the plaintiff is satisfied with the answer, then, so far as that part of the bill is concerned, the answer is complete. If the plaintiff is not satisfied, it is the special office of an exception, and not of a demurrer, to raise the question whether the answer is sufficient.

The demurrers are overruled.

ROSENBACH *v.* DREYFUSS and others.

(*District Court, S. D. New York.* March 8, 1880.)

DEMURRER—NOTICE OF HEARING.

Koones & Goldman, for defendants.

Fiero & Chittenden, for plaintiff.

CHOATE, D. J. This cause, which is a common-law action, being at issue on complaint and demurrer thereto, the plaintiff gave less than 14 days' notice of hearing for a stated term of the court. The defendant objects that under Revised Statutes, § 914, the same notice must be given as is required

under the New York Code for the trial of an issue of law which the hearing upon a demurrer is.

By that code 14 days' notice must be given. I think this is a matter of "practice" within the meaning of section 914 of the Revised Statutes, and I see no difficulty in its being adapted to the trial of causes in the federal courts. Therefore, it must be deemed applicable, and, so far as the rules of this court allowed a shorter notice, they are abrogated by the statute. Case stricken from the calendar.

COMBINATION TRUST CO. and others *v.* WEED and others.*

(*Circuit Court, E. D. Pennsylvania.* April 6, 1880.)

CORPORATION—CONTRACT WITH PRESIDENT—FIDUCIARY RELATION—INJUNCTION.—The president of a corporation occupies a position of trust, and may be called upon by bill in equity to account for and make restitution of any part of the property confided to his care which he has improperly applied to his own use. While a contract by which a corporation delivers to its president, with power of sale, unissued stock, as security for a loan from him, will be looked upon with suspicion, it will be enforced when shown to have been made for the benefit of the corporation, and to be just.

PLEDGE OF UNISSUED STOCK.—A corporation may pledge, as security for a loan, unissued stock held by it in trust for the advancement of its best interests.

Motion to dissolve injunction.

This was a bill in equity filed in a state court by the corporation plaintiff against its president, to restrain him from selling certain stock which had been transferred to him by the corporation, and held by him under a written agreement as collateral security for the repayment of a loan of $10,000, made by him to the corporation, with power of sale in case of default in repayment of the loan. The bill alleged that most of this stock was unissued stock held by the corporation in trust for the advancement of its best interests; that instead of paying to the corporation $10,000 defendant had deducted from

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

that amount over $2,000 as commissions and for other demands, and had made various other gains and profits from the transaction, and that, as president, he occupied such a fiduciary relation to the corporation that he was bound to account for the sums so retained before proceeding to sell the collateral. A five days' injunction was granted by the state court, which was afterwards continued until further order. The cause was afterwards removed to the United States circuit court, where respondent filed an answer alleging that he did not make the loan, but that at the request of the corporation he procured it from one Adams, by agreeing to give to Adams his individual indorsement upon the corporation notes, and that the loan was made in his own name, in order that he might indorse to Adams the notes given therefor; that with the consent of the corporation he had retained $1,000 for commissions, and $1,000 for a debt due him from the corporation, and that the corporation had received and spent the remaining $8,000. The motion was argued upon bill, answer and affidavits.

Angelo T. Freedley and *William Henry Rawle*, for complainants.

Thomas Hart, Jr., and *James E. Gowen*, for respondents.

BUTLER, D. J. The bill, we think, presents a case within the equitable cognizance of the court. The defendant Weed, as president of the corporation plaintiff, occupies a position of trust and confidence, and is liable to be called upon to account for and make restitution of any part of the property confided to his management and care which he has improperly applied to his own use. *Jackson* v. *Ludenling*, 21 Wall. 616; *Oil Co.* v. *Manbery*, 1 Otto, 587; *Kochler* v. *Iron Co.* 2 Black, 721; *Drury* v. *Cross*, 2 Wall. 299; *Luxemburg R. Co.* v. *Maquay*, 25 Beav. 586; *Cumberland Coal Co.* v. *Sherman*, 30 Barb. 553; *Dodge* v. *Wolsey*, 18 How. 331; *Hill* v. *Frazer*, 10 Har. 324; *Ashurst's Appeal*, 10 P. F. Smith, 314; Angel & Ames on Corp. § 312, (p. 329 of 10th Ed.) In addition to this a part of the property in controversy passed into his hands upon an express trust set out in the transfer under which he received it; and a trust is acknowledged, as respects

all the property, in the third paragraph of the defendants' agreement, marked "Exhibit B," accompanying the bill.

We do not, however, see anything to justify restraining the defendant to the extent asked for. The propriety of the contract entered into between him and the corporation is not questioned. While such contracts are looked upon with suspicion and disfavor by the court, they may be enforced when shown to have been made for the benefit of the corporation and to be just. *Oil Co.* v. *Manbery*, 1 Otto, 587. The only complaint here is that Mr. Weed, on receiving the securities, "instead of paying the sum of $10,000 to the corporation, deducted therefrom certain sums, amounting to upwards of $2,000, under various pretences and allegations that he was entitled to commissions thereon, and other demands, whereby the corporation plaintiff did not receive the sum of $10,000, but only received a sum much less in amount; and these sums the said Weed has since declined to pay or account therefor, and the complainants are informed and believe, and so aver, that the defendant has made various other gains and profits from the said transaction, the amount whereof is unknown to the complainants."

Whatever balance may be due the defendant, on account of the loan, the plaintiffs aver their willingness to pay. It appears, from the affidavits and exhibits, that the defendant retained $1,000 as commission for negotiating the loan, and $1,000 further in payment, as he says and as the corporation books show, of previous indebtedness to him. There is nothing before us, at this time, to justify a belief that he retained any more, or that he derived any other benefit from the transaction; nor does it appear that he has received anything on the stock or bonds as dividends or interest. As the case stands, therefore, the defendant Weed appears to have a just and virtually undisputed claim against the corporation to the extent of $8,000, with the interest due thereon.

The statement in T. H. Green's affidavit that the defendant "took an additional $225," has not been overlooked, but the circumstances—that the abstract from the books, which this witness says "is an accurate statement relative to said

loan," does not sustain his allegation respecting this sum; that it is not sustained by any entry in the books, so far as appears, while it was the duty of this witness to make an entry, if his statement is correct; that the witness is unsupported by any other evidence, and is contradicted by the defendant; that he fell into a very singular error in giving us the "statement relative to said loan" from the books—forbid a reliance upon this witness' testimony respecting this sum. Nor have we overlooked the statement of Mr. Wheeler respecting "other profits" said to be realized by the defendant Weed. But this statement is contradicted by the defendant, and of itself is too shadowy and uncertain to be of value on this hearing.

Why, therefore, should not the defendant be allowed to proceed on his contract to obtain satisfaction of the amount thus appearing to be due? While it is unpaid the plaintiffs have no equity that would justify the court in restraining the defendant from proceeding to this extent. We can only interfere so far as is necessary to protect the plaintiffs against danger of loss from the alleged misapplication of the $2,000 referred to.

The "unissued stock" was, as the bill states, left with the company to be applied to the "advancement of its best interests." The directors were thus made the judges of how it could most advantageously be used for this purpose. That they applied it to raising money for the company is not a subject of complaint. We have treated Mr. Weed as the holder of the securities, as, for the purposes of this hearing, at least, seemed necessary.

An order will be drawn modifying the decree in accordance with this opinion.

Afterwards the court entered the following decree:

"And now, April 8, 1880, a motion to continue the injunction heretofore granted by the court of common pleas, No. 3, of the city and county of Philadelphia, having been argued on affidavit filed by the plaintiff, and on the answer of the defendant Weed, it is ordered that unless the said plaintiffs, or either fo them, shall pay into court before Tuesday, April

13, 1880, the sum of $8,000, with interest thereon from the tenth day of October, 1878, the said injunction shall be restricted so as to apply only to such securitities as shall remain unsold after enough have been sold to pay the sum of $8,000 and interest as aforesaid, allowing the defendant to proceed and sell to the extent necessary to raise that amount, and that the injunction be continued as respects the remainder of said securities until further order; but if the said plaintiffs, or either of them, shall pay the said amount into court before the said thirteenth day of April, 1880, then the said injunction shall continue until the further order of court. And it is further ordered that if the said amount shall be paid into court it shall be to the solicitor of the defendant Weed, on his filing with the clerk a receipt therefor, signed by Samuel Adams, in the said answer mentioned, and depositing with the clerk the securities in the answer mentioned as having been given with the note of the Combination Trust Company for $10,000, described or mentioned in the bill and answer."

SCATTERGOOD *v.* TUTTON.*

(*Circuit Court, E. D. Pennsylvania.* April 28, 1880.)

CUSTOMS—DUTIES ON FRUIT—ALLOWANCE FOR DECAY—INTERPRETATION OF STATUTE.—The terms "quantity" and "whole quantity," in schedule "M," § 2504, Rev. St. 476, relating to duties on imported fruit, and making an allowance for loss on decay which exceeds 25 per cent. of the "quantiy," relate to the whole importation of fruit, and not to the quantity in each particular package damaged.

Motion for judgment on point reserved.

This was an action against the collector of customs to recover back duties alleged to have been illegally exacted upon an importation of oranges. The verdict was for the plaintiff, subject to a point of law reserved by the court as to the proper construction of schedule "M," § 2504, Rev. St. 476, under which the duties were levied.

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

George P. Rich and *Charles M. Neal*, for plaintiff.

John K. Valentine, for defendant.

BUTLER, D. J. Judgment must be entered for the defendant. The case turns upon schedule "M," § 2504, Rev. St. 476: "Fruits, oranges, lemons, pineapples and grapes, 25 per cent. *ad valorem;* limes, bananas, plantains, shaddocks, mangoes, 10 per cent. *ad valorem.* But no allowance shall be made for any loss by decay on the voyage unless the loss shall exceed 25 per centum of the quantity, and the allowance then made shall be only for the amount of loss in excess of 25 per centum of the whole quantity."

Do the terms "quantity" and "whole quantity" here employed relate to the quantity *imported* or the quantity *damaged?* Possibly no very great violence would be done to the language by either construction; but its most natural import, certainly, is the quantity *imported,* the quantity liable to duty. Indeed, it is a little difficult to understand how the term "whole quantity" can have any other rational application. Where is the warrant for applying it to a particular package?

The manner of proceeding to ascertain losses generally on merchandise (referred to in the plaintiff's argument) does not affect the question. When loss is alleged on importations of fruit, the claimant must submit the entire shipment to ascertain whether the loss exceeds 25 per cent. of the whole quantity on which he is charged before any reduction can be had. If the term "whole quantity" does not refer to the quantity imported, why should it be applied or confined to the quantity in a *particular package,* rather than to particular oranges, lemons, etc., damaged? Why not assort these from the several packages and apply the term "whole quantity" to the quantity thus found to be actually damaged? The arrangement into several packages is merely for convenience in carriage; and the number and size of the packages (which are subject to the will of the importer) should not have, and have not, any effect on the liability to duty. The charge is imposed on the quantity shipped as a whole, and no allowance for loss is made, except where it is so considerable as to exceed 25 per cent. of the entire importation. Prior to the

year 1870, allowance was made for all of such losses, by deducting them from the whole amount of duty in each case. In that year congress (manifestly to avoid allowance for trifling losses) applied the limitation here under consideration. The only change thus effected is in the exclusion of the 25 per cent. in making the reduction. Unless the loss exceeds 25 per cent. of the whole quantity subject to duty, no reduction is to be made.

The treasury department appears to have decided this question both ways; the last time, however, as we think, in conformity to the law.

FULLER *v.* JILLETT.

(*Circuit Court, N. D. Illinois.* February, 1880.)

COVENANT AGAINST ENCUMBRANCES.—A covenant that premises are "free and clear of and from all encumbrances of every kind, whatsoever," is not a covenant that runs with the land.

SAME—UNPAID TAXES—PAYMENT BY COVENANTEE.—Where there has been a breach of such covenant by reason of the non-payment of taxes, the lien of such taxes does not become operative in favor of the covenantee upon his payment of the same.

Demurrer to Bill.

Mattocks & Mason, for complainant.

William H. King, for defendant.

DRUMMOND, C. J. Willard N. Bruner, in October, 1872, being the owner of some lots of land in Chicago, executed mortgages on them to the plaintiff to secure a loan of $12,000. In them Bruner warranted that the premises were "free and clear of and from all encumbrances of every kind whatsoever," and he also covenanted that he would pay, or cause to be paid, all taxes and assessments levied or assessed on the premises while the debt was unpaid, and in case the property was advertised for sale for such unpaid taxes, and the plaintiff should pay the taxes, that then he should be reimbursed, with 10 per cent. interest. On the fifth of December, 1872, Bruner

sold the land to Jillett, the defendant, who assumed the debt due on the mortgages, with interest from December 9, 1872. The plaintiff, having heard that there were taxes due on the land which were unpaid, on the twelfth of December, 1872, paid $537.03, state and county and South Park taxes of 1871, which it is admitted were an encumbrance on the land at the time the mortgages were executed and delivered.

When the debt for which the mortgages were given matured, the defendant offered to pay the amount due, but refused to pay these taxes. By agreement the principal and interest of the debt was received, without affecting any right which the plaintiff might have as against Jillett for the reimbursement of the money paid for taxes; and the bill in this case has been filed to enforce as against Jillett the claim for the payment of these taxes. And to that bill a demurrer has been interposed, which, of course, admits the facts, and the question is whether the claim can be enforced under the circumstances against the defendant.

I am of the opinion that it cannot. Before proceeding to the discussion of the other part of the case it is proper to state that the plaintiff does not claim that the defendant is liable under the covenant which Bruner made, that he would pay or cause to be paid all taxes levied or assessed on the premises while the debt remained unpaid; because, as he admits, these taxes, the subject of controversy here, were not levied or assessed while the debt remained unpaid, but were levied and assessed and became due before the mortgages were executed.

There is no doubt, for we must so assume on the demurrer to the bill, that the taxes which were due were an encumbrance upon the land at the time that the mortgage was executed, and so when the deeds were delivered by Bruner to the plaintiff there was a breach in the warranty which had been made in them, that the premises were free and clear from all encumbrances, and Bruner was and is undoubtedly liable for that breach of the warranty; but does that liability adhere to the land and follow it in the hands of the defendant? I think not. The covenant that the land was free from all encum-

brances was not, according to the general current of American authority, one that run with the land. It was a personal covenant by Bruner, creating a personal liability on his part to the plaintiff; and it is difficult to understand, conceding that there was a lien, because of the existence of the taxes against the land at the time that the property was mortgaged to the plaintiff, when those taxes were paid, no matter by whom, how that lien was a still subsisting lien against the land. The taxes were paid. The tax lien had ceased to exist because there were no taxes due.

In order to sustain the claim of the plaintiff we must hold that he was subrogated to the right of the public, or that the lien which existed by virtue of the taxes became operative in his favor, because there was a liability by virtue of the warranty against Bruner; and that this claim operated as a lien upon the land, to whomsoever it might be transferred. I do not think that principle can be sustained.

I do not understand that any of the authorities cited by the plaintiff's counsel maintain that doctrine. Undoubtedly they hold that, where there is a warranty against encumbrances, the grantee can pay off a tax where a breach of warranty arises in consequence of a tax, and thus discharge the encumbrance, and charge the amount paid to the grantor. It is also true that if these taxes had not been paid by any one they would still operate as a subsisting lien upon the land, and that in whomsoever hands the title might be he would have to pay off the taxes before he could be said to have a title free and clear from all encumbrances.

It would be the same, I apprehend, if, instead of being a lien for taxes, there had been an unsatisfied judgment against Bruner, which operated as a lien upon the land. If the plaintiff had paid off the judgment, I do not understand how he could make the lien of that judgment operate in his favor, because of the claim which he would have against his grantor for a breach of the warranty. The judgment having been paid, the lien against the land would cease to exist. And so I think that the defendant, having agreed to pay the mortgage debt which was due upon the land, but having made no agree-

ment to pay off any encumbrance, would have the right to discharge the debt, with interest, and to compel the plaintiff to resort to his warranty for the enforcement of the claim which he had in consequence of having paid the taxes due. The result is that the demurrer must be sustained and the bill dismissed.

TOWNSHIP OF AROMA *v.* AUDITOR OF PUBLIC ACCOUNTS and others.

(*Circuit Court, N. D. Illinois.* February 14, 1880.)

REMOVAL—NECESSARY PARTIES—STATE AND COUNTY OFFICERS—TOWNSHIP BONDS.—State and county officers merely authorized to levy, collect and disburse the taxes required to pay certain bonds, are not necessary parties to a controversy, between citizens of different states, as to the validity of said bonds.

Motion to remand.

BLODGETT, D. J. This is a motion to remand this case to the circuit court of Kankakee county, from which it was removed, on the petition of defendants the Portsmouth Savings Bank, and the Appleton National Bank.

The cause is a bill in equity, filed by the complainant, one of the townships of Kankakee county, against the auditor of public accounts of this state, the treasurer of this state, the county clerk and county treasurer of Kankakee county, the Portsmouth Savings Bank, of Portsmouth, New Hampshire, the Appleton National Bank, of Lowell, Massachusetts, and several other persons who are alleged to be residents of Lowell, Massachusetts.

The bill charges that, under the pretended authority of certain acts of the legislature of Illinois, said town issued its bonds to the amount of $36,500, to aid in the construction of a railroad, which the Kankakee & Indiana Railroad Company, a corporation constituted by the laws of said state, was authorized to construct and maintain.

The bill also charges that by reason of certain irregularities, and for alleged want of power in said town, said bonds were void, and do not constitute a legal and binding indebtedness against the town; that said bonds have been registered with the auditor of public accounts of this state, in pursuance of the act approved April 16, 1869, entitled "An act to fund and provide for paying the railroad debts of counties," etc.; that defendant Portsmouth Savings Bank owns 15 of said bonds, of $1,000 each, and that the other defendants named, except the state and county officers, are owners of certain of said bonds.

The bill then prays that the auditor be restrained from certifying to the county clerk the amount of tax necessary to be levied to pay said bonds, or any part thereof; the county clerk from extending, the county treasurer from collecting, and the state treasurer from paying over to the holders of said bonds, or the coupons cut therefrom, any sum of money whatever, either as principal or interest, on said bonds; and also asks that the bonds be declared void, and their collection perpetually enjoined. Bill filed April 19, 1879. Summons issued April 24th, returnable third Tuesday of September, 1879, of Kankakee circuit court. August 2d, bill amended by leave of court in vacation.

September 5th, defendants Portland Saving Bank and Appleton National Bank appeared and filed petition setting forth that defendants are owners of part of the bonds which said bill sought to have set aside and held for naught; that the petitioners are citizens, one of the state of New Hampshire, and the other of the state of Massachusetts, and that complainant is a citizen of Illinois; that said suit involves a controversy wholly between complainant and petitioners, as holders of said bonds, concerning the validity of said bonds, and that the matter involved in said controversy exceeded $500, and prayed that said cause be removed to this court for trial. Circuit court of Kankakee county ordered same removed.

Complainant now moves to remand, on the ground that

state and county officers, who are made parties defendant, are necessary parties, and such officers are citizens of this state, invoking the well known rule that all the parties to the controversy must be entitled to remove the cause, or a removal should not be allowed.

It is manifest, from the allegations in this bill, that the sole controversy in this case is as to the validity of these bonds, and this is and can be only a controversy between complainant and the holders of the bonds.

If the bonds are a valid obligation of the town, the law prescribes the duty of the state and county officers in the matter of certifying, levying, collecting, and paying over a sufficient tax to pay the bonds, or the interest on them, as they mature. These officers have really nothing to do with this controversy further than to levy, collect and disburse the taxes required to pay the bonds, so that the controversy inaugurated by this bill is solely between the town and the bond holders.

If complainant had not made the holders of these bonds parties to his bill, there is no doubt that the court would have allowed them to make themselves parties on their own motion, and defend, and the contest would have been and can be only as to whether these bonds are a valid indebtedness against complainant.

True, the frame of complainant's bill makes it necessary to make these state and county officers parties, but they are indifferent as to the result. The struggle interests only the town and these bond holders.

I therefore think the case was rightfully removed.

Motion to remand overruled.

King and others *v.* The Ohio & Mississippi R. Co.

Campbell *v.* The Ohio & Mississippi R. Co.

(*Circuit Court, D. Indiana.* February 25, 1880.)

Railroad—Mortgage—Preferred Stockholders.—It is a general rule that the stockholders of a railroad are only to be paid after the claims of other lien holders, and where they come forward and insist upon having a priority of payment over mortgage creditors, a specific lien beyond all doubt should be shown to exist in their favor.

In Equity.

Mr. Porter and *Mr. Soren*, for the preferred stockholders.

Mr. Hendricks and *Mr. Peckham*, for the trustees.

Mr. Miller, for the receiver.

Mr. Hoadley and *Mr. Harrison*, for the second mortgage bond holders.

Drummond, C. J. These were bills filed by the plaintiffs as original and cross-bills, some of them claiming to be bond holders under certain mortgages or deeds of trust, and Campbell claiming to be a trustee under certain deeds of trust, which were given to secure certain bonds issued by the railroad company. These bills were filed in 1876 and 1877, and a receiver was placed in possession of the property under the order of the court, which included a line of railway from Cincinnati, in Ohio, to East St. Louis, in Illinois, with a branch to Louisville, and what is called the Springfield Division, in Illinois. It was consequently a railway existing and operated under the laws of three states, Ohio, Indiana and Illinois. These bills asked for foreclosure of the mortgages or deeds of trust, and a sale of all the property of the railway company. Various mortgages and deeds of trust had been given on parts of the combined railway before those which are in controversy here, and there had been foreclosure proceedings instituted on those prior mortgages or deeds of trust in the three states, and sales had taken place of different portions of the property, covering altogether the entire line of the railway. The railway has continued to be operated by the

receiver, under the direction of the court, since the bills in this case were filed. Application was made to the court in November last, by cross-bill, on behalf of certain preferred stockholders, claiming that as such they were entitled to priority of lien over all indebtedness and mortgages, or deeds of trust, made after the date of certain certificates given in 1867, which will be more particularly referred to hereafter. These stockholders were allowed to intervene for the protection of their interests in any form of pleading that they might select, and accordingly they have filed a cross-bill, setting up their claim to priority of lien, and to that cross-bill a demurrer has been interposed by those representing what is called the second mortgage or deed of trust, and other indebtedness of the company; and the question now presented for consideration is as to the sufficiency of this cross-bill. It is difficult to present a clear and intelligible statement of the facts from the allegations of the cross-bill upon which the preferred stockholders rely for the enforcement of their priority of lien. The material facts upon which they rely seem to be that, under the decrees and sales which took place before the mortgages and deeds of trust which are in controversy here were executed, Campbell and others became the purchasers of the property, as trustees of creditors and stockholders of the Ohio & Mississippi Company, for the purpose of providing for and protecting claims of judgment creditors and other persons holding liens on the property, and also the interests of the stockholders; that in exchange, and as a payment of the interest of the creditors and stockholders, which it is alleged, were transferred to the trustees and held by them for the purpose aforesaid, they issued their certificate, according to a certain stipulated proportion determined by certain considerations as to priority and right of lien. As a part of this general arrangement which took place in the sale and in the trust created, a reorganization was to be made, from which should spring a new corporation, with the usual powers under the law for operating the road and creating new encumbrances and liabilities; and this arrangement was carried into effect, and in executing the various contracts and ar-

rangements which were made the preferred stock was issued with the certificates in the form referred to, and these certificates were issued for the certificates issued by the trustees.

Before stating the form of the certificates, we may refer to the mortgages or deeds of trust which are sought to be foreclosed in the original and cross suits. One was executed December 24, 1867, by the railway company to Allen Campbell and J. U. F. Odell. This was on the railway from Cincinnati to East St. Louis, and including the branch to Louisville in a certain contingency; and another deed of trust or mortgage was executed March 25, 1871, by the O. & M. Co. This is called the second mortgage, and recites the lien and priority of $6,800,000 of first mortgage bonds. This last mortgage was made to secure $4,000,000 of bonds. The certificates which were issued to the stockholders were in the following form:

"This is to certify that.....is entitled to..... shares of the preferred capital stock of the Ohio & Mississippi Railway Company, of one hundred dollars each, transferable only on the books of said company in the city of New York, in person, or by attorney, on the surrender of this certificate. The preferred stock is to be and remain a first claim upon the property of the corporation after its indebtedness, and the holder thereof shall be entitled to receive from the net earnings of the company seven per cent. per annum, payable semi-annually, and to have such interest paid in full for each and every year before any payment of dividend upon the common stock; and whenever the net earnings of the corporation, which shall be applied in payment of interest on the preferred stock and of dividends on the common stock, shall be more than sufficient to pay both—said interest of seven per cent. on the preferred stock, in full, and seven per cent. dividend upon the common stock for the year in which said net earnings are so applied—then the excess of such net earnings, after such payments, shall be divided upon the preferred and common shares equally, share by share."

It is insisted by the preferred stockholders that because of their ownership of stock in this way they severally have a lien

and security and first claim upon all the property and franchises of the consolidated railway company which existed at the time of the original issue of such preferred stock, which was in or about the year 1867, next after and subject only to the indebtedness of the $6,000,000 mortgage authorized by the articles of agreement, being the indebtedness created by the mortgage or deed of trust of December 24, 1867, and June 23, 1869, which last mortgage covers only the Louisville branch. Of course, if this claim were well founded it would postpone the payment of all indebtedness under the second mortgage until the claims of the preferred stockholders were satisfied. Both the original and cross-bills of 1876–7 are framed on the assumption that this claim of the preferred bond holders was not well founded, as they each entirely ignore any such claim, and in any payments which have been made by the receiver on the first and second mortgages this claim of the preferred bond holders has also been disregarded.

It is alleged, on information and belief, that the existence of the preferred stock and of the character of the certificates issued for the same, and that such stock was and would always remain secured by a specific lien upon all the property and franchises of the railway company, subject only to the indebtedness created by the first mortgage, were well known to the trustees under the second mortgage, and also to the holders of the bonds issued under the second mortgage; and, in short, to all parties who are claiming their liens to be superior to that of the preferred stockholders. There is not set forth in the cross-bill any substantive act creating a specific lien upon the property in the way of mortgage or deed of trust in favor of the preferred stock, unless the certificates, or some agreements or stipulations which have been made and referred to, should constitute such a lien.

Whether or not, therefore, there was a specific lien must depend upon what actually occurred, and what agreements, stipulations and contracts affecting the property were entered into by parties who had the right to encumber it, and not upon what might have been in the minds of the preferred stockholders at the time these various transactions took place,

unless, indeed, their conclusions or inferences are fairly warranted by the acts themselves. It is said in the certificates that the preferred stock was to be and remain a first claim upon the property of the corporation after its indebtedness. The natural inquiry is, what indebtedness does this refer to? Does it mean the then subsisting indebtedness, or any indebtness which might exist against the corporation, and might be a valid lien against its property, although created afterwards? The certificates also say that the holder should be entitled to receive from the net earnings of the company 7 per cent., payable semi-annually, and that such interest should be paid before any payment of dividend upon the common stock; and that whenever the net earnings of the corporation which should be applied in payment of interest on the preferred stock, and to dividends on the common stock, should be more than sufficient to pay both, for the years in which said net earnings are so applied, then the excess of such net earnings after such payments should be divided upon the preferred and common shares equally, share by share. Now, was the object of this to create a specific lien as against all subsequent creditors of the property, and a priority over them, or was it merely an agreement made to indicate the distinction between the preferred and common stockholders, and would it have been, if the former was the intention of the parties, natural that they would have contented themselves merely with a certificate of preferred stock in this form rather than some clear, unmistakable declaration which should constitute an unquestioned lien upon the property as against all subsequent creditors?

It seems to me that the more natural construction of the certificate, and of all the acts which took place between the company and the stockholders who were thus preferred, was that they were providing a mode by which a preference should be given to particular stockholders over others, and that they did not contemplate that the indebtedness which was referred to, after which theirs was to be a first claim, was the indebtedness only which was then existing against the property. They were to be entitled to 7 per cent. from the net earnings of the company before any payment of divi-

dend upon the common stock, and when these net earnings, thus applied on the preferred stock and on the common stock, were more than sufficient to pay both, then the excess was to be divided between them equally, both common and preferred. Besides, it seems to me, from the nature of the case and character of the claim which is here set forth by these preferred stockholders as against other parties claiming and having liens upon the property, that the claim of preferred stockholders should not be allowed in a doubtful case.

The general rule is that stockholders are only to be paid after the claims of other lien holders, and where they come forward and insist upon having a priority of payment over mortgage creditors, a specific lien beyond all doubt should be shown to exist in their favor. If the claim of the preferred stockholders is valid, the second mortgage creditors may well ask when is their debt to be paid. It is only by construction, not very clear or satisfactory, that the claim of the preferred stockholders is sought to be made out in this case. It is a claim brought forward after long delay, and does not, under the circumstances, commend itself very strongly to the equitable consideration of the court. On the whole, therefore, I shall sustain the demurrer to the cross-bill.

BEALS *v.* NEDDO.

(*Circuit Court, D. Kansas.* February, 1880.)

MORTGAGE—DURESS—ASSIGNEE WITHOUT NOTICE.—Duress is not available, as a defence upon the foreclosure of a mortgage, where the note and mortgage were purchased before maturity, for value and without notice.

In Equity.

Peck, Ryan & Johnson, for plaintiff.

Danthill & McFarland and *Martin & Milchan,* for defendants.

FOSTER, D. J. The plaintiff, Charles L. Beals, filed his bill in equity against the defendants, A. P. Neddo and Louisa

Neddo, his wife, for a decree of foreclosure of a certain mortgage made by said defendants, on February 1, 1876, on 160 acres of land in Shawnee county, the same then and now being the homestead of defendants, which mortgage was made to J. H. Fairbanks to secure a negotiable promissory note, for the sum of $1,500, bearing even date herewith, and payable three years after date. Before the maturity of said note, and on March 27, 1877, the said Fairbanks indorsed said note and assigned said mortgage for a valuable consideration to this plaintiff, who had no notice of any infirmities in said papers, or of any equities against the same.

Louisa Neddo sets up in her answer to plaintiff's bill that she was induced to sign said mortgage, as also the note, under threats of personal violence from her husband, said A. P. Neddo; and that by reason of said duress she never gave her voluntary consent to said contract, and that the said mortgage is null and void. The evidence tends to show that on the day of the execution of the paper by Mrs. Neddo her husband threatened that if she did not sign said mortgage he would cut her throat; that at the time he made the threat he had in his hand a large pocket knife, and the threats were made in the presence of a grown son and daughter of Mrs. Neddo; that shortly afterwards, in a few minutes, the notary came into the room with the papers, and Mrs. Neddo signed and acknowledged the same in his presence; that there was nothing in her appearance or manner to excite the suspicion of the notary, or cause him to think she was acting under duress or excitement; that the money was borrowed and used mainly to pay off a prior mortgage on said homestead given by defendants.

The constitution of the state (section 9, art. 15) and statute (Gen. St. 473, § 1) provide that the homestead shall not be alienated without the joint consent of husband and wife. The constitutional and statutory provision makes the consent of both husband and wife necessary to the validity of the conveyance, and if the consent of either is wanting, the deed or mortgage is illegal *in toto*, and gives no title or lien whatever on the premises. In this respect it seems to change

the common-law rule, which would only invalidate the instrument so far as the party signing under duress was concerned, and it results that the husband is equally benefited with the wife under this defence, if it prevails, although he is the only party in fault.

If the constitution and statute are susceptible of construction permitting such defence, and the supreme court of this state appear to so hold in *Anderson* v. *Anderson*, 9 Kas. 112, and *Helm* v. *Helm*, 11 Kas. 19, it is probably predicated upon the ground that the husband is the agent of the grantee in procuring the signature of the wife to the conveyance, and is bound by his acts. *Bank* v. *Copeland*, 18 Md. 305. In any event, it is a defence which defendants, for the purpose of saving their homestead, have a great inducement to make, and once made a grantee, however innocent and however *bona fide* he has acted, is very much at a disadvantage.

The wife has, and in justice ought to have, the right to protect her home against an improvident husband; but she should assert her right, so far as possible, in a manner not to deceive and defraud parties purchasing or loaning money on the homestead in good faith. Of what occurs in the privacy of the family circle he can know but little or nothing. The wife signs the paper in the presence of the notary, and acknowledges the execution to be her voluntary act, and makes no sign of dissatisfaction. The grantee pays the purchase money, or makes the loan, entirely unconscious of any defect in the conveyance, and after the lapse of years the wife asserts her rights to annul the contract. It is a defence which, under many circumstances, does not present equities superior to those of the grantee. It opens wide the door for collusion between husband and wife to defraud the unsuspecting purchasers; and courts of equity in any case, before declaring such a conveyance void, ought to require the wife to make a clear and plain showing of fraud or duress, and that she is not guilty of collusion, laches, or fault on her part.

Whether the evidence for the defendants in this case makes such a showing I need not discuss, for it is settled by the

supreme court of the United States that this defence is not available against the purchaser of the note and mortgage before maturity, for value, and without notice.

The doctrine is old and indisputable that the holder of negotiable paper, before maturity and without notice, takes it clear of equities between the original parties, and neither fraud nor duress would invalidate it in his hands. See *Clarke* v. *Pease*, 41 N. H. 425, where this matter is fully discussed and authorities cited; also, *Hogan* v. *Moore*, 48 Ga. 162. So, also, is the doctrine that a purchaser, by deed of real estate, without notice, may rely upon the record, and will take the title free of equities between the original parties. *Boone* v. *Chiles*, 10 Pet. 210; *Deputy* v. *Staplefford*, 19 Cal. 305; 1 Story's Eq. Jur. 64, 434, 436. As to the question whether the purchaser in good faith of a promissory note before maturity, who takes an assignment of a mortgage securing the same, takes the security as the note free of equities, is one upon which there is some conflict among the decided cases, but the great weight of authority is to the affirmative. It is sufficient for this court that the supreme court of the United States has so held. The security is but an accessory to the debt, and follows the note and takes the same character. *Carpenter* v. *Logan*, 16 Wall. 271, 275; *Sawyer* v. *Pickett*, 19 Wall. 147; 1 Jones on Mort. § 834, and cases cited.

It follows that the plaintiff is entitled to his decree as prayed for in his bill.

BANK OF BRITISH NORTH AMERICA *v.* ELLIS and others.

(*Circuit Court, D. Oregon.* January 26, 1880.)

NEGOTIABLE INSTRUMENTS—EARLY BLANK INDORSEMENT—SUBSEQUENT INDORSERS.—The holder of a negotiable instrument who makes an early blank indorsement, payable to himself, does not thereby discharge all subsequent indorsers.

SAME—ACCOMMODATION INDORSERS—ATTORNEY FEE.—Accommodation indorsers are liable for the payment of a stipulated attorney fee in case suit should be instituted for the payment of the note.

Ellis G. Hughes, for plaintiff.

George H. Durham and *W. M. Gregory*, for defendant.

DEADY, D. J. This action is brought to recover the sum of $2,025, on 43 promissory notes made on May 1, 1878, by as many different persons, to the order of the Dayton, Sheridan & Grande Ronde Railway Company, and by it indorsed to J. Gaston. Afterwards, and before the maturity of said notes, they were indorsed in blank by said Gaston and defendants, and acquired by the plaintiff in the due course of business.

The case was before the court November 12, 1879, on a demurrer to the original answer. The demurrer being sustained, the defendants had leave to file an amended answer, containing further defences to the action, to which the plaintiff also demurs.

The complaint alleges that each of said notes contained a stipulation that, in case suit should be instituted for the collection of the same, there should be paid such sum as the court might deem reasonable as an attorney fee in said suit, and that $220 is such fee.

The amended answer denies that the plaintiff is entitled to recover any attorney fee in this action; and, for a further defence, alleges that, after said notes had been indorsed in blank by said Gaston and the defendants, the said Gaston negotiated the same to the plaintiff, and it became the owner thereof; that afterwards, and before the commencement of this action, the plaintiff wrote over said Gaston's name thereon a special indorsement to itself—"Pay to the —— of the Bank of British North America or order"—and "thereby released the defendants, and each of them, from any and all liability on said indorsements."

The answer also shows the order in which the indorsements were made on said notes, from which it appears that Gaston's name was written first, and those of the five defendants immediately thereunder, so that it was convenient, if not necessary, for the plaintiff, in writing the special directions thereon making the note payable to itself or order, to write the same as it did immediately above the name of Gaston.

This defence assumes that the holder of a negotiable instru-

ment who makes an early blank indorsement, payable to himself, thereby discharges all subsequent indorsers thereon from liability as such, the same as if he had stricken their names therefrom.

The only case cited which is directly in point is that of *Cole* v. *Cushing*, 8 Pick. 48, in which is was held that such an act did not discharge the subsequent indorsers, but they still remained liable to the holder. To the contrary of this there is a dictum or suggestion in 2 Par. on N. & B. 19, to the effect that "it might be said in such a case that when the holder made the note payable to himself by the first indorser, he made himself indorsee of that indorser, and thereby discharged all subsequent indorsers."

The suggestion, "it might be said," however distinguished the source, scarcely amounts to a *quære*, and certainly cannot overcome or cast doubt upon the well considered decision in *Cole* v. *Cushing*, with which my own judgment wholly concurs.

It is not to be presumed that the holder of a note with a number of indorsers thereon will intentionally discharge any of them without some reason or consideration commensurate with the loss of security for his debt thereby sustained. The indorsers having no right to be discharged, the act of the plaintiff ought not to be construed to have that effect, unless it plainly appears that such was the intention with which it was done, than which nothing is more improbable.

The direction written by the plaintiff over the indorsements upon the notes is not written over the signature of Gaston exclusively, and, under the circumstances, may be regarded as having been made with reference to those of the defendants as well as that of the former.

The defendants were without interest in the notes. They were mere accommodation indorsers, and their signatures could not and did not have the effect to transfer them to any one, but only to give them currency so as to enable Gaston to dispose of them as he did.

Under these circumstances there is no room for the inference that the plaintiff intended by this act, even if it had no

reference to the infringements of the defendants, to discharge them from all liability thereon.

As to the attorney fee, the defendants claim that the promise to pay one was only made by the makers of the notes, and that the subsequent parties thereto are under no such obligation to any one.

In the *Wilson Sewing Machine Co.* v. *Moreno et al.* (August 18, 1879,) this court held that a stipulation to pay a reasonable attorney fee to the holder of a promissory note, in case suit is brought to enforce the payment of the same, is just and valid, and that the negotiability of such note is not thereby affected or impaired. But the defendants herein claim that such a stipulation or contract is only the promise of the maker, and therefore not that of the defendants; and also that such stipulation, not being an integral part of the note, but a contract collateral thereto, is not negotiable, and therefore can only be enforced as between the immediate parties to it, the maker and payee.

In *Smith* v. *The Muncie National Bank*, 29 Ind. 158, it was held that the acceptor of a bill of exchange which contained a stipulation for the payment of an attorney fee was bound to pay the same. But this conclusion rests upon the fact that the acceptor of a bill of exchange sustains the same relation thereto as does the maker of a note. In *Hubbard* v. *Harrison*, 38 Ind., a stipulation in a promissory note to pay an attorney fee was entered in an action by the indorser against the payee, who was in fact an accommodation indorser. It was implied, rather than said, by the court, that the note, being negotiable, notwithstanding the stipulation, the latter passed with the former, and might be enforced by the holder thereof against any party to the instrument. In 1 Dan. Neg. Instr. § 62, it is said that the attorney fee need not be sued for by the attorney, but may be recovered by the holder; and that the liability therefor, "as for every engagement imported by the bill or note, entered into the acceptor's and indorser's contract.

While there is a conflict in the authorities upon the question of whether an instrument, otherwise negotiable, that con-

tains a stipulation for the payment of an attorney fee, is thus negotiable or not, no case has been cited which holds that such stipulation does not pass with the instrument, in case the same is deemed negotiable.

A stipulation in a negotiable instrument for an attorney fee, which in effect provides for the payment of certain expenses of collection in case the same is not paid without suit, so far gives security and curreney to such instrument, and is therefore to be regarded with favor, as being a just and convenient means of promoting the general object and utility of the same.

At common law the compensation of an attorney consisted of the various items allowed for his services, called collectively his "costs;" and, in case his client prevailed in the action, these were collected off the adverse party as a part of the judgment.

Substantially, this stipulation for an attorney fee is a substitute for the allowance of costs at common law, and enables a party taking a negotiable instrument to provide, by agreement with the maker or indorser thereof, that if the same is not paid without suit the holder shall recover his attorney fee, as well as the principal and interest.

The maker of these notes having agreed to pay an attorney fee to the holder thereof, if the same were not paid without action, in my judgment each subsequent party thereto assumed a like responsibility to such holders, and therefore the plaintiff is entitled to recover such fee from the defendants in this case.

But I think the defendants are liable to the plaintiff in this action for an attorney fee, even if the stipulation therefor can only be enforced between the immediate parties thereto. The defendants are accommodation indorsers—in effect, makers of these notes. By their indorsement of them they authorized Gaston, the then holder, to transfer them to the plaintiff, which was done. Every stipulation in them, and every obligation incident thereto, thereby became the stipulation and obligation of the defendants made directly to the plaintiff.

The demurrer is sustained.

MATHER v. AMERICAN EXPRESS CO.

(*Circuit Court, N. D. Illinois.* ———, 1880.)

COMMON CARRIER—LIMITATION OF LIABILITY—REFUSAL TO DISCLOSE VALUE OF GOODS.—A statute of the state of Illinois, which prohibits a common carrier from limiting its common law liability, does not prevent such carrier from limiting its liability where the shipper refused to inform the carrier of the value of the goods at the time they were shipped.

BLODGETT, D. J. This case was tried by the court without a jury, upon an agreed state of facts, the facts being, in substance, that a package containing two gold watches and five gold chains, and worth something over $500, was delivered to the agent of the Southern Express Company, at Bethany, Georgia, directed to the plaintiff in this city. The Southern Express Company accepted the package and forwarded it to Cairo, in this state, where it was delivered to the American Express Company, who undertook its transportation to this city, the Southern Express Company not running to this point.

No value was marked upon the package. The receipt given to the consignor stated, "Value asked but not given." The package was lost after arriving in this city, by theft, by reason of its not having been treated as a valuable package and placed in the safe where it would have been placed if its true value had been marked upon it.

Suit is brought by the plaintiff, and the question is as to the extent of the recovery to which he is entitled. The defendant admits that it is liable to the amount of $50, there being a provision in the receipt given for this package that where the value of a package is not stated or disclosed to the company the liability should be limited to $50. The plaintiff insists that the case comes within the provisions of the act of 1874* of the legislature of Illinois, which prohibits any

*"Whenever any property is received by a common carrier to be transported from one place to another, within or without this state, it shall not be lawful for such carrier to limit his common law liability safely to deliver such property at the place to which the same is to be transported by any stipulation or limitation expressed in the receipt given for such property." Rev. St. of Ill. (1874) c. 27, p. 268

common carrier from limiting its liability. I do not think, in the first place, that this case comes within that provision, because this was a contract of carriage made in the state of Georgia, and the parties could make any contract which the laws of the state of Georgia permitted them to make, and the laws of that state allowed a carrier to limit his liability. *Wallace* v. *Superintendent*, 39 Ga. 617. But, waiving the question as to whether this contract is to be construed by the laws of Georgia or Illinois, I do not think that the statute of Illinois intended that a common carrier should be prevented from limiting its liability where it asked for the value of the commodity of which it undertook the transportation, and the information requested is withheld. It seems to me that is one of those reasonable precautions which a common carrier has a right to demand; and where a sealed or closed package is presented, and the value is asked, and the consignor refuses to disclose it, the carrier has a right, it seems to me, to limit its liability to a fixed sum, and say that it will undertake the transportation on the assumption that it is not worth over a certain sum. It seems to me competent for a common carrier, under the Illinois statute, to require a shipper of goods to state the value which he puts upon them, and to stipulate that in case of loss the liability of the carrier shall not exceed the amount so fixed; and if this can be done, I can see no good reason why the carrier may not say that when the shipper refuses to disclose the value the liability of the carrier should not exceed a certain amount. This is equivalent to a special agreement between the parties that, for the purpose of the contract of carriage, the value of the goods is fixed at $50. The facts in this case show that the sender of the package was in the habit of shipping packages by the Southern Express Company, and this clause restricting liability to $50, where the value was not disclosed, was in all their receipts given for packages taken for shipment, and must have been known to him. The contract which was given to him by the agent stated that the value was asked but not given.

It is true the package was marked "watches," but the

values of watches vary so widely that no presumption that the value of the shipment exceeded $50 is raised by the statement of its contents. I must therefore assume that the consignor was content to accept the sum of $50 as the equivalent of the contents of this package, if it was lost in transit. True, the proof shows it to have been worth more than that, but it also shows that the charges of the carrier were regulated by the values, and that there was a difference in the care taken of packages when the value was stated and those on which no value was stated; and it seems to me so reasonable that a carrier should be entitled to know the value of property which it undertakes to transport, that I cannot believe the legislature of Illinois intended to prohibit the limitation of liability made by this contract, when the consignor refused to disclose the value.

The issue is found for the plaintiff, and damages assessed at $50; and plaintiff must recover costs, as this suit originated in the state court, and was removed to this court by defendant.

NOTE.—See *Muser* v. *American Express Co.* 1 FED. REP. 382.

KIMBALL and others *v.* THE TUDOR COMPANY.

(Circuit Court, D. Maine. ——, 1880.)

CONTRACT—DEMURRAGE—CONSTRUCTION.

Assumpsit by the owners of the ship Eclipse against the Tudor Company, upon the following account annexed to the writ: "For 7 days' demurrage, at $127.37 per day, $892.99." This was amended at the trial to nine days' demurrage, at the same rate, $1.148.13.

On the sixth of July, 1878, the plaintiffs, through Mr. Burt, a broker of Boston, chartered the ship, which was then building at Bath, to the defendants, to carry a cargo of ice from Wiscasset, Maine, to Madras and Calcutta. The contract was made orally by Mr. Burt with Mr. Field, duly acting

for the defendants, who refused to put it in writing, as being contrary to the usage of the company, but made a memorandum in a book used for that purpose, which was read by Mr. Burt. It was understood that the ship would be ready in about a month, and that a little longer time would make no difference to the defendants. Mr. Burt testified that the defendants agreed to load the ship "when ready;" Mr. Field did not remember using those words or any equivalent expression. The memorandum made no mention of the time. Mr. Kimball, the agent of the ship, testified to a conversation a few days after the sixth of July, in which similar language was used, that the defendants would load the vessel when she was ready, but that they were in no hurry. This was contradicted or not remembered by the other parties to it.

The defendants afterwards chartered of the Messrs. Sewall another ship, the Cheesborough, then building at Bath, for a similar voyage to Bombay. This second vessel was launched July 20th, a few days before the Eclipse, and appeared likely to be ready first; and Mr. Kimball testified that he called upon Mr. Minot, and, in the presence of Mr. Field, those two being the business managers of the defendants, offered to agree that the Cheesborough should be loaded before his vessel, provided the defendants would load her immediately, which offer was declined, Mr. Minot saying that he intended to load the Eclipse first. Mr. Minot and Mr. Field did not recollect this conversation. There was afterwards another conversation between the same parties, in which Mr. Minot said, either that the ship first ready should be first loaded, or that circumstances must decide the question when the time came.

Wiscasset is four or five hours distant from Bath by water, and about a half an hour by land. August 7th, the Cheesborough was taken round to Wiscasset; but a third ship, the Norwegian, was already there, and was loaded first, though delayed a short time by an accident. On the same day, August 7th, Mr. Kimball wrote to the defendants that the Cheesborough had gone to Wiscasset, and said that the Eclipse would

be ready August 13th, and asked if she was to load next after the vessel which should be loading when she was ready.

August 9th, Mr. Kimball wrote that he had been to Wiscasset, and heard from Mr. Sullivan, the defendants' agent there, that the Norwegian was to be loaded immediately, and asked whether the Eclipse was to follow the Norwegian, adding: "We are ready now to go to Wiscasset any day." He received no answer to either of his letters.

Mr. Kimball went to Wiscasset on the thirteenth of August, and found the Norwegian loading, and the Cheesborough lying in port, waiting her turn. He went to Boston again on the 15th, and asked the agents of the defendants whether his ship was to follow the Norwegian, and received no definite answer. August 16th, he wrote that the ship would go to Wiscasset on the next day to load, "as per agreement," and demanded that it should have the berth next after the Norwegian. August 16th, the Eclipse received her register, and on Saturday, the 17th, was towed to Wiscasset, and arrived there between 3 and 4 o'clock in the afternoon. The Norwegian was then loaded and about to haul out of the berth, and the Cheesborough had made fast a line to the wharf, in preparation for hauling in.

The Cheesborough was loaded before the Eclipse. Work on the latter was begun on Monday, August 26th, and finished Wednesday, September 4th, in which time 2,236 tons of ice were put on board. The crew were engaged in Boston, and did not arrive at Wiscasset until Saturday, the 7th, on which day the vessel sailed. The captain, first mate and cook were on board during the loading. Several letters were written by the plaintiffs, claiming demurrage, and by the defendants, denying the claim.

The defendants testified that they had more than 100 men sent from Boston to load their ships at Wiscasset, and that the Eclipse was loaded with great dispatch; that there was but one berth at which a vessel could load.

E. H. Kimball, for plaintiffs.

H. W. Paine and *R. D. Smith*, for defendants.

LOWELL, J. This case was submitted to me without a jury,

and I have stated above the substance of the testimony. Concerning the contract itself there can be no great doubt that it was, in substance, that the plaintiffs chartered their ship from the time she should be finished, and that the defendants took her from that time. The plaintiffs understood this to mean that they had the right to have their ship loaded next after any vessel which should be in the berth, when they notified the defendants that the Eclipse was ready to proceed from Bath to Wiscasset to be loaded; while the defendants understood it to mean that they should load the ship within a reasonable time after she was at Wiscasset, ready to be loaded, and that it was not unreasonable to require the Eclipse to take her turn next after a vessel which, having already waited ten days, had begun to haul in, or to prepare to haul in, when the Eclipse arrived at Wiscasset, especially if great dispatch was made in getting the ice on board both vessels. I think the defendants take the true view of the legal result of the contract.

Considering the uncertainty of the plaintiffs' undertaking, in point of time, namely, to have their vessel ready for the voyage in about a month or a little more, it is unlikely that the defendants intended to be bound to accept her instantly on the expiration of a time over which they had no control, without regard to their engagements with other vessels, or the necessary preparations for loading a ship with ice at Wiscasset. It was a contract by the plaintiffs to have their vessel ready within a reasonable time after one month; and by the defendants to load within a reasonable time after the vessel was ready.

Under these circumstances it was not unreasonable for the defendants to charter the Cheesborough, which neither party, I suppose, thought would be ready so soon as the Eclipse; but she was pushed forward very rapidly, and it was after she had gone to Wiscasset, ready to load, that the plaintiffs for the first time gave notice that their ship would be ready in six days more. It was not unreasonable to load the Cheesborough first, in this state of things.

This disposes of the claim for demurrage, considered as an extension of the freight. A question which has given me,

some difficulty is, whether, in the peculiar circumstances of this indefinite contract, the plaintiffs had a right to require the defendants to answer their repeated inquiries as to the order of time in which they would load the ship. If it is a question of courtesy, the law cannot deal with it. If one of right, the increased expense, slight though it is, of keeping the ship at Wicasset rather than at Bath, consisting of the wages of master, mate and cook, may fairly be charged to the defendants. Upon reflection, I think the plaintiffs were bound to notify the defendants of their readiness to send the ship to Wicasset, and were entitled to be told, in answer to their demand, when the defendants expected to be ready on their part. If the answer had been that the Cheesborough would be loaded first, it is very probable that the plaintiffs would have acquiesced, and have taken their measures to reach Wicasset some days later than the seventeenth of August. It seems to me, therefore, reasonable and just that the expenses which I have referred to should be paid by the defendants.

Judgment for the plaintiffs for $40 and costs.

UNITED STATES *v.* CLARE.

(*District Court, E. D. Pennsylvania.* March 12, 1880.)

INTERNAL REVENUE—DEALER IN MALT LIQUORS—REV. ST. § 3242.—Any person who carries on the business of a brewer, or wholesale or retail dealer in malt liquors, must first pay a special tax therefor.

SAME—"WHOLESALE DEALER"—REV. ST. § 3244.—If the quantity of malt liquors sold at one time exceeds five gallons, the vendor is a "wholesale dealer," although the same is not contained in one package.

Motion for new trial.

Defendant was indicted and found guilty as a wholesale dealer in malt liquors, who had not paid the special tax required by the act of congress.

John K. Valentine, U. S. District Attorney, for the United States.

William H. Staake, for defendant.

BUTLER, D. J. A new trial is asked for on two grounds—*First*, that the statute under which the indictment is drawn does not require payment of the tax specified in advance of prosecuting the business; *second*, that the defendant was not a "wholesale dealer," as charged.

Section 3242 of the Revised Statutes provides "that every person *who carries on* the business of a brewer, or wholesale or retail dealer in malt liquors, *without having paid* a special tax therefor, as required by law, shall, besides being liable for the payment of a tax, be fined not less than $10, nor more than $500."

Section 3232 provides "that *no person shall be engaged in or carry on* any trade or business hereinafter mentioned, *until he has paid* a special tax therefor, in a manner hereinafter provided."

Section 3237 provides "that all special taxes shall become due on the first day of May in each year, or *on commencing* any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for one year; and in the latter case it shall be reckoned proportionately from the first day of the month in which the liability to a special tax commenced, to the first day of May following."

Section 3239 requires the stamp denoting the payment of the tax to be prominently exhibited at all times, in the place where the business is conducted, and provides a penalty for failure to observe this requirement.

The foregoing provisions leave no room for doubt that the tax must be paid in advance. The business is prohibited, except when thus licensed; until the tax is paid it cannot be lawfully pursued.

The case of *U. S.* v. *Thirty-five Barrels of Spirits*, 9 Leg. Int. Rev. Rec. 67, 68, does not, as I understand it, involve the point here under consideration. It arose out of a claim to forfeiture, under the statute of July 20, 1868, relating to distilleries. The provisions of that statute differ materially

from the provisions before me. It would seem doubtful, at least, whether the tax there involved could be paid in advance; whether ascertainment of the amount must not await the close of the year. The bond required to be given, in advance, would appear to be intended, in part, to secure their payment when the amount should be ascertained. The judge refers to the fact that the statute does not specify, in terms, *when* the tax shall be paid; and infers that it is not payable until after demand. In our case, as already seen, the provision is plain that the tax shall be paid in advance; that, according to section 3232, "no person shall carry on any trade or business * * * *until he has paid*" the tax; that, according to section 3237, the tax is due and payable *on the commencement* of the business; that, according to section 3239, the evidence that payment *has been made* shall at all times be exhibited where the business is carried on; that, according to section 3242, "every person who carries on the business, * * * without *having paid*" the tax, is liable to prosecution.

Is the defendant a "wholesale dealer," as charged? The meaning of this language is defined by the fifth paragraph of section 3244 of the Revised Statutes, as follows: "Every person who sells or offers for sale malt liquors in quantities of more than five gallons, at one time, * * * shall be regarded as a wholesale dealer." This language is so plain as to leave nothing for construction. The proviso which follows relates to a different subject, and in no wise qualifies it. If the *quantity* sold at one time exceeds five gallons, the party selling is a "wholesale dealer" within the meaning of the statute. If we interpolate the words "in one package," as urged to do by the defendant, it is plain that the statute is not only changed in terms and effect, but is virtually abrogated. The wholesale dealer, in such case, need do no more to avoid payment of the tax than reduce the size of his vessels. By substituting demijohns and small casks for barrels and half barrels, he may prosecute his business without serious detriment, and escape the claim of the statute.

Motion denied.

UNITED STATES *v.* OSBORN.

(*District Court, D. Oregon.* April 8, 1880.)

INDIAN—SPIRITUOUS LIQUORS—REV. ST. § 2139.—The disposition of spirituous liquors to an Indian, under the charge of an Indian agent, who has abandoned his nomadic life and tribal relations, and adopted the habits and manners of civilized people, violates section 2139 of the Revised Statutes.

Information for disposing of spirituous liquor to an Indian.

Rufus Mallory, District Attorney, for the United States.

Defendant *in propria persona*.

DEADY, D. J. This is an information filed by the district attorney against Frank Osborn, charging him with having disposed of spirituous liquor to an Indian, under the charge of an Indian agent, contrary to section 2139 of the Revised Statutes.

The defendant pleaded not guilty, and submitted to be tried by the court without the intervention of a jury.

The evidence, in which there is no conflict, proves that the Indian in question belongs to one of the tribes on the Warm Spring Reservation, under charge of Indian Agent Capt. John Smith; that with the consent of the agent and his mother he has lived off the agency with Mr. Miller, near Eugene, in this state, for the past eight or ten years, as a domestic, and was therefore commonly called "Joe Miller;" that within a few months since he left the house of Mr. Miller, and has been working in the neighborhood for some of the farmers, and occasionally making his home with an Indian living in the vicinity upon a portion of the public land under the homestead act, and called "Indian Jim;" that *this* Indian belongs to one of the coast reservations, but has not resided there for some fifteen years, and claims to be a citizen and voter of Oregon; that a short time since, and after Joe had left the Millers, he went to Eugene, a few miles distant from his former residence, and asked the defendant, who kept a drug store there, for a pint of alcohol.

The defendant knew the Miller family, and Joe, as an Indian

who lived with them and bore their name, and when Joe asked for the alcohol he asked him if he was Miller's boy, and Joe answered, "yes;" whereupon, he sold him the liquor. Agent Smith has known of the whereabouts of this Indian Joe since he left the reservation, and claims the right to return him there whenever he thinks proper; and his mother is still living there.

Upon these facts and the authority of *U. S.* v. *Holliday*, 3 Wall. 418, there can be no doubt but that Joe is an Indian under charge of an agent appointed by the United States. In this case the Indian to whom the liquor was disposed lived upon a piece of land which he occupied in severalty, and voted at the elections, as he was authorized to do by the laws of the state of Michigan.

There appears to be an impression that Indians situated as Jim and Joe are—that is, who live off the reservation and among, and more or less after, the manner of white people—are citizens and voters of the state, and therefore it is no crime to give them spirituous liquors. But this is a mistake. The Indians are not a portion of the political community called the "People of the United States;" and, although not foreign nations or persons, they have always been regarded and treated as distinct and independent political communities. *Worcester* v. *The State of Georgia*, 5 Pet. 515; *The Cherokee Nation* v. *The State of Georgia*, Id. 1.

What effect, if any, the act of March 3, 1871, (16 St. 566; Rev. St. § 2079,) which declares that no Indian tribe within the territory of the United States "shall be acknowledged or recognized as an independent nation, tribe or power, with whom the United States may contract by treaty," may have upon this question, it is not necessary now to consider. Probably none, as in effect it is only a declaration that thereafter the United States will not contract with the Indian tribes, but will regulate its relations with them and their affairs by law—by act of congress rather than the treaty-making power; and whether, and how far, congress can thus limit the constitutional power of the president, "by and with the advice and consent of the senate, to make treaties," (arti-

cle 2, § 2, Con. U. S.) is another question of a more serious character.

The constitution of this state limits the privilege of suffrage to "white males." Article 2, § 2, Con. Or. But by the operation of the fourteenth and fifteenth amendments this word "white" is, in effect, stricken out of the constitution of the state. The fourteenth one provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state where they reside;" and the fifteenth one declares that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude." The result is that citizens of the United States cannot be excluded from the polls on account of color. Therefore, negroes born in the United States, being born "subject to the jurisdiction" thereof, became citizens and voters.

But the Indian tribes in the United States, or the members thereof, are not born "subject to the jurisdiction" of the United States. *McKay* v. *Campbell*, 2 Saw. 132. There are no Indians in Oregon that were born subject to its jurisdiction or that have since become so. In the report of the senate judiciary committee, made by Mr. Carpenter, December 14, 1870, it was stated that the Indian tribes, or the members thereof, are not subject to the jurisdiction of the United States, and, therefore, such Indians are not made citizens by the fourteenth amendment. 1 Dillon, 348, note.

The state may make any Indian a voter, or the United States may make him a citizen, and then by operation of the fifteenth amendment he becomes a voter within the state where he resides, if he is otherwise qualified according to its laws.

By the treaty of January 31, 1855, (10 Stat. 1157,) the tribal organization and relation of the Wyandotte Indians, in Kansas, with the United States, was dissolved and terminated, and they were made "citizens of the United States to all intents and purposes."

But an Indian cannot make *himself* a citizen of the United States without the consent and co-operation of the government. The fact that he has abandoned his nomadic life or tribal relations, and adopted the habits and manners of civilized people, may be a good reason why he should be made a citizen of the United States, but does not of itself make him one. To be a citizen of the United States is a political privilege, which no one not born to can assume without its consent in some form.

The Indians in Oregon, not being born subject to the jurisdiction of the United States, were not born citizens thereof, and I am not aware of any law or treaty by which any of them have been made so since.

It follows as a matter of course that the defendant, in disposing of spirituous liquors to the Indian Joe, when and as he did, was guilty of a violation of the statute. But as it appears probable that the act of the defendant was the result of carelessness or a misapprehension of the *status* of the Indian Joe, rather than any guilty purpose to violate the law, I think it is a proper case for a mere nominal punishment. The defendant is therefore sentenced to pay a fine of one dollar.

UNITED STATES *v.* WILLIAMS.

(*Circuit Court, D. Oregon.* February 5, 1880.)

ASSAULT WITH A DANGEROUS WEAPON—ATTEMPT TO COMMIT MURDER—PUNISHMENT.—There is no punishment provided for an assault with a a dangerous weapon, committed within the exclusive jurisdiction of the United States, if committed on land, even if it should involve an attempt to commit murder.

Indictment for an attempt to commit murder.

Rufus Mallory, District Attorney, for the United States.

William H. Page, for defendant.

DEADY, D. J. On January 7, 1879, the grand jury for this district found an indictment against the defendant, containing two counts.

The first one charges him with "an attempt to commit the crime of murder by means not constituting an assault with a dangerous weapon," by wilfully and maliciously "shooting one Edward Robert Roy," on October 8, 1879, with a loaded pistol, with intent him to murder, at Sitka, in the territory of Alaska. The second one charges him with an assault upon said Roy, at the time and place aforesaid, with a loaded pistol, with intent him to kill, and alleges that said territory of Alaska was then and there Indian territory. The defendant demurred to the indictment upon the ground that the facts stated did not constitute a crime.

The court sustained the demurrer to the second count, holding that Alaska was not "the Indian country" within the purview of section 21 of the act of March 27, 1854, (10 St. 270; Rev. St. § 2142,) defining the crime of an assault by a white person within such country, with a deadly weapon, with intent to kill, and citing *U. S.* v. *Savaloff*, 2 Saw. 311; *U. S.* v. *Carr*, 3 Saw. 302; *Waters* v. *Campbell*, 4 Saw. 121.

The demurrer to the second count was overruled *pro forma*, whereupon the defendant pleaded guilty thereto, and then moved in arrest of judgment for the cause stated in the demurrer.

This count is based upon section 2 of the act of March 3, 1857, (11 St. 250; Rev. St. § 5342,) which provides in effect that every person who, within any place or district of country under the exclusive jurisdiction of the United States, or upon the high seas or other water within the admiralty jurisdiction thereof, and out of the jurisdiction of any particular state, attempts to commit murder "by any means not constituting the offence of assault with a dangerous weagon," shall be punished, etc.

Without doubt Sitka, in Alaska, is a place under the exclusive jurisdiction of the United States, and, so far as this charge is concerned, not within the jurisdiction of any organized or judicial district thereof. Therefore, it appearing from the indictment that the defendant was first brought within this district for trial, it follows that, if the alleged

assault is a violation of any law of the United States, the motion must be denied. Rev. St. § 730; *U. S.* v. *Carr*, *supra*, 304.

The only provision in the statutes of the United States for punishing an attempt to commit murder or manslaughter on land, is found in section 5342, *supra*, but for some reason this is confined to cases where the means used do not constitute "the offence of assault with a dangerous weapon."

The punishment of an assault with a dangerous weapon, or with intent to perpetrate a felony, committed on the waters within the jurisdiction of the United States, and out of the jurisdiction of any particular state, was provided for in section 4 of the act of March 3, 1825 (4 St. 115; Rev. St. § 5346) but not the attempt to commit murder or manslaughter, unless it was coincident with such assault. But an attempt to commit murder or manslaughter on land, or an assault there, by whatever means committed, was not punishable by any law of the United States until 1857, when, as has been stated by section 2, of the act of March 3 of that year, it was declared that an attempt to commit murder or manslaughter, whether on land or water, should be punished as therein prescribed, provided, such attempt was not made by means of the assault mentioned in the act of 1825, *supra*, thus limiting the operation of the statute to attempts made by drowning, poisoning, or the like. And probably this was so provided upon the erroneous impression that the act of 1825 was applicable to assaults committed on land as well as water.

But, however this may be, as a result of this patchwork legislation, it appears that there is no punishment provided for an assault with a dangerous weapon, committed within the exclusive jurisdiction of the United States, if committed on land, even if such assault should involve, as it may, and did in this case, an attempt to commit murder.

In the drawing of the indictment an effort has been made to bring this case within the terms of section 5342, Rev. St., by an averment therein that the attempt to murder was made

"by means not constituting an assault with a dangerous weapon." But this is necessarily avoided, and, in effect, rendered null, by the very statement of the commission of the alleged offence, that the defendant attempted to commit murder by shooting Roy with a loaded pistol.

Whether a particular weapon is a deadly or dangerous one is generally a question of law. Sometimes, owing to the equivocal character of the instrument—as a belaying pin—or the manner and circumstances of its use, the question becomes one of law and fact, to be determined by the jury under the direction of the court. But where it is practicable for the court to declare a particular weapon dangerous or not, it is its duty to do so. A dangerous weapon is one likely to produce death or great bodily injury. A loaded pistol is not only a dangerous but a deadly weapon. The prime purpose of its construction and use is to endanger and destroy life. This is a fact of such general notoriety that the court must take notice of it. *U. S.* v. *Small*, 2 Curt. 242; *U. S.* v. *Wilson*, 1 Bald. 99. It appears, then, from the indictment, notwithstanding the averment therein to the contrary, that the act alleged to be an attempt to commit murder was an assault with a dangerous weapon, and therefore not punishable by the statute.

The motion in arrest of judgment must be allowed, and the defendant discharged.

By this ruling the defendant will escape punishment for what appears to have been an atrocious crime, but the court cannot inflict punishment where the law does not so provide. It is the duty of the legislature to correct the omission or defect in the law, and it is to be hoped that the result in this case will attract the attention of congress to the matter at an early day.

In re RUDOLPH.

(*Circuit Court, D. Nevada.* March, 1880.)

TRAVELING MERCHANTS—LICENSE TAX—SUBD. 2, § 10, ART. 1, AND SUBD. 3, § 8, ART. 1, OF THE CONSTITUTION.—A statute of Nevada provided that "every traveling merchant, agent, drummer or other person selling, or offering to sell, any goods, wares or merchandise of any kind, to be delivered at some future time, or carrying samples and selling, or offering to sell, goods, wares or merchandise of any kind similar to such samples, to be delivered at some future time," should obtain a license, and pay $25 a month for the same. The statute further provided that any person without such license, "so offering any goods, wares or merchandise for sale, shall be guilty of a misdemeanor, and on conviction shall be fined in any sum not less than $50 nor more than $500." *Held*, (1) that said statute did not violate subd. 2, § 10, art. 1 of the constitution, prohibiting the states from laying imposts or duties on imports; (2) that such statute did not violate subd. 3, § 8, art. 1 of the constitution, conferring upon congress power to "regulate commerce among the several states."

Lewis & Deal, for petitioner.

Attorney General Murphy, for respondent.

SAWYER, C. J. The petitioner is a citizen of California, and in the employment of Adelsdufer & Co., merchants of San Francisco, California, engaged in the coffee and spice trade. He was traveling is Nevada, engaged in such employment, offering to sell and selling such goods, wares and merchandise as his employers dealt in. Upon making sales he transmitted the orders to said employers in San Francisco, who filled them and shipped the goods sold to the parties ordering them, at their respective places of business in Nevada. For selling goods in the course of said employment at Virginia City, Nevada, he was arrested and held in custody upon a warrant issued upon a charge of having committed the offence of pursuing such business without having procured a license as required by the statute of Nevada, passed February 20, 1877, (St. 1877–79.)

A writ of *habeas corpus* having been issued and the body of the prisoner produced, he now asks to be discharged from custody on the ground that said act is void, as being in violation of subdivision 3, section 8, article 1, of the Constitution of the United States, conferring upon congress power to "regu-

late commerce among the several states;" also, of section 10, subdivision 2, of the same article, prohibiting the states from laying imposts or duties on imports.

The statute of Nevada in question provides that "every traveling merchant, agent, drummer or other person selling, or offering to sell, any goods, wares or merchandise of any kind, to be delivered at some future time, or carrying samples and selling, or offering to sell, goods, wares or merchandise of any kind similar to such samples, to be delivered at some future time," shall obtain a license, and pay for such license $25 per month. It further provides that any person without a license, "so offering any goods, wares or merchandise for sale, shall be guilty of a misdemeanor, and on conviction shall be fined in any sum not less than $50 nor more than $500."

It is settled in the case of *Woodruff* v. *Parham*, 8 Wall. 123, that the word "imports," as used in subdivision 2, section 10, of article 1, of the Constitution, does not apply to goods brought from one state into another, but is limited to goods brought into the United States from some foreign country. The statute of Nevada, therefore, does not violate that provision of the constitution.

We think, also, that the same case and the following case in the same volume (*Hinson* v. *Lott*, Id. 148) determine the other question raised, and that the statute of Nevada in question does not violate the constitutional provision conferring upon congress the power to regulate commerce among the states. Conceding, for the purpose of the decision, the license fees to be a tax upon the goods sold, there is no discrimination against the goods of other states in favor of the products of Nevada; but all are taxed alike, and under those authorities where there is no discrimination the imposition of the tax is a legitimate exercise of the taxing power by the state.

In *Woodruff* v. *Parham*, 8 Wall. 140, the court say: "The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another state, and whether

the goods sold are the produce of that state or some other. There is no attempt to discriminate injuriously against the products of other states or the rights of their citizens, and the case is not, therefore, an attempt to fetter commerce among the states, or to deprive the citizens of other states of any privilege or immunity possessed by citizens of Alabama. But a law having such operation would, in our opinion, be an infringement of the provisions of the constitution which relate to those subjects, and therefore void." And in *Hinson* v. *Lott*, Id. 152, the court say: "The tax in the case before us, if it were of the character we have suggested, discriminating adversely to the products of all the other states in favor of those of Alabama, and involving a principle which might lead to actual commercial non-intercourse, would, in our opinion, belong to that class of legislation, and be forbidden by the clause of the constitution just mentioned. But a careful examination of the statute shows that it is not obnoxious to this objection. A tax is imposed by the previous sections of the same act of 50 cents per gallon on all whisky and all brandy from fruits manufactured in the state. In order to collect this tax every distiller is compelled to take out a license, and to make regular returns of the amount of distilled spirits manufactured by him. In this way he pays 50 cents per gallon. So that, when we come in the light of these earlier sections of the act to examine the thirteenth, fourteenth and fifteenth sections, it is found that no greater tax is laid on liquors brought into the state than those manufactured within it. And it is clear that whereas collecting the tax of the distiller was supposed to be the most expedient mode of securing its payment, as to liquors manufactured within the state, the tax on those who sold liquors brought in from other states was only the complementary provision necessary to make the tax equal on all liquors sold in the state. As the effect of the act is such as we have described, and it institutes no legislation which discriminates against the products of sister states, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured within the state, we do not see in it an attempt to regulate com-

merce, but an appropriate and legitimate exercise of the taxing power of the states."

In all the cases cited on behalf of the petitioner, from *Brown* v. *Maryland* down, there was discrimination, and the discrimination was referred to as the obnoxious feature of the statute in question in the various cases. This is the distinction taken between that class of cases and those cited in this opinion; expressly taken in *Welton* v. *Missouri*, 1 Otto, 282; 3 Cent. Law Journal, 116; and again recognized in *Cook* v. *Pennsylvania*, 7 Otto, 573, as well as in other cases. The statute of Nevada makes no reference whatever to foreign goods from or the products of other states. It simply imposes a license tax upon the occupation of all traveling merchants, agents, drummers, or other persons selling or offering to sell goods of any description without reference to when or where they were made. The act we think valid, and that the petitioner is not restrained in violation of the constitution or laws of the United States. It is therefore ordered that the petitioner be remanded to the custody of the proper officer, and the writ be discharged.

HILLYER, J., concurred.

In re DURYEE, Bankrupt.

(*District Court, D. New Jersey.* March 22, 1880.)

BANKRUPTCY—TAX—REV. ST. § 5101.—A tax is not a debt provable in bankruptcy under section 5101 of the Revised Statutes.

SAME—SAME—REV. ST. § 5106.—Under the provisions of section 5106 of the Revised Statutes, no stay is authorized which hinders the use of the orderly methods for the collection of taxes during the pendency of bankruptcy proceedings.

Motion to vacate order.

Leslie Lupton, for city of Rahway.

Remington Vernam, for bankrupt.

NIXON, D. J. The petitioner filed a voluntary petition for adjudication of bankruptcy on the thirty-first of August, 1878,

and was duly adjudged a bankrupt. It appears, by his amended schedules, that the city of Rahway is an unsecured creditor of the bankrupt for $250, the amount of personal taxes due from the years 1870 to 1878, inclusive. The city commenced a suit for the recovery of these taxes after the petition in bankruptcy was filed, and the bankrupt applied for and obtained an order for an injunction restraining the suit pending the bankruptcy proceedings.

This is a motion to vacate the order, on the ground that the claim of the city is not a debt provable in bankruptcy, within the meaning of the act.

I think the objection is well taken, not only for the reasons assigned on the argument by the counsel for the city, but from the proviso of the fifth clause of section 5101 of the act.

The order staying the suit was improvidently made, arising from the fact that the petition presented to the court for obtaining it did not state upon its face or reveal to the court the nature of the action. It simply alleged that the city of Rahway, having a debt provable in bankruptcy against the bankrupt, was endeavoring by legal proceedings to enforce the payment of the claim. Under the provisions of section 5106 of the bankrupt act, it was the duty of the court, upon such a representation, to require the creditor to suspend the further prosecution of the suit until the question of the debtor's discharge should be determined.

But it appears upon this motion that the proceeding was for the collection of a tax, and it will be perceived, on an examination of the provisions of section 5106, that they do not apply to such a case. The section provides that "no creditor whose *debt* is provable shall be allowed to prosecute to final judgment any suit," etc.

But all the authorities agree that a tax is not a debt. The supreme court, in *The United States* v. *The Railroad Co.* 17 Wall. 326, defines a tax to be "a charge, a pecuniary burden, for the support of government." Wharton's definition is more comprehensive. He says it is "a portion of the national wealth applied to public use, granted and controlled by the representatives of the people." The supreme court of New

Jersey, (*City of Camden* v. *Allen*, 2 Dutch. 398,) in holding that the payment of taxes could not be enforced by an action of debt, where the statute provided any other method of recovery, say: "A tax, in its essential characteristics, is not a debt, nor in the nature of a debt. A tax is an impost levied by authority of government upon its citizens or subjects for the support of the state. It is not founded on contract or agreement. It operates *in invitum*."

But, aside from this, section 5106 must be construed in connection with the provisions of section 5101. Although a tax is not a debt, it is a provable claim, for the payment of which the bankrupt estate is liable, and the object of this section is to fix the relative priority of claims and to designate the order in which they shall be satisfied in full. It provides for the payment (1) of the fees and costs of the proceedings in bankruptcy; (2) for all debts due to the United States, and all taxes and assessments under the laws thereof; (3) for all debts due to the state in which the proceedings are pending, and all taxes and assessments made under state laws; (4) for the wages due to operatives and servants within the limitations specified; and (5) for all debts due to any persons who by the laws of the United States are entitled to priority; and then, as if to guard against any misconstruction or wrongful interpretation of these provisions, and especially against the construction contended for by the counsel of the petitioner in this case, the congress adds: "But nothing contained in this title shall interfere with the assessment and collection of taxes by the authority of the United States, or any state."

The city of Rahway, in attempting to collect the personal taxes due from the bankrupt, is proceeding under the authority of the laws of the state of New Jersey, and is not to be restrained from so doing by anything contained in the sections quoted and commented on above, or by any other sections of the title. *U. S.* v. *Herron*, 20 Wall. 256. The highest duty of citizenship is the prompt payment of taxes, whether national, state, county or municipal, although it would often seem that no duty is so grudgingly performed. In the contemplation

and judgment of the framers of the bankrupt law, no citizen shall be presumed to sink so low or become so poor that he should be excused from contributing his share to the support of the government, which continues to protect his person after his property is gone; and, under its provisions, no stay is authorized which hinders the use of the orderly methods for the collection of taxes during the pendency of bankruptcy proceedings.

The order heretofore granted is vacated, with costs.

In re NULL.

(*District Court, W. D. Pennsylvania.* April 12, 1880.)

PARTITION—WIDOW'S DOWER—LIEN.—In proceedings in partition a recognizance or mortgage given for the principal of the widow's dower is but collateral; the lien is independent of such security, being created by the law itself.

In Bankruptcy.

Sur exceptions to register's report.

ACHESON, J. The fund for distribution arises from the sale of certain land of the bankrupt, H. H. Null, in Westmoreland county, Pennsylvania, which, under an order of this court, was sold, divested of liens. The register reports that the heirs of Henry Null, deceased, had the first lien against the land, and he appropriates thereto the sum of $1,485.75. To this appropriation Jesse Fries, a judgment creditor of the bankrupt, has filed exceptions.

This land is part of the real estate of which the bankrupt's father, Henry Null, died seized, intestate. Subsequently, on September 11, 1849, the widow and heirs of the decedent made an amicable partition of his real estate by an instrument of writing, executed under their hands and seals, and duly recorded in Westmoreland county on June 2, 1851. By this partition the land now in question was allotted to H. H. Null, the bankrupt, at the agreed valuation of $5,209.50.

Other portions of the real estate were allotted to other of the heirs at agreed values, the valuation of all the purparts amounting to $11,268.25. After reciting the valuation and allotments, the partition agreement contains the following clause:

"Out of this, one-third remains in the land; interest, annually, to be paid to Elizabeth, the widow, and principal to be paid to the heirs of deceased, at her death—$3,756.08."

The partition agreement also contains the following clauses:

"The heirs also agree to execute deeds to Henry H. Null, Andrew J. Null, Francis M. Null and William Ruff, for the purparts taken by them." * * *

* * * * * * *

* * * "H. H. Null, Andrew J. Null, F. M. Null and William Ruff to give mortgages to the other heirs for the one-third which remains in the land, which is to be paid on the death of the widow; the interest on same to be paid annually to said widow during her life."

On the day of the date of the partition agreement, September 11, 1849, the other heirs executed to H. H. Null a deed for his said purpart, but it seems he never executed the mortgage as required by the agreement. The deed to H. H. Null, which was recorded November 3, 1865, contains this recital: "Being the mansion farm of the late Henry Null, deceased, who died seized thereof; and in the partition of the real estate of said deceased to and among his heirs, the trust was agreed to be taken at a price fixed upon by all the parties hereto, by Henry H. Null, whose title to the same is hereby confirmed and assured to the same."

Elizabeth, the widow of Henry Null, died before the commencement of the proceedings in bankruptcy in this case, viz., on January 9, 1873.

Such being the facts of the case, was the register right in his appropriation in favor of the heirs of Henry Null, deceased?

It is indisputably settled that a lien upon real estate may be created by an instrument under seal, duly recorded. *Dexter's Appeal*, 81 Pa. St. R. 403. Here, beyond all question,

the partition agreement of September 11, 1849, does expressly charge the purpart taken by H. H. Null with one-third of the agreed valuation. "*This one-third remains in the land,*" is the language of the agreement. Surely these are apt words to create a charge or lien upon the land. The agreement was recorded long prior to the entry of the judgment of Jesse Fries. He had, therefore, constructive, if not actual, notice of the prior encumbrance.

Was the lien intended to be created by the partition agreement defeated by the deed from the other heirs of Henry Null, deceased, to H. H. Null? Certainly not; for the agreement itself contemplated and provided for that deed. The deed bears even date with the agreement, and recites the partition. It is part and parcel of the partition, and cannot be used to defeat the manifest and expressed intention of the parties. This amicable partition is declared in the agreement to be made "for the purpose of avoiding difficulties and costs in selling said estate." It was in lieu of proceedings in partition in the orphan's court, which any of the parties might have instituted; and in respect to the one-third of the valuation money the parties merely adopted the provisions of section 41 of the act of March 20, 1832, (Purdon, 437, pl. 158,) which charges upon the premises the principal of the widow's dower, and directs that the interest be paid her annually, and the principal at her death to the parties thereunto legally entitled. Say the court, in *Long* v. *Long*, 1 Watts, 268: "Wherever parties, then, have done amicably what the law would have compelled, it will, if possible, be doubly binding upon them."

A deed is not always a merger of prior articles of agreement. In many cases it is to be considered a part performance only. *Selden* v. *Williams*, 9 Watts, 9. If the articles contain a provision for something more than the execution of a deed, it may remain in full force after a conveyance has been executed and accepted. *Barnitz* v. *Smith*, 1 Watts & Serg. 145.

It is, however, contended that the partition agreement provides how the one-third of the valuation money was to be secured, viz.: by mortgage; and that, as the deed was deliv-

ered without exacting then or afterwards the stipulated security, the lien in favor of the heirs was lost. But the very clause which provides for a mortgage contains this significant language: "For the one-third which *remains in the land*, which is to be paid on the death of the widow; the interest on the same to be paid annually to said widow during her life." The purpose of the mortgage was to afford additional and cumulative remedies to enforce payment. *Episcopal Academy* v. *Freize*, 2 Watts, 16.

In proceedings in partition a recognizance or mortgage given for the principal of the widow's dower is but collateral; the lien is independent of such security, being created by the law itself. *Hise* v. *Geiger*, 7 Watts & Serg. 273; *De Haven* v. *Bartholomew*, 57 Pa. St. R. 126. This principle is applicable to the present controversy; for here the agreement of the parties, which is the law of the case, created a lien independent of the contemplated mortgage.

And now, to-wit, April 12, 1880, the exceptions to the register's report are overruled and the report confirmed absolutely.

HOFFMAN *v.* YOUNG*.

(Circuit Court, E. D. Pennsylvania. April 28, 1880.)

PATENT—IMPROVEMENT IN TRIPOD HEADS.—A patented improvement in tripod heads for surveyors' instruments compared with previous devices and patent sustained.

COMBINATION OF OLD DEVICES—WHEN PATENTABLE.—If a combination of old devices contains (1) a novel assemblage of parts exhibiting invention, and (2) the co-operation of those parts producing a new result, it is patentable. The parts need not act simultaneously, if they act unitedly to produce a common result.

Per Butler, J. It may be conceded that in this respect the case is near the border line. If nearer, however, the *prima facie* right established by the letters patent, (strengthened, possibly, by the respondent's tardiness in discovering this defence,) would justify a decree in the plaintiff's favor.

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

Hearing on bill, answer and proofs.

This was a bill in equity to restrain the alleged infringement of a patent. The facts are sufficiently stated in the opinion.

Allen H. Gangewer, for complainant.

G. Morgan Eldridge and *Wm. Ernst*, for respondent.

BUTLER, D. J. On November 20, 1877, letters patent No. 197,369, for an "improvement in tripod heads for surveyors' instruments," were issued to the complainant, the claims in which are as follows: "*First*, the combination with the plate A, having central opening *a*, and the plate C, having the socket *c*, extending through said opening of the ball D, having threaded neck *d*, the levelling screw-plate E, having ball *g*, and the instrument-plate F, having neck *c* and socket *h*, substantially as specified. *Second*, the combination with the base-plate A, having central opening *a*, and the socket-plate *c*, having neck *c*, of the carrying-plate B, having aperture *b*, fitting said neck, and the levelling mechanism of a tripod head, substantially as specified. *Third*, a tripod head, having a ball and socket-joint for the base plate, in combination with the instrument-plate F, having a spherical bearing *g h*, concentric with said ball and socket-joint, and levelling-plate E, substantially as specified."

The object of the invention, as stated in the patent, was "to devise a tripod head of such construction that it may be levelled with absolute accuracy and expedition, and may be adjusted horizontally for bringing the center of the instrument over a fixed point on the ground, whatever be the nature of the same or its inclination."

The bill charges the respondent with infringing this patent. The answer, as originally filed, (virtually admitting the validity of the patent,) denies the allegation of infringment; alleges that the respondent's tripod heads are made in pursuance of letters issued to himself on April 20, 1878; and, also, that he has a license from the complainant. By amendment, the validity of complainant's patent is attacked, and his instrument declared to be a combination, simply, of those of William

J. Young and John Francis Pastorelli, previously patented, without any new combined result being obtained thereby.

On the argument the defence was confined to the alleged invalidity of the patent, the denial of infringement being abandoned. If this defence is well founded it must be conceded that the respondent was slow to discover it. His application for a similar patent, (for the one he obtained is, essentially, similar,) and his acceptance of a license from the complainant, are wholly irreconcilable with his present position, which seems not to have been assumed until all other grounds of defence had failed. It is not, however, too late to raise this question, and it must, therefore, be decided.

The complainant admits that the lower part of his instrument—the shifting device—is not new, and bases his claim on the combination with this of the upper part—the device for horizontal adjustment; denying that this latter device is copied from Pastorelli's, and asserting that if it were the combination of such old devices in one instrument, as here shown, whereby the lateral and horizontal adjustments are effected by one act or process, would sustain the patent. Our judgment is with the complainant on both questions. Without elaboration, it is sufficient to say that we regard the upper part of the instrument as materially different from Pastorelli's invention. The points of difference are minutely and intelligently stated by the complainant's witnesses, and it would be profitless to repeat them here. While the respondent's experts pronounce a different judgment, a comparison of the instruments has satisfied us that they are materially different. The arched bearing surface, connected with the leveling screws and supporting the instrument plate, securing a steady, firm rest for the instrument, and utilizing the friction produced by its weight, is alone sufficient to distinguish the complainant's invention from Pastorelli's.

If, however, the complainant's invention consisted exclusively in combining the former separate inventions of Young and Pastorelli in one instrument, with the result here exhibited, we would still hold the patent valid. That it required invention to do this, and that great saving of time and labor in adjusting

surveyor's instruments, and great consequent advantage to the public are attained by such combination, is very clear. This alone, however, would not support the patent. A mere aggregation of old parts, without any new result issuing from their united action, is not patentable. The parts must combine in operation, and by their joint effect produce a new result. They need not act simultaneously. If so arranged that the successive action of each contributes to produce the result, which, when obtained, is the product of all the parts, viewed as a whole, a valid claim for this combination may be sustained. *Williams* v. *R. Co.* 15 O. G. 655; *Waring* v. *Wilkinson*, Id. 247; *Forbush* v. *Cook*, 2 Law Rep. 664; *Herring* v. *Nelson*, 12 O. G. 362.

As was said by Commissioner Liggett, in *Lynch* v. *Dryden*, 3 O. G. 407, neither the courts nor commissioners have attempted to define a patentable combination so exactly as to be suited to universal application—broad enough to include all that is legitimate, and narrow enough to exclude all else. It would seem, however, from the decisions, that two things are always necessary—*First*, a novel assemblage of parts, exhibiting invention; *second*, the co-operation of the parts in producing a new result. By the term co-operate, however, the courts do not mean merely acting together or simultaneously, but unitedly to a common end, a unitary result. Each and every part must have its sub-function to perform, and each must have a certain relation to, and dependence upon, the other.

The result attained by the complainant's invention is the complete and expeditious adjustment of surveyors' instruments; their erection vertically, over a fixed point on the ground, by, substantially, a single act. This result was not attainable before by either or both the instruments referred to by the respondent. The result is, therefore, new in the sense here involved; and, as we have seen, is highly beneficial. In accomplishing it the shifting and levelling devices act in combination, each working to this end and uniting in its production. Though not essential that they should, they do, or, at

least may, act simultaneously. It may be conceded that, in this respect, the case is near the border line. If nearer, however, the *prima facie* right established by the letters patent (strengthened, possibly, by the respondent's tardiness in discovering this defence) would justify a decree in plaintiff's favor.

HENRY *v.* THE FRANCESTOWN SOAP-STONE COMPANY.

(*Circuit Court, D. New Hampshire.* January 30, 1880.)

PATENT—CONDITIONAL SALE OF INVENTION—SUBSEQUENT APPLICATION. A single conditional sale of an invention, more than two years before an application, works a forfeiture of a patent.

In Equity.

Bill in equity for infringement of a patent (No. 22,787) to Porter Dodge, granted February 1, 1859, for an improved air-tight stove, made of a double course of slabs or panels of soap-stone, held together by an iron frame. The application was prepared and signed December 26, 1856; a model was filed on the next day; the application was filed February 14, 1857.

In 1877, Judge Shepley entered a decree for the complainant. See *Henry* v. *Francestown Soap-Stone Co.* 9 Off. Gaz. 408. In February, 1879, Judge Clark granted a rehearing of the cause upon affidavits tending to prove that Dodge had sold one of his stoves to Harvey Huntoon, and another to John H. Patch, more than two years before his application. Evidence was taken and the rehearing was had before Judge Lowell.

Causten Browne and *Jabez S. Holmes*, for defendants.

Thomas L. Livermore, for complainant.

LOWELL, C. J. The evidence in the original case tended to show that Dodge made a few stoves, embodying his invention, in the autumn of 1854; that he was not fully satisfied with the iron part of the work, and caused it to be cast more care-

fully; and that he did not sell his stoves generally and extensively in the market until within two years before February 14, 1857, when his application was filed, but that he did sell the stoves which he then had, or some of them, in December, 1854, or January, 1855. Judge Shepley said (9 Off. Gaz. 409:) "There is but one sale clearly proved before February 14, 1855, and no evidence tending to show more than two or three sales before that time, and all of them accompanied with a notice of an intention to apply for a patent, and all of these during the time he was experimenting upon and before he had perfected his invention, and attained sufficient perfection in the castings to satisfy himself that his invention was practically successful. As in most, if not all, of these instances, the stoves were delivered on trial, to be returned if the invention did not work satisfactorily, they are to be regarded rather in the light of such practical tests as the law permits an inventor to make, than as such public sales as would tend to show abandonment, or mislead the public into a belief that the inventor had made a dedication to the public."

Upon the rehearing two more sales of stoves, one to Huntoon, and one to Patch, are proved to have been made by Dodge more than two years before February 14, 1857; but in that sold to Huntoon the inner panels of soap-stone appear to have been made of the full length of the frame, while the patent describes them as being cut shorter to allow for expansion upward. The defendants have introduced evidence that there is no need of shortening the inner lining, because soap-stone does not expand upward; and the plaintiff has evidence that it does or may expand in that direction. However this fact may be, this stove appears to have been made in what Dodge thought an imperfect form, and, therefore, may be held not a sale of the invention. *Draper* v. *Wattles*, 16 Off. Gaz. 629.

The inventor is dead, and the terms and particulars of the sale of the Patch stove are not proved; and I think it possible that, if the new evidence had been before Judge Shep-

ley, it would not have changed his opinion. He found one sale, and evidence which inclined him to think that there might have been two or three more, and yet sustained the patent. I find myself differing from my eminent predecessor upon the effect of the evidence, and have had great doubts as to my duty. I have determined that, as new evidence has been produced which I must act upon, my action must be in accordance with my own views of its effect. I cannot understand the new evidence without opening the whole record, and I must act upon what I find in the old and new evidence together.

In my opinion the evidence tends to show a sale of the invention. True, some sales were conditional; that is to say, the stoves were to be returned if they were not satisfactory to the buyers; but this does not, without further explanation, prove that they were experimental. It may show that the purchaser had doubts about the article, but does not prove any on the part of the seller. Sales in the usual course of business, whether absolute or conditional, if they are sales of the patented thing, work a forfeiture. A single sale has this effect, as well as a hundred sales. It is very unlikely that a buyer would take what he understood to be an experimental thing; but if he did, the evidence should be unequivocal that a test of the invention was one of the purposes of the seller. This article could be tested by the inventor as well in his own house as in any other place; and when he sold it in its completed form, though with warranty or on condition, he sold it.

Upon the facts, the stove appears to have contained the invention, within the doctrine of *Am. Hide, etc., Co.* v *Am. Tool Co.* 1 Holmes, 503, 513, in which Judge Shepley charged that the thing sold need not be perfect in the mechanical sense, but only in that it embodied the completed invention in a form which would be operative. Indeed, this stove appears to have been perfect in both senses, for it has been in successful use for about twenty-four years.

Judge Shepley found that the sales in evidence before him were made while the inventor was still conducting experi-

ments of his own. Granting, then, that the sales themselves were not experiments, and that at least two of the stoves contained the completed invention, does it save the forfeiture that the inventor himself was still trying his invention? I think not. The courts very properly limit the meaning of "public use" to a use in the ordinary way, and they may so limit the word "sale," if they can ever be persuaded of the fact; but, whether use or sale, that particular transaction must be experimental, or it is within the forfeiture of the statute.

But, further, I do not find the fact to be that the inventor was still experimenting. As I read the evidence, all that Dodge was then trying to do was to bring his stoves into the highest state of mechanical perfection. The precise day of the Patch sale is not proved; but it was in December, 1854, and the stove had upon it the words "registered for patent, 1854," which confirms the conclusion that it was after the invention was complete.

Neither filing the model, nor writing the paper commonly called an application, gives the date of the application from which the two years are to be reckoned. "Application," in this connection, includes the paper, or some written paper, and its presentation to the commissioner. One who desires a patent for his invention may apply in writing to the commissioner. There is no evidence that any writing accompanied the model, and none that any application was made until February 14, 1857. It would be most dangerous to hold that an application signed and kept in the inventor's pocket would answer the demand of the statute. In *Birdsall* v. *McDonald*, 6 Off. Gaz. 682, cited for the plaintiff, the solicitor neglected to file the application, and the court held that his neglect was not evidence of the inventor's abandonment of his invention. On the point of sale Mr. Justice Swayne says: "He sold no machine prior to two years before the filing of his application." As to filing the model see *Draper* v. *Wattles*, 16 Off. Gaz. 629.

The time allowed for the use and sale of the invention is

liberal, though arbitrary. It is a pity that a valuable invention should be lost by an inadvertence, but the policy of the law is well founded, and it must be carried out.

I find that this invention was "on sale" more than two years before the application, and therefore the patent was void. The patent having been sustained at the first hearing, the complainant should have his costs to the time when the rehearing was ordered. Of the rehearing itself I give no costs to either party.

Decree accordingly.

BELT *v.* CRITTENDEN and others.

(*Circuit Court, D. Minnesota.* February, 1880.)

PATENT—WANT OF NOVELTY—CORRUGATED IRON APPLIED TO THE ROOF OR SIDES OF A BUILDING.—If the ordinary form of corrugated iron, when applied to the roof or sides of a building, does not give sufficient air spaces, there is no novelty in making them larger, and diminishing the surface of iron at the point where it is nailed to the woodwork, although the objection may be thereby remedied.

SAME — SAME — THICKNESS OF IRON — NAIL HOLES — FORMATION OF JOINTS.—There is no novelty in the fact that the iron, at the point of contact with the wood, is double in thickness, or that the nail holes at the joints may be made elongated in order not to interfere with the nails in case of expansion or contraction, lengthwise, of the corrugations; nor in the manner of forming the joints connecting the several sections of sheathing.

Suit in Equity on final hearing upon pleadings and proof.

Homer C. Eller, for complainant.

Henry J. Horn and *Harvey Officer*, for defendants.

NELSON, D. J. This suit is brought to recover damages for the infringement of letters patent No. 177,386, granted to the complainant and F. E. Perkins May 30, 1876, and an injunction is prayed. The interest of Perkins was assigned to the complainant May 22, 1878.

The patent was granted "for an improvement in metallic

coverings for buildings." The specification says: "Our invention consists in a novel construction of a metallic sheathing for buildings, and similar structures, and is designed, more especially, to render the same fire-proof, although it is of great value as a protection against rain and snow. In the drawing, figure 1 represents a building with our improved sheathing applied to a portion of it; figure 2, a view showing the manner of making the joints; figures 3, 4 and 5, sectional views showing different forms of our improved device. Great inconvenience has heretofore been experienced in applying metal sheathing to buildings, bridges, and similar structures, owing to the fact that the expansion and contraction of the metal cause the nails to work out, and the metal to draw apart or wrinkle. The shrinkage and swelling of the wood to which the metal is nailed also tends to produce the same result, while the metal, coming against the wood, forms but little protection against fire. In addition to these difficulties, rain or snow, and even fire or flames, often find their way in at the joints as they are at present constructed.

"In order to obviate these difficulties, and produce a sheathing which shall be proof against both water and fire, we make our sheathing of sheet metal, and provide each section with one or more corrugations, as shown in figures 1, 3 and 5; or it may be made in the form shown in figure 4, in which case the metal is turned directly backward at each side, at a right angle to the face of the metal, and a flange then turned outward on each side, parallel to the face of the sheathing. It will be observed that in each case a space is left between the metal and the boards to which it is secured, which space is, of course, filled with air. It will also be seen that only a very small surface of the metal comes in contact with the wood, and that, as the joints are formed by lapping the flange of one section over that of the adjoining section, there will in every case be a double thickness of metal at those points at which the metal and the wood do come in contact. The joints between sections, falling one below the other, are formed as shown in figure 2, in which the sections each have the metal

turned backward upon themselves, and the flanges thus formed are hooked or locked into each other, and hammered down to make a close joint. As the lower edge of the section is always turned inward towards the building in making the flange, as shown in figure 2, it will be seen that it is impossible for the water to beat into or through this joint, for the reason that the face of the sheathing comes below the joint, and thus protects it; and it will also be impossible for fire to find its way into the joint, because of its being so close. It would even be impossible for it to find its way through the same when made comparatively open or loose, on account of the circuitous passage which it would be obliged to make. The manner of forming the joints at the ends of the different rows or sections of sheathing is shown in figure 1, in which A represents the boarding, and B the metal. As there shown the upper end is slit at the center of the corrugations, and the two parts drawn in and lapped one over the other, as shown, thus forming a beveled surface and a good joint.

"It will readily be seen that this construction will form an excellent protection against fire and water; and the expansion and contraction of the metal, and the shrinkage and swelling of the wood, are provided against by the corrugations in the metal, which will allow it to take up or give out, by reason of its elasticity, enough to entirely compensate for these difficulties. It is obvious that instead of running the sections up vertically they may be placed horizontally, that being especially convenient and desirable where the corrugations are made of the form shown in figure 5, which, when placed in a horizontal position, would present the appearance of clapboards. It is also apparent that the joints, which are here represented as simply lapped and nailed through, may be made as shown in figure 2 if desired. This construction, as before stated, forms a very efficient protection against fire and water, and compensates for expansion and contraction of metal, and for shrinkage and swelling of wood, and presents, withal, a very neat and pleasing appearance. If desired, the nail holes at the joints may be made elongated in order not

to interfere with the nails in case of the expansion or contraction, lengthwise, of the corrugations.

"This invention is applicable to wooden structures of any kind, and we propose to use it on bridges, cars and the like. We are aware that buildings have been made in which the walls, both inside and out, were composed of corrugated sheet metal, secured to metal bars and wooden frames, and we do not claim such."

The claim is "a metallic covering for wooden structures composed of the metallic sheets, B, applied to the surface of the structure, in the manner shown, whereby an air space is left between the metal sheets and the wall or structure at all points except the edges of the sheets, substantially as and for the purpose set forth."

The defendants rely, among other defences, on want of novelty, and, in my view of the case, it will not be necessary to consider any other defence.

In the drawings accompanying the letters patent are three different shaped metallic sheathings, showing as many different corrugations, or air spaces, and the defendants submit exhibits and designs of corrugated iron sheets which had been in use long anterior to the complainant's patent. The only difference between the form of the complainant's drawings and exhibits and these is that in the former the iron is so shaped or corrugated that the spaces between the wood-work and the iron are larger, and at the point where the sheathing is nailed only a small surface of iron comes in contact with the wood, and, as the air chamber is larger, the shape of the complainant's sheathing is, perhaps, a better protection against fire, and a more serviceable covering. But any person has the right to increase or diminish the size of corrugations or wrinkles in iron sheathing. There is no novelty in doing this. If the ordinary form of corrugated iron, when applied to the roof or sides of a building, does not give sufficient air spaces, there is nothing new in the idea of making them larger, and diminishing the surface of iron at the point where it is nailed to the wood-work, although it might remedy the objection.

Neither discovery nor invention was necessary to do this. The defendants' witnesses, upon the defence of want of novelty, refer to several forms of corrugated iron previously used, and all would fill the specification and claim made by the complainant.

The fact that the iron, at the point of contact with the wood, is double in thickness, or that the nail holes at the joints may be made elongated in order not to interfere with the nails in case of expansion or contraction, lengthwise, of the corrugations, will not sustain the patent; nor will his manner of forming the joints connecting the several sections of sheathing aid him. There is no novelty in the latter.

The bill is dismissed, with costs.

MURRAY and others *v.* THE FERRY-BOAT F. B. NIMICK.

(*District Court, W. D. Pennsylvania.* ——— 1880.)

ADMIRALTY—SEAMEN'S WAGES—REV. ST. §§ 4546 AND 4547.—The procedure authorized by sections 4546 and 4547 of the Revised Statutes, in relation to seamen's wages, is a summary and cumulative remedy given to seamen, which they may pursue at their option; but they are not thereby deprived of the right in the first instance to the ordinary admiralty process against a vessel, upon a direct application to the court or judge.

ADMIRALTY JURISDICTION — FERRY-BOAT. — A steam ferry-boat, plying between two points on the opposite sides of the Ohio river, within the same state and county, is subject to admiralty jurisdiction.

Knox & Reed, for libellants.

Barton & Sons, for respondent.

ACHESON, D. J. In this case Alonzo Murray presented in open court his libel for wages against the steamboat F. B. Nimick, wherein he alleges "that the said steamboat is a vessel duly enrolled and licensed under the laws of the United States, in the office of the surveyor of customs for the port of Pittsburgh, and has been engaged in navigating the Ohio river." The court ordered the libel to be filed and process to issue against the boat.

T. W. Fowler, the owner of the boat, has moved the court to quash the proceedings and dismiss the libel, for the following reasons:

"*First.* That said libel filed by said libellant is a claim for seaman's wages, and that the said libellant has not complied with the act of congress, (July 20, 1790, Rev. St. §§ 4546 and 4547,) in not having a commissioner certify to this honorable court sufficient cause of complaint, as required by the terms of said act."

"*Second.* That said respondent's vessel is a steam ferry-boat, running between two points or places in the same state, within the body of the same county, to-wit, between the foot of Locust street, Allegheny City, Pennsylvania, and Cork's run, on the opposite side, being enrolled and licensed as such at her home port, the city of Pittsburgh."

In support of the motion, there has been produced and filed a certified copy of the boat's enrollment, showing that she is a steam ferry-boat of 64 tons, and the libellant admits it to be true that, during the period covered by his claim for wages, the vessel plied as a steam ferry-boat between points on opposite sides of the Ohio river, to-wit: Allegheny City and Cork's run, within the county of Allegheny and state of Pennsylvania.

1. Sections 4546 and 4547, of the United States Revised Statutes, which re-enact substantially the provisions of section 6 of the act of July 20, 1790, provide that if the wages of any seaman are not paid after they become due and payable, or in case of a dispute touching the same, the district judge, or, in certain cases, any judge or justice of the peace, or any commissioner of a circuit court, may summon the master of the vessel to appear before him and show cause why process should not issue against the vessel; and if the master neglects to appear, or appearing does not show that the wages are paid or otherwise settled or forfeited, and if the dispute is not forthwith settled, the judge, justice or commissioner shall certify to the clerk of the district court that there is sufficient cause whereon to found admiralty process, and thereupon the clerk shall issue process against the vessel, etc.

The question intended to be raised by the first reason assigned, in support of the motion to dismiss the present libel, is whether the proceedings authorized by the statute are the exclusive remedy for a seaman suing the vessel for his wages, or can he, without resorting to this preliminary measure, apply to the court, and upon such application obtain ordinary process in admiralty against the vessel? This question has not hitherto been raised in this court, although the records show a number of instances where the same course was pursued in suits *in rem* for wages, as in the present case. The question, however, has received the careful consideration of district judges of learning and large experience in admiralty cases, who have held that the remedy conferred by the statute is not exclusive, but cumulative; and that the right of the seaman to arrest the vessel is not dependent upon a previous resort to the statutory proceeding, but that it is optional with him whether to pursue the preliminary measure of summoning the master, or make direct application for admiralty process. *The Ship William Jarvis*, (per *Sprague*, J.,) Sprague's Decisions, 485; *The M. W. Wright*, (per *Longyear*, J.,) 1 Brown's Ad. Rep. 290; *The Waverly*, (per *Dyer*, J.,) 7 Bissell, 465. The first two of the above cited cases arose under the act of 1790; the latter, under sections 4546 and 4547 of the Revised Statutes. These are well considered cases, and they adopt as applicable to remedies, under the maritime law, the well settled rule of construction that where a statute provides a new remedy it is cumulative, unless the statute expressly or by necessary implication takes away the common law remedy. Sedgwick on Cons. of Stat. and Com. Law, 75.

In the foot note to the report of the case of *The William Jarvis*, *supra*, it is said that in many reported cases it seems that no such preliminary summons issued, *e. g. The Martha*, Bl. & How. 156, and Judge Dyer says, (7 Bissell, 471:) "It has long been the practice of this court, and the practice of the district courts of other districts, to treat these provisions as furnishing rather an optional and cumulative remedy, than one which excludes the seaman from the right or privilege,

in the first instance, to resort to admiralty process." Following the above quoted decisions, I hold that the procedure authorized by the statute is a summary and cumulative remedy given to the seaman, which he may at his option pursue, but that the statute does not deprive him of the right in the first instance to the ordinary admiralty process against the vessel upon a direct application to the court or judge.

2. The second reason assigned in support of the motion to dismiss the libel raises the question whether a steam ferry-boat, plying between points on the opposite sides of the Ohio river, within the same state and county, is subject to admiralty jurisdiction?

Many of the cases bearing upon this question, cited in support of the motion to dismiss, are without authority, since the more recent decisions of the supreme court, which declare that the admiralty jurisdiction of the federal courts extends to all navigable waters. *Hine* v. *Trevor*, 4 Wall. 555; *The Eagle*, 8 Wall. 15.

Navigability, so far as water is concerned, is now the only test of admiralty and maritime jurisdiction. Id.; *The General Cass*, 1 Brown's Ad. Rep. 334. It is immaterial, therefore, that the F. B. Nimick plied wholly within the county of Allegheny, nor is it material, it seems to me, that in the course of her navigation she merely crossed and recrossed the Ohio river; for admiralty jurisdiction does not depend upon the length of the voyage. *The General Cass, supra.*

The subject-matter of this libel being of a maritime nature, viz., wages earned by an employe upon a vessel navigating waters within admiralty jurisdiction, does the jurisdiction of the court fail merely because the vessel upon which the libellant was employed was engaged in running as a ferry-boat? Clearly not, it seems to me. It is not the form, size, construction, equipment, or means of propulsion, that establishes the jurisdiction. Ben. Ad. § 218; *The General Cass, supra.* In *Ex parte Easton*, 5 Otto, 68, it was held that a district court has jurisdiction in admiralty to enforce *in rem* a claim for wharfage against a canal-boat or barge.

Mr. Benedict, in his work on admiralty, (§ 218,) says: "A scow, a lighter, a ferry-boat, and probably a raft or timber-ship, under certain circumstances, would be held to be a ship or vessel, and subject to the same maritime law as other vessels." A steam ferry-boat of the capacity of the F. B. Nimick transports on a large scale both passengers and freight, and is as much engaged in maritime commerce and business as if her voyages were longitudinal, instead of across the stream.

In this connection it is worthy of observation that by section 4426 of the Revised Statutes, title, "Regulation of Steam Vessels," the hull and boilers of every ferry-boat propelled by steam are subject to inspection under the provisions of said title, and such boats, for certain purposes, are made subject to the regulations of the boards of supervising inspectors; and the act provides that "no such vessel shall be navigated without a licensed engineer and a licensed pilot."

I am aware that in *Thackery* v. *The Farmer*, Gilpin's Rep. 524, there is an *obiter dictum*, and in *Harris* v. *Nugent*, 3 Cir. C. C. Rep. 649, it was ruled that a ferry-boat is not amenable to the jurisdiction of the United States district courts sitting in admiralty. But these cases were decided at an early day, when the admiralty jurisdiction of these courts was supposed to lie within comparatively narrow limits.

On the other hand, in *Chesman* v. *Two Ferry-Boats*, 2 Bond, 363, and in *Gate City*, 5 Biss. 200, it was held that ferry-boats propelled by steam are subject to the jurisdiction of the national courts in admiralty, when running between localities in different states. But, as already seen, it is not essential to admiralty jurisdiction that a vessel should be engaged in inter-state commerce.

In a recent case in this district, *The Monongahela Navigation Co.* v. *The Steam Tug Bob Connell*,* 10 Pittsburgh Legal Journal, (N. S.) 123, the circuit judge (McKennan) held that lockage in the Monongahela river is of a maritime nature, and cognizable in a court of admiralty, and in his

*S. C. 1 FED. REP. 218. See also, *Malony* v. *City of Milwaukee*, Id. 611.

opinion he remarks upon "the growing tendency of the decisions of the supreme court towards the expansion of admiralty jurisdiction in this country."

I but follow in the line of these decisions in holding that the claim of this libellant against the steam ferry-boat F. B. Nimick is cognizable in admiralty.

The motion to quash proceedings and dismiss libel is overruled, and fourteen days allowed within which to file answer.

HOBEN and others *v.* STEAMER WESTOVER.

(*District Court, D. Maryland.* April 2, 1880.)

COLLISION—STEAMER AND VESSEL—UNCERTAINTY AS TO COURSE OF VESSEL.—When the lights of a sailing vessel are fluctuating, a steamer must in due time slacken her speed, and if necessary stop and back, and neither proceed nor change her course until the course of the sailing vessel has been ascertained.

In Admiralty.

Mister & Bear, for libellants.

Barton & Wilmer, for claimants.

MORRIS, D. J. Collision between the schooner Ella Kirkman and the steamer Westover.

The libel alleged that on November 3, 1879, the schooner Ella Kirkman, an oyster pungy of 26 58-100 tons, laden with 800 bushels of oysters, was proceeding up the Chesapeake bay, bound for Baltimore, her proper lights burning, the wind blowing hard from north-west, the schooner close hauled on her port tack, steering north-east, making three to four knots an hour, under double reefed mainsail and foresail, and bonnet out of the jib, when between 8 and 9 o'clock P. M., near the mouth of the Patapsco river, about a mile south by east from the seven-foot knoll, the lookout saw the lights of the steamer Westover, coming down the river towards the schooner, a mile and a half off; that the schooner kept her

course, and when the steamer was close to her hailed and warned her off, but the steamer continued her course, and struck the schooner amidship, and so injured her that she sank in a few minutes.

The answer on behalf of the claimants of the steamer Westover alleged that the steamer was on her route from Baltimore to Norfolk, with her proper lights burning, a look-out on the forward deck, and her captain and second mate in the wheel-house; that when she reached a point half-way between the south-east buoy and the seven-foot knoll those in charge of the steamer saw the red light a mile and a half off, and immediately after saw both lights of the schooner one point on the steamer's starboard bow; that at this time the steamer was showing the schooner both of her lights, and the vessels were approaching nearly head on, and were about a mile and a quarter apart; that in a few minutes the schooner shut in her green light and showed her red, indicating that she had changed her course to the eastward; that when those in charge of the steamer observed this change they changed the steamer's course to the westward; that in a few minutes the schooner shut in her red and showed her green light, indicating that she had changed her course to the westward; that the vessels were, at the time, about half a mile apart, and seeing this last mentioned change the captain of the Westover ordered her helm hard a starboard; that when the vessels had approached within 200 yards of each other the schooner again shut in her green light and ran across the bow of the steamer; that as soon as the last change was indicated the steamer blew her whistle and reversed her engines at full speed, and made every effort to avoid the collision.

The answer admits that from the first moment of sighting the schooner's light the two vessels were approaching nearly head on, and, therefore, from the first they were aware there was danger of collision, and that it was the duty of the steamer to take timely and effective means to prevent it.

The rule is well settled that if the lights of the sailing vessel are fluctuating, or for any reason there is uncertainty as

to her course, the steamer must in time slacken her speed, and, if necessary, stop and back, and neither proceed nor change her course until the course of the sailing vessel has been ascertained. 17 How. 178; *Peck* v. *Sanderson*, 21 How. 6; *The Steamer Louisiana*, 5 Blatch. 256; *The Illinois, The Harvest Queen, and The Adriatic*, opinion of Chief Justice Waite, Circuit Court, S. D. of New York; *The Herman*, 4 Blatch. 441. A clearer case of admitted facts, requiring the observance of this rule, is rarely met with. When half a mile off the steamer had already witnessed four changes in less than four minutes in the lights of a sailing vessel directly ahead of her, yet she did not slacken from her speed of *nine* knots an hour, but continued porting and starboarding until within 200 yards, when at last, but too late, she reversed her engines.

That there was in the captain's mind great uncertainty as to the course of the schooner is apparent from his own testimony, and from that of the second mate, who was with him in the wheel-house.

In his testimony, after describing how he first saw the schooner's red light, and then saw both, and then saw her red light again, he says he then ordered his helm to port, and about as soon as they got the wheel over the schooner showed her green light, about 200 yards off. He says he then said to the mate: "She is either going about, or he has let her come up into the wind, and I told the mate" (not to slacken speed, as one would suppose, but) "to heave his helm hard a starboard." Next he says: "I could not see any lights, but could see her sails, and then I blew the whistle and gave the order to stop and back. I was then as far east as I could go without getting aground, and she was right under my bow."

The mate's testimony corroborates the captain's in every particular.

An examination of the testimony for the libellants very clearly shows why it was that the lights appeared so fluctuating to those on the steamer. The schooner was almost directly ahead, the water was very rough, and the small schooner conse-

quently very unsteady, and the wind was blowing hard in flaws. She was trying to make the mouth of the river, and sailing as near to the wind as she could. To a vessel directly ahead her lights were liable to present a fluctuating appearance from three causes: *First*, the flaws in the wind; *second*, the plunging of so small a boat in a rough sea; and, *third*, the occasional obscuring of her starbord light by her jib. The testimony of Captain Morris, of the Masonic Hall, another oyster vessel, confirms this. He says that he, in company with the Ella Kirkman, had been anchored for shelter under the highlands of the Magothy river, and when the weather had moderated they got under way together to come up to Baltimore; that he was about half a mile ahead of the Ella Kirkman, and the steamer passed him a quarter of a mile to the westward of the seven-foot knoll; that it was blowing hard and the water rough, and he did not tack until abreast of North Point, and that there was no need for the Ella Kirkman to tack; that she was behind him, and he could see her red light, and that he could have seen both her lights, except her jib shaded her green light.

The evidence altogether is conclusive that the schooner did not change her course. The testimony of Mahon, one of the two lookouts on the bow of the schooner, was much commented on by counsel for the steamer. He says: "I saw the steamer's lights directly ahead, sometimes over the port bow, and sometimes over the starboard." This I think is satisfactorily accounted for, partly by the luffing of the schooner, as the wind varied, partly by her unsteady motion in the rough water, and partly by the changes made by the steamer in her own course, as she constantly changed her helm, and it does not prove any change of the schooner's course. It does not appear, therefore, that the schooner did not do all that was required of her by any nautical rule. It was her duty to keep her course, and it was the steamer's duty to avoid her, and the serious consequences which have resulted are to be visited upon the steamer alone. They serve to show the practical wisdom of the rule which requires

the steamer, in every case of uncertainty with regard to the course of a sailing vessel with which she may come into collision, not to proceed or to change her course while that uncertainty remains.

With regard to the damage, I do not think the amount claimed is excessive. The value of the vessel, including all her equipment for her business of oystering, is put at $1,200; and I think the testimony shows it to be a fair valuation, and that, at that time of the year, when the oyster season had just begun, she could not be replaced for a less sum. The other amounts of loss seem to be reasonable, and I will sign a decree in favor of libellants for $1,558, and costs.

POWELL and others *v.* STEAM-TUG WILLIE, etc.

(*District Court, S. D. New York.* April 20, 1880.)

ADMIRALTY—TUG—NEGLIGENCE—DOWDALL V. THE PENNSYLVANIA RAILROAD CO., 13 BLATCH. 403.—A tug is not chargeable with negligence in not knowing of a hidden projection, dangerous to her tow, at a landing place selected by such tow, and which, from its evident actual use as a landing place for such a tow, it was reasonable to infer was suitable for the purpose to which it was put.

In Admiralty.

T. C. Cronin, for libellants.

W. R. Beebe, for claimants.

CHOATE, D. J. This is a libel to recover, against the steam-tug Willie, the value of the cargo of the canal-boat Nightingale, alleged to have been lost through the negligence and unskilfulness of those in charge of the Willie, which had the canal-boat in tow. The Nightingale was loaded with coal, and was taken in tow by the Willie at New Brunswick, N. J., on the tenth day of October, 1873, to be towed to the Montclair railroad bridge, in the Hackensack river. At that time there was, and for a short time before had been, a landing

place for canal-boats laden with coal on the south side of said bridge, with a derrick arranged on the bridge for the purpose of discharging the boats upon cars standing on the railroad track. This was the point to which the captain of the canal-boat asked to be towed, and the Willie undertook the service.

When they arrived within a short distance of the bridge the tide was still flood, and setting directly up the river, and against the bridge, which crosses the river at that place at a right angle. The bridge is an open spile bridge, through which the tide flows. The tug rounded to so as to head the tide, and took the canal-boat on a hawser. She then let the boat fall slowly back against the spiles of the bridge, by rendering the hawser, the tug working her engines sufficiently to hold her position in the river. The stern of the canal boat was thus brought up against one of the spiles of the bridge. This was done without injuring the boat, and with great care and caution on the part of the tug. In order to bring the canal boat into her proper position alongside of the bridge it was then necessary to swing her round with her head to the west against the bridge. This was done by slowly rendering the hawser; but when she got round so that her starboard-side came against the spile next to that at her stern, a brace, or piece of timber, running diagonally from spile to spile across the bridge, and at that point projecting beyond the spile, beneath the surface of the water, pierced her side, and she began to leak and to sink rapidly. On the discovery of the injury the tug tried to beach her, but was unable to hold her up on the bank, and she slid off into deep water, and the cargo was lost.

The evidence is entirely satisfactory that the tug was proceeding with due and proper care and skill to land the boat at the time she was injured, so far as relates to the management of the tug and tow, and that those in charge of the tug had no knowledge of the obstruction under water with which she came in contact. It was fully proved that if there had been no such projecting obstruction under water the mode adopted for landing the canal-boat would have been a prudent and

proper mode of landing her, and one which it was entirely safe to attempt without waiting for slack water, although it was one which required great care on the part of the tug to prevent too violent a contact between the boat and the bridge, and it was shown that this degree of care was exercised.

The only question is whether the tug is chargeable with negligence in not knowing of this obstruction under water. The cases of common carriers, and of owners or lessees of piers and wharves, which have been cited on the part of the libellants, have no application. Common carriers are liable for injuries caused by the negligent acts of third parties, because being liable except for the act of God. The negligence of third persons in leaving hidden artificial obstructions in the way is not within the exception. *Trent Nav. Co.* v. *Wood*, 3 Espinasse, 131; *Oakley* v. *Packet Co.* 34 Eng. L. & Eq. 530; S. C. 11 Exch. 618; *Steamboat Co.* v. *Tiers*, 4 Zabriskie, 697.

So owners or lessees of piers assume a duty in respect thereto, and the approaches to them, towards other parties who may have occasion to use the wharves for landing places, the neglect of which is clearly negligence. *Mersey Dock, etc.*, v. *Gibbs*, 11 H. of L. Cas. 687; *Leary* v. *Woodruff*, 4 Hun, 99; *Carleton* v. *Iron Co.* 99 Mass. 216.

But this tug is liable for her own negligence only. In rendering this service she was not a common carrier. *The Angelina Corning*, 1 Ben. 109; *The America*, 6 Ben. 122. Nor did her owners control or have any interest in this bridge, or landing place, so far as shown. They had no more duty with respect to its condition than the libellants had who employed the tug to take them there. There was nothing in the appearance of the bridge itself to suggest or raise a suspicion of any obstruction of this kind under water. It is true that braces could be seen crossing from side to side, and connecting the spiles in each bay of spiles, and it could be seen that these braces passed down diagonally into the water, and it was to be inferred from their appearance, position, and evident purpose, that the lower ends of them were fastened to the outer-

most spiles below the surface of the water, but there was nothing to indicate that they protruded beyond the spiles; and in view of the fact that this was a landing place in actual use, as was indicated by the derrick, I do not think that the exercise of ordinary care called upon those in charge of the tug to anticipate that the ends of these braces might so protrude. On the contrary, it seems to me that any person, having occasion to use the landing place would, without any thought of danger of this character, bring his boat up to the landing place in entire confidence that the place had been made safe for the approach of boats.

The danger could not be seen by persons going up and down the river in tugs. It could only be discovered by an examination under the water by a person going very close to the bridge. At low tide the obstruction was a little below the surface of the water. Subsequent examination disclosed the fact that the braces projected more or less at every spile, and had been somewhat worn off by frequent contact with boats lying there. The one which the Nightingale struck against projected far enough to push a hole in her side as she was let down very slowly against the bridge. It made it dangerous to land a loaded boat, as she was landed, with the tide, but those in charge of the tug were not, in my opinion, at fault or chargeable with negligence in not knowing that the obstruction was there.

It is doubtless true that a tug is bound to know, and avoid, so far as reasonable care and skill can do it, those dangerous points in the navigation, upon the voyage undertaken, which are well known to the public generally, and also such other obstructions and dangers as are in fact known to those in charge of the tug. But it would be holding her to a higher degree of care than the law imposes on her, to charge her with negligence in not knowing of a hidden projection unknown to her, dangerous to her tow, at a landing place selected by the tow, and which, from its evident actual use as a landing place for such a tow, those in charge of the tug may have reasonably inferred was suitable for the purpose to which it was put.

It is suggested that the tug should have waited two hours for slack water, and not attempted the landing at flood tide. But the proof is that but for this obstruction, which was wholly unknown, it was a safe and prudent course to land the boat as she was in course of landing at the time of the accident. Therefore, there was no duty to wait for a change of tide.

It is also suggested that she should have taken the canal-boat through the draw and landed her on the north side of the bridge, from which place she could have hauled round to her berth at slack water. The same answer applies to this suggestion, that what they did was safe and prudent, so far as they are chargeable with a knowledge of their situation; and to this suggestion there is the further answer, that as there was no place at the bridge apparently used as a landing place, except this berth under the derrick, the tug would have had no right to subject the tow to the unknown dangers that might exist under the water at other parts of the bridge. If, in attempting to bring the boat up against the north side of the bridge, she had struck such a projecting brace, the tug could not defend her course in taking her tow to a place not apparently fitted for a landing place. In taking her there without necessity, she would clearly assume the risk of hidden dangers that might be there.

The case of *Dowdall* v. *The Pennsylvania Railroad Co.* 13 Blatch. 403, is referred to as sustaining this libel. It is true that the jury in that case found the owner of this tug guilty of negligence for the loss of this canal-boat at the same place. The case is not claimed to be a decision conclusive of the fact in the present case as an estoppel by record. But it is claimed that the instructions of Mr. Justice Hunt to the jury were such as to charge the tug with negligence in not knowing of the obstruction. The court left the question of negligence to the jury as a question of fact, and to the submission of this question generally the defendant appears not to have excepted. The court charged "that the defendants were bound to possess a knowledge of the dangers of the navigation they undertook," and to this defendants excepted.

The defendants' counsel requested the court to charge "that if the jury find that the accident would not have happened but for the projecting timbers on the bridge, and that such projecting timbers were unknown to the defendants, they are not liable." The court refused so to charge, except in connection with the additional inquiry whether, as navigators, the defendants, or their agents, ought not to have known of the existence of the said timbers. To this refusal the defendants excepted. This last exception seems not to have been argued upon the motion for a new trial. It does not appear what the court had charged as to the liability of the defendants in connection with the question whether, as navigators, the defendants, or their agents, ought not to have known of the existence of the timbers except as above stated; nor what evidence there was, in that case, of the defendants' opportunities of discovering the danger. The case made up for the motion for a new trial does not give all the evidence, nor state that the whole of the charge is set out. The ruling is not, therefore, of that unqualified character and certainty that I feel bound to regard it as a conclusive precedent against my clear conviction that the tug is not chargeable, on the facts proved in this case, with negligence in not knowing of this danger.

Libel dismissed, with costs.

FARWELL and others *v.* THE STEAMBOAT JOHN H. STARIN.

THORNDIKE *v.* THE SAME.

STARIN *v.* THE SCHOONER JOSEPH FARWELL.

(*District Court, S. D. New York.* March 27, 1880.)

ADMIRALTY—COLLISION.—In a collision between a steamboat and a schooner, the steamboat is alone in fault where it was clearly proved that the schooner kept her course on her port tack for at least a mile, until the collision, showing her port light, and that the steamboat, without observing it, changed her course at least twice after she came in

sight, for some reasons not fully explained, probably in consequence of seeing other vessels; and that the steamer was negligent in her lookout, and did not observe the schooner till she saw her red light on her starboard bow, and so close that it was too late to avoid a collision, although she then rung to stop and slow.

SAME—SAME—VESSEL KEEPING HER COURSE.—"The cases in which a vessel is bound to disobey the positive rule which requires her to keep her course on meeting a steamer, and in which she is chargeable as a fault for not doing so, are very rare indeed, if any such case ever occurs."

*SAME—SAME—FAILURE TO SHOW A FLASH LIGHT—REV. ST. § 4234.—Section 4234 of the Revised Statutes, which requires a sailing vessel, in the night-time, to show a light on that "point or quarter" towards which a steam vessel is approaching, applies only to a case where the close vicinity of a steamer is such that it can be said that she is approaching some particular point on the sailing vessel. A vessel, therefore, is not in fault for a failure to comply with this provision, where the showing of a flash light would not have aided in avoiding the collision.

W. W. Goodrich, for the Joseph Farwell.

R. D. Benedict, for the John H. Starin.

CHOATE, J. These are cross libels to recover damages caused by a collision between the schooner Joseph Farwell and the steamboat John H. Starin, on the eighth day of November, 1877, about 6 o'clock in the evening, a little to the eastward of the southerly point of Hart's island, in Long Island sound. The steamboat left New York at about 10 minutes after 4 in the afternoon on her regular trip for New Haven. The schooner was on a voyage from Rockland, Maine, to Baltimore, with a cargo of granite. The wind was about S. S. E., blowing a gale at a velocity of some 28 miles an hour. The schooner was making about eight knots an hour. The speed of the steamboat was about 12 knots. The tide was the last of the ebb, setting to the eastward. Both vessels had the proper regulation lights.

The case of the schooner, as stated in the pleadings, is that the schooner was on the port tack, close hauled, heading about south-west, when the steamer was seen about two points on the weather or port bow, showing both her red and green lights, and apparently about a mile and a half or two miles distant; that the schooner held her course until the collision;

*See *Perkins* v. *Schooner Hercules*, 1 FED. REP. 925.

that shortly after the steamer's lights were seen her green light disappeared, the red light alone remaining in sight; that soon after that both lights came in sight, and remained visible for a short time, when the red light disappeared, and the green light was alone visible, and so remained to the time of the collision; that soon after the red light disappeared the steamboat gave a number of quick toots of the whistle, and almost immediately the schooner, which had not changed her course, ran into the starboard side of the steamboat just forward of the paddle boxes; that the collision was occasioned solely by the fault of the steamboat in not keeping out of the way of the schooner, and in attempting to cross her bows.

The case of the steamboat, as stated in the pleadings, is that after passing the Stepping Stones the course of the steamboat was changed so as to head for Execution Light, after that change heading north-east; that after running on that course for about four minutes the schooner's green light was seen, and reported bearing two or three points on the starboard bow; that for greater caution the helm of the steamboat was starboarded, altering her course so that she headed about half a point to the northward of Execution Light, and that the two vessels were then proceeding on such courses; that there was no danger of a collision; that the steamboat kept on her course until the vessels were about 150 yards apart, when the red light of the schooner came into view, and the green light almost immediately disappeared; and that it then appeared that the schooner was changing her course and heading for the steamboat; that several blasts of the steamboat's whistle were immediately blown, and the bells were rung to slow and stop, which were obeyed, but the schooner kept on and almost immediately the vessels came together; that the schooner at no time showed a flash light, and that she changed her course so that at the collision she was heading nearly west; that when and after the red light of the schooner came in view the steamboat could have done nothing to avoid the collision, but that even then the schooner could, by starboarding, have gone clear under the stern of the steamboat,

or have made the blow more glancing, which would have lessened the injury caused by the collision.

It is admitted that the schooner did not show a flash light, but it is alleged on her behalf that there was no need to do so until the steamboat suddenly changed her course and ran across the course of the schooner, and that there was then no time to exhibit such a light.

The crew of the schooner consisted of the master, mate, two seamen, and a boy who served as cook. The master was at the wheel, the two seamen forward on the lookout, and the mate was on deck walking backwards and forwards, and the boy was below.

The master, mate, and two seamen, testify substantially to the same account; that after passing Execution Light, the schooner made a tack to the eastward and then was put upon her port tack, heading about south-west by the wind or one point free—Stepping Stones and Throg's Neck Lights bearing a little on the weather or port bow; that they were on this tack when they made the steamer's lights, although one or more of them think they may have seen the steamer's lights while still on their tack to the eastward; that she was, when they first saw her on this tack, from a mile to two miles distant and showing both lights.

The mate alone puts her much nearer, but he testifies to the same changes in her lights, and bearing from the schooner, which the other witnesses testify to; that when they first saw her, after getting on their port tack, she bore about a point on their port bow; that the schooner kept her course till the collision, without any change whatever; that very soon after sighting her the green light of the steamer was shut out, and the red light alone remained visible, showing that she was passing them on their port side, and as she approached she bore more and more on the port side; that afterwards both lights appeared again for a short time, and then the green light alone, and then, almost immediately, the collision took place.

On the part of the steamboat, the pilot and assistant pilot

were in the wheel-house, and they, together with the lookout, were the only witnesses examined who observed the movements of the two vessels before the collision and, so far as appears, they were the only persons on deck who had any opportunity to observe what happened before the two vessels came together.

The story of the pilot and assistant pilot is that soon after passing Stepping Stones they put the steamboat on a northeast course, heading for Execution Light; that they made a vessel's green light on the starboard bow at a distance which they estimate at from half to three-quarters of a mile; that they then starboarded so as to head a little to the north of Execution Light. The evidence of these two witnesses is very unsatisfactory as to the attention they paid to this light after they had thus starboarded, on its being reported. The next thing which they appear to have noticed was a red light very near them, not more than 150 yards distant, and two or three points on their starboard bow. Their testimony alone would not be sufficient to show that the red light, which was undoubtedly the port light of the Joseph Farwell, was on the same vessel with the green light which they had previously seen. It was their conclusion that it was the same vessel, but this conclusion is in no way warranted by their own testimony as to their observation of the green light after they first saw and altered their course to avoid it. Their inference was that after they had changed their course, and after the vessel bearing the green light got very near them, she suddenly changed her course from a south-west course to a course nearly west, running right down upon the steamboat.

The lookout testifies to seeing and reporting the green light on the starboard bow, and his testimony is that he continued to observe it as it approached, and that when it got very near it suddenly disappeared and the red light showed, and then the collision almost immediately happened.

This witness, therefore, confirms, from his observation, what with the other two witnesses appears to be a mere conclusion, that it was the same vessel which bore the green and the red light.

It is entirely clear that the two stories cannot be reconciled. It is impossible that the schooner could have thus suddenly, and in the immediate vicinity of the steamboat, have changed her course to the westward, unless the four witnesses from the schooner are not only mistaken, but so entirely wrong, as to the schooner's course, and as to what they saw of the movements of the steamer, that the error is not consistent with an intention to testify truthfully. No more exaggeration of distance or confusion as to length of time can reduce the time and distance they ran on their last port tack to make it conform to what the witnesses from the steamboat think they saw—a sudden change of course and running down on the steamboat from a point 150 yards away, while well on the starboard bow of the steamboat.

Nor on that theory could those on the schooner have possibly seen the red light of the steamboat at all after they stood on their port tack, and they all testify positively to seeing first both lights, then the red light alone, then both lights, then the green light alone, all after getting on that tack. Such changes of the steamboat's course, if seen as they testify, imply, necessarily, that the schooner ran a considerable distance, and is wholly inconsistent with the account given by those on the steamboat. Assuming the truthfulness of the witnesses on both sides, there is no improbability in the hypothesis that the green light which was seen from the steamboat was not on the Farwell, but on some other vessel. There is evidence that there were other vessels in the vicinity. It is more probable that the lookout of the steamboat is mistaken in supposing, or in his recollection, that he kept his eye steadily on the green light, and that he saw the vessel that bore it shut it out and show her red light, than that the four witnesses from the schooner have testified falsely to what they did and what they saw.

As above remarked, the identity of the vessel bearing the green light with the vessel bearing the red light rests almost entirely on the testimony of the lookout. But, if forced to reject as false one story or the other, I should not hesitate to

hold that the account given by the schooner has the preponderance of the evidence.

The schooner's witnesses are corroborated also by the testimony of the master and crew of the schooner Clara Sawyer, which was following in her wake before the collision.

Great importance is given by the learned counsel for the steamboat to the confusion in the testimony on the part of the schooner's witnesses, and of those from the Clara Sawyer, as to the place where the schooner made her tack to the eastward before she stood on her port tack upon which she was lost; and a very ingenious theory is constructed from the testimony, that this tack to the eastward was not made till the schooner found herself close to the southern point of Hart's island, and that she beat across, well towards the eastern part of the channel, before standing westward again. This might account for her showing to the steamboat her green light while on her eastward tack, and would necessarily make her port tack very short, and bring her on the starboard hand of the steamboat upon her last tack.

There are, however, several objections to this theory. In the first place, it is wholly inconsistent with the positive evidence of four witnesses, apparently truthful, as to the time and distance they stood on the port tack, and as to what they saw while standing upon that tack. In the next place, there was nothing especially to fix in the minds of the witnesses the time and place of making this eastward tack, and it is no way surprising that some of them concluded, from their idea that it was taken to avoid Hart's island, that it was made when they were nearer to the island than they really were. It was a movement and event more remote from the collision than the movements and events happening on their last tack. And it is observable as to a collision that the startling character of the event serves to fix more certainly in the mind what happens immediately before it than what is more remote in time and space. Consequently we often find a hopeless confusion in attempting to determine the course of events that preceded the immediate occurrences, partly, no doubt, because

the memory afterwards is far more retentive of those events that were immediately connected with the collision than those more remote; but also partly because the collision itself arrests the attention of the parties at the time and fixes the immediate course of events with greater certainty of observation than the same persons are ordinarily in the habit of using; and, finally, this theory is clearly inconsistent with the libel and answers put in on the part of the steamboat.

In the libel against the schooner it is alleged "the green light only of a vessel, which afterwards proved to be the schooner Joseph Farwell, was seen and reported by the look-out, and was at the same time, or a little before, seen by the pilot. Such light, when seen, bore from two to three points on the starboard bow of the steamboat. With the wind as it was, the said schooner could have held, without difficulty, the regular course of that reach of the channel which she was bound to do, viz.: a course parallel to the course of the steamboat; and, inasmuch as she was on the starboard bow of the steamboat, showing her green light, no collision could have occurred if said schooner had held her course."

This statement clearly implies that when the green light was seen the schooner was running nearly on the opposite course to that of the steamboat, that is, nearly south-west, and continued on that course till she suddenly changed her course more to the westward, and ran into the steamboat. It is impossible, therefore, that the sudden change, almost under the bows of the steamboat, should have been a change from an eastward tack to a westward tack.

It is stated as a change from a westward tack by the wind, or nearly so, to a course more off the wind to the westward. And if, when first seen, she had been standing to the eastward, she would have seemed to those on the steamboat to be moving almost directly across their course, which evidently was not the case, as they state it in their pleadings. It is clear, therefore, from the pleadings of the steamboat, that she admits the schooner was for half or three-quarters of a mile, after being seen from the steamboat, on her port tack, and

the only questions are, what lights did they show each other, and did the schooner, while on that tack, change further to the westward just before reaching the steamboat.

There is neither probability nor evidence to support such a hypothesis. The testimony is clear that, though a dark, windy, and stormy night, lights could be easily seen, and I have no doubt that the schooner's light must have been visible at least a mile off to those on the steamboat; probably considerably more.

Upon the whole testimony, I think, it is clearly proved that the schooner kept her course on her port tack for at least a mile until the collision, showing her port light, and that the steamboat, without observing it, changed her course at least twice after she came in sight, for some reasons not fully explained—probably in consequence of seeing other vessels; that she was negligent in her lookout, and did not observe the Farwell till she saw her red light on her starboard bow, and so close that it was too late to avoid a collision, although she then rung to slow and stop; and that, therefore, the fault was with the steamboat and not with the schooner. Nor is there any force in the claim of the steamboat that the schooner should, when she saw that the collision was imminent, have starboarded to avoid the consequences of the steamboat's mistake. The cases in which a vessel is bound to disobey the positive rule which requires her to keep her course on meeting a steamer, and in which she is chargeable as for a fault in not doing so, are very rare indeed, if any such case ever occurs. *The Havre and The Scotland,* U. S. Circuit Court, S. D. New York, unreported.

One question still remains: Was the schooner in fault in not showing a flash light? The rule requiring a sailing vessel in the night-time to show a light on that "point or quarter" towards which a steam vessel is approaching, (Rev. St. § 4234,) has its most obvious application to the case of a steam vessel approaching a sail vessel from abaft the beam, where the sailing vessel's regulation lights do not show. Independently of the rule, there is authority for this requirement

in situations where it would be a prudent course to adopt; yet it seems hardly possible to restrict the statute by construction to that application, notwithstanding the use of the word "quarter." It is clear, however, that the rule applies only to a case where the close vicinity of the steamer is such that it can be said that she is approaching some particular point on the sailing vessel. That, obviously, cannot be said of a steamer a mile away, for instance, although both her lights are seen. At that distance it could not be said that the steamer was approaching any particular point of the vessel. So, I think, the rule implies that the movement of the steamer shall have sufficient steadiness in its approach to be seen by those on the sailing vessel to be approaching a particular point. The rule is that the light is to be shown at the *point* towards which she is approaching. If the movement of the steamer's lights is such as to show that she is swinging rapidly across the sailing vessel, especially where the sailing vessel presents her bow to the steamer nearly head on, it can hardly be said that she is approaching any particular point. The point is, in that case, constantly shifting. And if the lights of the steamer are such as to indicate that she is on the swing, and the observation is not aided by seeing her bow or hull at all, there can be no certainty in the minds of those on the sailing vessel as to the point at which they should display the flash light, and showing it would be as likely to mislead as to aid the steamer, which has, at the time, full opportunity to discover the position and course of the sailing vessel by her colored light, which is in full view.

In the present case it is true that there was a time shortly before the collision when both lights of the steamer were in view from the schooner.

Their coming in view, from seeing the red light only, showed that she was changing her course, and that her bow was pointing towards the schooner; but it is not shown that then her hull or bow was visible so as to enable those on the schooner to determine towards what particular part of the schooner she was pointing. And before, so far as the proof goes, this

could be determined with reasonable certainty and a flash light shown, she had swung so far that the red light was no longer visible. It is difficult to find from the evidence how far off she was while thus showing both lights, or during what length of time she showed them. The time was, however, very short, and the event showed that she was during that time constantly on the swing under a starboard wheel.

I think, upon all the evidence, that the showing of a flash light would not have aided in avoiding the collision. When it could first have been properly shown, if at all, the steamer was swinging around across the schooner's bow, under a starboard helm, in such a way, and the vessels were coming together with such speed, that there is no reason to believe that the collision would have been avoided, although by porting the steamer might have struck the schooner, instead of the schooner striking the steamer on her starboard side as she did. Moreover, I do not think it can be fairly said that there was any particular point on the schooner which, so far as those on the schooner could see, the steamer was approaching, at which they could, conformably to the rule, show the light. For these reasons I think this defence of the steamboat is not made out. See *The Leopard*, 2 Lowell, 238.

Decrees for the libellants in the two suits against the steamboat, with costs, and reference to compute damages.

Decree for the claimants in the suit against the schooner, dismissing the libel, with costs.

FERRIS *v.* THE BARK E. D. JEWETT.

(*District Court, S. D. New York.* April 8, 1880.)

SHIPPING BROKER—SERVICES IN PROCURING CREW—FAILURE TO SECURE PAYMENT BEFORE VESSEL LEFT PORT—LIEN.

W. R. Beebe, for libellant.

L. S. Gove, for claimants.

CHOATE, D. J. This is a libel against a British vessel to recover $30, balance of alleged advances made to the crew, who were procured for the vessel by the libellant, as a shipping broker, together with $12 alleged to be due to him for his services in procuring the men. It is alleged in the libel that the services were rendered and the advances made on the credit of the vessel. It appears, however, that the owners do business in this port, and it is not shown that they do not reside here.

The vessel was bound on a foreign voyage, without anything to show that she was expected to return. Yet the libellant, knowing when she was to sail, took no measures to secure payment from the vessel before she left the port. Although the libellant was employed by the master, yet he was at the office of the owners before the vessel sailed.

The libellant testified that before the vessel sailed he made out his bill, which was for $162, and gave it to the master; and that the master promised to approve it and leave it at the office of the owners. In doing this the libellant appears to have acquiesced in the vessel going to sea, leaving him to look to the owners for payment.

After the ship left the port a difference arose between the libellant and the owners as to the terms of the agreement between the libellant and the master, the owners admitting their liability for $120 only. After some discussion the libellant took the $120, and gave a receipt for it as received for advances to the crew, and after receiving it he claims that he told the owners that he should sue the vessel on her return for the balance.

The libellant avers that credit was given to the vessel. The libellant, though examined as a witness, did not testify upon whose or what credit he relied. Under the circumstances, I think that the evidence shows that he did not rely upon the credit of the vessel, and that he has no lien on her. It is unnecessary, therefore, to consider the other questions that have been raised.

Libel dismissed, with costs.

WHITE and others *v.* THE STEAMER CYNTHIA.

(*District Court, E. D. New York.* April 15, 1880.)

ADMIRALTY — LIEN OF MATERIAL-MEN BY STATE LAW. — W. & Co., machinists and steam-fitters, did work upon a steamboat in Norfolk, Va., to the amount of $117. The boat was afterwards, and without payment of this bill, sold to parties in New York; whereupon W. & Co. filed a libel against her in the eastern district of New York for their bill.

Held, that they were material-men, whose claim was a lien upon the vessel by the laws of the state of Virginia, and that such a lien is enforceable in admiralty in the state of New York.

Birdseye, Cloyes & Bayliss, for libellants.

Beebe, Wilcox & Hobbs, for defendant.

BENEDICT, D. J. The materials sued for do not, in my opinion, come within the rule that has been applied to cases of building a vessel. The relation of the libellants was not that of builders, but of material-men. As such they acquired a lien upon the vessel for the value of the articles sued for, by virtue of the law of the state of Virginia, where the vessel then belonged, and where the contract was made. *The Steamer Raleigh*, 2 Hughes, 44. That lien, unless it has been lost by laches or waiver, may be enforced by this court. Neither laches nor waiver has been proved. The libellants are, therefore, entitled to a decree for the amount of their bill, with interest and costs.

THE MISSOURI VALLEY LIFE INSURANCE COMPANY v. KITTLE and others.

(*Circuit Court, D. Nebraska.* May, 1880.

USURY—QUESTION OF FACT.—Any agreement, device or shift to reserve or take more than the law permits for use of money loaned is usury, and whether by such means more than the legal rate of interest has been contracted for is a question of fact to be collected from the whole of the transaction as it passed between the parties.

SAME—AGREEMENT FOR INSURANCE IN LENDER'S COMPANY.—A transaction whereby a party, in order to secure a loan of money, contracts to pay 12 per cent. per annum interest, the maximum rate allowed by law, and also as a part of the same transaction, and in consideration of such loan, agrees to take from the party loaning the money a policy of insurance, and to pay premiums thereon, is usurious under the statute of Nebraska.

SAME—PAYMENT OF INSURANCE PREMIUMS.—Payments made in such a case, under the name of premiums on the insurance policy, must be regarded as paid on the loan; the insurance contract, made as it was to cover usury, being held void.

J. M. Woolworth, for plaintiff.

E. Wakely, for defendant.

MCCRARY, C. J. Bill in equity brought to foreclose a mortgage upon certain real estate in Nebraska, executed by Robert Kittle and wife to the plaintiff, to secure the payment of a certain promissory note for $2,500.

The defence is that the note sued on is usurious. The legal rate of interest under the law of Nebraska is 12 per cent. per annum, and this rate is contracted for by the terms of the note. It is claimed by the defendants that, in addition to the lawful interest thus provided for, a further consideration for the loan was exacted by the plaintiff under the cover of a transaction of insurance entered into between the plaintiff and defendant Robert Kittle. The plaintiff is a corporation organized under the laws of Kansas, and its purposes are declared by article 4 of its charter, among other things, to be "to make insurance upon the lives of individuals, * * * and to make such legal investments of all moneys received as premiums for policies issued and from

other sources as will best promote the interests of all concerned; and, carrying out the objects of said corporation, may loan the money of the corporation at a percentage not exceeding 20 per cent. per annum." It is clear that the company was organized for the purpose of engaging in the business of insuring the lives of individuals and of loaning money, and it does not appear, either from the charter or the evidence, that the loaning of money was merely incidental to the business of insurance. It is pretty evident, I think, that the company looked to the income to be derived from investments and loans as the chief source of its profits; but, however this may be, it is safe to assume that loaning money was one of the primary objects for which the company was created.

The defendant Robert Kittle applied to the plaintiff for a loan of money. He did not desire, and did not apply for, a policy of insurance upon his life. He was informed in substance that the company was loaning money, and would loan him $2,500 upon satisfactory security, provided he would take from plaintiff a policy of insurance upon his own life or that of some other person for $5,000, and pay the premiums, amounting to about $300 per annum. Whether more than the legal rate of interest has been contracted for is a question of fact to be collected from the whole of the transaction as it passed between the parties. We are to inquire whether there was an agreement, device or shift to reserve or take more than the law permits. It is not usual to express an usurious contract upon the face of a written agreement. "The charge of usury," says Mr. Tyler, "in most instances attaches to pretended cases of exchange of credits or commodities, or when a profit is realized for something besides the use of the money loaned or the debt forborne." Tyler on Usury, 105. We must, therefore, inquire whether, considering the whole transaction, there has been a successful effort on the part of the plaintiff to obtain, under color of the insurance transaction, exorbitant and unlawful gain for the use or forbearance of the money loaned to defendant Robert Kittle. Were these two separate

and independent *bona fide* transactions between the parties—one a loan of money at a lawful rate of interest, and the other the taking by defendant Robert Kittle of a policy of insurance upon his life from the plaintiff? Or were the two so intermingled as to constitute only one transaction, one result of which was that plaintiff actually received or contracted to receive more than 12 per cent. per annum interest as a consideration for the use of the money loaned?

The evidence, as it appears in the depositions, might leave us in serious doubt as to the true answer to be given to these questions, but the matter is rendered reasonably clear by reference to the mortgage sued on, which must be accepted as an authoritative statement of the contract as understood by the parties themselves, and which provides as follows: "And the parties of the first part hereby agree, in consideration of the aforesaid loan, to take out and keep in force during the continuance of said loan a policy of life insurance in the Missouri Life Insurance Company aforesaid, upon his own life or the life of some other person, and upon which he hereby agrees to pay or cause to be paid to said company the annual premium thereon, and not less than $310 per annum. And it is further agreed in consideration of said loan that all renewals thereof, or extensions of time of payment thereof, are upon the express condition of the payments upon said life insurance policy being made when due; * * * that any neglect or refusal so to do shall cause the whole amount of said loan to become immediately due and payable, any agreement of renewal or extension of payment to the contrary notwithstanding."

This language is explicit, and from it we learn that the two transactions were, in some respects at least, blended into one. The insurance was taken in consideration of the loan. It was not a clause inserted in pursuance of a policy to loan only to policy-holders, for it stipulates that the policy to be taken may be upon the life of the borrower "or the life of some other person."

It was the profit to be derived from the transaction of in-

surance that was demanded "in consideration of the loan," it being expressly declared that premiums amounting to not less than $302 per annum were to be paid to said company. It was further agreed, "in consideration of said loan," that a failure to pay premiums on the policy of insurance should work a forfeiture of all renewals or extensions of time of payment of the loan, and cause the whole amount thereof, both principal and interest, to become immediately due. The contract of insurance was very clearly demanded by the plaintiff as a condition precedent to, and an additional consideration for, the loan of the sum of $2,500 to defendant Robert Kittle. It was a thing of value to the company—a transaction out of which it was to make a considerable profit; and, as 12 per cent. per annum had been otherwise contracted for and reserved, the agreement for additional compensation for said loan rendered the said loan usurious. To hold otherwise would be not only to disregard the plain terms of the contract, as expressed in the mortgage, but also to point out the way by which insurance companies may easily evade the statutes of the several states prohibiting usury.

In this case the payments which have been made under the name of premiums on the insurance policy must be regarded as paid on account of said loan; the insurance contract, made as it was as a cover for usury, being held void.

The statute of Nebraska on the subject of usury in force when this loan was made, to-wit, the eighteenth day of November, 1872, will determine the rights of the parties in view of this opinion, and decree will be entered accordingly.

Mr. Justice MILLER concurred in the foregoing opinion.

FARMERS' LOAN & TRUST COMPANY v. THE ST. JOSEPH & DENVER CITY RAILROAD COMPANY and others.

(*Circuit Court, D. Nebraska.* May, 1880.)

LEASE—PART PERFORMANCE.—A lease which has not been reduced to writing, but has been acted upon and partly performed, will be considered as binding as if signed.

SAME—ULTRA VIRES—RATIFICATION BY STOCKHOLDERS.—Under section 152, p. 204, Statutes of Nebraska, a railroad company in that state cannot make a valid lease of its property and franchises for the term of its charter, without the same being ratified by its stockholders; but when the same have been used for a time under such void agreement, the company, or those representing it, may recover a just compensation for the use of such property during the time it is so used.

In the matter of the petition of the Burlington & Missouri River Railroad Company in Nebraska.

J. M. Woolworth, for Burlington & Missouri River Railroad Company in Nebraska.

John Doniphan and *A. J. Poppleton* for William Bond, receiver of St. Joseph & Denver City Railroad Company.

MCCRARY, C. J. Prior to the commencement of this cause the defendant company had leased from the Burlington & Missouri River Railroad Company in Nebraska so much of its road as lies between Hastings, Nebraska, and Kearney, Nebraska, including road track, depots, and other property. The contract here called a lease will be referred to more particularly hereafter.

In the present suit (being a bill to foreclose a mortgage upon the road and property of the defendant company) a receiver was appointed, who continued to use said road between Hastings and Kearney, under the terms of said lease, until January 1, 1876.

The said Burlington & Missouri River Railroad Company in Nebraska petitions the court for an order on the receiver to pay certain balances claimed as due under said lease, and it is upon this petition that this case is now before me. The claim of the petitioner is admitted by the receiver except one item, to-wit: a claim of $17,164.95, for depreciation or wear

and tear of the road during the time it was used by the lessee.

The lease was not signed, but having been reduced to writing, acted upon, and partly performed by both parties, it must be considered as binding as if signed. By its terms it was to continue in force during the life of the charter of the said Burlington & Missouri River Railroad Company in Nebraska, and this, it is claimed, made it a lease in perpetuity. Whether this be true or not, the stipulated term was for a long period.

It is insisted on behalf of the receiver that the contract or lease was *ultra vires*, and void. By the Revised Statutes of Nebraska, § 152, p. 204, it is provided that "any railroad company * * * may mortgage or lease, sell or convey, the whole or any part of its railroad situated within this state, and the rights, privileges, and franchises connected therewith, and other property pertaining thereto, to any person or persons, on such terms and conditions as may be agreed upon. * * * *Provided, however*, that no sale or purchase shall be made of a railroad situated within this state, of companies without this state, or consolidations effected as provided in this act, until the terms of such sale or consolidation shall have been approved by a majority of the stockholders in interest, in person or by proxy," etc. It does not appear that the lease in question was approved by the stockholders, and it is therefore insisted that it is void under this proviso. It will be observed that the authority to lease is given in terms by the section quoted, while the proviso, in expressing the limitation upon that power, uses only the words "sale," "purchase," and "consolidation," omitting the word "lease." Unless, therefore, the contract in question amounted by its terms, upon a fair construction, to a sale by the Burlington & Missouri River Railroad Company in Nebraska "of the whole or any part of its railroad," and the rights, privileges and franchises connected therewith, the limitation does not apply.

The statute must be held to apply to the transaction in its essence. If a sale is made under the name of a lease or of a

consolidation, it must be held to be within the proviso above quoted. That the contract in question, if given effect, amounted to a sale of part of the railroad, and of the rights, privileges and franchises connected therewith, there can be no doubt. It was, in effect, a sale of one-half of the road, with all its privileges, between Hastings and Kearney, being by its terms a transfer thereof for the whole period of the grantor's charter. It would be impossible, consistently with the plainest rule of construction, to hold that under this instrument no part of the property or franchises of the lessor was intended to be sold. The contract must, therefore, be held unauthorized and invalid, unless it can be shown that it was ratified by the stockholders as required by the statute. It devolved upon petitioner to show such ratification. If it be claimed that this can be shown I will give the petitioner the opportunity to show it, by directing a master to take proof and report upon that question. But if, as I suppose the fact to be, there was no such ratification, my decision is that nothing can be recovered upon the contract as such.

But inasmuch as the transaction is not tainted with any immorality, I hold that the petitioner is entitled to recover, without regard to the contract, a just compensation for the use of its road and property during the time in controversy. And if the petitioner is content to take decree for the sum recommended by the master, less the disputed item for depreciation of property, an order may be made accordingly. If this is not accepted the case will be sent to a master to take further testimony and report what would be a reasonable compensation for the use of the property during the period in question, including the depreciation caused by such use. In the event of such reference the question of the effect of the receiver's admission of certain items as due under the contract will be reserved.

PATRICK *v.* LEACH and others.

(*Circuit Court, D. Nebraska.* May 7, 1880.)

COVENANTS OF WARRANTY—DEFENCES.—In an action for breach of covenant of warranty, the defence that the covenant sued upon was a joint one, and that it was sued upon as several, can be made under an answer denying there is anything due.

DEED—STATEMENT OF CONSIDERATION.—The statement of the consideration in a deed is *prima facie* only, and may be rebutted.

SAME—ESTOPPEL—WASTE.—One who has given a deed of lands with covenants of warranty is estopped from denying that the grantee is the owner, and cannot complain of waste committed by such grantee.

WARRANTY—COVENANT—DAMAGES.—In an action for breach of covenant of warranty the measure of damages is the consideration money, with interest.

J. M. Woolworth, for plaintiff.

J. C. Corwin and *John D. Howe*, for defendants.

MCCRARY, C. J. Bill in equity seeking to recover judgment for damages of a covenant of warranty in a deed of real estate, and for an accounting, to the end that the sum recovered may be set off against a certain judgment held by defendant David Leach against plaintiff.

Defendant asks leave to amend his answer by alleging the following facts:

First. That the warranty deed upon which plaintiff sues was not the deed of David Leach alone, but the joint deed of David Leach and Jane E. Leach, his wife. The latter is not joined. The original answer is in effect a denial of the right of plaintiff to recover, and it is not necessary for defendant to plead specially that the covenant of warranty was joint, and not joint and several.

The plaintiff must make out his case, and the defence now sought to be specially pleaded can be insisted upon under the pleadings as they stand. If the plaintiff is not entitled to recover on the covenants in the deed sued on, when he comes to offer it in evidence that defence can be made. It is not necessary to consider now whether the husband can be sued alone upon a covenant of warranty contained in a deed exe-

cuted by him, jointly with his wife, and for the conveyance of the wife's separate property. I hold that, if the proof shall show the facts to be as claimed, the defence can be made under the answer which claims that there is nothing due the plaintiff on the covenants sued on.

Second. Defendant asks leave to amend by plea only that the consideration for the deed sued on was only $2,000, and not $77,000, as alleged. The real consideration may be shown under the pleadings as they stand. The sum named in the consideration clause of the deed is only *prima facie*, and not binding on either party. Defendant may show that the consideration was less than the sum named. Rawle on Covenants, 258, 259.

Third. It is proposed to amend the answer by alleging that while the land conveyed by the warranty deed was in possession of plaintiff, under defendant's warranty deed, he committed waste upon the same. This, if shown, would constitute no defence to a suit to recover damages for breach of the covenant of warranty.

It is now well settled that the measure of damages in such a suit is the consideration money and interest, and that the recovery is not to be increased by an increase in the value of the land, nor diminished by a decrease in such value. The parties are to be regarded as having fixed the measure of damages when they agreed upon the value of the land at the time of the sale. Rawle on Covenants, 235, 236, 237, *et seq.*; 6 Wheat. 118. Besides, as between plaintiff and defendant Leach, the land was the plaintiff's, and he was at liberty to do as he pleased with it. He held it under warranty deed from defendant, who is estopped from saying that notwithstanding his conveyance he still owned or was interested in the land conveyed so as to be entitled to sue and recover for waste committed upon it.

The motion for leave to amend is overruled.

ANDRESSEN and others *v.* THE FIRST NATIONAL BANK OF NORTHFIELD.

(*Circuit Court, D. Minnesota.* April, 1880.)

BILLS OF EXCHANGE—ACCEPTANCE.—Any act clearly indicating an intention to comply with the request of the drawer of a bill of exchange, as paying part in cash, and issuing certificate of deposit for the balance, will constitute an acceptance.

SAME—SAME—REVOCATION OF ACCEPTANCE.—After a bill of exchange has been received, and the proceeds credited to the payee, who presents it, the drawee cannot thereafter, by arrangement with the payee, revoke such acceptance and hold the drawer.

SAME—REPAYMENT BY DRAWER OF ACCEPTED DRAFT.—Repayment of a draft in this case by the drawer, having been made in ignorance of facts showing an acceptance by the drawee, it cannot be regarded as voluntary, and the amount thereof may be recovered from such drawee.

Action at law, tried before the court without a jury.

Cameron, Losey & Bunn and *Geo. L. & Chas. E. Otis*, for plaintiffs.

Perkins & Whipple and *Gordon E. Cole*, for defendant.

NELSON, D. J. This suit is brought to recover from the defendant $2,728.49, with interest from October 1, 1878.

The trial is before the court without a jury, and the following are the facts:

The plaintiffs, citizens of the kingdom of Norway, are bankers, doing business at Christiania. The firm of Wilson & Jurgens, bankers in the city of La Crosse, Wisconsin, and the correspondents of the plaintiffs, sent to them a printed list of their correspondents in this country, among whom was the defendant, and authorized the plaintiffs to draw drafts on them, to be paid on account of Wilson & Jurgens.

The plaintiffs drew a draft as follows:

"For $2,724.87, gold. CHRISTIANIA, 16th August, 1878.

"Three days after sight pay this first of exchange, (second unpaid), to the order of Mr. Ole Mikkelsen, two thousand seven hundred twenty-four dollars eighty-seven cents, gold,

value received, and place it to account W. & J., without or as per advice from.

"N. A. ANDRESSEN & Co.

"*To the First National Bank, Northfield, Minn.*

"*In need with Messrs. Wilson & Jurgens, La Crosse.*"

The First National Bank, Northfield, had no funds of the plaintiffs, and was unknown to them, except as included among the correspondents of Wilson & Jurgens.

Ole Mikkelsen, the payee in the draft, presented it to the drawee September 7, 1878, and an officer of the bank said it was all right, received it, paid $24 upon it, issued a certificate of deposit to the payee for the balance, and made the following entries in the bank books:

		Debit.	*Credit.*
September 7, 1878.	Certificate of deposit favor of Ole Mikkelsen, No.—, -		$2700 00
" " "	Cash paid, - -		24 87
" " "	Wilson & Jurgens, draft forwarded for collection,	$2724 87	
September 9, 1878.	Draft was intercepted and handed to Batavia Bank, La Crosse, for protest.		
September 10, 1878.	Certificate of deposit withdrawn and cancelled, and receipt given for collection.		
	W. & J. draft returned, -		$2724 87
	Certificate deposited, account cancelled, - -	$2700 00	
	Bills receivable, Mikkelsen note, - - -	24 87	

The draft was sent to Wilson & Jurgens by the First National Bank, with a request to send gold draft on New York for amount, and on discovery of Wilson & Jurgens' bankruptcy it was subsequently intercepted at La Crosse, and the Batavia Bank, having no interest in it, caused it to be protested at the instance of the First National Bank of Northfield.

The plaintiffs had ample means, some $4,500, on deposit with Wilson & Jurgens when this draft was drawn. On August 29, 1878, Wilson & Jurgens were adjudged bankrupts. Their assets were in the hands of an assignee at the time the draft was presented for payment by the Batavia Bank.

The draft was returned to Andressen & Co., with the protest, and the following letter from Ole Mikkelsen:

"NORTHFIELD, Sept. 18, 1878.

"*Messrs. N. A. Andressen & Co., Christiania:*

"DEAR SIRS: The draft, $2,724.87, I bought from you on the sixteenth of August, has been protested on the ground that Messrs. Wilson & Jurgens, of La Crosse, became insolvent. I return this to you through the First National Bank of this city, and Messrs. Knauth, Machod & Kuhne, of New York, for collection.

"I have bargained for a farm here, and hope there will be no delay in collecting the amount of the draft.

"Yours, etc.,

"OLE MIKKELSEN."

The plaintiffs, believing that the defendant had not paid the draft as it asserted, and that Wilson & Jurgens had not been able to pay, on account of insolvency, when returned to them, paid it.

On discovering from a correspondence with the assignee in bankruptcy and others the facts, suit is brought to recover from defendant the amount paid.

CONCLUSIONS.

The draft on its face indicated that it was drawn for the account of Wilson & Jurgens, and if not paid for any reason by the drawee, the holder could apply to Wilson & Jurgens for payment.

Defendant was not authorized to pay for the account of the drawers.

The directions being clear the defendant could not pay the draft and charge the drawers.

The facts proved establish an acceptance of the draft, charging Wilson & Jurgens with the amount; issuing to the payee, with his consent, a certificate of deposit for all but a small portion, which was paid in money. This was a payment as to the drawers, and when thus made cannot be revoked by the drawee so as to charge them.

Any act which clearly indicates an intention to comply with the request of the drawer will constitute an acceptance, and when the draft is received, and the proceeds credited to the payee, who presents it, the drawee cannot, by a subsequent arrangement with him, cancel the payment, and hold the drawer.

It is true, a certificate of deposit is not in law an extinguishment of a debt or payment, unless there was an agreement to so accept it.

In this case the evidence shows that Mikkelsen authorized the deposit of the balance of the proceeds of the draft not paid to him in cash to his credit, for his benefit. The uncontradicted evidence of Mikkelsen is: "I presented the draft and they said it was all right. They asked if I wanted it right away. They paid $24 or $25, and gave me a note for the money I left." Had the First National Bank failed immediately after this certificate was issued and received by Mikkelsen, the loss would have been his; so that, even as between Mikkelsen and the bank, the certificate, whatever its form as to time when due, was a payment of the draft.

The subsequent payment by the plaintiffs on the return of the draft, protested, was made without full information of all the facts, and the effect of the letter of Mikkelsen was to mislead them. A payment thus made is not voluntary, and the amount can be recovered.

Judgment for plaintiffs.

ADLER and others *v.* ECKER, defendant, and BOOTH, garnishee.

(*Circuit Court, D. Minnesota.* ———, 1880.)

ASSIGNMENTS—RIGHT TO CONTEST.—Assignments for the benefit of creditors in the state of Minnesota are simply regulated by statute. The assignee is mere trustee, and the legality of the assignment may be contested by a creditor in the federal court.

SAME—FRAUDULENT INTENT—HOW SHOWN.—The validity of an assignment for the benefit of creditors, as affected by f audulent intent, is to be determined by the intent of the assignor, and his contemporaneous fraudulent acts are evidence of such intent.

SAME—FRAUD.—Facts in this case *held* to show a fraudulent intent on the part of the assignor, and the assignment void.

Rogers & Rogers, for plaintiffs.

Young & Newell, for defendant and garnishee.

NELSON, D. J. Suit was brought by plaintiffs against Otto Ecker and judgment recovered. Garnishee proceedings were commenced against N. R. Booth, to whom Ecker had made an assignment for the benefit of creditors. After disclosure by the garnishee a supplemental complaint was filed by permission of the court under the statutes of the state of Minnesota, and it is charged that Ecker made the assignment to Booth to defraud creditors.

The questions presented for consideration are: *First.* Can this court entertain a suit against the assignee, Booth, who has given a bond to faithfully fulfil his trusts, and is amenable to the state court, by virtue of the statutes of the state of Minnesota regulating proceedings under assignments for the benefit of creditors? *Second.* Is the assignment to Booth fraudulent and void as to Ecker's creditors?

There is no law of the state authorizing assignments for the benefit of creditors, but such conveyances are recognized and regulated by the statute for better security. The assignee is selected by the assignor, and can only be removed for such dereliction of duty as would subject him to removal by a court of equity. In fact, the statutory enactment to this

extent is declaratory of the jurisdiction of a court of chancery over trustees, among whom are assignees under voluntary conveyances for the benefit of creditors.

The property in possession of such assignee is not *in custodia legis*, for the assignee is not an officer of the state court, but a trustee, subject to statutory provisions compelling him to execute his trust according to the terms prescribed by the assignor in the conveyance. The authority of the assignee depends upon the validity of the assignment, and is not conferred by the court. The right of a creditor or other person interested to contest the legality of a voluntary conveyance in a court of competent jurisdiction is not obstructed by the law prescribing the manner of executing assignments made for the benefit of creditors.

A creditor having a standing in the federal courts can contest the validity of such assignment, and a state law cannot deprive him of it.

It remains only to determine whether this assignment was made with intent to delay, hinder and defraud creditors.

The only intent which will determine the validity of an assignment is that of the assignor, at the time it is made, and contemporaneous fraudulent acts are evidence of this intent.

It is in proof that Ecker being insolvent, and owing debts amounting to more than double the value of his assets, took from his business, within four weeks before his assignment, a sum equal to one-half of the value of the property assigned, and erected with it a building upon a lot owned by his wife, and within a short time thereafter joined with his wife in giving a mortgage upon this property to his father-in-law for three times the amount of any debt owing either by him or his wife, and this mortgage and accompanying notes were sent to the father-in-law without any request on his part or any information on the subject until the papers were received. There is no evidence to counteract or explain why such mortgage was given for so large a sum, after one-fourth of his entire assets had been taken from his business in the manner above stated, and under circumstances calculated to show an

intent to put a portion of his available means beyond the reach of his creditors.

I have arrived at the conclusion that the assignment is fraudulent and void, and must give judgment for the amount claimed, with costs, and it is so ordered.

THE MERCHANTS' NATIONAL BANK OF ST. PAUL *v.* McLAUGHLIN, Sheriff, etc.

(*Circuit Court, D. Minnesota.* April, 1880.)

CHATTEL MORTGAGE—LOGS—SUFFICIENT DESCRIPTION.—A chattel mortgage of certain logs described them as being the northerly or rear 1,250,000 feet lying in a certain creek, and marked with a certain mark, to be ascertained by commencing at the rear or northerly end of said logs, and counting along said stream southerly until the requisite number was so counted and set apart. *Held*, sufficiently definite.

SAME—DEFAULT—RIGHT OF POSSESSION.—After default in the conditions of a chattel mortgage the absolute right of possession is in the mortgagee.

LIEN HOLDERS—RIGHTS OF.—Where there are two funds, to both of which a prior lien holder may resort, while a junior lien holder can resort to but one, the former must first enforce his claim out of the fund to which the latter cannot have recourse.

CONFUSION OF GOODS—INNOCENT MORTGAGEE.—An innocent mortgagee will not be compelled to suffer by reason of the wrongful confusion of the goods by the mortgagor.

Cause tried before the court without a jury.

Geo. L. & Chas. E. Otis, for plaintiff.

I. V. D. Heard, W. H. Grant and *Wilson, Lawrence & Rogers*, for defendant.

NELSON, D. J. This action is brought against the defendant sheriff to recover damages for the conversion of personal property, consisting of logs, and lumber manufactured therefrom.

The sheriff defends under a seizure by virtue of certain writs of execution issued upon judgments obtained against the firm of McCaine Bros. & Barteau, and also sets up pro-

ceedings instituted by laborers in the employment of this firm, as lien claimants under the laws of the state of Minnesota.

Briefly, the sheriff, in his answer, says the logs and lumber were not the plaintiff's property, and were not in its possession or under its control, but were owned by McCaine Bros. & Barteau; and that executions came into his hands against said firm, and that he had levied upon the logs and lumber as their property.

The plaintiff claims the right to the possession of the property by virtue of a chattel mortgage, and on default of the mortgagor to pay the money secured thereby.

The mortgage is in the form usual in this state. It is a sale of certain logs with conditions, and, in case of default, the mortgagee had the right to take possession and sell, subject to redemption by the mortgagors. It is executed by McCaine Bros. & Barteau to the plaintiff. It acknowledges an indebtedness to the plaintiff of $3,000; and, for the purpose of securing this indebtedness, grants, bargains, sells and mortgages the property described therein as follows: "All, and singular, such, and so many, of all those certain logs belonging to said parties of the first part, now lying and being in the north fork of Grindstone creek, [so-called,] in the town of Hinckley, county of Pine, and state of Minnesota; and being those certain logs now lying in and along said stream, ready to be driven out when the stage of water will permit, and marked 1 y 1, [read notch y notch,] as are described and designated, as follows, viz: The northerly, or rear, one million two hundred and fifty thousand (1,250,000) feet of said logs, to be ascertained by commencing at the rear or northerly end of said logs, as the same are situated in the said north fork, as aforesaid, and running along said stream in a southerly direction, and taking, counting, and including all of said logs until the full number of 1,250,000 feet thereof shall have been so counted, taken and set apart; the logs so counted and ascertained to be the logs covered, and intended to be covered, by and included in the mortgage." The usual condition of defeasance upon payment precedes the following covenants and agreements: "It is hereby mutually covenanted and

agreed, between the parties hereto, that if default shall be made in the payment of said sum of money, or any part thereof, or the legal interest thereon, at the time or times when, by the conditions aforesaid, the same shall become payable; or if any attempt shall be made to remove or dispose of said property, or any part thereof, by the said parties of the first part, or any other person; or if the said party of the second part shall, at any time, deem itself insecure, that, thereupon and thereafter, it shall be lawful for, and the said parties of the first part do hereby authorize, the said party of the second part, its successors or assigns, or its authorized agent, to enter upon the premises of said parties of the first part, and any other place or places where the said goods and chattels, or any of the same, may be, and remove and sell and dispose of the same, and all of the equity of redemption of the said parties of the first part therein, at public auction, with notice, as by the statute in such case made and provided, and on such terms as said party of the second part, or its successors or assigns, may see fit, and out of the proceeds thereof to retain the amount which shall then be owing to the said party of the second part, as aforesaid, its successors or assigns, together with all reasonable charges, costs, and expenses attending the same, rendering to the said parties of the first part, or their legal representatives, the surplus moneys, (if any there shall be,) after paying such mortgage debt, interest and costs, in full. And until default is made, as aforesaid, or until any attempt shall be made to dispose of or remove the same, or any part thereof, the said parties of the first part may continue in the peaceable possession of all the said goods and chattels; all which, in consideration thereof, they engage shall be kept in as good condition as the same now is, and taken care of at their own proper cost and expense."

It is insisted by the defendant that the mortgage is void for incompleteness and uncertainty in the description of the property mortgaged. There is no controversy about the delivery of the mortgaged property at the time the mortgage was executed. The law prescribing the record and filing of the

mortgage was followed. The mortgagee never had possession of the logs. They were left in the river where the mortgagor had transported them.

Default was made in the payment of the money secured by the mortgage, and, by its terms the right of possession was thenceforth in the plaintiff, and it can maintain this suit.

The only question presented is whether the logs are described and designated with such certainty as to enable third parties and creditors of the mortgagors to distinguish the property intended to be mortgaged and identify it.

If the property, or subject-matter, is described so that it may be identified by the terms of, or language used in, the mortgage, and other evidence admissible in such cases, it is sufficient. Herman on Chat. Mort.; Pomeroy on Cont. 226; 20 Wis. 187; 22 Wis. 134.

Until the mass of logs were intermixed and driven into the pond by the mortgagors it was possible for the mortgagee to have taken possession of the specific quantity of logs described and located as the northerly or rear 1,250,000 feet of the logs lying in the north fork of Grindstone creek.

In the case of *Richardson* v. *Alpena Co.*, cited by defendant, (8 Cent. L. J. 297,) the particular logs mortgaged were not described or designated, in any respect, from the mass bearing the same mark. They were described as a given number of feet of logs, board measure, situated in a stream containing a very large quantity of the same mark, and it was impossible to tell from what part of the mass they should be taken. Here, the mortgage fixed the location of the particular logs, and furnished *data* for separating them. The written description identified specifically the property mortgaged. It was a transaction made in good faith, and the mortgage was duly registered. It was not necessary to measure or separate them by a boom, or other artificial boundary, in order to make the mortgage valid; nor were the logs required to be measured before the mortgage took effect. The clause in regard to "taking and counting the logs" makes the description more certain by furnishing *data* by which the location could be determined. A surveyor of logs, or person skilled in their

mensuration, with the mortgage before him, going, at the time it was executed, to the Grindstone creek, and examining the logs in the north fork, could ascertain accurately the specific logs mortgaged, which is all that is required to make the mortgage sufficiently definite and certain.

There is some conflict in the evidence about the surrounding facts and circumstances. It is claimed the agent of the mortgagee agreed to permit the mortgagors to drive the entire lot of logs to their mill, and manufacture and sell them. The evidence, however, does not satisfy my mind that such was the understanding.

If I am right in my construction of the mortgage, then, manifestly, so far as the executions are concerned, the sheriff cannot hold the property by virtue of any rights of the judgment creditors as against the plaintiff. The absolute right of possession of the mortgaged property belonged to the plaintiff on default by the mortgagors, which was prior to the seizure, by the sheriff, upon the executions. Authorities are numerous. See *Edson* v. *Newell*, 14 Minn. 228, and citations.

Can the sheriff avail himself of the rights which the statute gives certain laborers to secure liens and preferences for services performed? There is some doubt about the construction of the statute of Minnesota, and the nature of the proceedings necessary to establish and perfect the lien given by it. It is not necessary, in determining this case, to consider the rights of claimants under this statute. If the claim is an equitable one, then, conceding that the lien claimants, by serving notice upon the sheriff, did all that is necessary to preserve their liens under the statute, it cannot avail the sheriff to defeat the plaintiff's right to the property mortgaged. The money in the hands of the sheriff far exceeds the amount of plaintiff's claim, and the overplus is more than enough to secure payment for the services of the workmen, who urge prior liens under the statute; and, if it is admitted that these workmen have a first lien on all the logs cut, or lumber manufactured, including the logs mortgaged to the plaintiff, the lien not being upon any specific portion, the rule prevails that where there are two funds to which he other lien claimants can resort,

while the plaintiff has only one of these, the former must enforce their lien on the fund to which the latter cannot have recourse.

This doctrine shuts out the defence set up under the statute. The sheriff cannot avail himself of his relationship to the claims of the workmen on the fund or money in his hands, for it is more than enough to pay them, and the plaintiff's rights are superior to those of the judgment creditors.

The logs were not intermixed with the consent of the plaintiff, and, the confusion existing on account of the wrongful acts of the mortgagors, the innocent party will not suffer thereby.

Judgment will, therefore, be entered in favor of the plaintiff.

ATWATER and others *v.* SEELY and others.

SEELY and others *v.* ATWATER and others.

(*Circuit Court, D. Minnesota.* ———, 1880.)

VOLUNTARY CONVEYANCE—EFFECT OF.—A voluntary conveyance, without consideration, will vest an absolute title in the grantee, subject only to the rights of creditors.

CURATIVE ACT—DEEDS.—The act of February 28, 1877, (Minn.,) legalizing deeds executed in another state according to the laws of such state, is a valid "healing statute," and as to a deed covered by it operated to validate the same, and pass the legal title, except as to intervening rights.

DEED—INSUFFICIENT TO PASS LEGAL TITLE.—A deed in Minnesota executed in another state according to the laws thereof, but insufficient under the laws of the state where the lands are situate, will operate as a transfer of the equitable rights of the grantee.

Original and cross-suit in equity heard and submitted together, upon pleadings, proofs, and arguments of counsel.

Charles A. Clark, for plaintiffs in original suit and defendants in cross-suit.

Davis, O'Brien & Wilson and *E. R. Hollinshead,* for defendants in original suit and plaintiffs in cross-suit.

NELSON, D. J. The original suit was brought to set aside a deed executed by Julinah P. Atwater to John D. Seely, Jr., dated April 19, 1875. The bill contains a prayer, also, that certain real estate therein described be partitioned among the owners, or sold and the proceeds distributed according to the interest of the parties as alleged therein. A cross-bill is filed by the defendants, Seely and others, and affirmative relief prayed. The cases have been fully presented and argued upon the pleadings and proofs.

The controversy involves the title to real estate claimed by the complainants in the original suit, as heirs at law of Josephine Seely, and by the defendant John D. Seely, as the heir at law of her husband, John D. Seely, Jr.; the other defendant, Norman G. Seely, being administrator of his estate.

The testimony is voluminous, and discloses a very bitter feeling on both sides.

The following facts are established by the proofs, and I so find: On August 12, 1873, John D. Seely, Jr., and Josephine, his wife, were in possession and seized in fee of the north-west quarter of section fourteen, (14,) township one hundred and seven, (107,) range twenty-one (21) west, situated in the county of Steele, Minnesota, and on that day, by warranty deed, they conveyed these premises to Julinah P. Atwater, a sister of Josephine Seely, for the consideration expressed in the deed of $6,000, when in fact no consideration was paid at the time of the conveyance, or ever has been, but the deed was executed and delivered from apprehension of a slander suit against John D. Seely, Jr., by one Prisley, and to prevent a lien of any judgment obtained in that suit. I also find that John D. Seely, Jr., made an attempt to create a secret trust for his benefit; and I further find that on October 14, 1873, Julinah P. Atwater, at ———, in the state of New York, by a quitclaim deed of the real estate above described, executed in accordance with the laws of the state of New York, conveyed the real estate in controversy to Josephine Seely, and the deed was delivered to and received by her, but was not so executed as to admit it to record according to the laws of Minnesota then existing, for the reason that there were no

witnesses to the signature of the grantor; that this deed remained in the possession of Josephine Seely and her husband after its delivery, and no effort was made to have any correction in the form of the same, or demand made for a deed to be executed in conformity with the laws of Minnesota, until after the death of Josephine Seely, which occurred April 14, 1875, when, upon the request of John D. Seely, Jr., a warranty deed was executed and delivered by her to him of the same premises, April 19, 1875, without any consideration passing therefor, which deed was recorded September 6, 1875, after the death of John D. Seely, Jr., occurring in July, 1875.

I find that John D. Seely, Jr., and Josephine, his wife, left no issue by their marriage.

I also find that an act was passed by the legislature of the state of Minnesota, approved February 28, 1877, as follows: "*Be it enacted*—

"Section 1. That all conveyances of real estate in this state, or of any interest in such real estate heretofore executed in any state or territory of the United States, if executed and acknowledged according to the laws of such other state or territory, are hereby legalized and made valid, and may be recorded to the same extent and for the same purposes as though the same had been executed in accordance with the laws of this state: *Provided*, that before such conveyance shall be entitled to record the party presenting such conveyance for record shall also present for record the certificate of the clerk, or other proper certifying officer, of a court of record of the county or district within which such acknowledgment was taken, under the seal of his office, that the person whose name is subscribed to the certificate of acknowledgment was, at the date thereof, such officer as he is therein represented to be, and that he believes the signature of such person subscribed thereto to be genuine, and that the conveyance is executed according to the laws of such state, territory, or district; and all such conveyances are hereby declared to be legal, and valid, and effectual, to all intents and purposes, and the record thereof shall have the same effect as in other cases authorized by law: *Provided, however*, that nothing herein

contained shall, in any manner, affect the rights or title of any *bona fide* purchaser, without notice, for a valuable consideration, of any such real estate prior to the passage of this act."

On July 4, 1877, the quitclaim deed from Julinah P. Atwater to Josephine Seely, dated October 14, 1873, was filed for record in the office of the register of deeds of Steele county, aforesaid, and duly recorded.

CONCLUSIONS.

The deed executed August 12, 1873, by John D. Seely, Jr., and Josephine, his wife, to Julinah P. Atwater, conveyed and passed the legal title of the real estate therein described, subject only to the rights of the creditors of John D. Seely, Jr.; and Julinah P. Atwater, by virtue of this deed, had full control over the real estate, and could dispose of it in such manner and to whom she pleased, the grantee taking by any conveyance from her the title subject to the rights of the creditors aforesaid. 1 Story Eq. Jur. § 61, note, 371, 428; 8 Minn. 309; 12 Minn. 60, 67, and cases cited; 2 Sug. Vendors, 436, and authorities.

The quitclaim deed from Julinah P. Atwater to Josephine Seely, executed October 14, 1873, and delivered, was a nullity as a deed, and did not convey the legal title, but did pass all of her equitable interest.

The act of the legislature approved February 28, 1877, is a "healing statute," and cured all defects in the deed which prevented its record, and after its passage the deed was entitled to be recorded in the register's office of Steele county.

This act of the legislature is remedial in its character, and the deed, when recorded, conveyed the legal title to the real estate, unless vested rights of third persons intervened.

The "healing statute" was confined to validating acts which the legislature might have authorized previous to the execution of the deed, and divested legal rights in a case where the equitable rights were superior, and both did not concur in the same person. Such legislation is constitutional and valid. The legal rights affected by the statute were deemed to have

been vested, subject to the equity existing against them, which the statute recognized and enforced. 1 Kent (6th Ed.) 455–56; Cooley Const. Lim. 357, 371–77. The heir has no rights superior to those conferred upon John D. Seely, Jr., by virtue of the deed executed and delivered April 19, 1875, and recorded September 6, 1875. He succeeded, on John D. Seely, Jr.'s death, to such interest in the real estate as the latter had at the time of his death, and such only. This interest or title in the heir was subject to the equity created by the conveyance from Julinah P. Atwater to Josephine Seely, dated October 14, 1873, and he took the title *cum onore*. 2 Peters, 380; 8 Peters, 108; 13 Mich. 217; 11 Minn. 439; 23 Minn. 84.

By the deed to John D. Seely, Jr., executed April 19, 1875, Julinah P. Atwater conveyed all the interest in the real estate which she became possessed of as one of the heirs of Josephine Seely, and she has parted with all her right, title and interest in the same, and it cannot be recovered by these complainants. They are, however, entitled to the relief demanded, with this exception, and to the possession of two-thirds of the real estate, less the interest of Julinah P. Atwater, as one of the heirs of Josephine Seely, and a decree is ordered in conformity with this opinion.

The matter is referred to H. E. Mann, master in chancery, to take an account as prayed for, and also report to the court the condition and situation of the property, so that it can determine whether the real estate should be partitioned among the parties entitled thereto, or sold and the proceeds divided.

The cross-bill is dismissed.

BOYD and others *v.* BOYD and others.

(*Circuit Court, D. Minnesota.* ———, 1880.)

WILL—CODICIL—CONSTRUCTION.—A testator is presumed to have used words in their natural sense, and where he has attached a codicil to his original will the two are to be construed together, and the will is not to be regarded as revoked by the codicil unless such appears to be the intention.

SAME—SAME.—Certain specific devises in a will *held* not to have been revoked by a subsequent codicil.

Suit to quiet title.

Lamprey & James, for plaintiffs.

Henry J. Horn, for defendants.

NELSON, D. J. This suit was brought under the statutes of Minnesota to quiet the title to certain real estate situate in the county of Ramsey, in said state. The fee of the land was in the defendants' testator at the time of his decease, and had been since the year 1855. The plaintiffs claim title by gift from the deceased, and that possession was given to them, without a deed, in 1855; also by devise under a holographic will executed by their testator May 26, 1856, in Adams county, in the state of Mississippi. The defendants set up title under the same will, and a codicil thereto executed September 10, 1862. The case is put at issue by proper pleadings, and is submitted to the court without a jury.

The defendants prove their title by will, which is met by opposing title of plaintiffs attempted to be shown as before stated by gift, and also by adverse possession under the statute of limitations, and finally by special devise under the will through which the defendants claim.

It is urged by the defendants that the special devise in the will of the land in controversy to the plaintiffs is revoked by the codicil. If it is not, then there can be no doubt about the plaintiffs' title. The following is the will and codicil:

"I, Samuel S. Boyd, of the county of Adams and state of Mississippi, do make, ordain, and publish this my last will and testament, revoking all others, and this being all in my own handwriting and containing ten pages of manuscript:

"1. I direct my whole estate existing at the time of my decease—real, personal and mixed, private and partnership —to be kept together, managed, controlled, disposed of, and distributed as hereinafter directed.

"2. I give to my beloved wife and children the use of my Arlington property in Natchez, or such other dwelling-house as may be our usual family residence at the time of my death, to be so held during the life of my said wife, at all events, and after her death for the use of such of our children as may survive her, until such survivor or survivors marry or arrive at the age of 21 years. With said residence I include all the furniture, carriages, horses, servants, and other things appurtaining thereto, and in the ordinary use of the family. So far as the children are concerned this right to cease as each arrives at the age of 21 years or marries. And for the support, education, and maintenance of my said family, under this clause of my will, as well as for keeping up said establishment, I direct my executor, hereinafter named, to apply a gross sum not exceeding $10,000 per year, and an additional sum not exceeding $2,000 per year for the sole and separate use of my wife, all without accountability or charge to them on the final settlement of my estate, and to come out of the income or profits of my estate. It is also my desire and intention that my beloved sisters-in-law, Ann and Maria Wilkins, remain in the use of said residence as long as any of the family occupy it under this clause of my will.

"3. As each of my children become of age (21 years) or marry, I direct the above allowance of $10,000 to be diminished $2,000 per year, and so also should any of them die.

"4. As each of my children become of age or married I give to such child the sum of $50,000, to be invested by my executor in productive property—land and slaves preferred—for the sole and separate use of such child forever; but if such child should die without issue surviving, then and in that case this devise to return to my estate and be distributed as hereinafter directed.

"5. The investments and disbursements hereinbefore directed are to come from the income and profits of my estate;

that is—*First*, from the income and profits of my private and individual estate; and, *secondly*, from the income and profits of my partnership estates, as hereinafter named and indicated; and in the last case whatever amount is taken from the proceeds of the partnership property, a like amount is to be deducted and transferred to the private and individual account of the surviving partner.

"6. It is the understanding and agreement between me and my partner, Rice C. Ballard, that the planting partnership alluded to above shall be continued, notwithstanding the death of either partner, for the period of 12 years from the first of January, 1856, in the same way and with the same force, authority and right in the survivor as if both were living; and I therefore direct that at that time, or as soon thereafter as all the partnership debts are paid, the whole of our said partnership as it may then exist, and wherever it may be, shall be divided into two equal parts, any necessary inequality to be made equal by money, and the part then belonging to my said estate and to my said partner, or his estate, if he be dead, to be ascertained by lot; and thereupon I direct all my property, of all kinds and descriptions, be divided into as many equal parts or shares as will correspond to the number of my surviving children and wife, counting my wife as a child for this purpose, and my said estate I give and bequeath to them in said shares, the share of each to be ascertained by lot, each share being made equal to the other, as in the above case, and each to have an equal share thereof, as aforesaid, in absolute estate and forever, my wife included. Should any of my children die before said distribution is made, leaving issue surviving at the time of said distribution, then such issue are to take the place of such deceased child; and after said distribution should either of my said children die leaving no issue surviving, I direct that the share of such child shall be distributed equally among the surviving brothers and sisters of such child.

"7. In order that my said partner surviving me may be freed from embarrassment in the management of our partnership affairs till the time of the aforesaid division, I state

that he has full power as survivor, without regard to any power as executor, to manage and control all our partnership property and effects, and the proceeds thereof to invest in further purchases of any kind for the benefit of our said partnership, and to increase and extend the same, and to manage and dispose of the same, and to sell or exchange any portion thereof, if deemed most advantageous by him for the benefit of our said partnership, as we could do if both were living, it being my preference that land and slaves be preferred in purchasing, especially in regard to the proceeds of any sales of land or slaves by my said partner.

"8. In regard to the division of said partnership property between said Ballard and my estate, I direct the probate judge of Adams county, for the time being, under his private seal, to nominate one judicious and disinterested person, who shall act with such other as may be appointed by and on behalf of said Ballard, or his estate, in making said division, and should they not agree then the two to select a third man as umpire, and the conclusion thus arrived at, in either way, shall be final. In regard to the division herein provided for of my estate among my children and wife, I direct my executor to make a like selection of suitable persons to make the same. In regard to both of said divisions, I mean and intend by the above to include the appraisement of the shares, as well as the actual process of division by lot.

"9. I appoint my friend Rice C. Ballard my executor, with full power to carry into effect each and every clause of my will, and to manage and employ for the benefit of my estate all my property, and the income thereof; to invest the same and the proceeds thereof, and to sell or exchange any part thereof, and to re-invest the same as he may deem most advantageous to my said estate; and such sales, purchases and investments he may make publicly or privately, and with or without any order of court, as he may prefer. He may settle, adjust, and compromise all claims and demands against me or my estate, but not to pay any money demanded barred by the statute of limitations, unless he knows the same to be due and correct; and to assist him in the proper performance of his

duties I request my friend Alexander Montgomery to advise freely with him, with my family whenever called on, and in case of the death of said Ballard before the full execution of the trusts herein I appoint him my executor, with like powers as are given to said Ballard.

"10. I appoint my beloved wife guardian to my children, and direct that she give no bond as such guardian; nor shall said Ballard, as executor or surviving partner, nor said Montgomery, should he become my executor, be required to give any bond or security.

"11. As I now have, and expect to have, property in several states, and have made my will in a spirit of impartial justice and equal kindness to all interested in my estate, I direct that if my wife or my children, or either of them, refuse to abide by said will, then such one or more refusing shall have no part of my estate, except what is in the state of Louisiana, and such share in that estate as the law will give them alone, and the final division of my estate is to be made accordingly, and the provisions of my will carried out in all respects.

"12. Three years after my decease I give to my wife the sum of $50,000, if she desire it, which is to be invested by my executor for her sole and separate estate forever, land and slaves preferred, and thenceforth the allowance of $2,000 provided for her annually in the second clause of this will is to cease, and the amount herein given is to come out of the income and profits of my estates.

"13. By way of exception to the sixth clause of this will I give to my brothers Edward and Walter my lands on which they reside in Minnesota territory; and to my brother R. S. Boyd I give my interest in the estate of my father belonging to me to assist him in purchasing the family mansion in Portland, Maine, now occupied by Mrs. Merrill; and to my sister, Mrs. Merrill, of said Portland, I give the sum of $250 a year during her life. I direct my —— in Woodville, and my wild lands in Warren, Washington, Yazoo counties, to be sold and the proceeds re-invested.

"14. As I have acted for several years as agent for my sisters Ann and Maria Wilkins in managing their affairs, it

is proper to state that all their funds will be found in the hands of my merchants in New Orleans, invested in commercial paper, except what stands in their own names on the books of W. A. Britton & Co., in Natchez. The account in New Orleans, for convenience, is headed 'S. S. Boyd Agency.' Some further statements on this subject (if more is desired) will be found in my letters in my iron chest at my office, accompanying a previous will, addressed to F. B. Ernest, which I refer to, not to make it a part of my will, but simply for private reference and satisfaction.

"15. For the information of my family I state that the partnership property referred to herein consists, *in præsenti*, of the following plantations, including the slaves and all other things belonging thereto, *i.e.*, 'Magnolia,' 'Lipun,' 'Karnae,' 'Elcho,' and 'Cut Post,' with some wild lands adjoining Karnae and a lot under the hill in Natchez. The state of the accounts of each of these places will appear by the books of our merchants in New Orleans, and have always been so kept as to show the payments made by each of us, and the debits and credits entered accordingly as between us, or each of us, and said places respectively, and no account between us individually in respect to any partnership matter ever having been kept or intended. For any matters not appearing on said books the private memorandum books and papers of each other have always been and are to be taken as true.

[SEAL.] "SAM. S. BOYD.

"Executed and published under hand and seal this twenty-sixth May, 1856."

Codicil to the will of S. S. Boyd, deceased:

"I, Samuel S. Boyd, of the city of Natchez, do make and publish this by way of a codicil or additional clause to my last will and testament, the same being wholly written in my own handwriting:

"I appoint my friend Martin Davis my executor in place of R. C. Ballard, deceased, with same power and authority in all respects, both as to my will and the will of said Ballard; and I make the following alteration of my said will: that is to say,

as soon as a division can be had of the partnership property, etc., of said Ballard and myself, and my debts and liabilities are paid, I direct my executor to have all my estate, except the Arlington property, divided between my wife and children in equal parts, share and share alike. The Arlington property I direct to be left for the use of my said wife and such of our children as she may choose to have with her during her natural life, and after that to be divided to and among my said children like the rest of my estate as above; and if my wife, at any time, declines to hold said Arlington property in the way herein directed, then it is to be divided as above among my wife and children, which can be effected by sale or as my executor may think best. In case of the death of said G. M. Davis before the final settlement of my estate, I appoint my friend Judge Alexander Montgomery my executor, with the same power and authority; and I revoke so much of my said last will and testament as may be inconsistent herewith. I request that my executor employ T. H. Thistle, as far as assistance may be necessary, in the same way I have employed him.

"Written with my hand, executed and published this tenth September, A. D. 1862.

"Witness my hand and seal.

[SEAL.] "SAM. S. BOYD."

The will and codicil are drawn with care, and evidently the testator was a skilful draftsman, using unequivocal and plain terms to declare his intention. In the codicil he makes no change in his bequests. The will specifically devised his estate, and with such devises he is satisfied; but when and in what manner the estate devised to his wife and children shall be divided the testator, for some reason, determines that a change should be made, and he alters the will in that regard by the codicil. He revokes the will only wherever it may be inconsistent with the codicil in that respect. In no part of this codicil does he use the words "devise and bequeath," but studiously avoids any words which would, of themselves, necessarily import a devise. The widow and children take the

property, not by virtue of the codicil, but under the will, through which title passes to them.

The testator is presumed to have used words in their natural sense, and when in the codicil he authorizes the executor to divide all of his estate, etc., it cannot be said that the words imported devise all his estate and authorized the executor to divide it, when by such construction a radical change would take place in the will, and bequests be revoked which were made by express terms. The intention of the testator is to be gathered from the will and codicil; both must be construed together. The words "divide" and "devise" are both used in the will—the former confined to an act to be done by the executor—and it would be a strained construction to say that in the codicil the testator intended by the use of the word "divide" to do more than authorize a change in the division of that portion of the estate already devised by the will to the widow and children.

I see no ambiguity in the language of the codicil, and its terms are not inconsistent with the special devise of the Minnesota land to the plaintiffs. Having arrived at this conclusion, it is unnecessary to consider the case any further.

Judgment for plaintiffs.

THE UNITED STATES v. COMAROTA.

(*District Court, S. D. New York.* March 13, 1880.)

IMPORTS—WITHDRAWAL FROM WAREHOUSE—DUTIES ON—RELIQUIDATION OF.

S. L. Woodford, District Attorney, for plaintiff.

Hartley & Coleman, for defendant.

CHOATE, D. J. This case has been tried by the court upon a waiver of the jury. The facts are agreed.

The suit is to recover a balance of duties on goods imported by the defendant. The goods were imported and entered for warehouse September 29, 1874. On the twenty-eighth of

October, 1874, the duties were liquidated at $658.25. On the twenty-seventh of April, 1875, the duties were reliquidated at $783.35. Meanwhile, the goods had been withdrawn from warehouse and the goods delivered to the defendant, and the duties paid upon the basis of the first liquidation—the last delivery and payment of duty being on the ninth of February, 1875.

There was no fraud in the importation, entry or withdrawal of the goods, and no protest by the importer.

This action was commenced in June, 1876, to recover the balance of $125.10, being the excess of the second liquidation over the amount of the duties paid.

The entries which are made part of the agreed statement of facts show that the first liquidation was upon the basis of a duty of 25 per cent., and the second liquidation was on the basis of a duty of 40 per cent. upon that portion of the goods which actually remained in warehouse after the eighth day of February, 1875, although the defendant had, on the twenty-fifth of January, signed and presented to the collector an entry for their withdrawal, under which they were delivered from warehouse and the duties paid on the ninth of February.

The point sought to be raised by the defendant is whether, under the act of February 8, 1875, (18 St. 307,) which imposed this increased duty on goods "in bonded warehouse" on the eighth day of February, these goods were, within the meaning of the law, "in bonded warehouse" on that day. The ground on which, as it is assumed by counsel, the duties were reliquidated at 40 per cent., was that they were, within the meaning of the act, still in warehouse, while the defendant contends that they had been withdrawn. It is, however, impossible to raise this question on this record. In the recent case of the *United States* v. *Phelps* it was held that the collector is authorized, notwithstanding the payment of duties upon a regular liquidation, and the delivery of the goods to the importer, to make a reliquidation, although the error sought to be corrected by such reliquidation is an error or a supposed error of law only. The circuit court held that the act of March 3, 1875, (18 St. 469,) did not restrict the power

so to reliquidate to a case where the purpose of the reliquidation was to correct an error of fact.

It is, however, insisted that because this action was commenced more than a year after the original entry of the goods it cannot be maintained. The argument is that the twenty-first section of the act of June 22, 1874, which provides that the settlement and payment of duties conformably to that section shall, "after the expiration of one year from the time of entry," etc., "be final and conclusive," limits the United States to one year for the commencement of a suit. But I think it is clear that this section contains no limitation upon the time within which an action can be brought on a reliquidation of duties duly made by the collector within the year to which his authority to reliquidate extends, and that the reliquidation duly made determines the right of the United States to the duty as reliquidated, unless the importer protests and brings his action thereon in the mode provided by law.

Whether, if there is no reliquidation, but an action is brought within the year for the larger duty, the United States could recover, is another question, which it is unnecessary to consider.

The plaintiff is entitled to judgment.

THE UNITED STATES *v.* EVANS and others.

(*Circuit Court, W. D. Tennessee.* March 29, 1880.)

RECOGNIZANCE—SCIRE FACIAS—DEFENCE.—Where a recognizance was given for the appearance of a defendant to answer a "charge against him for passing counterfeit money," *held*, that the fact that the indictment was defective could not be asserted as a defence to *scire facias*, upon such recognizance, after forfeiture.

SAME—SAME—SUFFICIENCY OF BOND.—In Tennessee every bond or recognizance that would have been good at common law will be regarded as sufficient statutory bond in any proceeding where it may be questioned.

SAME—EXECUTION OF BOND—PRESUMPTION AS TO ACTION OF CLERK.—A bail-bond present in the record was executed before a clerk, who wrote at the foot of it "signed, sealed and acknowledged, and approved by," signing his name thereto. It did not appear from the bond or otherwise that the defendant was brought before the clerk for examination and bail as a magistrate. The court was in session that day. *Held*, that it would be presumed to have been taken by the clerk under the immediate direction of the court.

SAME—POWER TO TAKE—CLERKS.—Courts have inherent power to take a recognizance. Clerks have such power only by virtue of statute.

W. W. Murray, District Attorney, and *John B. Clough*, Assistant, for the United States.

Emerson Etheridge and *W. I. McFarland*, for defendants.

The case was submitted to the court upon the following agreed statement of facts:

On June 19, 1876, R. L. D. Evans, the defendant, was twice indicted for passing counterfeit money, Nos. 1,313, 1,314. On May 30 and 31, 1878, he was tried by jury in one case on a plea of not guilty, resulting in a mistrial. On May 31, 1878, after the jury were discharged and while the defendant was under bond for that (the May, 1878) term, and when no *capais* was outstanding for his arrest, nor any order for one entered, and when he was in court under said bond, the said defendant, with his counsel, in open court, (Judge Trigg presiding,) with his sureties, offered to enter into recognizances for his appearance at the following November term, 1878, and was directed by the court to execute the bond before the clerk of said court, who at that time had not been appointed one of the commissioners of said court in addition to his appointment as clerk. In pursuance of the verbal direction of the court, the bond was executed in the clerk's office adjoining the court room, in each case. On January 20, 1879, judgment *nisi* was taken on the bonds, and on the same day *scire facias* issued. The return of the marshal shows service on W. R. Evans only, the other two not being found. We agree to the above statement of facts, and agree that judgment may be pronounced as though an *alias* writ had been issued and returned *non est inventus* as to the defendant R. L. D. Evans. We also agree that the defend-

ant William Tinder is deceased, and that H. B. Wilson has been appointed his administrator, and that judgment may be pronounced as though the record showed these facts, and a regular revivor had been had against said administrator, who was regularly in court by proper process. It is also agreed that if a motion to quash the *scire facias* could be sustained, or the *scire facias* be had on demurrer, or on plea of *nul tiel* record or motion in arrest, judgment may be rendered for the defendants; otherwise judgment to be rendered against R. L. D. Evans, W. R. Evans, and H. B. Wilson, administrator of William Tinder, for the sum of $5,000 and costs, in each case in favor of the United States—the whole record to be used and relied on in the argument.

HAMMOND, D. J. This is a *scire facias* upon a forfeited recognizance submitted upon the foregoing agreed statement of facts and the record of the proceedings in the case. It is first insisted by the defendants that the indictment is bad in not charging the offence to have been committed on a particular date. The caption is "May Term, A. D. 1876," and the offence is alleged to have been committed "on the — day of ———, A. D., 1876." It is urged that for this defect, upon conviction, the judgment would be arrested. Whart. Cr. Law, § 264. It is denied for the plaintiff that this case falls within that rule, if, indeed, such defence can be made to the *scire facias*, which is also denied.

I express no opinion on the sufficiency of the indictment, for, conceding it to be defective, and fatally so, it is, I think, no defence to this *scire facias*. In the first place the bond did not bind the defendant to answer this indictment, but only a "charge against him for passing counterfeit money." He was bound to appear to answer the charge, whether upon this indictment or some other indictment, or information to be preferred against him. His appearance at court was the thing to be secured, and a further condition was that he should continue in attendance until discharged by the court. He cannot abscond, forfeit his bond, and on the *scire facias* try collaterally the merits of the case upon the sufficiency of the indictment or other matter of defence. The defendant

and his sureties would, by such practice, be allowed to judge of the propriety and utility of his appearance, which cannot be permitted. *State* v. *Adams*, 3 Head. 259; *State* v. *Rye*, 9 Yerg. 386; *U. S.* v. *Reese*, 4 Saw. 629; *U. S.* v. *Stein*, 13 Blatchf. 127; *State* v. *Stout*, 6 Halst. 124.

The defence most relied on is that the clerk had no authority to take this bond, and, having no authority, the *scire facias* must be quashed. It is argued that this *scire facias* must speak by the record, strictly pursue it, and show by it the validity of the bond; that it was taken by a competent officer, and all the jurisdictional facts to support his action; that by this record it appears that the clerk, as of his own authority, took this bail bond, because the minutes of the court do not show that he took it by order of the judge sitting either as an officer authorized to hold to bail, or as a court acting under its general powers in the premises; and that inasmuch as the clerk is not named in the Revised Statutes, §§ 1014, 1015, as an officer authorized to hold to bail, the bond is void. In support of this position many authorities are cited showing how strict the practice was that the *scire facias* must be based on a record showing all the essential jurisdictional facts to support the validity of the proceedings and justify an award of execution. *State* v. *Edwards*, 4 Humph. 226; *State* v. *Austin*, Id. 213; *State v. Cherry*, Id. 232; *State* v. *Smith*, 2 Me. 62; *Bridge* v. *Ford*, 4 Mass. 641; *People* v. *Kane*, 4 Denio, 530; *State* v. *Edgarton*, 7 Rep. 122, (Boston, 1879;) Foster's Sci. Fa. 279.

It is to be observed, however, that in Tennessee, since the above cases, these niceties of practice have been abandoned by legislative direction. Act of 1852, *c.* 256, T. & S. Code, § 5155. By this section "every bond or recognizance deemed good and valid as a common-law bond shall be a good statutory bond, and no defence to any action, or *scire facias*, prosecuted to enforce such bond or recognizance, shall be available unless it would be a legal and valid defence to a suit at common law upon the same." The federal courts are bound, in this matter of taking bail in criminal cases, by the state laws, by express command of the statutes. Rev. St. §§

1014, 1015 and 716; *U. S.* v. *Rundlett*, 2 Curt. 4144; *U. S.* v. *Horton*, 2 Dill. 94, 97. This Tennessee act of the legislature has been construed to be a new dispensation, designed to abolish those "dry technicalities," which were said to have operated as "a judicial pardon of offenders," and to have put statutory bonds and recognizances upon an equal footing with common-law bonds. *State* v. *Quinby*, 5 Sneed, 418.

I think the effect of it is to make this voluntary obligation, however taken, filed in court, to secure the release of one of the obligors, binding, to all intents and purposes, as if taken by a proper officer. I do not wish to be understood as holding that one arrested, and under duress to find bail or stand committed by an officer having no authority to hold to bail, can be lawfully bound to bail upon the judicial determination of an unauthorized officer; but only that, by the operation of this statute, on the agreed facts in this case, this is a voluntary bond, filed of record and accepted by the court having power to take it, and which binds these defendants as if it had been, in all respects, a proper statutory bond or recognizance.

By the influence of the same principle, without any statute, it was held, in *McLean* v. *State*, 8 Heisk. 22, 235, that the approval of a tax collector's bond by a tribunal which had no legal existence, and whose acts were void, did not release the sureties. It was a voluntary obligation, accepted by the state and acted on by all parties, and they would not be heard to say it was taken by an improper officer.

Here the court had power to take a bail-bond and release the defendant; and, while so lawfully in custody before a proper tribunal, he and his sureties executed and filed this bond. It was accepted by the court, or otherwise he could not have been discharged, and after such acceptance and discharge they will not be heard to say that it was not properly acknowledged and approved. This statute was enacted for the very purpose of obviating such objections when made in this class of cases.

But, on the other ground, I am of opinion this defence must fail. It assumes that the clerk acted as a committing

magistrate in taking this bond. There is nothing in the record to show this to have been the case. There is no recital in the bond or elsewhere that the defendant was brought before the clerk for examination and bail by him as a magistrate authorized to hold to bail. He simply wrote at the foot of the bond "signed, sealed, and acknowledged and approved by me," signing his name as clerk of this court, and the bond is indorsed filed by him in the same manner as all other papers are indorsed when filed by whomsoever presented. The bond itself does not show that it was ordered or taken by any officer whatever, but is in the common form, and ample under the statute, T. & S. Code, 5153.

I think the presumption of law is that he acted as clerk, there being nothing to show that he assumed to act as a committing magistrate. The record shows the court was open that day; that defendant was present on trial in court; that there was a mistrial, and the case continued. From all this, and the presence of the bond in the record, it appears by the record that the bond was taken by the clerk under the immediate direction of the court itself. The proof *dehors* the record shows that he did so act in fact. Now it is true the act of February 26, 1853, (10 U. S. St. 163,) in terms, gave the clerks power to administer oaths, take acknowledgments, etc., and that this provision has not been carried into the Revised Statutes. I doubt if that act would authorize a clerk to act as committing magistrate and hold to bail. Recognizances cannot be taken by an officer out of court without a commission or statutory authority. Viner's Abridg., title "Recog. A 13." But they could always be taken in courts by virtue of the inherent power to do so. Id. and Bac. Abridg., title "Bail." And one of the clerks of the enrollment, or a deputy, is to attend the acknowledging, vacating, etc., of all deeds and recognizances. Vin. Ab., title "Recog. A, 15." A clerk has no statutory power to administer oaths, yet he or his deputy may do it. All such acts are done by him in his ministerial capacity, presumably in the presence of the court, and by its express order. *U. S.* v. *Nichols*, 4 McLean, 23; *U. S.* v. *Babcock*, Id. 115.

I have no difficulty in holding, therefore, that, without any statutory authority, the clerk may take the acknowledgment and justify the obligors to a bail-bond when required by the court to do so.

Judgment for the plaintiff.

In the Matter of Lazarus Lissburger.

(*District Court, S. D. New York.* ——, 1880.)

Bankruptcy—Cross Demands for Accommodation Paper Between Bankrupts—Adjustment of—What Provable.

Shipman, D. J. This is a motion to confirm the report of George F. Betts, Esq., to whom reference was made by order, dated March 8, 1876, to ascertain the amount due from Holmes & Lissburger to Henry F. Hamill. Holmes & Lissburger filed exceptions to the report.

In May, 1874, the firm of Holmes & Lissburger and Henry F. Hamill were each large dealers of metals in the city of New York. Each was aware that the other was financially embarrassed and needed assistance to raise money. In that month Hamill applied to Holmes & Lissburger for the loan of their paper, to his order, to the amount of $60,000 or $70,000, and as an inducement to this loan offered to loan them a lot of pig iron and railroad iron, with the right to hypothecate the same for their own benefit. These loans were made. Holmes & Lissburger loaned Hamill $68,000 of their paper, the earliest note maturing September 19, 1874, and he loaned them about 2,000 tons of iron, to be returned, or to be returned in iron of equal amount and value. This iron they pledged to various parties as security for their indebtedness. The notes were not given in payment for the iron, which was treated as a loan to the firm and was entered among their loan accounts. Hamill agreed to pay these notes as they matured, and thus the iron would be, in effect, a security against his default, for Holmes & Lissburger would have the property in their control, with which they could secure themselves for the

payments which they might be compelled to make upon the notes.

Subsequently about 2,000 more tons of iron were loaned by Hamill, more notes were loaned by Holmes & Lissburger, and exchange notes were also loaned between the parties, until on July 29, 1874, the firm had received from Hamill, 3,962 tons of iron, and his accommodation notes to the amount of $109,929.88. Two of these notes, amounting to $11,877.11, were not in existence at the time of the subsequent bankruptcy of the firm, and two more, amounting to $12,213, had been paid to the Shoe & Leather Bank, leaving $85,839.77 due, provable and proved against their estate by various holders for value.

On July 29, 1874, Hamill had received from Holmes & Lissburger their accomodation notes for $167,039.97, of which he subsequently returned $39,809.10. The residue, amounting to $127,230.89, he had indorsed, and had used for his own benefit. Each party had agreed to pay the notes of which they were respectively makers, except the $68,000 as aforesaid.

Hamill suspended payment July 28, 1874, and Holmes & Lissburger stopped payment on the next day. The firm immediately commenced endeavoring to compromise with their creditors, and it became necessary to have an adjustment of accounts with Hamill. The iron had been hypothecated, and was being sold from time to time by the pledgees upon a falling market.

Up to this time no price for the iron had been agreed upon, and the account was, consequently, in a very unsettled state. Lissburger had interviews with Hamill, and it was in substance agreed, on or about August 25, 1874, that the loan should be treated as a purchase for $134,214, its cost to Hamill. It was also agreed that Holmes & Lissburger should, in addition to the $134,214, be charged with all the notes and cash which they had received from Hamill, and be credited with all the notes which Hamill had received and had not returned, or should not return.

The idea that Hamill was to pay the $68,000 notes does not

seem to have been entertained at this time, but all the notes were either then regarded or had been previously regarded as exchange notes. Hamill, on or about the same day, at the request of Lissburger, signed a composition agreement for his debt. Opposite to his signature the debt was entered at "about $134,000," in Lissburger's handwriting. This composition apparently fell through, and about January 9, 1875, a petition in bankruptcy against the firm was filed by Lissburger. Before adjudication, a composition of 15 per cent. was agreed to by a sufficient amount of the creditors in number and value. This composition has been paid to all the creditors, except to Mr. Sinclair, the receiver of Hamill's estate. The estate is confessedly insolvent. From a notice, which was put in evidence, it seems that he was adjudged a bankrupt by the district court for the eastern district of Arkansas, about September, 1876.

Mr. Holmes paid a composition of 15 per cent. upon $85,839.77 to the various holders of the Hamill paper indorsed by Holmes & Lissburger. He also paid the same composition upon $50,968 of the $68,000 notes first loaned by his firm to Hamill. $17,032 of these notes were not used.

In addition to the purchase of the iron, Holmes & Lissburger owed Hamill, at the time of their bankruptcy, $9,024 for cash borrowed. The commissioner states the account as follows:

Holmes & Lissburger,	*Dr.*
To amount of iron purchased, -	$134,214 00
To amount of cash borrowed, - -	9,024 00
	$143,238 00
	Cr.
By payment of notes held by Shoe & Leather Bank, - - - -	$12,113 00
By payment of 15 per cent. on other notes of Hamill, - - -	12,871 34
	$24,984 34
Balance due from Holmes & Lissburger to Hamill, - - - -	$118,253 66

The receiver takes no exception. I think that the commissioner made a clerical error of $100 in the amount paid to the Shoe & Leather Bank, and there is a slight discrepancy between his figures and those furnished to me as correct, of the amount which was paid upon the composition.

The receiver admitted, in his proof of debt, that Hamill promised to pay his own notes at maturity, and that the Holmes & Lissburger notes had been used by Hamill for his own benefit. The Citizens' Bank of Waterbury recovered judgment against Hamill upon some of their last mentioned notes, and upon the proceedings under their judgment Mr. Sinclair was appointed receiver. The errors which are alleged by Holmes & Lissburger are substantially as follows:

1. An error of $68,000 in not deducting that sum from the amount charged to Holmes & Lissburger for the iron, for the amount of notes advanced by Holmes & Lissburger to Hamill, when they received the iron from him, which Hamill had discounted for his own use, receiving the proceeds thereof.

2. An error of $50,000 in charging Holmes & Lissburger with the iron at $134,214, instead of at $84,724.71, its value at the time of the filing of the petition to have Holmes & Lissburger adjudicated bankrupts.

3. An error in allowing the credit for the 15 per cent. paid on Hamill's notes to the amount of $85,808.93, since the proceedings in bankruptcy were commenced, by way of composition, as a reduction of the principal debt on which the composition is computed, instead of allowing it as a payment of so much of the composition itself.

The second error has been disposed of by the findings of fact. In regard to the first alleged error it is to be noticed that the notes for $68,000 were not given in payment for the iron. Like all the other notes, they were accommodation notes loaned to Hamill. By the agreement which was entered into about August 25, 1874, if there ever had been an idea that these notes were to be set off against the iron, that idea was abandoned, and all the notes were treated as exchange notes.

The third error involves a question of law. The rule

seems to have become well established in England, that where two bankrupt parties have each given cross accommodation bills or notes to the other prior to their bankruptcy, which bills or notes have been indorsed, and are outstanding and unpaid at the time of the bankruptcy of such estate, and which have been proven against such estate by the holders, and a cash balance was also due from one estate to the other at the time of the bankruptcy, such cash balance only is provable, and that the outstanding bills or notes, or any dividends which may be paid thereon, cannot be proved by one estate against the other, unless the creditors of one estate have been paid in full and such estate has a surplus. This doctrine was, after argument, in which the hardships of the rule were fully set forth by counsel, declared in *Ex parte Laforest*, Mont. & Bligh, 363, to be the existing English doctrine. The judges based their decision upon *Ex parte Walker*, 4 Ves. 373, which case was substantially affirmed in *Ex parte Earle*, 5 Ves. 833, and in *Ex parte Rawson*, 1 Jacob, 274. The case of *Ex parte Metcalf*, 11 Ves. 404, in which a different principle is recognized or asserted by Lord Edon, does not seem to have shaken the opinion of the court in *Ex parte Laforest*.

In *Ex parte Walker*, Lord Loughborough places his decision upon the ground that if the estate of the accommodation maker should be permitted to prove against the other estate the dividend which had been paid by the estate of the maker, when the note had also been proved by the holder against both estates, the same debt, or a part thereof, would be proved twice, which would operate as a hardship upon the creditors of the estate then paying an additional dividend. In *Ex parte Rawson* Lord Eldon says: "If so much of the account as consists of bills, consists of bills that may be proved against both estates, how is it possible, till the creditors proving them are satisfied, that one estate can make any proof against the other with reference to these bills? How can they be allowed to come into competition with their own creditors?"

The theory of the rule is that the holder of each indorsed note, who presents it as a claim for its full amount against such estate, draws from such estate the full share of the

assets of each concern to which the indebtedness represented by that note is entitled. If the indorser has not paid the note he cannot present it against the maker's estate, but the holder is entitled to the entire dividend. Neither can the indorser present it indirectly by using the dividend which he has paid upon it as a set-off to diminish the assets of the maker's estate. No debt is to be proved twice. So, then, if each of the estates in this case were in bankruptcy, neither could present its unpaid indorsements or the dividends which had been paid thereon against the other. It is true that Hamill's estate is not in bankruptcy in New York, and it is not proved to be in bankruptcy in Arkansas, but the receiver had no right to present against the bankrupt's estate the notes which Hamill had indorsed, because Hamill had paid nothing and was not the owner. If the receiver had paid simply a dividend on these notes to the holders, it would seem that the principle of the English rule would be applicable, and that the amount of the dividend could not be presented against the bankrupt's estate, because the notes had been presented once and had drawn their full proportion of the assets of the estate.

Hamill's claim, then, against the bankrupts' estate was the price of the iron and the cash loaned. The remaining question is, should the composition, being $12,871.34, which was paid upon the notes, amounting to $85,839.77, of which Hamill was maker, be deducted from the composition which is due to Hamill's estate, or should it be deducted, if deducted at all, from the principal of the Hamill debt?

The theory of a composition is that the cash value of the bankrupts' estate is substantially divided among the creditors in proportion to their respective debts. The bankrupts owed to Hamill, and to the owners of the Hamill notes, debts of at least $171,679.54, and showed assets sufficient to pay 15 per cent. thereof, and had agreeed to pay that percentage. Upon the theory of Holmes & Lissburger this obligation is satisfied by the payment of 15 per cent. upon $85,839.77, and by pocketing the other 15 per cent., whereas, by the payment of

the dividend upon the Hamill notes, the indebtedness to Hamill's estate is reduced only $12,871.34.

In this way Holmes & Lissburger pay Hamill's estate nothing for its debt of $85,839.71, and receive full payment from his estate of the set-off of $12,871.34. The question, how much do the bankrupts owe Hamill upon a settlement of accounts, is lost sight of, and the erroneous assumption is made that the 15 per cent. is the entire debt of Holmes & Lissburger, and that it can, therefore, be set off against the entire debt of Hamill's estate.

Again, Hamill's estate is entitled to receive from Holmes & Lissburger its debt, less the amount paid for its benefit by the bankrupts. The theory of Holmes & Lissburger ignores the state of the account between the parties, and exalts the payment of a composition into the payment of a debt, and compels Hamill's estate to receive nothing; not because the indorsers have paid all the notes, and have, therefore, a complete set-off, but because they have paid only 15 per cent. of the debt. If Hamill had paid 50 per cent. upon the $127,230.89 for which Holmes & Lissburger were primarily liable, would it be contended that the composition which they had paid upon the $85,839.77 should be set off against the composition which they were to pay upon this part of their indebtedness to Hamill? In brief, the composition is to be paid upon the balance due to Hamill's estate, simply because Holmes & Lissburger owe that sum, and have no supreme right to receive their side of the account in full.

I am aware of the able opinion *In re Purcell*, 18 N. B. R. 447, and of the great respect which is due to a decision of Judge Choate, but I think that the strong equities in that case against an acceptance of the composition perhaps led the court into the line of reasoning which he adopted.

The exceptions are overruled. The motion to confirm the report is granted.

BRITTON, Assignee, etc., *v.* BREWSTER and others.

(*District Court, S. D. New York.* April 28, 1880.)

FRAUD—OMISSION TO COMMUNICATE FACTS.—Whether omission to communicate a fact will be considered a fraud depends on the circumstances of the particular case and the relations of the parties.

SAME—INSUFFICIENT EVIDENCE.—Evidence upon the question of fraudulent representations considered and *held* insufficient to prove fraud as alleged.

SAME—RIGHT TO RELIEF ON OTHER GROUNDS.—Where the fraud alleged in the bill as the sole ground of relief is not proven, a party is not entitled to relief upon other grounds.

In Equity.

S. A. Bradley and *T. M. North*, for complainant.

J. K. Murray and *J. E. Parsons*, for defendants.

CHOATE, D. J. This is a bill in equity, brought by the assignee in bankruptcy of Theodore E. Baldwin and Edward W. Burr, who constituted the firm of Theodore E. Baldwin & Co., to recover moneys alleged to have been fraudulently diverted from the assets of that firm to pay the individual debts of Baldwin, and also to recover a carriage fraudulently transferred by Baldwin to the defendant Brewster, and to enjoin the proof of certain notes held by the defendants against the firm or Baldwin individually. The defendants are James B. Brewster and a manufacturing corporation, "J. B. Brewster & Co.," of which the defendant Brewster is the president and principal stockholder.

The bill alleges that the firm of Theodore E. Baldwin & Co. was formed on the tenth day of August, 1870, and was adjudged bankrupt November 25, 1871, upon a creditor's petition, filed November 6, 1871; that Burr had no knowledge or experience in the business, which was that of selling carriages at No. 786 Broadway, New York; that from January 1, 1860, to January 1, 1869, and again from March 1, 1869, to December 1, 1869, Baldwin and the defendant Brewster had been in partnership, carrying on a like business upon the same premises; that their business in 1869 had been largely unprofitable, their losses amounting to over $46,000; that

upon the settlement of their copartnership business Baldwin assumed all the indebtedness of the business, amounting to $73,000, and besides that sum was found to be indebted to Brewster individually about $14,000, for which Brewster held his notes; that a part of these notes were transferred to "J. B. Brewster & Co.," with Brewster's guaranty of their payment; that at the time of this settlement Baldwin was largely insolvent, which the defendants well knew, and that on and before August 10, 1870, Baldwin was, to the knowledge of defendants, contemplating the stoppage of business, and an assignment for the benefit of his creditors; that thereupon and in view of these facts the defendant Brewster, "fraudulently combining and confederating with said Baldwin, formed the fraudulent plan and design of inducing said Burr to make a copartnership agreement with said Baldwin, and to contribute to the capital stock of the firm so to be formed the sum of $50,000, upon the corrupt and fraudulent agreement with said Baldwin, and with the fraudulent design and intention that said Baldwin would and should thereafter use said $50,000, and the funds, property and credits of the firm so to be formed, in paying the said indebtedness due from Baldwin to Brewster and 'J. B. Brewster & Co.,' and the said indebtedness of Brewster & Baldwin assumed by Baldwin."

It is then alleged that in pursuance of said fraudulent combination and intention the defendant Brewster falsely and fraudulently represented to Burr that the business carried on by Brewster & Baldwin had been largely profitable, to the extent of over $100,000 a year; that Baldwin was the best man for the business in the city of New York, and that they could make $40,000 to $50,000 a year in the business; and that the defendant Brewster fraudulently advised and urged Burr to go into the partnership and to put in his $50,000, and concealed from him the losses of the last year, and the fact that Baldwin was largely indebted and insolvent, and contemplating an assignment; that Burr, believing and trusting to these representations, made the partnership agreement, and contributed his capital, in all $65,000, to the firm; that in pursuance of the same fraudulent design and conspiracy,

and in violation of the terms of the partnership agreement, the defendant Brewster induced Baldwin to pay to him and to "J. B. Brewster & Co." nearly all of the debts so owing to them from Baldwin, out of the funds of the firm and the moneys so contributed by Burr, and that by these fraudulent practices, and this use of the assets of the firm, it was compelled to stop payment and go into bankruptcy; that to cover up the real nature of these payments the defendants pretended to loan money to the firm on their notes, knowing that the proceeds were to be used for the aforesaid fraudulent purpose.

It is then averred that the defendants have made claims and filed proofs of debt for a large amount against the joint estate, upon certain notes and a check described purporting to be the obligations of the firm; that all of said notes and said check were given by Baldwin in pursuance of the said fraudulent design and intention, and that for one of these notes the defendant Brewster holds a carriage, which was the property of the firm, and was delivered by Baldwin to Brewster as security for Baldwin's individual indebtedness, in pursuance of the aforesaid fraudulent design and intention; that all these acts and all this application of the funds, property and credits of the firm were without the knowledge or consent of Burr, and in fraud of his rights and of the copartnership creditors of the firm, and of the individual creditors of Burr, and of the complainant as assignee.

The bill then prays for relief that these transactions be decreed to be in fraud of the firm and of Burr, and of the firm creditors, and of the individual creditors of Burr, and of the complainant as assignee; that the defendants refund the moneys so paid to them; that the delivery of the carriage be decreed to have been in fraud of the creditors of the firm, and that the complainant recover it or its value; and that they be enjoined from any proceedings in bankruptcy or otherwise touching said notes, and for general relief.

From this recital of the allegations of the bill it will be seen that the whole basis of the suit is the fraudulent conspiracy between Brewster and Baldwin—*First*, to inveigle Burr into a partnership with Baldwin; and, *second*, that being ac-

complished, to divert the funds of the copartnership from their legitimate use, in carrying on its business and paying its debts, to the payment of the individual debt of Baldwin to Brewster.

All the alleged illegal and invalid acts complained of are charged to have been done in pursuance of this fraudulent purpose and design, and the sole ground for relief against them in equity is this alleged fraud. The bill, therefore, very properly avers, and probably necessarily does so, that the diversion of the firm assets complained of was without the consent of Burr. The first question, therefore, to be determined in the cause is whether the complainant has proved the fraud alleged. Upon a careful consideration of the testimony and documentary proofs relied on by his counsel as establishing the existence of this fraudulent design and purpose on the part of the defendant Brewster, I think there is an entire failure to prove the fraud, either in its whole scope as alleged in the bill, or in any part.

The alleged fraud of Brewster in getting Burr into the partnership consists of three parts:

First, statements of matters of facts averred to be false; *second*, concealment of facts, the knowledge of which would, if known, have prevented Burr from going into the partnership; and, *third*, expressions of opinion as to the probable profits of the business of the proposed firm, known at the time to Brewster to be grossly extravagant and misleading. As to the first they were not shown to be false. The proof, on the contrary, is that the business carried on by Brewster & Baldwin had been largely profitable, to the extent of over $100,000 in a single year; that Baldwin was the best man in the city of New York, as a salesman, for carrying on the business; and that their place of business, Broadway, corner of Tenth street, was the best stand for the business in the city of New York. This is a more correct statement of the representations made by Brewster to Burr than that contained in the bill, and they were true in every particular.

The facts claimed to have been concealed were Baldwin's embarrassed financial condition, and the extent of the losses

of the firm of Brewster & Baldwin while that firm did business in 1869. Whether the omission to communicate a fact will be considered a fraud depends largely on the circumstances attending the particular case, and what duty, in respect to the matter in question, the party charged with improper concealment owes to the other party. Brewster undoubtedly had an interest in Baldwin's obtaining a partner with capital, and when the connection with Burr was first proposed he certainly desired, and had reason to desire, its consummation. He knew, also, that in the interviews between himself and Burr that possible partnership was in contemplation, and that the interviews, or one of them, were specially arranged for the purpose of considering this subject.

Assuming, however, that the circumstances were such as called for the communication on his part of any thing known to him which might influence Burr, and which he had any reason to believe Burr was ignorant of or would desire to know—and this, I think, is as strongly as the complainant's case at this point can be put—there is still no proof of fraudulent concealment. Brewster knew that Baldwin and Burr were intimate friends and constantly together; that for several months Burr had been aiding Baldwin financially; that he had obtained from him the preceding April a pledge of a large part of his stock of carriages as security for his loans of some $35,000. He had good reason to believe, and did believe, that Burr knew that Baldwin was, and had for several months been, in financial straits; that he found it difficult to meet his current maturing obligations in his business.

The fact that the business had been poor, and carried on at a loss for the last year, was not concealed from Burr. On the contrary, it was matter of discussion between the parties. In the settlement of their partnership affairs Baldwin & Brewster agreed upon a certain sum, about $46,000, which was treated as the amount of the losses in the business, for the purpose of such settlement. It was not strictly and exclusively losses in business. It included allowances for depreciation in what had been spent on the premises leased by the firm and other matters. The account had been made

up very favorably for Baldwin, particularly in this item of losses, of which Brewster bore two-thirds. In view of these facts, and of Burr's intimacy and close business relations with Baldwin, known as it was to Brewster, I think there was clearly no fraud in not communicating to Burr the details as to the losses of the firm, and as to Baldwin's financial troubles, as he made no special inquiries about them.

In respect to the alleged exaggerated estimates of future profits given by Brewster, it is very difficult to prove fraud in such a matter, since this was the expression of an opinion only, and known to Burr to be so. It was not, however, shown that Brewster did not honestly entertain the opinion that he expressed. The complainant has put in evidence, and relies upon, the private letters of Brewster to Baldwin. It is claimed on the part of the defendants that in some respects these letters do not represent the real sentiments, feelings and opinions which on their face they appear to express; that they were written for a purpose, which required and accounts for great exaggeration of the financial difficulties referred to in them. But the complainant insists that they must be taken as truthful expressions of the thoughts and opinions of the writer. Taking them at his own estimate of their proper construction they abundantly show that Brewster really entertained the most sanguine expectations, fully up to those expressed to Burr, of the probable success of a firm in which Baldwin's great abilities as a salesman should be aided by an amount of capital such as Burr proposed to put into the concern. There was, therefore, no proof of the alleged fraud in inducing Burr to go into the partnership.

It was also shown clearly by Burr's own testimony that the representations of Brewster, whatever they were, were not the operative inducements by which he was led to take this step; that he had made up his mind not to go in, but was induced to change his purpose by the report and advice of his own book-keeper, whom he specially directed to make a thorough examination of Baldwin's books. The complainant's case is equally unfounded as to the other part of this supposed conspiracy and fraud. So far is it from being

proved that the use of the copartnership assets to pay Brewster's debt was without the knowledge or consent of Burr, that the contrary expressly appears by the testimony of Burr himself, who was complainant's witness.

Brewster's interest in having Burr join Baldwin, and furnish capital enough to do a successful business, was that Baldwin might be able to pay off his debt to him. This was perfectly well understood by all parties, and one of the inducements held out to Burr to come in was that if he did Brewster would give up $20,000 of his debt against Baldwin, upon the balance of it being promptly paid. Baldwin was to turn into the concern all his business assets, which were very valuable.

Under the circumstances, which it is unnecessary to detail more at large, it would be absurdly improbable that there should be any other expectation or understanding between the parties than that after the formation of the firm Baldwin should go on and reduce Brewster's debt down to the limit of $20,000 by using the funds of the firm. Burr himself, who is alleged to have been defrauded by this having been done, testified that he expected Brewster to be paid out of the proceeds of the sales of the stock of goods which by the formation of the copartnership was to become its property. He says, indeed, that as between himself and Baldwin he understood such payments were to be charged to Baldwin, and not to the firm. In other words, while he admits that he understood that Baldwin was to be allowed to use the firm's funds to pay Brewster, the firm did not assume as its own Baldwin's debt to Brewster. This qualification is of no importance. It simply affects a settlement of copartnership accounts between Baldwin and Burr. So far as Brewster's rightful or wrongful receipt of the money goes Burr's testimony distinctly negatives the alleged fraud of Brewster upon him or his firm in the receipt of these moneys.

It is, however, urged that by the copartnership articles the debt to Brewster was not assumed, and the copartners were expressly prohibited from using the firm's funds to pay the debts of the individual partners. The suggestion has no

force. The articles constituted an agreement between Baldwin and Burr alone. Brewster was no party to them, and, as is proved, did not know what they contained. The question here is of the agreement between Brewster on the one hand and Baldwin & Burr on the other, and of a fraud practiced by Brewster on Burr. If it was the understanding between Brewster on the one part and Baldwin & Burr on the other that the firm funds, after the formation of the partnership, should be used in a particular way, no agreement between Baldwin and Burr, to which Brewster is not a consenting party, can possibly affect Brewster's right, as against them both, to have the funds so used. Still less can such a secret agreement between them be adduced as proof that such use availed of by Brewster is a fraud upon either of them.

The complainant having failed to prove the fraud is entitled to no relief in this suit. The complainant claims that the debt due to Brewster was reduced below $20,000, and that therefore such of the notes now held by the defendants as represent a part of that original debt should be delivered up to be cancelled. The defendants insist, with better reason, I think, that the debt never was so reduced; that new loans were made from time to time to pay the notes representing this debt, and that within the true spirit and meaning of the agreement the debt has always exceeded $20,000. It is unnecessary, however, to determine this question. If the complainant is right the proper mode of raising the question is by proceedings under the bankrupt law for re-examining the proofs of debt. He can have no relief in this suit, because the fraud alleged as the sole ground of relief is not proven.

So, as to the carriage, if Baldwin exceeded his authority as a copartner in pledging it, and the pledge was without Burr's knowledge or consent, or for any other reason Brewster's claim to it is invalid, the remedy of the assignee is obvious enough. The only claim made in equity in this suit to recover it or its value is the same alleged fraud. Nor can the bill be sustained on the ground that the funds were diverted from an insolvent firm, to the knowledge of the de-

fendants, to pay a partner's individual debt, and, therefore, operated as a fraud on the creditors of the firm. Such seems not to be the scope of the bill. But, without regard to this question, it was not proved that at the time of the payments made the firm was known to the defendants to be or was in such a situation financially that such use of the firm's funds was a fraud upon its creditors. Moreover, the payments, such as they were, having been made in pursuance of an agreement between Brewster and both partners, before the formation of the firm, to remit a part of his debt against Baldwin, the consideration of the payments to be so made out out of the firm assets, I do not see how either the firm or its creditors can claim that the payments were merely voluntary, or without consideration. The consideration enured indirectly to the benefit of the firm, inasmuch as the remission of part of his indebtedness would enhance the credit and financial ability of one of the partners. It is, therefore, unnecessary to consider the legal questions raised and discussed, touching a suit for the purpose of recovering firm assets fraudulently diverted as against its creditors alone.

I have attributed no weight to the evidence offered by the defendants tending to show that the complainant has been actuated by motives of personal animosity in bringing and carrying on this suit. His motives would be immaterial if he had proved a case against the defendants.

Bill dismissed, with costs.

ANIBAL, Assignee, etc., *v.* HEACOCK.

(*District Court, N. D. New York.* ——, 1880.)

ASSIGNEE—RECOVERY OF PROPERTY TRANSFERRED IN FRAUD OF BANKRUPT LAW.—To entitle an assignee in bankruptcy to successfully attack a preference given to a creditor, as being in fraud of the bankrupt law, he must bring himself entirely within the statutory provisions.

PREFERRING CREDITORS.—There is nothing essentially immoral or dishonest in preferring one creditor to another, or in concealing the fact.

SAME—CONCEALMENT OF PREFERENCE.—While it is the doctrine in equity that statutes of limitations, cannot be invoked to carry out a fraud, still such principle has no application to a case under the bankrupt law where a creditor, having secured a preference, keeps the same concealed from other creditors.

WALLACE, J. The demurrer to the bill of complaint must be sustained.

Although one aspect of the bill is designed to present a cause of action for a fraudulent transfer, the facts do not warrant the legal conclusions averred. The transaction disclosed is not fraudulent as to creditors generally, but one by which certain creditors were induced to part with their property by deceit, and for which they can maintain their several actions. If the assignee can recover at all it must be upon the theory that the defendant received a preference as a creditor of the bankrupt. The action cannot be sustained upon this theory, because the preference was received more than two months before the petition was filed against the debtor upon which he was adjudicated a bankrupt. The averments in the bill to the effect that the debtor fraudulently concealed the fact that a preferential transfer had been made to the defendant do not help the complainant. Assuming that the bill shows that the debtor fraudulently concealed the transactions from his creditors, and that the creditors filed their petition in bankruptcy against the debtor as soon as the fraud was discovered, nevertheless the admission that the transfer was actually made more than two months before the filing of the petition is fatal to the assignee's right to recover.

The right of an assignee in bankruptcy to recover property

or its value, which has been transferred by the bankrupt in fraud of the provisions of the bankrupt act, is purely a statutory one. By section 5128 of the Revised Statutes of the United States, as amended in 1874, in its application to involuntary bankruptcy, it is provided that the transfer shall be void, and the assignee may recover the property or its proceeds, when the person who has been declared a bankrupt being insolvent, or in contemplation of insolvency, within two months before the filing of the petition against him, with a view to give a preference to any creditor, makes any transfer of any part of his property to a person who received the transfer having reasonable cause to believe such debtor to be insolvent, etc. It is as indispensable to the right of the assignee to recover that the transfer be one made within the two months, as that it be one made by a person who was insolvent or in contemplation of insolvency. He has no cause of action unless he brings himself within the conditions precedent to its existence.

It is not within the province of a court of law or equity to enlarge or change a statutory cause of action; the court can only interpret and enforce; and I should deem the question presented so plain as not to require further comment, were it not that Judge Dillon, in the *Exchange National Bank of Columbus* v. *Harris*, 14 N. B. R. 510, has decided the same question adversely to the views which I entertain. In that case the learned judge justly remarks that it shocks the moral sense to permit a fraudulent purchaser purposely to conceal his fraud from the world, and then insist that it is too late to pursue him; and he is of opinion that the cases in which courts of equity have refused to apply the bar of the statute of limitations, when the fraud has been perpetrated and concealed by the party who seeks to avail himself of the lapse of time, are analogous and controlling, and his conclusion is that a creditor who has received a preference, and concealed it, cannot insist that it was not received within the statutory time.

The reasons thus given and the conclusion reached would be more satisfactory if the act of a creditor in obtaining a

preference over other creditors were a fraudulent act. Such an act is not fraudulent. Neither is there any legal fraud in concealing the fact that a preference has been obtained. Except for the intervention of the bankrupt act, the legal and the moral right of a creditor to obtain payment of his just debt and keep silent about it, although the debtor be insolvent, is unquestionable. The bankrupt act declares preferences and purchases to be invalid if consummated under certain specified conditions, and when thus consummated they are a fraud upon the act and a wrong in legal contemplation. Unless consummated within these conditions the bankrupt act does not attempt to deal with them. No better presentation of this view of the subject can be found than was made by the same learned judge in *Bean* v. *Brookmore*, 4 N. B. R. 196; S. C. 1 Dillon Rep. 24. After stating that there is nothing essentially immoral or dishonest in the preferring of one creditor over another, and that it was not forbidden by any law in this country previous to the bankrupt act, but that it was designed by that act to frame a system of law one feature of which should secure an equal distribution of an insolvent's property among his creditors and yet protect creditors whose liens ought to be respected, he says: "In this dilemma, congress said we cannot prescribe any rule by which a preference would be held to be morally right or wrong, and it would be fatal to the administration of the law of distribution to permit such a question to be raised. We will, therefore, adopt a conventional rule to determine the validity of these preferences. In all cases where an insolvent pays or secures a creditor to the exclusion of others, and that creditor is aware that it is so when he received it, he shall run the risk of the debtor's continuance in business for four months. If the law which requires equal distribution is not called into action for four months, the transaction, being otherwise honest, shall stand; but if that law is invoked within four months the transaction shall not stand, but the money or property received by the party shall become a part of the common fund for distribution."

The same considerations apply to that section of the bank-

rupt act which declares sales and transfers invalid made to defeat the operation of the act within a specified period before bankruptcy proceedings are commenced.

If this is a correct exposition of the spirit and effect of those sections of the act under which the assignee's cause of action arises, the question when a case is presented is simply whether the transaction in controversy is one which contravenes the conventional rules thus adopted. One of these rules is that the preference shall be one which was received within a designated time before proceedings in bankruptcy were commenced. To hold that if the preference is concealed the time when it was obtained dates from the discovery of the preference, would, in effect, abrogate one of these conventional rules and substitute a different rule.

There is no analogy between a case arising under the sections of the bankrupt act referred to, and those where parties have been denied the right to invoke the statute of limitations as a defence in actions of fraud, until the discovery of the fraud. Statutes of limitations, like the statute of frauds, are defensive statutes. Instead of creating a cause of action, as is done by the bankrupt act, they operate upon existing causes of action, and impose restrictions upon their enforcement intended to prevent fraud.

It is the settled doctrine in equity, and now frequently recognized at law, that such statutes cannot be invoked by a party who has concealed his fraud for the purpose of making his fraud successful. Early in the history of this doctrine courts of equity planted it, upon the ground that the concealment of the fraud gave rise to an equity binding upon the conscience of the party of which equity would take cognizance. The better ground, however, seems to be that rule of interpretation of statutes which requires them to be so construed as to best secure the end in view; and this is the only ground open to a court of law. Speaking of the statutes of limitations, Judge Story says, in *Sherwood* v. *Sutton*, 5 Mason, 143: "It ought not, then, to be so construed as to become an instrument to encourage fraud, if it admits of any

other reasonable interpretation; and cases of fraud, therefore, form an implied exception, to be acted upon by courts of law and equity according to the nature of their respective jurisdictions. Such, it seems to me, is the reason upon which the exception is built."

This principle of interpretation has no application to a statute which is designed to formulate a system of artificial rules to effect a satisfactory distribution of the estates of insolvent debtors. It cannot apply unless Congress intended by the bankrupt act to treat a creditor, who has obtained a preference and concealed the fact, as one who has committed and concealed a fraud, and that Congress did not so intend is very clearly shown by Judge Dillon in *Bean* v. *Brookmire*.

The bill in this case does not show that the creditor took any affirmative action to conceal the fact that he had obtained a preference, and in this respect the case is not so favorable to the complainant as that presented in the *Exchange National Bank of Columbus* v. *Harris*. Upon the rule, however, which obtains when a party seeks to defend his fraud by the statute of limitations, it is held that it need not appear that the concealment was effected by any affirmative action of the defendant, and I have considered the case as though the bill alleged a concealment by the defendant. The consideration, however, that the application of this rule would place a creditor who has received a preference and merely kept silent about it in the position of a party who has committed and concealed a fraud, furnishes another argument against any such interpretation of the bankrupt act as is contended for.

The demurrer is sustained.

ADAMS, Assignee, etc., *v.* MERCHANTS' NATIONAL BANK OF INDIANAPOLIS.

(*Circuit Court, D. Indiana.* April, 1880.)

WAREHOUSE RECEIPTS—INDIANA STATUTE.—The provisions of the act of March 9, 1875, (1 Davis, 1876, p. 927, Ind.) making warehouse recepts negotiable, and an indorsement of such receipts a transfer of the property, *held* not applicable to a transaction where a private warehouseman took out a permit for his warehouse, in class B, and then issued receipts for his own property stored therein.

PLEDGE—WAREHOUSE RECEIPTS.—As against creditors, possession, actual or constructive, is essential to the validity of a pledge. Where a private warehouseman issued receipts for his own property, in his own warehouse, and delivered them as security for his indebtedness, *held*, that the person to whom they were so delivered acquired no title to the property described therein as against other creditors, and, in bankruptcy proceedings, was not entitled to any preference.

BANKRUPTCY—ASSIGNEE.—An assignee in bankruptcy represents all the creditors, and as such may contest transfers binding upon the bankrupt.

SAME—PREFERRED CREDITOR—UNLAWFUL CONTRACT.—The fact that a bankrupt received money or property upon an unlawful contract, under which a creditor seeks a preference, which property went to increase the estate, will not render such contract valid.

Petition in review of order of the district court.

McMaster & Boice and *Judah & Caldwell*, for assignee.

R. O. Hawkins and *Dailey & Pickerill*, for defendants.

DRUMMOND, C. J. In the fall of 1877, Van Camp & Son were engaged in business at Indianapolis, in buying and selling apples and other produce, and in the manufacture and putting up of meats, fruits, etc. They had a storehouse at Indianapolis, where they kept articles which they wished to hold for better prices. At that time they applied to the bank for a loan of $2,000. The bank agreed to make the loan upon the execution of a note by the bankrupts, with certain sureties, and on the condition that they would convert their storehouse into a public warehouse of class "B," by taking out a permit therefor under the statute, and would place the 800 barrels of apples, for the purchase of which they made the loan, in the warehouse, issuing warehouse receipts therefor

to a certain person, by name, the son of one of the firm, to be by him indorsed, and left with the bank as collateral security. This arrangement was carried out, the note executed, with sureties, the apples purchased and placed in the warehouse, for which a permit was taken out, the store being made a warehouse of class "B," and the receipts issued and indorsed to the bank, as provided in the agreement. The son, to whom the receipts were given, had no interest in the property, and had no business connection with the firm in any way. During the time that these transactions occurred the bankrupts kept their general account with the bank, and deposited and drew out money as they received or needed the same; and the note, discounted by the bank, was placed as a credit to their general account.

In January, 1878, Van Camp & Son were adjudged bankrupts by the district court for this district, and the apples, covered by the receipts referred to, together with the other property, came into the hands of the assignee, and were sold by the order of the district court, the proceeds being permitted to remain in the hands of the assignee, subject to the same rights which existed against the property itself. Upon application by the bank to the district court, requesting that a lien might be declared in its favor on the fund arising from the sale of the apples, the assignee was ordered to pay the amount of the note out of the fund in his hands, on the ground that the bank had an absolute lien upon the property for which it held the warehouse receipts. That order the assignee asks to have reviewed by this court, and the question before the court is whether the bank had a priority of lien over the general creditors, as the district court adjudged.

There is nothing in the statement of the case to indicate that the bankrupts used their warehouse, as a warehouse under the statute, in any other way than for the purpose specially intended by the bank. It does not appear that the property of any other person than that of the bankrupts was stored in the warehouse. The case, then, was one where the bankrupts having purchased and taken possesssion of prop-

erty stored it in their warehouse, for which a permit had been obtained, as class "B," and issued receipts for the same, and transferred them, through a third person to whom they were issued, to the bank as collateral security for the loan made.

By the act of March 9, 1875, (1 Davis, 1876, p. 927,) public warehouses are divided into two classes, "A" and "B." Any person or incorporation may keep a public warehouse by obtaining a permit from the auditor of the county in which the warehouse is situated. The warehouse shall continue subject to the provisions of the law until the owners shall file a notice in the auditor's office, renouncing the character of public warehousemen.

Class "A" embraces warehouses in which grain is stored in bulk, and that of different owners mixed together. Class "B" embraces warehouses where property *of any kind* is stored *for a consideration.*

Most of the sections following the first and second, to which reference has been particularly made above, refer to the storing of grain in warehouses of class "A." The fourteenth section of the act declares that receipts for property stored *in any class* of warehouses shall be negotiable and transferable by the indorsement of the warehouse receipts which are to be given for the property stored, and the indorsement of the party to whom the receipt is given shall constitute a valid transfer of the property. The indorsement is to be deemed a warranty that the indorsee has a good title and lawful authority to sell the property named in the receipt.

All warehouse receipts for property stored in warehouses of class "B" are to distinctly state *on their face the brand or distinguishing mark* of the property.

The fourth section of the act provides specifically for the issue of a receipt for property stored in warehouses of class "A." There seems to be no such provision in relation to property stored in warehouses of class "B;" but the fourteenth section of the act speaks of warehouse receipts for property stored in any class of public warehouses, and includes, of course, class "B" as well as "A."

There is nothing to show that the money advanced by the bank to the bankrupts was specifically appropriated in the purchase of the apples covered by the receipts; but they seem to have been paid for as other purchases were, by checks on the bank, drawn on the general account of the bankrupts. Independent of the fact that there is no evidence to show any other receipt issued by the bankrupts, as warehousemen, for property deposited in their warehouse, and of the fact claimed, that these were receipts, given by them, of their own property in the warehouse, substantially to themselves, (the son of one of the bankrupts being merely a nominal party, in whose name the receipts were issued, and who indorsed them to the bank,) the receipts can hardly be considered as valid under the statute. They are as follows: "Received of Cortland Van Camp, subject to his order, and deliverable on return of this receipt, 150 barrels of apples, for storage in fruit house." Signed by the bankrupts, and indorsed by Cortland Van Camp. The other receipts are similar.

Now, the statute of the state in relation to warehouses of class "B," provides for property stored therein "for a consideration," which can hardly be said to be true of the property in this case, as it belonged to the bankrupts themselves, by whom the receipts were issued. And the law also declares that all warehouse receipts for property stored in warehouses of class "B" should distinctly state on their face the brand or distinguishing mark of the property, which these receipts did not state, and so were not within the terms of the statute. I think, therefore, under all the circumstances of the case, they cannot be considered to come within the meaning of the special statute in relation to warehouses of class "B." Indeed, that is hardly claimed by counsel; and so the case must turn upon the general law upon the subject.

If this had been a sale of the property to the bank, and these receipts had been given upon the sale, there would, perhaps, not be so much difficulty about the case. But that is not claimed by the bank, and it is clear from the facts that

there was no sale, unless the circumstances attending the transaction amounted to a sale. In nearly all the cases which have been cited in support of the decree herein the court found that there was a sale of the property. For instance, in *Gibson* v. *Stevens*, 8 Howard, 384, the case proceeds throughout upon the assumption that the party through whom the plaintiff claimed the property had purchased it of the warehousemen, who issued the receipts therefor. It was the case, therefore, of a sale of property for which receipts were given, and in consequence of which the vendors became bailees of the purchasers, and so the title of the property was in the purchasers or in their assignees by virtue of the indorsement of the warehouse receipts.

The case of *Gibson* v. *Chillicothe Bank*, 11 Ohio St. 311, was in many respects like this, and there would seem, from a statement of the evidence, to be strong grounds for the claim that it was a case of mere security, although the contract under which the advances were made and the receipts given in that case are not set forth; but the court found that the receipts were not merely given as security, but that the money was advanced upon an agreement that the title of the property was passed when the receipts were given; and that it was to be held for the payment of the advances made.

In *Yenni* v. *McNamee*, 45 N. Y. 614, the court referred to the difference between the case of a sale of property for which a receipt was given, and one where it was a mere security, distinguishing the case from that of *Gibson* v. *Stevens*, and holding that as the property was held merely as a security, and there was not an absolute sale, it came within the principle of a mortgage of chattels, and, the law of the state not being complied with, it was invalid as against other creditors.

In the case of *Shepardson* v. *Green*, 21 Wis. 539, the owners of coal gave a warehouse receipt to the plaintiff for a certain quantity of coal then in their possession. They treated the coal as their own, and sold portions of it to their customers, appropriating the proceeds to their own use, and afterwards

a third person purchased all the coal which the parties who had given the warehouse receipts then had in their possession. The court found against the warehouse receipts in that case, and the judgment was affirmed by the supreme court on the ground the receipt was given as a security only, and in the nature of a chattel mortgage. There seems to have been a misapprehension by the counsel on both sides in this case as to the effect of the decision of the court in that case.

The question arose in a different form in the case of *Shepardson* v. *Cary*, 29 Wis. 34, where the court intimates (although it was clearly not necessary to the decision of that case, as they held that the former judgment was a bar to the latter) that a warehouse receipt given by a warehouseman transferred the property, and the implication is that if it had appeared in the former case that the parties who gave the receipt were regular warehousemen, that the decision would have been different in *Shepardson* v. *Green*. In *Shepardson* v. *Cary* this language is used by the court, in referring to *Gibson* v. *Stevens* and *Gibson* v. *Chillicothe Bank*, and to *Rice* v. *Cutler*, 17 Wis. 351: "Such relation and the consequent rights and obligations of the parties are held by the decisions just referred to, *even where the sale is made as collateral security for the payment of a debt due from the warehouseman*, not to be affected by the statute regulating the filing of mortgages of personal property, nor by the act concerning warehouse receipts and bills of lading," which language can hardly be said to be justified, as we have already seen, either by the case of *Gibson* v. *Stevens*, or by the case of *Gibson* v. *The Chillicothe Bank;* and *Rice* v. *Cutler* was, like the others, one of sale, and not of mere security.

There may be some question, perhaps, whether the parties, having relied upon a title under the statute of this state in relation to warehouses, can change their ground and rely upon the efficacy, at common law, of the receipts which were given; but, waiving that question, there not having been any actual sale of the apples in this case, in order to render the contract valid as to creditors there must have been a pledge

or a mortgage of the property. As already stated, the bank has not proceeded upon the assumption that there was a sale of the property, but only that it had a lien for the money loaned. There was no pledge of the property, because the possession was not with the pledgee. Possession, actual or constructive, is in general indispensable to the validity of a pledge as against creditors. Neither was there any valid mortgage of the property, because there was no possession in the mortgagee, nor was there, in fact, any written mortgage. If the receipts, and the circumstances connected with them, constituted a mortgage, then it was not recorded, as required by the statute of Indiana. Under the facts, I cannot regard this as anything more than a security given by the bankrupts to the bank for the loan that was made. It therefore was in the nature of a chattel mortgage, and, for the reasons already stated, as such it was invalid under the statute. Undoubtedly this was a valid contract as between the parties, and it is claimed it was therefore valid as against the creditors of the bankrupts, because the assignee, it is insisted, can be in no better position than the bankrupts themselves, he simply being the representative of the bankrupts, and standing as they stood in relation to their rights and equities.

But that I do not understand to be the true rule in cases of this kind. The assignee represents all the creditors of the bankrupts. He occupies as such a different position from that of the bankrupts themselves. This has always been the rule established in this circuit, and I think is the better rule. The reasons for it have been given *In re Gurney*, 7 Biss. 414. They are also stated by Mr. Justice Strong in *Miller* v. *Jones*, 15 B. Reg. 150. The same rule is also laid down in the case of *Allen* v. *Massey*, 17 Wall. 351. If it once be admitted that the contract which is the subject of controversy is fraudulent as to creditors, then, by the express provision of the bankrupt law, it is competent for the assignee to attack it, and to cause it to be abrogated for the benefit of creditors. I think that the assignee has the right of a judgment creditor, where the mortgage or the pledge is invalid in consequence of wanting

any element requisite under the law or under the statute. This is the rule laid down *In re Gurney*, and also in *Miller* v. *Jones*. In the latter case, while admitting there are decisions to the contrary, *Strong*, J., says: "The adjudication of bankruptcy is equivalent to the recovery of a judgment and a levy." It seems to me that any other rule than this would be fatal to the rights of creditors, and would render the bankrupt law in one particular almost entirely inoperative.

It is also claimed, on the part of the bank, that the bankrupts received a considerable fund at the time this contract was made which went to increase their estate, and, therefore, it not being a security given for an antecedent indebtedness, but for money actually received at the time, it ought to be held valid. Undoubtedly there are distinctions between a case where an effort is made to secure or pay a precedent debt, and that where money or property is received at the time by the bankrupt as a part of the contract which is the subject of investigation; but that circumstance alone cannot render a contract valid as against creditors which otherwise is unlawful, because that would enable one creditor to obtain a priority of payment over another; and to hold the contract valid in this case would give the bank a preference over the general creditors of the bankrupt, which ought not to be allowed unless the contract is in all respects valid. This principle is recognized, and the law as to pledges and the rights of an assignee in bankruptcy as the representative of the creditors stated, in *Casey* v. *Cavaro*, 6 Otto, 467.

The result is that the decree of the district court must be reversed, and the bank stand as a common instead of a preferred creditor of the bankrupt's estate.

MOYER and another *v.* ADAMS, Assignee of Stoner & Moyer.

STONER and another *v.* ADAMS, Assignee of Stoner & Moyer.

(*Circuit Court, D. Indiana.* April, 1880.)

HUSBAND AND WIFE—FRAUDULENT CONVEYANCE TO WIFE.—A wife cannot allow the husband to use and appropriate her property as his own for years, and incorporate a part of his own means into it, and then, upon a conveyance of the whole from her husband, make valid claim to it as against his creditors.

Mr. Winter, for appellants.

Mr. Harris, for appellee.

DRUMMOND, C. J. The case of *Moyer et al.* v. *Adams* was a bill filed in the district court by the assignee of Stoner & Moyer to set aside conveyances made on the twenty-fourth of November, 1877, by Moyer to Stephen C. Shank, and by Shank to the wife of Moyer, on the ground they were fraudulent as against creditors. Stoner & Moyer were adjudicated bankrupts on their own petition on May 18, 1878.

It does not clearly appear, by the evidence submitted to the court in this case, at what time Moyer became the owner of the property covered by the conveyance. The inference is that it was not later than 1869. Moyer bought the land with his own money and property. He had sold some real estate belonging to him many years before the bankruptcy, when he was comparatively free from debts, and made a present to his wife out of the proceeds of the sale of the sum of $500, and she took possession of the money and retained it, as she says, about a year. Then Moyer wanted it, and she gave it to him for the purpose of being used in the construction of the house placed on the property, and in which they lived; this must have been as early as 1869. When she gave her husband the money no note or other evidence of the debt was executed to her. There was no agreement about paying any interest. When needing the money, he asked for it to use in building, and she voluntarily gave it to him for that purpose. He says that the deed was made to her to secure her

the $500; that she had insisted upon it before that time, but that he had neglected to have the deed executed. Shank was made use of simply as the channel through which the property was conveyed to the wife by the husband. The house cost between $1,200 and $1,500. The husband says that when he got the money from the wife he was to pay it back to her. Moyer always paid the taxes on the property and the insurance, and seems to have treated it as his own prior to the conveyance made to his wife. The language used by Moyer is as follows: "When I got it (the money) from her I was to pay her back; there was no time set; I just said I would pay her back; no note was given or anything put in writing about it; I never put down in any book that I owed her $500." The property in controversy was worth $2,500 to $3,000.

The case of *Stoner et al.* v. *Adams*, was also a bill filed in the district court by the assignee of Stoner & Moyer to set aside a conveyance made November 6, 1877. The facts that give rise to the controversy in this case are these:

Stoner and his wife were married in January 1859, and the wife, about 1868, received from her father's estate the sum of $600. With this money the lot in controversy was purchased, and the deed taken in the name of the husband, July 14, 1868. Stoner built a house on the lot about three years after it was purchased, for which he paid $1,500 of his own money. This property, when the deed was made to her, was worth about $2,500 or $3,000. He had always paid the taxes on the property, and he resided in the house as his own. He had instructed a real estate agent to offer the house for sale at one time, in consequence of which he became liable to him for a commission, which he did not pay, and for which he was sued, and a judgment obtained against him, which he subsequently paid. No writings passed between the husband and wife in relation to the $600 with which the lot had been purchased. No note was ever given by the husband for the amount, and no agreement was made to pay any interest. It is said by both that the intention was that the property should be conveyed to the wife at the

time of the purchase, which, however, was never done until November 6, 1877, as already stated. The wife says that when the deed was made to her she paid him $20 in money that she had made herself since her marriage. A mortgage had been made on the house and lot for $1,000, which had been borrowed by the husband for the purpose of building the house. They both executed the mortgage. She says for years she had insisted that the property should be placed in her own name before it was done, but that he had put it off from time to time. She says, also, she did not know, at the time, that the deed was made to him, although, of course, she must have ascertained the fact shortly afterwards. The husband had never paid her the $600, or any interest on it.

These two cases were argued as one, and, as they relate to the property of two partners engaged together in trade, who became bankrupts, and, as the facts are somewhat similar, and the same principles are involved in each case, they will be considered together.

Several cases have been cited by the appellant's counsel in support of the deeds made to the wife, but they do not seem to go to the full extent necessary in these cases. In *Parton* v. *Yates*, 41 Ind. 456, the supreme court of this state sustained a deed made by the husband to the wife, where the property had been conveyed to the husband, and the whole consideration paid therefor belonged to the wife; but the court, in that case, laid stress on the fact that no money or property of the husband had become united with the real estate which was the subject of controversy. It is true, there being a balance due as part of the purchase money, the husband had given a note for it, and he and his wife had executed a mortgage on the premises to secure its payment, but it was entirely unpaid, which the court considered an important fact in the case. *Summers* v. *Hoover*, 42 Ind. 153, was a case where the real estate was conveyed to the husband, but the consideration proceeded solely from the wife, and the deed was made to the husband without the wife's consent, and the court intimated, in such a case, the deed to the wife would be valid; but it was clearly, as in the other case, on the ground that

neither money nor property of the husband had entered into the land which was the subject of controversy. In both these cases the property was conveyed to the wife by the husband through a trustee. These are the only cases cited from the supreme court of Indiana which bear any analogy to the case now before the court. In *Catherwood* v. *Watson*, 65 Ind. 576, the supreme court merely decided that, where a tract of land was purchased by the wife with her money, and a deed was taken in her husband's name, there was no resulting trust in favor of the wife as against a judgment and execution creditor who levied on the land, and had no notice of the wife's interest in the land. In *Glidewell* v. *Spaugh*, 26 Ind. 319, the court decided, where a conveyance of real estate was made to one person, and the consideration therefor proceeded from another, that no trust arose under the statute unless there was an agreement without fraud to hold the title for the use of the person paying the purchase money.

The district court, in each of the cases now under consideration, sustained the bill, and held that the conveyances respectively made to the wife were fraudulent as against the creditors of the bankrupts. From that decision an appeal was taken in each case by the wife, and by her husband. I think the decision of the district court was right in each case. The deeds were made to the wife in the fall of 1877, at a time when there can be no reasonable doubt that the firm of Stoner & Moyer was insolvent, as well as each member of the firm. Neither can there be any doubt that these conveyances were respectively made for the purpose of preventing the property from coming into the hands of the creditors of Stoner & Moyer, and so were fraudulent in contemplation of law, unless the fact that some money of the wife entered into the property changed the principle. The supreme court of this state has sustained conveyances made to the wife where the whole consideration was paid by her, where no money or property of the husband became an integral part of the estate conveyed, and where the deed had been taken in the name of the husband; but this is as far as the supreme court has gone. It may be questionable, I think, where the wife has

permitted the real estate to remain for a long time in the name of her husband—has permitted him to exercise apparently the sole control over it, and treat it as his own, with all the *indicia* of ownership, for a series of years, thus holding himself out to the world as the owner of the property, and trading and doing business upon the faith of such ownership—whether we ought, on principle, to sustain a conveyance to the wife under such circumstances; but, however this may be as an abstract principle, if these cases were within the rule established by the supreme court, it would be the duty of this court to follow it as one of property in the state. But these cases now before the court are different from those cited in this: that in each there was a large share of the value of the property, the subject of controversy here, which had been contributed by the husband. In the one case he had purchased the property with his own means, and had merely made a gift to his wife many years before the conveyance was made to her; in the other she had advanced the purchase money out of her own estate, but he had contributed a large share to the value of the property; and in both cases the husband had exercised apparent ownership over the property for many years, traded on it and used it as his own, so far as we know, without any action on the part of the wife in hostility thereto. To allow the wife, under such circumstances as these, to retain the property, or even any part of it, as against creditors, would, it seems to me, be inequitable.

It is true that the law discriminates between the property of the husband and that of the wife, and allows the wife protection in her individual property; but we know how frequent it is for them, although there may be separate property in the wife, to consider it as common, and how often the wife allows the husband to treat her property as his own. A court of equity would go very far, even in such a case, to protect a wife in her individual rights; but it is hardly permissible for her to allow her husband for a series of years to treat the property as his own, and to incorporate a part of his own means in it, and then claim the whole of it as against the creditors of the husband. It is possible that, where the ques-

tion came before a court of equity immediately after the fact, that it might feel inclined to separate that portion of the value of the property which belonged to the wife, and give her the benefit of it in some of the modes within the province of a court of equity; but where so much time has elapsed without action on the part of the wife, and the husband has been permitted for so long to treat property as his own, it would seem to be inequitable, as well as impracticable, to sever the interest of the wife from that of the husband.

For these reasons the decree of the district court in each case is affirmed, with costs.

CRANE and others, Assignees, etc., *v.* PENNY and another.

(*District Court, S. D. New York.* April 27, 1880.)

JUDGMENT—LIEN OF—DORMANT EXECUTION.—Under the laws of New York the lien of a judgment, except as against *bona fide* purchasers for value and subsequent judgment creditors, attaches to the goods and chattels of the debtor from the time the execution is issued to the sheriff to be executed, though no levy is made, and such lien does not become dormant merely by virtue of instructions to the sheriff to delay his levy.

ASSIGNEE IN BANKRUPTCY—TAKES SUBJECT TO ALL LIENS.—An assignee in bankruptcy takes the property subject to all existing liens, and cannot avail himself of a claim that an execution was dormant at the time of the assignment, if the bankrupt could not.

JUDGMENT BY DEFAULT—MOTION TO VACATE—SUBMISSION TO JURISDICTION.—An application by a defendant in an action against whom a judgment by default has been entered, for a vacation of the same, and for other relief, and procuring a stay of proceedings until the hearing and determination of such motion, is such a submission to the jurisdiction of the court as will cure all defects of jurisdiction to the person of such defendant.

FRAUD—WAIVER OF RIGHT TO RELIEF.—Complainant's assignor in bankruptcy *held* to have waived its right to relief on the ground of fraud before its adjudication in bankruptcy.

ILLEGAL PREFERENCE—BURDEN OF PROOF—CREDITOR'S KNOWLEDGE.—The burden of showing that a creditor of a bankrupt has acquired an illegal preference is upon the assignee seeking to avail himself of that fact. He must show, by a fair preponderance of proof, that the debtor

was insolvent, or in contemplation of insolvency, that the security was designed to give a preference, and that the creditor had reasonable cause to believe the insolvency, and knew the security was designed as a preference.

SAME—INSUFFICIENT EVIDENCE TO CHARGE CREDITOR.—Evidence in this case considered, and *held* insufficient to charge a creditor, who had obtained a preference for her claim, with reasonable cause to believe that the debtor was insolvent at the time.

EXECUTION—LIEN—LEVY AFTER BANKRUPTCY PROCEEDINGS ARE COMMENCED.—Where the lien of an execution attached before the filing of a petition in bankruptcy, the fact that the levy was not made until afterwards is immaterial.

Brownell & Lathrop, for complainants.

M. E. Sawyer, for defendants.

CHOATE, D. J. This is a suit in equity brought by the assignees in bankruptcy of the Hudson River Manufacturing Company, a corporation organized under the laws of New York, to avoid and annul certain judgments, executions and levies under the same. The grounds on which it is claimed in the bill that they should be avoided are—*First*, that they were an illegal preference under the bankrupt law; *second*, that they were the means of effecting a fraudulent assignment of the property of the bankrupt under the bankrupt law; *third*, that they were the result of a fraudulent conspiracy between the defendant Emma C. Penny, the execution creditor, and her husband, William G. Penny, who was also the secretary and treasurer of the corporation, to defraud the company; *fourth*, that under the laws of New York the executions were dormant at the time of the levies, and, therefore, that the levies were void; and, *fifth*, that the judgments were opened before the commencement of the bankruptcy proceedings, and were not, at that time, judgments which could support the executions and levies. The defendant Hutton was the sheriff of Rockland county, by whom the levies under the executions were made.

The three judgments in question were recovered by the defendant Emma C. Penny, in the marine court of the city of New York, on the twenty-third day of July, 1877, upon alleged notes of the corporation—one dated May 1, 1875, for

$2,000, payable one day after date; one dated July 1, 1875, for $1,000, payable one day after date; and one dated May 1, 1876, for $2,000, payable one day after date. The summons in each action was dated July 9, 1877, and was served on William G. Penny, the secretary and treasurer of the corporation, at the city of New York, on the tenth day of July, 1877. The complaints were verified July 21, 1877, and the judgments were entered by default. On the twenty-fifth day of July, 1877, the judgments were docketed in the office of the clerk of Rockland county, and on the same day executions were issued to the sheriff of that county, with instructions to levy. On the twenty-sixth of July the attorney for the judgment creditor instructed the sheriff not to levy till he received further instructions. Levies were not made, as to part of the property, till August 28th, and as to the residue till August 31st; the attorney having given instructions to levy on the fourteenth of August, which were countermanded on the eighteenth of August, and not renewed till the twenty-seventh of August. The adjudication in bankruptcy was on the tenth of September, 1877, upon the petition of creditors, which appears, by the official certificate of the clerk, to have been filed on the thirtieth of August, but which the defendants claim was not in fact or in law filed till after the second levy was made, on the thirty-first of August. This difference, as to what is to be considered the proper date of filing, is unimportant, for reasons hereafter stated.

The claim that the executions became dormant by reason of the instructions given to the sheriff not to levy, and that, therefore, the levies are to be considered void as against the assignees in bankruptcy of the judgment debtor, is clearly not well founded. By the statutes of New York the goods and chattels of the judgment debtor are bound by the execution from the time it is issued to the sheriff to be executed, although no levy is made, except as against *bona fide* purchasers for value and subsequent judgment creditors. This lien of the executions is a lien which is preserved by the bankrupt law, if it is existing at the time of the filing of the petition. *In re Hall*, 18 N. B. R. 1; *In re Stockwell*, Id. 144.

An assignee in bankruptcy takes the property subject to existing liens. He is not a purchaser for value, but a volunteer. He cannot, therefore, avail himself of the objection that the execution is dormant, since the bankrupt himself could not do so; nor did the subsequent instructions to the sheriff, not to levy, impair or affect the lien created by the delivery of the execution to the sheriff, if that is to be upheld as a valid lien. *Ferguson* v. *Lee*, 17 Wend. 260; *In re Week*, 4 N. B. R. 364. Nor is there any basis for the suggestion that prior to the bankruptcy the judgments had been vacated, and that the executions and levies must fail on that account.

The only ground for this is that on the twenty-seventh of August, 1877, the judgment debtor applied to the marine court by motion, upon affidavit, to be allowed to come in and interpose a defence in said actions, and for other relief. Upon this application the court granted an order to show cause, with a stay of proceedings under the executions until the hearing and determination of the motion. This stay was modified, however, so as to allow a levy to be made, and the first levy certainly was made before the commencement of the proceedings in bankruptcy. The motion did not come to a hearing till after the bankruptcy. It resulted in the granting of the motion for leave to come in and defend, leaving the judgments, executions and levies to stand as security. Answers were served under the leave so given, which were afterwards struck out as sham and frivolous. There was clearly nothing in this proceeding which affected or impaired the lien of the executions, if that was otherwise valid.

The further point made by the complainants, that the judgments and executions must be set aside as fraudulent in fact against the bankrupt and its assignee, cannot be sustained. It is unnecessary to consider the question raised by the defendants, whether this court would have jurisdiction to decree the nullity of the judgments and executions for this cause, as it is very plain that whatever cause of action of this nature, if any, the corporation had, it waived its right to this relief before the bankruptcy, and its assignees are bound by that waiver. The bill, indeed, puts in issue the existence

of any indebtedness from the company to Mrs. Penny; but the proofs on this point do not admit of any doubt as to the fact that in the years 1875 and 1876 she loaned to the corporation, in three several sums, $5,000, the proceeds of the sale of her house in Brooklyn. Deposits in the company's bank account, substantially corresponding in time and amount with the alleged loans and entries in the books of the corporation, corroborate her testimony to the fact. Slight discrepancies between the checks received from the purchaser and the amounts testified to by her as received, and between the actual sums received by her and her affidavit as to the amounts received, are not such differences as ought to be considered as impeaching her truthfulness. Such mistakes are of frequent occurrence, even with the most truthful persons.

It is insisted, however, that the loan stood merely as an open account for money borrowed; that no notes of the company were given for the loans at the times they were made; that shortly before the three suits were commenced a plan was formed between Mr. Penny, who was secretary and treasurer of the company, and his wife, to obtain for her an unlawful preference over the other creditors; and in pursuance of this plan, and to facilitate it, he, as treasurer, issued to her the notes sued on, dating them back to the times of the several loans, and making them respectively of the amounts not exceeding $2,000 each, so that they might be within the jurisdiction of the marine court of the city of New York, in which court judgment can be obtained in case of default in six days after service of the summons; that in further pursuance of this fraudulent scheme it was arranged that service of the summonses should be made on Mr. Penny, and that the fact of service should be concealed from the other officers of the company, and so that default should be taken secretly and in fraud of the company; that this plan was carried out and the judgments were so obtained by default, and the executions were issued without any knowledge on the part of the stockholders, creditors or officers of the company, except Mr. Penny. If all this were proved the company

would, doubtless, be entitled to some relief on account of the mode of serving the summonses, and the concealment of the proceedings.

The giving of the notes alone could hardly be considered any fraud. It is proved that the treasurer had full authority to manage the financial affairs of the company and to give notes in its name. It would seem to be no fraud upon the company for him to give its notes for loans justly due, for which he might have given notes at the time the loans were made. But his accepting service of summons in his wife's suits, with intent to have judgment taken by default, and the property of the company seized on execution to satisfy the judgment, even for a justly due obligation of the company, appears to be inconsistent with the relation of trust in which he stood to the company. It was a proceeding for his wife's interest, and therefore for his own, which might seriously embarrass the company, and if the fact of the pendency of the suit were communicated to the other officers of the company some arrangement might be made with the creditor suing much more advantageous for the company. On this ground, probably, the court in which the judgments were obtained would, without hesitation, have set aside the service of the summonses as irregular and a fraud upon the defendant, if application had been promptly made for such relief upon discovery by its other officers of the fraud. Perhaps, also, the corporation could have disowned entirely the act of its treasurer, and in collateral proceedings the judgments might possibly have been held wholly void for want of jurisdiction in the court over the person of the defendant, the service of the summons being treated as wholly void. It is unnecessary, however, to determine that question, but such at all events would, as it seems to me, have been the utmost benefit which the corporation could claim from the irregularity. The defect in the judgment was at most a nullity, resulting from want of jurisdiction of the person.

How, then, was the fraud, assuming it to be fully proved, met by the company? The fact that Mrs. Penny had recovered judgment on her claim was known to all the officers within a

few days after judgment was entered. It is true, they did not know that there were three judgments, and may have supposed there was but one. This, however, is immaterial. They knew the principal fact that the claim was in judgment, and if they did not know the details it was because they did not choose to inquire. On the first of August the trustees passed a resolution, reciting that she had recovered judgment, and was designing to enforce payment, and authorizing the president to execute a chattel mortgage in satisfaction of it. It is claimed that this resolution was obtained by fraudulent practices on the part of Mr. and Mrs. Penny, in pursuance of their design to secure her an illegal preference. But on the twenty-seventh of August, after all attempts to negotiate a settlement between the parties had terminated, and before the bankruptcy, the corporation applied to the court for leave to come in, have the defaults opened, and to defend the action, or for such other relief as the court might grant. I think it is impossible to contend that this did not cure and waive any defect in the service of the summons, except so far as that court might, upon this application, make the irregularity the ground of vacating the judgments, and setting aside absolutely, if it saw fit to do so, the service of the summons. It was clearly a submission to the jurisdiction of the court—a consent to receive such measure of reparation of the wrong done as the law, acting through that court, would award them. From the form of the papers used on the application, and the order to show cause obtained, it is, I think, more properly to be regarded as a motion to open the default, and to be let in to answer; in itself waiving, even in that court, all questions of jurisdiction. It seems to have been so understood at the time. But as an application for general relief it may be considered also as a motion insisting on the extreme view of the nullity of the service of the summonses, and the absolute vacation of the judgments; but the prayer was in the the alternative, and, in any view of it, it was a submission to the jurisdiction, for the purpose of having the judgment of that court on the relief to which they

were entitled, including that based on the want of jurisdiction.

I think this proceeding clearly estops the corporation from taking the ground that the judgments are an absolute nullity in any collateral proceeding. The application could not have been withdrawn without leave of the court so as to reinstate the defendant in the position it was in, with respect to the judgment, before the application was made. It was not withdrawn before the bankruptcy. It was afterwards proceeded with to the knowledge and with the apparent concurrence of the assignees, and resulted in the validity of the judgments being established by the decision of the court. It is not necessary, however, to impute any particular efficacy to what was done after the petition in bankruptcy was filed. The corporation was already bound by its election of remedies. If the judgments might have been treated as absolutely void, by reason of the fraud, for want of jurisdiction, it had a right to elect between treating them so and going into the court in which they were rendered as a party defendant therein, and submitting itself to its jurisdiction, and obtaining such relief as it was entitled to there. It chose the latter course, and its assignee is bound by its election.

Thus far it has been assumed that the fraud is proved. I am not satisfied, however, that the notes were given to Mrs. Penny, as claimed, shortly before the suits were brought, and for the purpose of enabling her to bring the actions in the marine court. The notes themselves have nothing on their face to indicate that they were made long after their date. They are written upon blanks in use by the company at the time of their dates respectively, and not in use at the time the suits were brought. Mrs. Penny's testimony is positive that they were given at or about their dates. It is a point on which she cannot be mistaken. I have examined with care the testimony of this witness and of the other witnesses, and while there are certainly some inconsistencies in her statements, and on some points she is seriously contradicted, I have not been able to reach the conclusion, to which the argument of the learned counsel for the complainants ear-

nestly led, that she is entirely unworthy of belief. The only fact seriously conflicting with her testimony on this point is the fact that, in the books of the company kept by Mr. Penny, the notes were not entered. Upon the proofs as to the mode of keeping the books I think this fact is far from being sufficient to overcome her positive testimony of the fact of their receipt by her. The books were not scientifically kept. These loans were evidently regarded, both by Mr. and Mrs. Penny, as an investment in a business which was substantially his regular business. They were not notes which were expected to be paid or provided for upon their due day, or at any particular time. They were more in the nature of loans for an indefinite time, though the notes were, in form, payable in one day after date. This may, not unnaturally, have led to their being differently treated from notes and bills payable, maturing and to be provided for at a time certain. Upon the whole evidence I think the preponderance of the proof clearly is that they were issued at or about their apparent date. There may be ground for suspicion to the contrary, but that is not enough to rest a conclusion upon against the positive testimony of the witness, and the evidence of the notes themselves.

As to the design and purposes of Mr. and Mrs. Penny those matters will be more properly considered in the discussion of the question whether there was an illegal preference under the bankrupt law. As it is found that Mrs. Penny is a creditor, it is unnecessary to consider further the point that the judgments, executions and levies constituted an assignment in fraud of the bankrupt law. That specification in the bill was probably inserted in view of the possibility that the evidence might show that there was no debt due Mrs. Penny, and that the design was to cover up the property of the bankrupt by a fraudulent assignment.

The only remaining question is whether there was an illegal preference within the terms of the bankrupt law. The burden of proof on this point is upon the complainants. They must prove that the security obtained by means of the judgment and lien of the execution was obtained by something

done, on the part of the corporation, which amounts to more than mere passive non-resistance to the enforcement, by judgment, of a valid claim. *Wilson* v. *City Bank*, 17 Wall. 473. They must also prove, by a fair preponderance of the evidence, that the corporation was insolvent, or in contemplation of insolvency, and that the security was designed to give the judgment debtor a preference, and that the creditor had reasonable cause to believe that the corporation was insolvent and knew that the security was designed to be a preference. It is not enough that the creditor *suspects* the debtor may be insolvent. He must have such a knowledge of facts as to induce a reasonable belief thereof. "He may feel anxious about his claim, and have a strong desire to secure it, and yet such belief as the act requires may be wanting." *Grant* v. *Bank*, 97 U. S. 80.

It is unnecessary to discuss at length the testimony upon this issue. It is very voluminous and at some points conflicting. But in several respects the proof adduced by the complainants falls short of what is required to sustain the burden which is upon them. I think it is clear from the testimony that the primary purpose of the defendant Emma C. Penny in suing the company was not to obtain a preference over other creditors, but to have her claim, as to the validity of which one of the officers of the company had in a suit against her husband expressed a doubt, secured or paid, and that this purpose had no reference to any insufficiency of the assets of the company to pay all the debts. It was in June, 1877, that this question was raised as to whether she had loaned the money to the company, and it at once led to her consulting counsel on the proper course for her to pursue. Her husband was also consulted. It was then concluded to wait till after the annual meeting of the corporation, which was to take place on the second of July, the suggestion being made that at that meeting the claim might be in some way recognized by the company or security for it authorized. The matter was brought before the meeting and some discussion was had. The same person who had expressed doubt about it before expressed doubt about it then, and the meeting was adjourned

till the sixteenth of July without completing its business or recognizing Mrs. Penny's claim. The next day Mrs. Penny again consulted her attorney, and it was decided to sue the company on the notes. The actions were commenced on the ninth or tenth of July, and service was made on Mr. Penny as secretary or treasurer, and he did not disclose the fact to any other officer of the company till after the judgments were obtained.

At the adjourned annual meeting, although directly asked by those present if there were any suits against the company, he denied that there were any except one for a small amount for rent. This concealment of the pendency of the actions, considering his relation to the plaintiff, would, it seems to me, amount to such co-operation on the part of the corporation, which in this matter acted by and through him as its officer, as would satisfy the requirement of the bankrupt law, making something more than passive non-resistance necessary. But there was not sufficient evidence either of the insolvency of the corporation, or of the intent to prefer on its part, or of knowledge of such intent, if it existed, on the part of Mrs. Penny. The evidence will not justify the conclusion that the corporation was in fact insolvent. None of the parties in interest seem to have understood or believed that it was not able to go on with its business, or that it had not property enough to pay all its creditors. When the fact that Mrs. Penny had got judgment was known, negotiations were immediately commenced for some amicable arrangement by which she could be secured and the business of the company continued. She proposed to take the property and assume all the debts. This was found impracticable, because the officers other than Mr. Penny objected. The reason they gave was that the property was worth more than the debts, and it would be sacrificing their entire stock. It is evident, however, that another reason was that it would throw the whole business and property into the hands of Mr. and Mrs. Penny, and exclude the other officers from the business. They were, some of them, hostile to Mr. Penny, and they were interested to keep the company alive and partly under their own control,

because its business was their business. It was then proposed that Mrs. Penny should take a chattel mortgage, payable in one year, in satisfaction of her judgments, and that all the other creditors should take notes at three, six, nine, and twelve months, with interest. This plan met the approval of the other officers and trustees, and on this basis negotiations took place between two of the largest creditors and Mrs. Penny. After this plan was proposed, and to promote it, the trustees passed a resolution authorizing the execution of such a chattel mortgage to Mrs. Penny in satisfaction of her judgment. This was on the first day of August.

Interviews followed between the two other creditors, who assumed to act for all the other creditors, and Mr. and Mrs. Penny and Mrs. Penny's attorney. Some modifications were proposed in the plan. One was that in case upon foreclosure of the mortgage there should not be sufficient assets to pay Mrs. Penny and all the other creditors in full, the loss should be borne *pro rata*, in proportion to their several claims. The terms of the arrangement were explained to Mrs. Penny, and seemed to meet her approval. A final meeting was held on the seventeenth of August, at which she was not present, but Mr. Penny and her attorney in the actions were present and assumed to agree to the arrangement for her, and instructions were given to a lawyer at Nyack to draw up papers to carry the agreement into effect. The papers were drawn and were found incorrect and were altered. After several days delay Mrs. Penny finally refused to sign the papers and gave instructions to have levies made under the executions. Then followed the application to the marine court for relief against the judgments, and the actions of the other creditors, in co-operation with the trustees other than Mr. Penny, to throw the company into bankruptcy, in order to prevent Mrs. Penny from realizing any benefit from her judgment. This precipitated the ruin of the company. In what is disclosed by the evidence as to the assets and liabilities of the company up to that time, I fail to find evidence that it was insolvent in such sense as to make a security acquired by a creditor a preference. The statement made at the annual meeting was that

its liabilities were $17,000 and its assets $8,000, exclusive of its factory and machinery, which stood upon its books at $40,000.

In the propositions for settlement with Mrs. Penny, made or consented to by the other creditors, and in what is shown of the opinion of all the parties in interest, there is nothing to show that anybody valued the assets at less than the debts, but quite the contrary. The modification of the proposed agreement, securing a *pro rata* distribution in case of insufficiency of assets, was made with reference to a proposed continuance of the business for a year, subject, of course, to all the chances of business. It showed nothing of any present apprehension of insolvency on the part of Mrs. Penny or the other creditors.

It is claimed that Mr. Penny knew the exact condition of the company; that he knew it was insolvent; that his cooperating in the obtaining of the judgments, his concealment of the fact of the pendency of the action, and his course generally, show that his real purpose was to obtain a preference for his wife; that she is chargeable with knowledge of all that he knew because he was her agent. His action in concealing the pendency of the suits, and in not communicating the fact of the service made on him to the other trustees, is wholly indefensible, of course, but I do not think that the evidence as a whole shows that even his purpose was the obtaining a preference by his wife over other creditors.

There were other motives for his action, to which it can, in my judgment, be more probably attributed. In the first place, I see no reason to doubt that it was the evident hostility of some of the other officers of the company to his wife's claim that induced him to give any assistance that he could, in the first instance, to its being secured by judgment. There is evidence that he was worried in mind by this hostility. He was also, at that time, not well in health. He desired to be continued in office as treasurer and secretary. The disclosure of the facts of the suits being brought might have prevented this, and the readiest way of shutting out all further question as to the liability of the company to her may

well have seemed to him to be, to suffer the judgment to be taken without telling the other trustees. It is also evident that he desired to get rid of the other officers and the stockholders, and he looked upon a possible sale of the property on execution, as a means to this end. He spoke of this to one of the other creditors.

On the question whether he was the agent of his wife in all this transaction, and especially in the negotiation for an arrangement with the other creditors, the evidence is not satisfactory. Giving full credence and effect to the narration of the conversations of Mrs. Penny, as testified to by the witness Crane, I think they do not contain any direct and unequivocal admission on her part that she had committed the whole matter of a settlement to her husband as her agent. Her saying to Mr. Crane that he (Mr. Penny) could do as he liked about it does not, under all the circumstances, amount to such an admission. She undoubtedly was consulting her husband, but she had her own attorney, and was giving him instructions from time to time. She seems, in fact, to have retained a considerable control over her own affairs, and not to have constituted her husband her general business agent, as the complainant's counsel insists. It is, however, of little consequence whether or not she authorized her husband to give her consent to the final arrangement proposed with the other creditors. The only importance of it is as evidence in connection with her subsequent change of purpose, and other circumstances, as tending to show that she had from the beginning been acting an insincere part, and had at the time she acquired her lien been really in pursuit of an illegal preference over the other creditors. Even if she had expressly and unquestionably consented to sign the papers she refused to sign, there would have been in law no agreement which she can be charged with having broken. There was no agreement, because it is entirely certain from the papers themselves, as well as from the testimony, that the agreement, if made, was to be between Mrs Penny on one part, and *all* the other creditors on the other part. Mr. Crane and Mr. God-

frey, who were or represented the largest of the other creditors, had no authority to act for all the creditors.

It is expressly proved that there were several other creditors who had not even been yet spoken to on the subject. No doubt Mr. Crane and Mr. Godfrey acted in entire good faith, and believed that all the others would unite with them; but so long as there remained any who had not given their consent to the proposed arrangement it bound no one, and any one who had consented was, in law, at liberty to withdraw. However censurable in morals such inconsistency on the part of Mrs. Penny may have been, it cannot be said that she broke any valid agreement in refusing to sign the papers. She alleges, in her excuse, that the violent language of one of the other creditors towards her and her claim led her to distrust the good faith of the other party. But, however this may be, I cannot think that this change of purpose on the part of a woman is sufficient to supply the evident lack of proof up to that time of the essential elements of the intent to give and to secure an unlawful preference.

As the lien of the executions attached on their delivery to the sheriff, the fact that the last levy may have been after the filing of the petition in bankruptcy is immaterial. There being no injunction from this court the judgment creditor could enforce her lien by a levy. It is, therefore, unnecessary to determine the question raised as to the true date of filing the petition. On the whole case the complainants have failed to prove the allegations of their bill.

I have not referred in this opinion to all the evidence, nor to all the able arguments of counsel upon the evidence, but both have been carefully considered.

Bill dismissed, with costs.

WARFORD, Assignee, etc., *v.* NOBLE and others.

(*Circuit Court, D. Indiana.* March, 1880.)

WIFE—RIGHTS IN LAND OF HUSBAND—INDIANA STATUTE—EFFECT OF BANKRUPTCY.—The statutes of Indiana providing that the wife shall, upon the death of the husband, have a one-third interest in all lands of which he is seized during coverture, and one-third interest in all equitable rights in lands he may have at the time of his death, and that in all cases of judicial sale her inchoate interest, unless ordered sold or barred by the judgment of the court, shall become absolute the same as in case of the death of the husband, and the supreme court of that state, having declared a deed to an assignee in bankruptcy, is in effect a judicial sale. *Held*, that the wife, upon the bankruptcy of the husband, became the owner of one-third of his equitable interest in certain school land purchased from the state.

Appeal from district court.

Mr. Claypool, for appellant.

Mr. Norton and *Mr. Roberts*, for appellees.

DRUMMOND, C. J. This is a bill filed by the assignee of William F. Noble for the purpose of removing a cloud from the title of a certain tract of land of which the bankrupt was the owner at the time the petition in bankruptcy was filed.

It is alleged in the bill that Mrs. Noble, the wife of the bankrupt, claims an interest in the land by virtue of her marriage with the bankrupt, and claims that the act of 1875, when the property was transferred to the assignee, operated upon it so as to make her interest in the land absolute.

The law of Indiana in relation to the right of the wife to the estate of which her husband was seized during marriage, and in which he had an equitable interest, was as follows: "A surviving wife is entitled to one-third of all the real estate of which her husband may have been seized in fee-simple at any time during the marriage, and in the conveyance of which she may not have joined in due form of law; and also of all lands in which her husband had an equitable interest at the time of his death."

With that law in force the act of March 11, 1875, was passed, which declares "that in all cases of judicial sales of real property, in which any married woman has an inchoate

interest by virtue of her marriage, where the inchoate interest is not directed by the judgment to be sold or barred by virtue of such sale, such interest shall become absolute, and vest in the wife in the same manner and to the same extent as such inchoate interest of married women now becomes absolute upon the death of the husband, whenever, by virtue of said sale, the legal title of the husband in and to such real property shall become absolute and vest in the purchaser thereof, his heirs and assigns, subject to the provisions of this act, and not otherwise."

The property of the bankrupt having been transferred under the bankrupt law to the assignee, that has been declared by the supreme court of this state to be a judicial sale within the meaning of this act of the legislature, and so the act operates upon the interest which the husband may have had in real property. The difference between the interest which the husband has is that where he is seized of real estate the right of the wife cannot be divested without her consent. When he has merely an equitable interest in land he has the right to dispose of it at any time during his life. At the time of the bankruptcy, the bankrupt had an equitable interest in a tract of land in the county of Hamilton, in this state. It was a tract of school land, which had been sold in conformity with the laws of this state, and a certificate of purchase had been given, which had been transferred by the purchaser to various parties, and finally had come by purchase into the possession of the bankrupt. Under the law of this state he had taken possession of the property, and had resided on it for a considerable time. The purchase was originally made in 1839. There was due upon the certificate of purchase, in order to consummate the title in the bankrupt, $700, which, of course, before a perfect title could be obtained, must be paid, and the bankrupt having this equitable interest, the assignee made an application to the court for leave to raise the necessary amount to pay what was due. This was granted, and the money was raised, and the balance due on the land was paid by the assignee, thus entitling the purchaser or who-

ever had the right under the certificate to a perfect title to the land from the state.

The contention on the part of the wife is that by virtue of the act of 1875 her right became consummated, the property having been sold under a judicial sale, and that is the question involved in the case. I think, under the general law of this state, that she is entitled to one-third of the interest which her husband had in this property at the time of this judicial sale, precisely as though he had died. And in this respect I differ from the district judge.

What does the language mean? "In all cases of judicial sales of real property in which any married woman has an inchoate interest by virtue of her marriage." The district court thought the term "inchoate" was one applicable to a case where the husband had an absolute title, a complete seizin, in the land, and that it did not apply to a case where there was merely an equitable interest, because in the one case the right of the wife could not be divested without her consent, and in the other it was in the power of the husband at any time to deprive her of her right; the language of the statute being express that she is only vested with the right to an equitable estate which her husband may own at the time of his death. But I am inclined to think the term is applicable to both kinds of estate—as well to the equitable interest as to the absolute interest in fee simple. Does it cease to be an inchoate interest simply because the husband has the power of disposition over the land? I think not. It seems to me that where a married man has an equitable interest merely in land, that under the general law of this state, and within the meaning of this particular statute, it may be truly said that the wife has an inchoate interest in the land by virtue of her marriage, because if the husband retains that interest up to the time of his death the inchoate right becomes consummated. The only qualification is that he can deprive her of the right by disposing of the land.

Now, the statute of 1875 intended to place the rights of married women upon the same footing, in case of a judicial sale, as if the husband had died. An inchoate interest means

an imperfect interest—one that is begun and not completed. Take the case of those states where the wife has only the right of dower in land of which the husband dies seized, and of which he has the absolute title: it has always been considered in such cases that although the husband can deprive the wife of her right of dower by disposing of the property, still her right has been admitted and called an inchoate right of dower. And so in this state the right which the wife has in lands—an inchoate interest, as it is called—in any equitable claim which the husband may have, although he can deprive her of it, still it is an interest which becomes vested and complete if the husband dies holding an equitable claim, or if disposed of by judicial sale; and it seems to me to be the duty of the court to give a liberal construction to these statutes for the benefit of married women. The law of this state does not give dower to the wife in the ordinary meaning of the term; that is to say, it does not give a life interest in one-third of the real property of the husband, but gives her an absolute estate in one-third of the real estate of the husband, in the manner heretofore stated.

This case is a strong illustration of the propriety of such a construction. This is a case where the husband took possession of the property with the wife, remaining on it for many years, cultivating it and making it their home, and yet if the wife has no interest in the land she is deprived of what would be her ordinary right under the law of this state.

There is another question proper for the court to consider, and that is the fact that this was a case of bankruptcy, where, in one sense, it may be said that the whole estate which the bankrupt owned belonged to his creditors, and inasmuch as it was necessary to raise out of the assets of the estate a sufficient sum in order to pay the balance which was due, and that belonging to creditors, it should go for their benefit.

There is a law of this state which provides that if the husband shall have made a contract for lands, and at the time of his decease the consideration in whole or in part shall not have been paid, but after his death the same shall be paid out of the proceeds of his estate, the widow shall have one-third

of said land in the same manner as if the legal estate had vested in the husband during the coverture; and it may be said, I think, with a great deal of force, that this judicial sale, being substantially the same thing, so far as the rights of the wife are concerned, as the death of the husband, that the right of the wife in a case like this should be protected in the same way as if the husband had actually died, and the proceeds of the estate had been used for the purpose of paying any balance that might be due.

In this case the balance was paid out of this very property; that is, the money was raised out of this property by the assignee, and it may be said, I think, that the wife ought to contribute her quota, or it should be deducted from the amount which has to be paid. In other words, she should bear her proportion of the share which is due on the property; but that, of course, can be arranged in the settlement of the various questions that exist in this case. If the property shall be sold, the proceeds will be held for the benefit of the creditors of the bankrupt's estate, and also for the benefit of the wife, so far as she may be entitled to protection under the law.

The decree of the district court will be reversed, and a decree prepared in conformity with the opinion of this court.

COLLENDER *v.* GRIFFITH & CO.

(*Circuit Court, S. D. New York.* May 4, 1880.)

BILLIARD TABLES — DESIGN PATENT — SUBSEQUENT MECHANICAL PATENT.—A design patent for a particular style of billiard table, granted more than two years before a mechanical patent for a similar table was issued, does not render the latter void.

SAME—BEVELLED SIDES—UTILITY.—A billiard table having the broad side rails bevelled or inclined inward, so as to give the player opportunity to get his knee under the table, and so constructed as to be cheaper than the curved or ogee form, has sufficient utility to support a patent.

SAME—EVIDENCE SHOWING PRIOR USE.—Evidence in this case showing that tables similar to those described in the patent were in use in this country many years prior to the patent, the bill is dismissed.

George Harding and *H. D. Donnelly*, for plaintiff.

Dickerson & Beaman, for defendant.

BLATCHFORD, C. J. This suit is brought on re-issued letters patent granted to the plaintiff June 1, 1875, for an "improvement in billiard tables," the original patent having been granted to him, as the inventor, December 23, 1873. The specification says:

"Previous to my invention it has been customary, in the construction of billiard tables, to form the body of the table with vertical sides, extending downwards from lines a short distance within the outer edges of the cushion rails, or with what are generally designated as straight or vertical side rails; and, previous to my invention, nearly all billiard tables manufactured and used in this country have been made according to this plan. A great variety of designs in the finish and ornamentation, and in the shape of the legs, have been devised and carried into use, and many and great improvements, in the past few years, have been made in the construction of the beds, cushions, and details of the table, for which numerous patents have been granted to me and to other billiard table makers, until nearly all the requisites of a perfectly working and unique apparatus, or machine, appeared to have been attained; but one serious inconvenience and disadvantage still remained, in the shape of the body of the table. It was necessary, on account of the weight of the bed, and to provide for a sure and lasting support of the same, to have the side rails, or the body of the table, of considerable depth; and their arrangement in vertical planes, extending downward the requisite distance, has proved a source of great disadvantage to the player, in preventing him from assuming a position with his leg nearest the table, by which he might be enabled to place and conveniently hold his bridge hand as far over on the bed table, or as far away from the cushion, as possible, in the execution of shots in which the cue ball rests far from the cushions, and thus avoid the use of the bridge, which, to most players, is objectionable, and which it is of great advantage to dispense with as much as possible.

"It had also been customary, previous to my invention, to

make billiard tables with the sides of the body run under, somewhat after the fashion of what are known as 'French' tables or 'ogee' tables; but in all this kind of tables the sides or broad rails have been so formed and so arranged relatively to the extreme upper edge of the table, or to the edge of the cushion rail, that the lower part of the sides, or that portion likely to be on a level with the bended knee of the player, obstructed the advance leg of the player; besides which objection the legs of the table were not placed far enough under to be always entirely out of the way of the players' feet, and the curved or ogee form of the sides rendered the manufacture of such tables very expensive. My invention has for its object to overcome all these objectionable features in the structure and form of the table, and to provide a billiard table which, while it shall be equally as strong and durable in construction as either of the kinds heretofore made, and equally as desirable in all other respects, shall embody the great advantage of having its broad rails (or the lower portion of its sides) and feet so located as to be always entirely out of the way of the legs and feet of the player, and so as to permit the player to place his bended knee as far under the cushion rail and table bed as may be necessary to effect the placement of his bridge hand as far as possible from the cushion, and, at the same time, properly support his center of gravity or maintain his equilibrium; and to these ends and objects my invention consists in a billiard table in which the broad rails are so bevelled or inclined under, and so arranged with the cushion rails (or edge of the table) and the table bed, that while the latter shall be properly supported the broad rails shall always be out of the way of the player's bended knee, as will be hereinafter more fully explained.

"To enable those skilled in the art to make and use my invention I will more fully explain the construction and operation thereof, referring by letters to the accompanying drawings, in which figure 1 is a side elevation, and figure 2 a vertical cross section of a billiard table, made according to my invention. The bed B, the cushion rails C, with their

attached cushions *e*, and the legs *a*, which support the body of the table, are all made in about the usual most approved manner; but the side rails, *f*, or sides of the body of the table, are made and arranged, as seen, in an oblique, in lieu of the usual vertical, or nearly vertical, position, their upper edges being located as far under the table, and away from the cushion rails, as they can be placed, and afford a proper support to the edges of the slabs composing the bed.

"The figure represented by the body thus formed is that of an inverted frustrum of a pyramid, instead of being about rectangular in its appearance, as in most of the tables heretofore made. The sides, *f*, should be bevelled or inclined inward, as they descend from the cushion rails or under side of the bed, at about an angle of from 30 to 40 degrees, or quite sufficiently to permit the player to place his leg in the proper position for reaching as far as possible with the bridge-hand, but no further than is necessary for this purpose; because, if the angle or flare be increased, the structure is proportionately weakened, the capacity of the body or plane to sustain vertical strain being lessened as such inverted frustrum-mural frame is flattened out. At figure 2 I have illustrated part of a player's figure, to show the convenient and advantageous position which the player may assume in playing, and which position it would be utterly impossible to assume were the sides, *f*, extended down in the usual manner, about vertically.

"It will be seen that the bevelling of the sides or broad rails of the table, as shown and described, permits the player to so extend his bended knee under the table, and so place his foot and posture himself, as to maintain his equilibrium perfectly while reaching over the table to make his bridge; and that the arrangement of the bevelled sides with the bed and cushion rails, as shown and described, renders the support of the bed as perfect, and the whole structure as durable, as in tables made with the old-fashioned vertical broad rails. Any one skilled in the art appreciates the importance of affording the best possible support to the bed throughout the whole extent of the plane of the table, so that it will not get out of level. It will also be seen that while, in a table made

according to my invention, the body will be equally as strong as, if not stronger, (with the same amount of material,) than a table made the old way, by the convergence of the sides, *f*, as they descend, the legs, *d*, are brought further under the table, and more out of the way of the player's feet. The construction of such a table as herein shown and described is no more expensive than one with the vertical sides, and may be ornamented and elaborated to the same extent that other tables can be, while at the same time the inclination or obliquity given to the sides, and the consequent location of the legs further under the table, give to the whole machine or contrivance a lighter and more beautiful appearance.

"It will be understood that the angle of inclination of the sides, *f*, may be varied somewhat from the position or inclination shown, without departing from the spirit of my invention, the gist of which rests in the idea of having the planes of the broad rails, *f*, so inclined or bevelled under as to permit the placement of the player's leg and foot as I have explained, and so combined and arranged with the bed and cushion rails of the table as to afford the most effectual and permanent support of the bed by the said broad rails. I am aware, as I have already remarked, that previous to my invention what are commonly known as French tables have been made and used; but my invention should not be confounded with any such construction of table, which differs materially from my improved billiard table in these essential and material particulars, among others, viz.:

"*First.* In the French (or ogee) tables the sides of the body, or those parts corresponding to what are called in American tables the broad rails, were so combined and arranged with the cushion rail and bed that the lower portions of the body (that part on about a level with the bended knee of the player) were not located any further under the table, and out of the way of the player, than were the lower portions of the bodies of the old-fashioned, vertical-sided American tables.

"*Second.* On the French tables the curved form, or the ogee shape of the body, rendered the cost of the construction so great that the manufacturer of such tables could not compete

with the manufacturer of either the plane vertical-sided tables or my improved bevel tables."

The clause is as follows: "In combination with the bed and projecting cushion rails, the bevelled sides or broad rails *f*, the whole constructed and arranged substantially in the manner and for the purposes described."

Infringement is proved and is not contested. The defences insisted on are that the patent is invalid because the plaintiff was not the original and first inventor of the combination claimed in the patent, because the same invention was described by him in a prior patent, and because the invention claimed was not, in itself, a patentable invention. The original patent of December 23, 1873, was applied for January 16, 1872.

On the sixth of June, 1871, letters patent were issued to the plaintiff for a design for a billiard table. The specification says: "My invention relates to a new shape and design for billiard tables. Previous to my invention billiard tables have generally been made with the sides to extend down vertically from the lower side of the rail. In this shape, since the body of the table has to be rather deep to give strength to it, it is rather inconvenient for the player to get his leg in a position which will enable him to reach over the table, and hence this form of construction is objectionable. This objection has, I believe, been partially overcome by a design of some of the French tables, the deep side pieces of which run downward in a sort of ogee form; but this shape, composed of curved surfaces, renders the cost of manufacture of the table much greater than is compensated for by the advantage of greater convenience to the player. I propose, by my design, to overcome the difficulty found in the shape of body or sides, as the tables have been generally made, and render the design and appearance of the table much handsomer; while, at the same time, the cost of manufacture shall not be increased at all. In the accompanying drawing I have shown, in elevation at figure 1, and in vertical cross section at figure 2, a table of my new design or shape. In the drawing, A is the body or main frame of the table; B, the bed; *c*, the

cushion rails; *d*, the legs; and *e*, the cushions; all of which are made about as usual, except that the main frame is made so that the sides of the body of the table run under or flare at about an angle of 30 or 40 degrees, as shown at *f*. The inclined sides, *f*, it will be seen, are perfect planes, so that the expense of getting out the stuff and putting together, and the veneering, is no more than in the manufacture of the vertical sided tables now generally made. The inclined or flared sides, *f*, may be ornamented, panelled, etc., to any desired extent. By reference to the figure drawn at figure 2 it will be seen that the player can so extend his leg under the table, when made as shown, as to enable him to reach further over the bed, which is a great convenience, and enables the player to easily reach many shots, which, on the table as now made, have to be played with the bridge."

The claim is in these words: "The design for billiard tables, as herein shown and described."

The specific defence set up in the answer, in connection with the design patent, is that the invention patented by the mechanical patent was described in the design patent before it was invented by the plaintiff. What exact defence is intended by this statement it is difficult to see. In argument it is contended for the defendant that, as the mechanical patent was issued December 23, 1873, more than two years after the issuing of the design patent, which was issued June 6, 1871, the mechanical patent is void because the original mechanical patent describes and claims the same thing which is described in the design patent. The application for the mechanical patent was filed January 16, 1872. The statutory defence allowed by section 61 of the act of July 8, 1870, (16 U. S. St. at Large, § 208, now § 4920 of the Revised Statutes,) is that the thing patented "had been in public use or on sale in this country for more than two years before the patentee's application for a patent, or had been abandoned to the public." No such defence is set up in the answer, nor is any such defence proved by the evidence. The fact that the original mechanical patent was issued more than two years after the design patent is of no importance. The claim

of the design patent is a claim to shape. The claim of the re-issued mechanical patent is a claim to a mechanical combination. The shape of the structure may be the same as the shape in the design patent, but the subject-matter of the two claims is not the same. The shape covered by the claim of the design patent may be attained without following the mechanical combination claimed in the re-issued mechanical patent.

It is apparent, from the evidence, that there is sufficient utility and advantage in the structure with the broad side rails made of bevelled or inclined planes, in the way of cheapness of construction, as compared with a curved or ogee form, to support the patent. For the same reason the prior structures, which did not have the broad side rails made of bevelled or inclined planes, but had them curved or ogee in form, are not an anticipation of the claim of the re-issued mechanical patent. But the evidence of Daniel D. Winant and of Strong V. Moore is sufficient to show the prior existence of billiard tables containing the combination covered by the plaintiff's re-issued patent. I refer to the bevelled tables which Winant says he repaired in New York, and which were imported tables, and were made like any other table, except that the broad rail was bevelled, the cushion rail projecting over the bed of the table, and the bed projecting over the frame. I refer also to the billiard tables constructed like the defendants' infringing tables, which Moore saw in New York nearly 50 years ago, the broad rail being a straight bevel, made of flat plank and veneered. These former tables appear to have gone out of fashion, and been replaced by the vertical-sided tables, and then to have come into repute again. It is apparent, from the evidence, that in these former tables, so testified to by Winant and Moore, not only did the bevelled plane of the broad rails place the broad rails and the legs out of the way of the player's knee, but the arrangement of the broad rails with the cushion rail and the table bed was such that the table bed was properly supported, the cushion rail projecting over the bed.

I do not deem it necessary to refer to any of the testimony

as to other prior tables, or as to drawings of prior tables, as it results from the foregoing considerations that the bill must be dismissed, with costs.

BICKFORD *v.* LAPORTE.

(Circuit Court, D. New Jersey. May 4, 1880.)

PATENTS—KNITTING MACHINES—WANT OF NOVELTY—INFRINGEMENT.—Certain patents of complainants for "improvements in knitting machines" considered, and *held* not void for want of novelty, and that certain machines manufactured by defendants were infringements thereon.

On Bill, etc.

Frost & Coe, for complainant.

H. W. Isaacson, for defendant.

NIXON, D. J. This suit is brought for the infringement of four several letters patent, issued to the complainant, for "improvement in knitting machines." The first is numbered 68,595, and dated September 10, 1867; the second numbered 162,886, and dated May 4, 1875; the third and fourth are re-issues, dated May 11, 1875, and numbered, respectively, 6,423, 6,424; the original of the first-named being numbered 80,121, and dated July 21, 1868, and the second numbered 92,146, and dated July 6, 1869.

The bill alleges that the inventions claimed in said letters patent are of such a character that the same are capable of conjoint as well as separate use, and that the defendant is infringing by using them conjointly, and not separately, on knitting machines.

The defendant, in his answer, denies—(1) the alleged infringement; (2) the novelty of the complainant's patents; (3) the validity of the two re-issues, claiming that they included more than was specified or revealed in the original patent.

The third defence, as to the re-issues, may be disposed of at the outset. The defendant has not thought proper to put into the case the two original patents, and hence the court has no means of determining whether the re-issues contain other

and different features or not. The legal presumption is always in favor of the re-issue, and that it is for the same invention as the original; and the defendant not furnishing the court with the means and opportunity of deciding the question by a comparison of the two, it must be held that this branch of the defence has failed, and that the complainant is entitled to hold, and to carry back to the respective dates of the original patents, all that the re-issues claim.

This may have an important bearing upon that part of the defence, which relates to the priority of invention by other patentees; for, not including the distinctive claims of the complainant's patent No. 162,886, all his other patents anticipate inventions which are subsequent to the month of July, 1869.

1. *As to the infringement.* The essential parts of the patents of the complainant, when embodied and combined in a working machine for knitting, show a needle cylinder, in combination with a cylinder carrying cams, which actuate the needles, and a sliding ring to which the yarn carrier is secured, together with a ring clasp for keeping the needles in position. A machine (Exhibit E) was put in evidence which was constructed in accordance with the claims of his several patents. It consisted of a stationary needle cylinder, grooved to hold the needles in a vertical position. Around this was a rotary cylinder, with a portion of its periphery formed with a projection, on which the heels of the needles rested. To this cylinder were attached the actuating cams, which operated on the heels or butts of the needles, and which accomplished the knitting by the alternate elevation and depression of the needles.

The defendant also brought in machines (Nos. 24 and 25) to show what he was manufacturing and selling. Being requested by his counsel to point out in what respects they differed from the Bickford machine, he replied that in No. 24, instead of the swing cam, he used a curved piece of metal, secured to the cylinder, the ends of which projected above the needle rest; and that in No. 25 he used the swing cam similar to those in the Leech machine; but, instead of employing

the butts of the needle to lift the end of the swing cam up to free the latch, the yarn carrier had been adapted to effect the same object; and to throw down the swing cam a simple weight had been attached to the end thereof and used for the purpose.

It is quite obvious that these changes are merely equivalents of the complainant's devices, and that their use is an infringement on the claim of his patents.

2. *As to the want of novelty.* Among the large number of patents which the defendant exhibited to prove the lack of novelty, it is remarkable that many of them are younger than the complainants', and there is no evidence that the date of the alleged inventions was earlier than the date of the respective patents.

At the hearing the counsel of the defendant seemed to rely chiefly upon three machines, which he produced, and which are known as the Lamb machine, the Leech machine, and the Franz & Pope machine. They were exhibited as showing machines made in accordance with letters patent of prior date to some of the patents of the complainant, and as anticipating his inventions.

The defendant, on his cross-examination, admits that the Lamb machine is not circular, but has a straight bed for the needles and cams, and that it cannot make a circular web without using both sets of needles and cams.

In reference to the Franz & Pope machine the defendant proved, on the cross-examination of the complainant, that the complainant in fact made the identical model which accompanied their application for letters patent as early as the latter part of the year 1867, or the beginning of 1868.

As to the Leach machine: Mr. Leach, also, was in the employ of the complainant at the time he made his model for his patents, and the date of his patents is long after the date of the complainants.'

I am of the opinion, also, that the defendant has failed in his defence of want of novelty, and there must be a decree for the complainant.

ROSENBACH v. DREYFUSS and others.

(*District Court, S. D. New York.* April 28, 1880.)

COPYRIGHT—GIVING FALSE NOTICE OF.—Section 4963, Revised Statutes, imposing a penalty for impressing a notice of copyright upon books, etc., for which no copyright has been obtained, is only applicable where such notice is so impressed or inserted in an article copyrightable under section 4 52, Revised Statutes.

SAME—SUBJECT OF—PATTERN PRINTS OF BALLOONS.—Prints of balloons and hanging baskets, with printing on them for embroidery and cutting lines, showing how the paper may be cut and joined to make the different parts fit together, and not intended as a mere pictoral representation of something, are not copyrightable.

SAME—PLEADING—COMPLAINT.—Where an article mentioned in the complaint for falsely using a notice of copyright may or may not be within the statute, it should be averred to be within it. It must appear that defendant *is* liable if the complaint is true, not merely that he may be.

J. A. Koons, for defendant.

Chittenden & Fiero, for plaintiff.

CHOATE, D. J. Four actions between these parties have been consolidated, and the plaintiff has served amended complaints, stating separately the causes of action originally set forth in the several complaints. The suits were all for penalties under Rev. St. § 4963, which is as follows: "Every person who shall insert or impress such notice, or words of the same purport, in or upon any book, map, chart, musical composition, print, cut, engraving, or photograph, or other article for which he has not obtained a copyright, shall be liable to a penalty of $100, recoverable, one-half for the person who shall sue for such penalty, and one-half to the use of the United States."

The notice referred to is the following: "Entered according to act of congress in the year ———, by A. B., in the office of the librarian of congress, at Washington."

In the first complaint the plaintiff alleges "that on the first day of November, 1878, and at divers times between said day and the commencement of this action, the said defendants, contrary to the statute in such case made and provided, (Rev. St. title 9, *c.* 3,) did impress and cause to be

impressed upon certain divers prints of small balloons, with printing for embroidery and cutting lines, to the number of 34 of said balloons, and for which said defendants had not obtained a copyright, and which had not and have not been copyrighted, the following words: 'Copyrighted 1878, by Dreyfuss & Sachs, No. 7577,' and against the form of the statute, and with intent to deceive the public and evade the statute, whereby and by virtue of the statute the said defendants have forfeited and become liable to pay to the plaintiff the sum of $3,400 penalties, etc.; being $100 for each of said 34 violations aforesaid of said statute," etc. Then follows an averment of a demand and refusal, and prayer for judgment in the sum of $3,400.

The second complaint is in similar form, for impressing or causing to be impressed the same words on "prints of large balloons, with printing on them for embroidery and cutting lines," to the number of 95 "of said balloons," and prays judgment in $9,500 penalties.

The third complaint is in six counts, each of which is in similar form, for a penalty of $100, for impressing said words on "a certain print of large balloon, with printing thereon for cutting lines," and prays judgment for $600 penalties.

The fourth complaint is similar in form, charging the impression of the same words upon "prints of hanging baskets, with printing for embroidery and cutting lines," to the number of six of "said hanging baskets," and prays judgment for $600 penalties.

To the first, second and fourth complaints, and to each count in the third complaint, the defendant has demurred on the ground "that it does not state facts sufficient to constitute a cause of action."

Upon the argument of the demurrers the defendant has contended that an informer is entitled to recover but one penalty, of $100, for all violations of law prior to the commencement of his suit; and, also, that Rev. St. § 4963, is unconstitutional. It is unnecessary, however, to determine these questions, as the demurrers must be sustained on another ground.

The point is taken, in support of the demurrers, that the statute applies only in case of impressing the prohibited words on articles that are the proper subject of copyright, or copyrightable articles, and that it does not appear on the complaint that the articles described therein as "prints of balloons," and "prints of hanging baskets," are copyrightable; that, on the contrary, it does appear on the complaint that they are not copyrightable. As to this point, I think the statute is to be construed as imposing the penalty only in case of copyrightable articles. It is to be construed in connection with the other sections relating to the same subject-matter.

Section 4952 defines what may be copyrighted: "Any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary," and "models or designs intended to be perfected as works of the fine arts." Section 4954 imposes, as a condition of the renewal, the recording of the "title of the work or description of the *article*" within a certain time. Section 4956 requires the delivery to the librarian of congress of a printed copy of the title of the "book or other *article*," or a description of the "painting, drawing, chromo, statue, statuary, or a model or design for a work of the fine arts," and a delivery of two copies of such "book or other *article*," or in case of a "painting, drawing, statue, statuary, model or design for a work of the fine arts," a photograph. Section 4957 requires the librarian to record the name of such "copyright book or other *article*." Section 4958 prescribes his fee for recording the title or description of any "copyright book or *article*." Section 4959 requires the proprietor of every "copyright book or other *article*" to deliver at Washington two complete copies of the best edition. Section 4961 requires the postmaster to give a receipt for such "copyright book, title or other *article*." Section 4962, which is directly referred to in section 4963 in the words "such notice," meaning the notice set forth in section 4962, provides "that no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition

published, on the title page or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be perfected or completed as a work of the fine arts, by inscribing upon some portion of the face or front thereof, or on the face of the substance on which the same shall be mounted, the following words: "Entered according to act of congress," etc.

It is, I think, sufficiently obvious that the words "or other article," in section 4963, following the enumeration, "any book, map, chart, musical composition, print, cut, engraving or photograph," do not mean any article whatsoever, whether copyrightable or not, but must be taken as limited to other articles, which in the preceding sections are described as the proper subject of copyright, a part of which only are expressly enumerated in this section; that the word "article" here is used in the same sense in which it is employed in the other sections. If it had been the purpose of congress to impose a penalty for using this notice on any article whatever, there was no occasion for the enumeration of "book, map, chart," etc., in section 4963. That enumeration should have been avoided as tending to mislead. The meaning would much more clearly have been expressed without any such enumeration. There is also no apparent object or obvious reason of public policy in imposing a penalty for using this notice on any article not subject to copyright. The purpose of the statute seems to be to protect persons entitled to copyrights from their privilege being impaired, cheapened, and lessened in value by the unauthorized assumption of the privilege by persons not entitled thereto.

The offence is deceiving the public by the false assertion of a valuable privilege to which a party is not entitled. But it is obvious that the public cannot be deceived by putting such a notice on articles not the proper subject of copyright, any more than they can be deceived by putting the mark "patent" on an article not patentable. There is, therefore, no reason for extending the terms of this statute, which is penal and to be strictly construed, beyond the case of articles subject to

copyright, which is the limit indicated by the terms of the statute itself, if read in connection with the other sections. All doubt, however, that this is the proper construction is dispelled by an examination of the act of 1870, *c.* 230, §§ 97, 98, (16 St. 214,) of which Rev. St. §§ 4962, 4963 are a re-enactment. Section 98, which imposes this penalty, uses the expression, "any book, map, etc., or other articles herein named, for which he has not obtained a copyright." In the Rev. St. § 4963, this is abbreviated into "or other article for which he has not obtained a patent." The words "herein named" were undoubtedly dropped as unnecessary, the context clearly restricting the words "or other article," as the words "herein named" had before done. A similar construction of a statute, imposing a penalty for using the word "patented" on an unpatented article, was made in *U. S.* v. *Morris*, 2 Bond, 23.

Assuming, then, that the penalty applies only to articles subject to copyright, the question is whether the articles described in the complaint are subject to copyright. They are described as "prints of small balloons, with printing for embroidery and cutting lines;" as "prints of large balloons, with printing on them for embroidery and cutting lines;" and as "prints of hanging baskets, with printing for embroidery and cutting lines."

The word "print," in section 4952, is used in connection with "engraving, cut and photograph." It means, apparently, a picture, something complete in itself, similar in kind to an engraving, cut or photograph.

It clearly does not mean something printed on paper, that is not intended for use as a picture, but is itself to be cut up and embroidered, and thus made into an entirely different article, as a balloon or a hanging basket. There is, perhaps, some little doubt what is meant by a "print of a balloon, with printing for embroidery and cutting lines;" but I do not think the words import a mere picture of something, or a print, the use of which is the pictorial representation of something.

As I understood the counsel, upon the argument, it was not contested that the meaning was that the form of the

different parts of the balloon is marked out with lines showing how the paper is to be cut to make the different parts fit together, so as to construct of them a balloon, and with other marks indicating where and how they may be embroidered. This seems to be the fair meaning of the words, and I think I do no injustice to the plaintiff in assuming it to be the meaning, since his counsel have assumed it, and attempted to show, as matter of law, that such an article is subject to copyright, either as a "print," or as a "model or design intended to be perfected as a work of the fine arts." I think, however, it does not come within the statute under either of these specifications.

As to "prints," in addition to what has already been said, it is only necessary to refer to the statute of June 18, 1874, (18 Stat. § 78,) which is to be treated as a statute subsequent in time to the Revised Statutes.

The first section re-enacts, with some amendment, Rev. St. § 4962. The third section provides "that in the construction of this act the words 'engraving,' 'cut,' and 'print,' shall be applied only to pictorial illustrations, or works connected with the fine arts; and no prints or labels designed to be used for any other articles of manufacture shall be entered under the copyright law, but may be registered in the patent office." Section 4 repeals "all laws and parts of laws inconsistent with the foregoing provisions." It seems to be entirely clear that these printed balloons, intended to be cut apart and manufactured into balloons, cannot be considered "pictorial illustrations, or works connected with the fine arts," within the meaning of this act, although they may be "prints or labels designed to be used for another article of manufacture," which are patentable under Rev. St. § 4929. Nor are they "models or designs intended to be perfected as works of the fine arts," within section 4952.

Balloons and hanging baskets, with or without embroidery, are not works of the fine arts, unless the words "fine arts" are to have an extension far beyond their usual and proper significance.

Of such model or design, by section 4956, a photograph

must be sent to Washington. This also affords some indication that the words "works of the fine arts" are used in their proper and customary sense; but the words themselves are too plain and well understood to be extended as the plaintiff claims.

The case of *Marsh* v. *Warren*, 14 Blatch. 263, which is cited by plaintiff's counsel, does not hold that "prints or labels, designed to be used for any other article of manufacture," as distinguished from "prints" which are "pictorial illustrations, or works connected with the fine arts," are copyrightable, instead of patentable. It simply holds, in conformity with the express provision of the third section of the act of June 18, 1874, (18 St. 79,) that the provisions of the copyright law, as to the entry and registry of "prints," shall apply to this class of prints and labels under the supervision of the commissioner of patents, with the single exception of the fees to be paid to the commissioner.

This clearly does not make such prints and labels copyrightable. It simply applies to those articles which, under Rev. St. 4929, are made patentable, certain provisions of the copyright law, which impose certain prescribed conditions on which the exclusive right or privilege granted is made to depend. In other words, the statute adopts for certain patented articles, and applies to them, certain provisions of the copyright law.

By the same third section such prints and labels are, by necessary implication, if not expressly, excluded from the category of copyrightable articles, if, by any liberal construction of the law, they might have been held to be within it before, which I do not think was the case.

The act is entitled "An act to amend the law relating to patents, trade-marks and copyrights." The law of copyrights (Rev. St. § 4962) requires every copyrighted article to be marked as copyrighted, and the law of patents required every patented article to be marked as patented, (Rev. St. 4900;) and in each case a penalty is imposed for the false use of the mark, (Rev. St. 4001, 4963.)

It would be such a strange departure from this settled policy of these laws that one particular class of copyrighted articles, namely, this class of "prints and labels," if they are copyrightable, should be expressly excluded, without any apparent reason, as they are by the third section of the act, from being marked as copyrighted; that, whatever may have been the construction of the former laws, this exclusion must be taken to show the intention of congress that thereafter these articles should be excluded from the category of copyrighted articles.

I think, therefore, that it does appear on the face of the complaints that the articles described are not subject to copyright. Even if the language used is not plain enough fairly to import that, it certainly does not appear on the complaint that they are articles subject to copyright. "Prints" may or may not be the subject of copyright. And the rules of pleading require that, if the article mentioned in the complaint may or may not be within the statute, it should be averred to be within it. Such averment is necessary, unless the terms used in describing the thing necessarily bring it within the statute.

In *U. S.* v. *Morris, et supra*, it was held that it was necessary to aver as well as to prove that the article was patentable. See, also, *Wilson* v. *Manfg. Co.* 9 N. Y. Weekly Digest, 340. This is in accordance with the general rule of pleading that the plaintiff must state a case for recovery with reasonable certainty, and in case of doubt a pleading must be taken most strongly against the pleader.

It is not enough that the defendant *may* be liable if the facts stated in the complaint be true. It must appear that he *is* liable if the complaint is true.

These complaints, therefore, do not state facts sufficient to constitute a cause of action, because it does not appear by them that the articles described therein were copyrightable, or articles for which a copyright could be granted under the laws of the United States.

Demurrers sustained. Judgment on the demurrers for the

defendants, with costs, unless within five days defendants apply on affidavit for leave to amend, in which case the entry of judgment or further order will await the determination of such motion.

NATHAN and others v. NEW YORK ELEVATED RAILROAD CO.

(Circuit Court, S. D. New York. March 10, 1880.)

PATENT—DESCRIPTION IN PRIOR PATENT OR PUBLICATION.—A patent, or printed publication to defeat a patent subsequently obtained must describe the invention so as to enable one skilled in the art to which it belongs or pertains to construct and use it.

SAME—SUBSEQUENT PATENTEE—A subsequent patentee can acquire no right in the devices of a former patentee included in his machine.

SAME—FOREIGN PATENT FOR SAME INVENTION.—Where a patent for the same invention has been granted in a foreign country, prior to the one allowed in this, the patent here will run 17 years from the date of the issuance of the foreign patent.

SAME—INJECTORS FOR STEAM BOILERS.—Claims of certain patents for improvements in injectors for boilers determined.

In Equity.

Edmund Witmore, for complainants.

George Harding and *F. C. Chambers*, for defendant.

WHEELER, D. J. This suit is brought upon letters patent No. 57,057, dated August 7, 1866, issued to James Gresham for an improvement in injectors for boilers, and now owned by the plaintiffs. The questions raised and relied upon in argument relate principally to the novelty of the invention described in the patent.

The invention purports to be of an improvement upon an apparatus known as Gifford's Injectors, patented to Henry J. Gifford by letters patent of Great Britain, No. 1,665, dated July 23, 1858.

The defendant sets up these letters patent to Gifford; and letters patent of Great Britain, No. 2,775, granted to Andrew Barclay and Alexander Morton, dated November 7, 1863; and No. 1,151, granted to Andrew Barclay, dated May 6, 1864,

each for improvements in certain apparatus for injecting and ejecting fluids, to defeat the plaintiff's patent.

Gifford's injector underlies all these inventions. When once started it seems to have been all or nearly all that was desirable for forcing water into boilers; but in starting it would not, of itself, raise the water from any considerable depth, to force it into the boilers. Where the water had to be so raised, before being forced it was necessary to first prime the injector with water by some outside means, and then, when started, it would continue to both raise and force the water. His patent provided for an additional jet of steam, coming in and striking the principal column of steam and water after it had passed the overflow in its course towards the boiler, and aiding in forcing the column along; but this jet merely aided the injector as such, after it was started, and did nothing of itself towards removing the difficulty of starting when the water had to be raised.

Barclay and Morton, in their patent, described peculiar shaped chambers to change the direction of, and facilitate the flow of, the fluids after they had passed the injecting apparatus, but described nothing for raising them to the apparatus, and added: "It may be necessary to combine two of the before mentioned apparatuses, so that the one may merely raise or lift the water or other fluids, whilst the other then merely forces it; and also one lifting apparatus may be combined with that known as Gifford's Injector, and by this means supply water to steam-boilers from any depth where an ordinary lift-pump is required."

Barclay's patent described an injector into which a column of cold fluid could be brought when that to be injected was too warm to condense the steam sufficiently, and which took the water and steam through alternate concentric annular passages to combine them, to make the combination of them more perfect and the apparatus more effective; but it described no means for priming the injector in order to start it to drawing fluids from low depths and injecting them.

Means for raising fluids into open vessels, or discharging them into open air, by throwing a jet of steam past the upper

end of a tube leading from the fluid upward, out into a larger descending nozzle, making an apparatus in the nature of a siphon operated by steam, were well known. Gresham contrived means for throwing a jet of steam past the end of the passage for water from the reservoir to the overflow opening of a Gifford, or other injector, at that opening, into such a nozzle arranged there, so as to draw water from the reservoir to the overflow and prime the injector, ready for starting, to raise water and force it into the boiler.

His patent is, and purports to be, for the mechanical devices by which this is accomplished, and does not rest at all upon the discovery of any of the principles of philosophy employed in its accomplishment. Neither Gifford, nor Barclay and Morton, nor Barclay, described in their patents any such devices; nor does it appear that they, or any one else, ever knew of or used any such before Gresham's invention. Barclay and Morton suggested in their patent, in the part quoted, that one lifting apparatus might be combined with a Gifford injector, and by that means supply water to steam boilers from depths where lift pumps were required; but they did not suggest, in that immediate connection, what sort of a lifting apparatus. Probably they meant, and are to be understood as having meant, such lifting apparatus as they had before described in other parts of their patent. Such apparatus would not be at all like Gresham's, nor could it be employed for the same purpose as Gresham's, namely, to raise water, before starting the injector, to prime it.

All injectors will, in starting, draw water upwards to some extent, but not much when they have the injector apparatus only. Whatever they do draw they draw upon a similar principle to that upon which Gresham's lifting apparatus works. They to that extent lift water, and his lifts water; still, they cannot lift to the extent his does. They do not do it by the same mechanical means that his does, nor do they employ all the philosophical principles that his does. His jet of steam works in a nozzle which is the reverse of theirs; his projecting into a nozzle increasing in size, which increases

the vacuum and power of suction, and theirs into one decreasing in size, which increases the power of projection.

If Barclay and Morton's patent could be said to suggest the combination of any lifting apparatus other than that mentioned in other parts of their patent with a Gifford injector, it does not show any such, nor any mode of combining them.

A patent or printed publication must, in order to defeat a patent for an invention subsequently obtained, describe the invention so as to enable those skilled in the art to which it belongs or most nearly appertains to construct and use it. This patent gives no information as to how a lifting apparatus can be combined with a Gifford injector. It merely says that this may be done, but leaves others to invent the mode of doing it. Gresham invented a mode which their suggestion in no way anticipates or defeats.

The defendant uses injectors constructed according to the specification of letters patent No. 138,198, dated April 22, 1873, and granted to Samuel Rue, Jr., for an improvement in injectors for steam generators. There is no fair question upon the evidence, and it is not claimed by counsel in argument, but that these injectors contain substantially the same devices, operating in substantially the same manner, as Gresham's. They contain additional devices, and are perhaps improvements upon his; but that does not carry with it any right to make use of his devices, and it is not claimed that it does. Both Gresham and Rue have made improvemements upon injectors, and each became entitled to the improvements he made, and to his own form of machine, so far as it should not include parts belonging to others. But Gresham preceded Rue, and the latter could acquire no rights to the devices of the former, which he included in his form of machine. *Railway Co.* v. *Sayles*, 97 U. S. 354.

The case shows that letters patent of Great Britain, No. 410, dated February 14, 1865, were issued to Gresham for the same invention. Whether there was any other date of issue to that patent does not appear. As the case stands now that must be taken to be the date of issue; and accord-

ing to *De Florez* v. *Reynolds*, S. D. N. Y. February, 1880, this patent will run 17 years from that date only. An injunction issued in pursuance of a final decree should, by its terms, be limited to the time it may properly remain in force; and an injunction to restrain infringement of a patent can, of course, properly continue only during the term of the patent. No question as to this has been made by counsel, and it is not intended to conclude any question that might be made by what is here said. It seems most proper now that the injunction should issue for the remainder of the term as it now appears, which is for 17 years from February 14, 1865, leaving the parties to move further in respect to it as they may be advised.

Let there be a decree for an injunction, and an account accordingly, with costs.

ZANE and another *v.* LOFFE.

(Circuit Court, S. D. New York. March 9, 1880.)

PATENT—EVIDENCE OF USE OF SIMILAR ARTICLES AT TIME OF PATENT.—Evidence of the manufacture and use of an article similar to that covered by the patent, at the time of its issuance, *held* proper, as tending to show what was in existence at the time, though knowledge had not been pleaded.

SAME—SELF-CLOSING FAUCET.—Defendant's patent for self-closing faucet, where the valve is lifted against a spring by a stem, with projections near the valve working against inclines under the shell, *held*, not an infringement upon one where the valve is pushed downwards from its seat against a spring by a screw turned by hand, with a swivel to prevent turning the valve with the screw, which lets the valve back when the screw is released.

In Equity.

George Wm. Clarke, for complainants.

Duell, Wells & Duell, for defendant.

WHEELER, J. This suit is brought upon letters patent No. 48,407, dated June 27, 1865, and issued to Nathaniel Jen-

kins, for an improvement in self-closing faucets, which is now owned by the orators. The validity of the patent and infringement of it, if valid, are both denied. The patent had been tried in *Zane et al.* v. *D'Este et al.*, in the district of Massachusetts, and in *Zane et al.* v. *Peck et al.*, in the district of Connecticut, and sustained in both cases. There is evidence in this case of self-closing faucets made and sold by Frederick H. Bartholomew, at New York, before the patent, and, so far as appears, before the invention, which were not shown in either of these cases, and knowledge of which has not been pleaded in the case. The evidence as to those most material has been taken without objection; and the counsel for the defendants argued that, being so taken, it should be considered as if the knowledge it shows had been pleaded. If showing that knowledge as an anticipation was the only purpose for which the evidence could be received, there would be force to that argument; but the evidence was clearly admissible for the purpose of showing what there was in existence at the time of the invention and patent, in the light of which to construe the patent, and as it could not be excluded if objected to, there was no waiver of the right to have its use restricted to the purpose for which it was admissible, by not objecting to it.

There is nothing in the case proper to be considered for the purpose of showing want of novelty that can defeat the patent for what it properly covers, in view of these pre-existing things.

The evidence shows, and so far it is not seriously questioned, that faucets with valves which were opened by being pulled away from their seats against springs, and which would be closed by the springs when the force used to open them was withdrawn, are well known. Sometimes the valves were lifted from their seats by stems, having projections on the upper ends working against steep inclines, as canes. In the orators' faucet the valve is pushed downward from its seat against a spring by a steep, quick-threaded screw, turned by hand, with a swivel to prevent turning the valve with the screw which

lets the valve back when the screw is released. The patent is, in one claim, for the screw as a follower, in combination with the valve; in the other, for the combination of the screw follower, swivel, valve and spring. The patent is good for a faucet in which the valve is opened and closed in that manner. In the faucet of the defendants the valve is lifted against a spring by a stem, with projections near the valve working against inclines inside the shell of the faucet.

The counsel for the orators argues that these projections and inclines are the equivalent of a screw, and that the arrangement infringes the first claim of their patent. The screw would work both ways—pull and push—or either. The projections and inclines will only pull, as arranged by the defendants. They are not the equivalent of the screw for pushing the valves open, as the orators make use of it, and as their patent covers it. The defendants do not use a swivel at all. They do not make use of the combination of parts mentioned in either claim, nor of what is the equivalent of the parts, for the same purposes. The same thing that distinguishes the orators' faucet from some of the prior devices of Bartnolomew distinguishes the defendant's faucet from theirs. No question of infringement was made in *Zane et al.* v. *Peck et al.*, so far as appears from the opinion of the court by *Shipman*, J., and, from what is said there about *Zane et al.* v. *D'Este et al.*, it is probable that none was made there. Those cases, therefore, furnish no guide as to the question of infringement here. The patent is apparently valid for the particular improvement which Jenkins invented, but the defendants do not infringe it.

Let there be a decree dismissing the orators' bill of complaint, with costs.

MATTHEWS *v.* THE LALANCE & GROSJEAN MANUFACTURING CO.

(*Circuit Court, S. D. New York.* April 28, 1880.)

PATENT—BILL FOR INFRINGEMENT OF SEVERAL PATENTS—PLEA TO WHOLE BILL—PRACTICE.—Where a bill was filed for the infringement of several patents, to which a plea that said patents were not connected in one mechanism, or conjointly used, was interposed, general replication made, and proofs thereon taken, *held*, that as the plea did nothing but deny an averment in the bill, the complainant was entitled to recover, if it appeared that the defendant's structure embodied in it an invention covered by only one of said patents.

EQUITY PLEADING—PLEA—BAD IN SUBSTANCE.—Plea to the whole bill in this case averring that the several patents set forth in the bill are for separate and distinct inventions, not in point of fact connected together in use or occupation, and not in fact conjointly embodied in any mechanism manufactured by defendant, *held*, bad in substance.

A. V. Boresen, for plaintiff.

B. F. Lee, for defendant.

BLATCHFORD, C. J. This bill is brought for the infringement of five several letters patent. The bill alleges that the defendant made, used, and vended to others to be used, "soda water and other fountains, each made according to, and employing and containing, the inventions described and claimed in each of the above-named letters patent and re-issued letters patent." The defendant put in a plea to the bill. The plea sets forth that the bill is brought for the infringement of five separate letters patent, (designating and identifying them as the same which are set up in the bill,) "all of which said letters patent are for separate and distinct alleged inventions," (a fact which the bill shows,) "which several alleged inventions are not, in point of fact, connected together in use or operation, and are not, in point of fact, conjointly embodied in any of the soda water and other fountains manufactured, used or sold by this defendant; so that the said plaintiff, by his single bill of complaint aforesaid, seeks to compel this defendant to unite five separate and distinct defences, depending severally upon distinct and different proofs, so as to complicate the defence, and embarrass this defendant in its answer to the said bill of complaint; and that it is not true, as alleged in said bill, that the said defendant

has made, constructed, used, and vended to others to be used, soda water and other fountains, each made according to, and employing and containing, the inventions described and claimed in each of the above-named letters patent and reissued letters patent."

The plaintiff put in a general replication to the plea, in the form of the usual general replication to an answer, substituting the word "plea" for the word "answer." Both parties have treated the putting in of this replication as taking issue on the plea, within the meaning of rule 33, in equity, and have taken proofs on the question as to whether a certain structure made by the defendant contains mechanism covered by a claim or clause in each of the five patents sued on. The testimony for the plaintiffs is addressed to establishing the fact that each of the five patents is infringed by such structure. The testimony for the defendant ignores three of the patents, and is addressed to establishing the fact that two of the five patents are not infringed by such structure. The case has been heard on these pleadings and proofs. The plaintiff asks for a decree overruling the plea, with costs, on the ground that the defendant's structure infringes each of the five patents, and granting the injunction against infringement which the bill prays for, and refusing to the defendant leave to answer the bill. The defendant asks that the bill be dismissed, with costs, on the ground that the defendant has proved that two of the patents are not infringed by the defendant's structure.

The defendant, contending that two of the patents are shown not to have been infringed, invokes the rule that the plaintiff, by replying to the plea, admits it to be a valid plea, if true, and thus admits that he cannot recover in the suit unless the defendant's structure embodies an invention claimed in each one of the five patents. As setting forth this rule, the cases of *Hughes* v. *Blake*, 6 Wheaton, 453, 472; *Rhode Island* v. *Massachusetts*, 14 Peters, 210, 257; and *Myers* v. *Dorr*, 13 Blatchf. C. C. R. 22, 26, are cited by the defendant. The general rule is, undoubtedly, as stated; but in this case the plea does nothing but deny an averment of

the bill. What is set up in the plea amounts to no more than denying and negativing the allegation of the bill as to the matters to which the plea relates. On an issue as to such an allegation, whether such an issue be raised by an answer or by a plea, the plaintiff can recover, even though it should appear that the defendant's structure embodies in it inventions covered by only one, or two, or three, or four of the five patents. The plaintiff must make the averment as to all five of the patents in order that he may have the opportunity of endeavoring to show that all five are infringed by the structure, but he will not fail of relief even though he succeeds in showing that only one of the five is infringed.

The rules of equity practice (and the rule referred to is merely one of practice and not one of substantial right) are not so rigid and inflexible and procrustean as to require that the plaintiff should, in this case, be held to have put himself in the position, by taking issue on the plea, of losing the benefit of a right to recovery which he would have had if the same matter set up in this plea had been set up in an answer. The language employed by text writers and in the cases cited is to be interpreted with reference to the facts of the cases to which the language was applied. Undoubtedly, pleas in some cases are allowable, in equity, which deny merely an allegation of the bill. An instance of this is found in *Burnham* v. *Rangely*, 1 Woodb. & M. 17, where the bill described the plaintiffs as citizens of New Hampshire and the defendant as a citizen of Maine, the suit being in the circuit court for Maine. The defendant pleaded that he was not a citizen of Maine when the suit was brought, but a citizen of Virginia. If he was not a citizen of Maine the court had no jurisdiction. Issue was joined on the plea. If the plea was true the plaintiff could not recover. But, in the present case, the plaintiff may recover, even though the plea is true.

In *Hughes* v. *Blake*, *supra*, the court, without applying to that case the rule referred to, held that the matters set forth in the plea constituted a complete defence to the suit.

In *Rhode Island* v. *Massachusetts*, *supra*, the court, while announcing the general rule and overruling the plea as mul-

tifarious,—issue not having been joined on it,—said: "It is the strict and technical character of these rules of pleading, and the danger of injustice often arising from them, which has given rise to the equitable discretion always exercised by the court of chancery in relation to pleas."

In *Stead's Ex'rs* v. *Course*, 4 Cranch, 403, there was a plea, a replication to it, and testimony to support the plea. The circuit court sustained the plea, and dismissed the bill. The supreme court say: "The only questions before this court are upon the sufficiency of the plea to bar the action, and the sufficiency of the testimony to support the plea, as pleaded. On the first point the counsel for the plaintiff has adduced authority which would certainly apply strongly, if not conclusively, in his favor, if a special demurrer had been filed to the plea; but, as issue has been taken on it, the court thinks it sufficient, since it contains in substance matter which if true would bar the action."

The plaintiff contended that the plea was substantially defective, and contained defects which could not be considered as cured by the replication. The court, notwithstanding the replication to the plea, examined the plea so far as to see whether it was a good plea in substance. In the case before us the plea is clearly bad in substance.

Rule 33, in equity, provides that "if, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail himself as far as, in law and equity, they ought to avail him." If the court should determine for this defendant the facts stated in this plea, they ought not to avail the defendant to secure a dismissal of the bill, the plea being to the whole bill. No case has been cited, or is found, where, on such a bill, and such a plea, and such an issue, the court has refused to look into the substance of the plea, or has dismissed the bill when the plea was bad in substance, although the facts set up in the plea were true. Even though the facts stated in this plea should be determined for the defendant, the proper disposition of this case would be to overrule the plea as bad in substance; therefore, the testimony taken on the issue need not be examined. The plea must be over-

ruled, and, under rule 34, with costs. Under the same rule the defendant will be allowed to answer the bill, on payment of such costs, within twenty days.

STRAUSS and others *v.* KING and others

(*Circuit Court, S. D. New York.* April 29, 1880.)

PATENT — IMPROVEMENT IN CLOTHING — METAL RIVETS AT EDGE OF POCKET OPENING.—The use of metal rivets, or eyelets, in fastening the end of seams in clothing, at pocket openings, so as to receive the strain from pressure within, keep the same from coming upon the threads of the seam and prevent ripping, is a patentable invention.

M. A. Wheaton and *George Gifford*, for plaintiffs.

Gilbert W. Plympton, for defendant.

BLATCHFORD, C. J. This suit is brought on re-issued letters patent granted March 16, 1875, to Jacob W. Davis and Levi Strauss & Co. for an "improvement in pantaloons," etc., the original patent having been granted to them May 20, 1873, on the invention of said Davis. The specification of the re-issue says that Davis has invented an "improvement in fastening seams." It proceeds: "My invention relates to a fastening for pocket openings, whereby the several seams are prevented from ripping or starting from frequent pressure or strain thereon; and it consists in the employment of a metal rivet or eyelet at each edge of the pocket opening, to prevent the ripping of the seam at those points. The rivet or eyelet is so fastened in the seam as to bind the two parts of cloth which the seam unites together so that it shall prevent the strain or pressure from coming upon the thread with which the seam is sewed. In order to more fully illustrate and explain my invention, reference is had to the accompanying drawing, in which my invention is represented as applied to the pockets of a pair of pants. Figure 1 is a view of my invention as applied to pants. A represents the side seam in a pair of pants, and *bb* represents the rivets at each edge of the pocket opening. The seams are usually ripped or

started by the placing of the hands in the pockets and the consequent pressure or strain upon them. To strengthen this part I employ a rivet, eyelet, or other equivalent metal stud, *d*, which I pass through a hole at the end of the seam, so as to bind the two parts of cloth together, and then head it down on both sides so as to firmly unite the two parts. When rivets which already have one head are used, it is only necessary to head the opposite end, and a washer can be interposed, if desired, in the usual way. By this means I avoid a larger amount of trouble in mending portions of seams which are subjected to constant strain. My invention is applicable to pantaloons, overalls, coats, vests and other garments. I am aware that rivets have been used for securing seams in shoes, as shown in the patent to George Houghton, No. 64,015, April 23, 1867, and to L. K. Washburn, No. 123,313, January 3, 1872, and hence I do not claim, broadly, fastening of seams by means of rivets."

The claim is as follows: "As a new article of manufacture, pantaloons or other garments having their pocket openings secured at the edges by means of rivets, or their equivalents, substantially in the manner described and shown."

This case has been contested with great vigor. The bill was filed in November, 1876. Testimony was taken from May, 1877, to January, 1878. The plaintiffs examined 283 witnesses, and the defendants 145. The plaintiffs' proofs cover 2,465 printed pages, and the defendants' 1,196. The plaintiffs' brief covers 323 printed pages, and the defendants' 152. Infringement is not contested, but the defendants rely on want of patentability and want of novelty in the thing patented.

On the point that there is no invention in the thing patented, the defendants contend that the want of patentability consists in the fact that the invention is nothing more than the employment at the corners of a pocket opening of the old and well-known rivet; and that no new function is performed by the rivet in that place from what is performed by it in any other place.

The invention is claimed as an improvement in the pocket

opening of a garment which has a pocket opening. It does not extend to anything but a pocket opening. It requires that the seam which unites two pieces of cloth laterally shall terminate at the commencement of the pocket opening; that such seam shall be made by means of sewing the two pieces of cloth together laterally by thread; that the rivet shall be of metal; that it shall be placed in the seam at the edge of the pocket opening —that is, where there the seam ends and the pocket opening begins, but still in the seam; that it shall be so located and fastened, with reference to the two lateral pieces of cloth which the seam unites, as to bind together such two lateral pieces of cloth by pressing tightly upon both of them; that this shall be effected by putting the rivet through a hole and heading it down on both of the two opposite faces where the hole begins and ends; that the operation of the rivet, when so set, shall be to receive the strain which results from pressure from within on the edge or end of the pocket opening, and keep such strain from coming on the thread of the seam, and thus protect such thread from ripping or starting, and allowing the seam to open; and that the practical advantage of the arrangement shall be to get rid of the frequent renewal, by sewing, of the thread in the seam at the edge of the opening. In view of the testimony as to the state of the art prior to the invention of Davis all the foregoing features are involved in such invention. They all appear on the face of the specification of the patent, and are embraced in the claim. They amount to invention, and they embody patentability. The result of them was new and useful. The case is not one of mere double use, or of the use of an old rivet in a new place. It is not merely the usual through and through binding or uniting function of the rivet that is availed of.

It is argued for the defendants that there is no combination between the rivet and the sewed seam, but a mere aggregation; that the claim is not confined to the application of a rivet to a sewed seam; that a stay of sewed thread is the equivalent of a rivet; that in view of the prior use of a stay of sewed thread at the corner of a pocket opening there was no invention in the change to a metal rivet; and that a but-

ton had before been sewed on with thread at the upper end of the seam, at the edge of the pocket opening, to prevent the thread of the seam from being worn away, and the seam had been stayed by sewing in leather or other fabric, and there was no invention in passing from these arrangements to Davis'. It is sufficient to say that there is no force in any of these suggestions as against the validity of the patent. Nor is it shown that the invention, as before defined, was known or in any use before it was made by Davis. The defendants, to defeat the patent on the ground of want of novelty, must make out the defence by satisfactory and preponderating proof. This they have not done. In coming to this conclusion I have considered the Magee coat, the Nightingale coat, the evidence grouped in the defendant's brief under the heads "Nevada (C)" and "Nevada, (D,)" the evidence of Stanton, Ford, Richville and Hogbin, the Orr overalls, the patent to Bowker, and the patent to Bellford. There must be the usual decree for the plaintiffs.

GOLDSMITH and another *v.* THE AMERICAN PAPER COLLAR COMPANY.

(*Circuit Court, S. D. New York.* April 27, 1880.)

PATENT—ACTION FOR INFRINGEMENT—PARTY COMPLAINANT.—An action for the infringement of a patent must be brought in the name of the real and beneficial party in interest.

John D. Shedlock, for plaintiffs.

William A. Jenner, for defendant.

BLATCHFORD, C. J. This is a suit in equity, brought for the infringement of letters patent granted to Charles Spofford and James H. Hoffman. The bill sets forth that Spofford and Hoffman are the sole legal owners of the patent; that Spofford, after the grant of the patent, entered into an agreement in writing with the plaintiff Goldsmith, whereby, among other things, he appointed Goldsmith his attorney, "and in his

place and stead to commence, prosecute, compromise, settle, release, conclude and enforce, by suit at law or in equity, any infringements of the rights secured to him, said Spofford," by said patent, by the defendant—all such suits to be brought in the name and at the cost of said Goldsmith; that Spofford thereby expressly covenanted and agreed that he would not do, in respect to the defendant, any of the acts which he thereby authorized Goldsmith to do; that Goldsmith is the sole lawful person to bring the bill, as to the interest in the patent vested in Spofford; that Hoffman and Spofford will receive large profits from the patent if infringement by the defendant be prevented. It prays for a discovery of profits and of damages. The bill is demurred to because Spofford is not made a party, and because Goldsmith is made a party.

It is provided by section 4919 of the Revised Statutes that "damages for the infringement of any patent may be recovered by action on the case in the name of the party interested, either as patentee, assignee, or grantee." Jurisdiction is given to the circuit courts, by section 629, of all suits in law or in equity arising under the patent laws. It is provided by section 4921 that, upon a decree being rendered in any case for an infringement, the complainant shall be entitled to recover, "in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby."

The clear purport of these provisions is that the party in interest must bring the suit, whether at law or in equity, in his own name, and cannot delegate the right to another person to bring the suit in the name of such other person, when the suit is not for the benefit in any way of such other person. It is a question of public policy. The defendant has a right to require that the real owner or party in interest shall be in court, so that the court may exercise a control over him, in the course of the suit, if necessary, to require him to do something which the rights of the defendant may require to be done. Goldsmith has no control as to the patent, or anything to be done under it, except to bring suits in respect of Spofford's interest.

There is another respect in which it is against public policy to permit a suit like this to be brought. Goldsmith appears to be clothed with the entire discretion as to when and under what circumstances to bring suit, and when to compromise or settle for infringements. Spofford has stripped himself of all control in this respect, although he has the beneficial interest, and Goldsmith is not averred to have any. As was said by Judge Shipman, in *Gregerson* v. *Imlay*, 4 Blatchf. C. C. R. 503–6, this is "detrimental to the peace of society and the safety of individuals, and against public policy."

The demurrer is allowed, with costs, but the plaintiffs may move, on notice, for leave to amend the bill.

GERRITY v. THE BARK KATE CANN, etc.

(*District Court, E. D. New York.* April 27, 1880.)

ADMIRALTY—DAMAGES FOR PERSONAL INJURIES—STOWAGE—DUTY OF OWNER.—Where a ship's crew stowed dunnage in the between-decks, held up by braces overhead, and one pile broke away and fell, causing personal injury to a man who was assisting in trimming the cargo of grain then going into the ship, and an action was brought by the man for damages, *held*, that the ship was liable for the personal injuries caused by the insufficient and careless manner of stowing the dunnage.

John J. Allen and *Patrick Keady*, for claimant.

Henry T. Wing, for respondent.

BENEDICT, D. J. This action is brought to recover damages for personal injuries caused by the falling of a mass of dunnage and plank upon the libellant while he was engaged in trimming the cargo of the bark Kate Cann, in the harbor of New York, on the twenty-first day of November, 1878.

The facts are as follows: The bark Kate Cann was an English vessel, under a charter to receive and transport a cargo of grain. The grain was being put into the vessel from an elevator in the Atlantic dock. The libellant was one of several persons who had agreed to trim the grain as it came into the hold from the elevator spout for so much a bushel,

paid by the elevator company. At the time of receiving the injury complained of the lower hold was about full of grain, and the libellant was sitting in the between-decks, his work having been suspended for the moment to permit a change in the position of the elevator spout. In the between-decks, and behind and above the libellant, when so seated, a quantity of dunnage and plank had been stowed behind two braces, each running from the ceiling at a point about midway between the decks to a point on the deck beam above, several feet from the vessel's side, and forming a sort of rack. While the libellant was seated as above described, nearly under this dunnage, the braces gave away, and the whole mass fell upon him, causing him injuries of a serious character.

The evidence leaves no room to contend that the libellant is in any degree responsible for the falling of the dunnage upon him. He had nothing to do with the stowing of it, nor is there any evidence of his having interfered with it after it was stowed; nor was its fall occasioned by any act of his. The braces supporting the dunnage had been put up by the second mate of the vessel, some 10 days before the accident, for the purpose of stowing the dunnage behind them, and the dunnage was piled upon them by the second mate and two of the crew. Six of these racks were put up at the same time and filled with dunnage. This method of stowing dunnage in the between-decks, in order to have it out of the way until needed for use, is not unusual. On the morning of the day on which the accident occurred two heavy planks were taken by the crew from the main deck of the vessel, and placed in that one of the racks which subsequently fell upon the libellant.

There is no evidence that the libellant had knowledge of this increase of the weight resting upon the braces under which he seated himself, nor did anything occur to call the libellant's attention to this dunnage; and there is no evidence to lead to the conclusion that any person interfered with it between the time of placing the plank upon it, at about 9 A. M.,

and its fall at about 5 P. M. of the same day. The fall was without warning or any apparent cause other than the excessive weights pressing upon the braces. After the accident one of the braces was found to have broken, but it cannot be told whether the braces broke first, or whether the fastenings of the braces first gave way. From these facts the fair inference is that the placing of the heavy plank in this rack overweighed the braces and rendered the mass insecure.

From the moment of the addition of the plank the mass in its then position was a dangerous structure, erected in a place where men were required to be, and calculated at any moment to inflict great bodily harm.

Whether upon these facts the libellant is entitled to the relief he seeks by this proceeding is the question now to be determined. The jurisdiction of a court of admiralty to condemn a ship to pay damages arising from the neglect of the owner or master of a ship to discharge a maritime duty arising upon navigable waters cannot be deemed open to question. There are many adjudged cases in which it has been said, in respect to torts, that the jurisdiction arises from the locality alone.

"The jurisdiction of courts of admiralty, in matters of contract, depends upon the nature and character of the contract, but in torts it depends entirely upon locality. If the wrongs be committed on the high seas, or within the ebb and flow of the tide, it has never been disputed that they come within the jurisdiction of that court." *Phila., W. & B. R. Co.* v. *Phila. & Havre de Grace S. Tow-boat Co.* 23 How. 215; *S. B. Co.* v. *Chase*, 16 Wall. 53.

It is almost a daily occurrence in these courts, not only to entertain jurisdiction, but to charge the ship with damages suffered by other ships because of neglect on the part of the crew properly to navigate the offending ship. So, also, it is not an infrequent occurrence to charge an offending ship with personal injuries resulting from her improper navigation, and this when the person injured is in no way connected with the offending ship. *The Washington* v. *The Gregory*, 9 Wall. 513.

In cases of this description the ship herself is held responsible for the failure of her crew to discharge a duty arising out of the navigation of the ship, and owing to all other ships and the persons on board thereof. In such cases admiralty courts apply to the ship herself the rule that "a principal is liable for the acts and negligence of the agent in the course of his employment, although he did not authorize or did not know of the acts complained of." *R. Co.* v. *Hanning*, 15 Wall. 649. "By the maritime law the vessel, as well as the owners, is liable to the party injured for damages caused by its torts. By that law the vessel is deemed to be an offending thing, and may be prosecuted without any reference to the adjustment of responsibility between the owners and employes for the negligence which resulted in the injury." *Sherlock* v. *Alling*, 93 U. S. 108.

So, also, ships are charged in the admiralty for a failure of their crews to perform contracts made for the transportation and safe delivery of the cargo of the ship. In those cases the ship herself is charged because of the relation of the contract to the employment of the ship; but the liability of the ship is not confined to cases arising from faulty navigation, or out of a breach of the contract of affreightment, as was said by the learned judge who rendered the decision in the case of the Germania, so greatly relied on by the claimants. But in all these cases there is a duty on the part of the officers and crew, as representing the owner, and in the discharge of the authority entrusted to them by him, and while acting within the scope of such authority, not be negligent towards the person to whom the liability is incurred. The duty may arise out of the fact that the vessel is being navigated, or is anchored in the pathway of other vessels, or has a relation by contract to the person injured, in person or property, and no doubt out of other circumstances. *Jennings* v. *Bark Germania*, *Blatchford*, J., MSS. March 12, 1878.

Such a liability, in my opinion, exists where damage arises from the neglect on the part of the owner of a ship to discharge any duty arising on navigable waters out of the em-

ployment of the ship as an instrument of commerce, and owing to the person injured. If, then, it appears in this case that there was a duty owing to the libellant in respect to the manner of stowing the dunnage and plank that fell upon him, and it also appears that such duty arose out of the employment of the ship as an instrument of commerce, and to be performed on navigable waters, the jurisdiction of this court to condemn the ship, and the right of the libellant to require that the ship be held to be charged with the damages caused to him by the omission of that duty, must be upheld.

I proceed, therefore, to the inquiry whether the owner of this ship, who, for the purposes of this inquiry, must be held to be represented by the crew of the ship, under the rule already stated, became charged with any duty towards the libellant in respect to the stowage of the dunnage and plank that caused the injury in question. The character and position of the dunnage and plank here become important, and it is to be noticed that the weight of the mass, and its position at the top of the between-decks, and overhanging the space where men must necessarily be at work, rendered the structure dangerous to life, unless it was properly secured. It was so arranged that, from its nature, it was dangerous to all persons who might be in that part of the between-decks. It was at all times, at least from the time of the addition of the planks to the weight resting upon the braces, equally dangerous, and necessarily so. The danger arose not from any use of the thing, but from the thing itself.

So far as the character of the structure affects the question of liability, this case seems to be within the principle of the case of *Thomas* v. *Winchester*, 6 N. Y. 397; for in this case, as in that, the death or great bodily harm of some one was the natural and almost inevitable consequence of the structure as it was at the time it fell. Such being the character of this structure, in case the mass was not properly secured, if the libellant was in the between-decks of this ship in the exercise of a right to be there, the ship-owner owed him a duty to see that the dunnage and plank were properly secured, which duty was not properly performed.

In regard to the presence of the libellant in the between-decks, the evidence shows that he was not there by the mere sufferance or license of the ship-owner, but for the purpose of performing a service that could not be performed elsewhere, and in which the ship-owner had an interest. To be sure, the libellant was not directly employed by the ship-owner, and it may be truly said that no relation by contract existed between the ship-owner and the libellant. But the libellant was trimming the ship-owner's ship. He was doing what was necessary to be done to enable the ship to carry the cargo in safety, and the reason why he was so employed was because the ship-owner had, by a contract with the charterer, indirectly provided for the performance of this service.

There was a relation between the ship-owner and the libellant arising, not out of the mere presence of the libellant on board the ship, but out of the service he was then engaged in performing, the necessity of that service to the ship-owner, and the circumstances of the libellant's employment to perform that service. The libelant had, therefore, a right to be where he was; and it follows that there was a duty on the part of the owner to see to it that the dunnage and plank stowed above him were so secured as to prevent its falling upon him of its own weight. *Nicholson* v. *The Erie R.* 41 N. Y. 533.

The libellant's case differs from the case of the Germania, to which reference has already been made. In the case of the Germania a charterer of the ship had contracted to deliver to the ship a cargo of grain in bags. The libellant was employed by the charterer to sew up the bags of grain as they were filled, and while walking over the deck of the ship fell through an open hatchway and was injured. In that case it was not necessary that the bags be sewed on board the vessel, or indeed to be sewed at all except to enable the charterer to perform his contract to deliver the grain in bags. In this case the grain could not be carried unless it was trimmed on the ship, and the libellant was injured while engaged in performing that service. This libellant was, in a very proper sense, required by the ship-owner to be in the between-decks of the

ship, and he was there engaged in ship's work. The ship's officers testify that they were seeing to it that the grain was properly trimmed. It would be strange indeed if he could be there so engaged without any duty on the part of the owner of the ship to see to it that he was not subjected to the peril arising from such a structure as the evidence discloses this pile of dunnage and plank to have been.

Moreover, in the case of the Germania, the injuries arose from that common and at most times necessary feature of a ship's deck while in port, viz., an open hatch; while here the libellant was injured because of the dangerous character of a structure erected in the between-decks, as to the nature of which the libellant had no means of informing himself, and respecting which he was informed by no one. This case would seem to be within the rule as stated in *Smith* v. *Dock Co.* 3 L. R. C. P. 326, that persons inviting others on their premises are answerable for anything in the nature of a trap upon their grounds. It is certainly within the principle of the case of *Indemaux* v. *Dawes*, 2 L. R. C. P. 311, where a gas-fitter, having contracted to fix certain gas apparatus to the defendant's premises, sent his workman, the plaintiff, after the apparatus had been fixed, and by appointment with the defendant, to see that it acted properly, and the workman having gone upon the defendant's premises fell through an unfenced shaft in the floor and was injured. In that case the plaintiff was held entitled to recover because he was not a mere volunteer.

For these reasons I conclude that the damages sued for arose from the neglect of a duty owing by the ship-owner to the libellant. This neglect was the neglect of a maritime duty, and attaches to the ship herself. Not only did the neglect occur upon navigable water, but in the performance of a service necessary to be performed to enable the ship to receive her cargo. The stowing of this dunnage was part of the ordinary duty of the ship's crew, and in this case was done by the crew. The object of stowing the dunnage was to facilitate the taking in of the very cargo upon which the libellant was

employed at the time he was hurt. Still further, the dunnage and plank that, by reason of neglect in the manner of stowing, fell upon the libellant, were part of the apparel and furniture of the ship.

In legal effect the blows inflicted upon the libellent were blows of the ship, and for blows given by the ship she has always been held liable; as, for instance, in cases of collision. It thus appearing that this is a case where the damage sued for was caused by the wrongful neglect, upon navigable water, of a duty owing to the libellant by the owner of this ship, and arising out of the employment of the ship, in her capacity as a carrier of cargo, I must adjudge the vessel herself to be liable for such damage, and she is accordingly condemed to pay the same. Let a reference be had to ascertain the amount of the damage.

DUNLAP *v.* STEAMBOAT RELIANCE, etc.

(*Circuit Court, D. Georgia.* ———, 1880.)

CARRIERS OF PASSENGERS—LIABILITY OF.—Carriers of passengers are not insurers of the safety and lives of their passengers, but are bound to the exercise of the utmost knowledge, skill and vigilance.

STEAMBOAT—EXPLOSION OF BOILER—NEGLIGENCE.—The explosion of the boiler of a steamboat causing injuries is *prima facie* evidence of negligence.

NEGLIGENCE—INSUFFICIENT EVIDENCE TO REBUT.—Evidence in this case considered, and *held* not sufficient to remove the presumption of negligence arising from the fact of the explosion of the boiler of the boat.

In Admiralty.

R. R. Richards and *H. C. Cunningham*, for libellant.

Lester & Ravenel, for respondent.

WOODS, C. J. The Reliance was a passenger and freight steamboat, making regular trips by the middle route between Jacksonville, Florida, and Savannah, Georgia. On September 3, 1878, about 10 o'clock P. M., she left Jacksonville, bound for Savannah. On that trip the libellant was a pay passenger. Between 11 and 12 o'clock on the night of that day, as the Reliance was going up the St. Mary's river, one of her boilers exploded. The result of the explosion was to throw overboard her other boiler and to break in the lower forward saloon.

At the time of the explosion the libellant was sitting on the port side of the upper deck. He was thrown upwards by the explosion and fell upon the deck 10 or 12 feet from where he had been sitting at the time of the explosion. His right leg was broken at the neck of the trachanter, and his elbow and hand were bruised. He was taken to a hospital in Savannah for treatment, and for weeks suffered great pain from his injuries. As a result of the fracture he was crippled for life, his injured leg being shortened about an inch and a half.

The libellant was an Episcopal clergyman, and at the time of his injuries aged 37 years, and was of sound bodily health. At the time of the explosion William Moultrie, first engineer

of the boat, was in charge of the engine; he was killed by the explosion; he went on duty at 6 o'clock that evening. Mark Davis was fireman on duty at the same time.

John Sherman was second engineer, and was relieved by Moultrie at 6 o'clock. When Moultrie relieved him he told Sherman that when the latter came on watch again that night he should keep a strict lookout for everything, and to be sure to keep his eyes on the pump and to see that it continued to work.

At the time of the explosion, Moultrie, the engineer, was in his usual position, in full view of the glass and water-gauges.

The explosion was preceded by a humming or whistling noise, and water and ashes came from under the port boiler and were blown forward.

The testimony touching the character of Moultrie, the engineer on duty when the explosion took place, was conflicting; some of the witnesses spoke of him as a sober, careful and competent engineer, and very faithful and attentive to his duties. One witness, however, stated that about two weeks before the explosion he saw him on the wharf at Savannah, while the boat was getting up steam, so drunk as to be unfit to run an engine in any steamer. The witness said he spoke to Mr. Benson, the agent of the boat, about the condition of Moultrie at that time, and Mr. Benson said the company intended to get rid of him as soon as possible.

The evidence showed that the boilers and machinery of the boat were in good order and repair just before the explosion. The boilers had been repaired and inspected in August preceding, and a short time before the trip on which the explosion occurred had been cleaned out, and were apparently sound and good. The pump was a good one, and had never been known to fail.

There was a glass water-gauge, and there were water-cocks for ascertaining the quantity of water in the boilers. The evidence showed that it was necessary to try the water-cocks, as well as to examine the glass water-gauge, in order to ascertain the height of the water in the boilers; that it was

not prudent to rely entirely on the glass water-gauge, which was likely to choke up and deceive the engineer. There was some conflict in the evidence whether it was customary on the boat to test the water by the water-cocks.

After the explosion a piece of the bottom of one of the boilers was found in the boat. It was hard and brittle, and broke under the shears. Its tensile strength had been lost to the extent of 5,000 or 6,000 pounds by being heated and chilled. It had been burnt by fire. It was in evidence that it was the duty of an engineer to prevent the burning of his boilers, and that when they were allowed to burn there was a presumption of negligence.

The Reliance was allowed to carry 80 pounds of steam, but she not unfrequently carried from 82 to 83 pounds, and it was often necessary for her to carry this amount to make up her time. Just before the explosion the steam-gauge in the cabin indicated a steam pressure of 72 pounds.

The libellant was without fault, and his injuries were received without any negligence or carelessness on his part.

The carriers of passengers are not insurers of the safety and lives of those whom they carry. Ang. on Car. § 536; 2 Greenl. on Ev. § 222; *Christie* v. *Griggs*, 2 Camp. 79; *Israel* v. *Clark*, 4 Esp. 259; *Aston* v. *Heavier*, 2 Esp. 533; *Meir* v. *Penn. R. Co.* 64 Penn. St. 225; *McPadden* v. *N. Y. Cent. R. Co.* 44 N. Y. 478; *Daniel* v. *Metropolitan R. Co.* L. Rep. 5 H. L. 45.

Nevertheless, a carrier of passengers is bound to exercise the utmost knowledge, skill and vigilance to carry his passengers in safety. *Curtis* v. *The Rochester & Syracuse R. Co.* 18 N. Y. 543; *Steamboat New World* v. *King*, 16 How. 469; *Stokes* v. *Suttonstall*, 13 Pet. 181.

In the last case cited the supreme court says: "It is certainly a sound principle that a contract to carry passengers differs from a contract to carry goods. For the goods the carrier is answerable at all events, except an act of God and the public enemy. But, although he does not warrant the safety of the passengers at all events, yet his undertaking and liability as to them go to this extent, that he or his agent, if he

acts by an agent, shall provide competent skill, and that, so far as human care and foresight can go, he will transport them safely."

The explosion of the boiler, and the consequent injuries to the libellant, are, of themselves, *prima facie* evidence of negligence.

In *Christie* v. *Griggs*, 2 Camp. 69, *Sir James Mansfield*, chief justice, said: "I think the plaintiff has made a *prima facie* case by proving his going in the coach, the accident, and the damage he has suffered. When the breaking down or overturning of the coach is proved, negligence on the part of the owner is implied."

This case is cited with approbation by the supreme court in *Stokes* v. *Suttonstall*, *supra*; in *Railroad Company* v. *Pollard*, 22 Wall. 341. The case of *Stokes* v. *Suttonstall*, 13 Pet. 181, was approved, and it was declared that in a suit against a railroad company for an injury to a passenger, if it appeared that the passenger was in the exercise of that degree of care which might be reasonably expected from a person in his situation, and injuries occur to him, this is *prima facie* evidence of the carrier's liability.

In the present case, where the injury was caused by the explosion of the boiler of the steamboat, while the same was in charge of the servants of the boat, there can be no question that the explosion itself makes out a *prima facie* case of negligence, and, unless this presumption is rebutted, entitles the libellant to recover.

The question for decision upon the facts is, therefore, has the respondent rebutted this presumption?

The proof shows that the boilers of the Reliance and her machinery were in good order. The boilers had been recently repaired and had been inspected by one of the government inspectors at Savannah, and had been cleaned out a short time before. At the time of the explosion there were on defects apparent in the boat, her boilers or machinery.

The explosion must, therefore, have been caused either by some latent defect which the closest examination could not

discover, or by the negligence of those in charge of the boilers and machinery, and it is incumbent on the respondent to show that the disaster was caused by the former, and not by the latter.

There is no direct proof whatever that there was any defect in the boiler or machinery of the boat to which the explosion could be attributed. The respondent, however, seeks to draw the inference that there was such defect from the proof tending to show the good character of the engineer for sobriety, skill and attention to his duties, and from the fact that just before the explosion he was at his post apparently attending to his duties; but there is evidence on the record tending to rebut this proof of the respondent. It is shown that the engineer was not always sober, and there is evidence tending to show that the glass gauge was relied on to ascertain the height of water in the boilers, and that the water-gauge cocks were not used for that purpose. This, according to the evidence of the government inspector, would be negligence, because a glass gauge is likely to choke up and deceive the engineer.

But the fact which, to my mind, rebuts the inference to be drawn from the alleged good character of the engineer, and his attention to his duties, is found in the condition of that part of the boiler which was left in the boat after the explosion. The government inspector says, in reference to this fragment of the boiler: "I examined it with Mr. Henderson. We had it cut, but did not cut the worst part of it, as we desired to keep it for further information. The piece we had cut was hard and brittle, and it broke under the shears; its tensile strength had been taken away to the extent of about 5,000 or 6,000 pounds by being heated and chilled; it had been burned by fire."

This witness adds: "It is an engineer's duty to prevent the burning of the boilers, and the presumption is that when they do burn it is negligence." On this point Sherman, the second engineer, says: "I would consider it great carelessness to let your boiler burn; it could not happen without great carelessness."

The respondent claims that the piece of the boiler found on the deck might have been burned after the explosion by the fire left in the furnace. This is mere conjecture, without any evidence to support it, and the result of the explosion, as disclosed by the evidence, renders such a theory extremely improbable. This evidence makes it perfectly clear that the boilers of the boat were not in a sound condition at the time of that explosion, and that their unsafe condition was due to the carelessness of the engineers, or one of them. It may have been owing to the carelessness of Moultrie, the engineer on duty at the time of the explosion, or of the second engineer, Sherman, who admitted after the disaster that it was not his habit to try the water-gauge cocks, and who for this negligence has had his license revoked.

It is also in evidence that the boat very frequently carried more passengers than she was allowed to. With all this testimony touching the management of the boat by her engineers and the condition of the boilers at the time of the explosion, we are asked to find that the explosion was caused by some hidden defect in the material out of which the boilers were constructed, and not to defects caused by carelessness and bad management. No hidden defect is shown to exist, and we are asked to infer it from the good character of the engineers. The facts prove that the engineers were careless and negligent, and the result of that negligence is shown by the condition of the boilers at the time of the explosion. The natural and almost unavoidable inference is that the explosion was the result of the bad treatment of the boilers by the engineers, and not the result of some concealed flaw.

In my judgment, the presumption of negligence arising from the fact of the explosion is not removed, but is greatly strengthened, by the evidence in the case, and the libellant must have a decree for the damage that he has sustained.

Upon the facts, as disclosed by the evidence, I estimate his damage at $5,000, and direct a decree in his favor against the boat for that sum, and costs, both in this court and in the district court.

STRETCH *vs.* THE TUG MARGARET.

(*District Court, S. D. Michigan.* April 8, 1880.)

ADMIRALTY—DUTY OF TOW—LIABILITY OF TUG—It is the duty of a tow to be steered properly, to follow in the wake of the tug, and do all that nautical skill requires for the proper management of such tow. Where a vessel being towed carried so much sail that the tug could not, at the critical moment of her entering the harbor, control her either as to course or headway, *held*, that it should not be liable for damages sustained by such vessel in consequence thereof.

In Admiralty.

Ackley & Farr, for libellant.

G. C. Markhaus, for tug Margaret.

WITHEY, D. J. In seeking to enter the harbor of Ludington, the schooner Mary was taken in tow by the tug Margaret, June 20, 1878, about 9 o'clock in the evening. She was about five miles south of the south pier, and three or four miles out from shore; wind from the north-west, from 15 to 20 miles an hour. The course taken to reach the harbor was about north by east; speed about three or four miles an hour, the schooner carrying her mainsail, foresail, and fore-staysail. The two piers at Ludington run due west from the shore; the south pier extends into the lake about 200 feet further than the north pier, so that the vessel in entering the harbor had to round the south pier. The same course was continued after the tug took hold of her until the turn was made to go into the harbor. In entering, the schooner went off to the northward, and north of the north pier, when the line was cut by the tug. During the night the schooner was damaged from the position she occupied, and this suit is brought to indemnify her for such damages. The sea was running so that the current tended to carry the vessel leeward. The captain of the schooner states that when within half a mile of the south pier he ordered the mainsail lowered, and it was slackened about one-half down, or a little more; that the tug kept its course, passing the end of the south pier at about 100

feet distant, and until nearly opposite the end of the north pier, then turned sharp, the line slackened, and the schooner "shot past the dock, when a strain came on the tow-line," and she struck the end of the north pier, and the tug cut the line. He testifies that he received no orders from and gave none to the tug; but says when he gave his line to the tug he asked the master if he should keep on sail to help her along, and received answer, "Yes, sir;" that just prior to entering she was steering about north, or north by east, and as she passed the end of the south pier "then she was turned." He says he cannot state what way the vessel was headed when she struck the end of the north pier, "because she was going off to the eastward fast when she struck." When asked the reason of the vessel going on the north pier and around it, he answers, "From the fact of the captain (of tug) not bringing the vessel far enough out into the lake to the westward and giving a chance to follow the tug into the harbor, and having cut the line."

The master of the tug testifies that he had the vessel in tow from an hour and a half to two hours; that she had on her foresail, mainsail and jibs; that he thinks they were west of the south pier before rounding to, to come in, from 1,200 to 1,400 feet, because he could not see the south pier when he got in range of the piers or light; that the vessel kept on her canvas after they had rounded to to make the harbor; that she straightened up in line of the tug before the latter reached the end of the piers; that as she rounded to he could see both her tow-line and her signal lights; that she followed the tug until he got abreast of the end of the north pier, when she sheered off to the northward of the north pier. He was asked what caused the vessel to sheer and go to the northward of the north pier, and answered, "having her mainsail on."

He further testifies that the vessel had her "mainsail on, and her sheets hauled clear up, coming close by the wind, before we made the turn. When we got pretty close to the end of the north pier a sea happened to strike his port quarter and that carried his stern to the southward; enough so that

his mainsail would fill again, and so that the schooner luffed up and shot by the end of the north pier. The schooner had to slack her main peak halyards in order to make her course up alongside the north pier; when she got around to the northward she shot clear by the pier." He further states that the tug was there just inside the north pier, so that her stern was just about even with it, and she was about 25 feet south of the north pier.

There are the usual contradictions and disagreements between the men on the schooner and those on the tug touching the material facts. There are five witnesses, sailors and masters of vessels, having no interest, who agree substantially that the cause of the disaster was attributable to unskilful management by the master of the schooner. Taking into consideration the direction and strength of the wind and the condition of the sea, it would not seem to be proper management on the part of the master of the schooner, after turning to go into the harbor in tow of a tug, to carry any mainsail at all. To carry any part of her mainsail would, in the opinion of experienced sailors, have a tendency to render her unmanageable; cause her to broach to and go to the windward in spite of the tug.

It is claimed that the tug was at fault in failing to keep the line, and not using proper efforts to bring the vessel back from the north side of the north pier, but masters and seamen of much experience have said that the tug could not have prevented the disaster after the schooner went to the northward of the pier. It was plainly the duty of the master of the vessel, in the absence of any directions from the master of the tug, to manage his helm and sails judiciously.

It is not contended that it was unsafe for the tug to undertake bringing the schooner in, from any condition of the wind or sea. It is claimed that the tug slackened her line at a critical moment for the vessel, and came too close to the end of the south pier when turning to come in. The better opinion seems to be, on the part of those competent to judge, that the vessel would be carried ahead so that the tow line would be

slackened between the seas in consequence of the force of wind and sea. Whether the line was slackened from any other cause does not satisfactorily appear. As to the distance west from the end of the south pier when they turned to come in witnesses do not agree, and this fact does not seem to us at all controlling.

The evidence establishes, in our opinion, that there would have been no difficulty in bringing the tow in safely had the schooner carried no part of her mainsail, and the question of liability appears to us to turn upon whether the tug or the schooner is responsible for so much after sail being carried from the time when the turn was made to come in.

The tow was from 120 to 180 feet in the rear of the tug. It was in the night, and in our opinion, unless the tug had assumed to take entire control and direction of the vessel, it was the latter's fault if she had up part of her mainsail. To apply such rule is to do no more than to require of the captain of the schooner the exercise of that measure of care and skill which is incumbent on the tow. *The Margaret*, 94 U. S. 496; *The Margaret*, 5 Bissell, 357. In the latter case it is said there are certain duties incumbent on those who have the management of the tow. It is the duty of the tow to be steered properly; to follow in the wake of the tug, and to perform all those duties which nautical skill demands in order to properly manage the tow.

It is manifest that if the tow, at a critical point, when about to enter the harbor, carries such sail as to take her out of the control of the towing craft, either as to her headway or course, the tug should not be held at fault for any disaster that ensues.

We entertain the opinion that the libel should be dismissed, and decree accordingly, with costs to claimant.

THE JOSEPH NIXON *v.* THE STEAM-TUG GEORGE LYSLE and owners.

(*District Court, W. D. Pennsylvania.* ———, 1880.)

ADMIRALTY—COLLISION—DAMAGES ALLOWED.—In consequence of a collision between libellant and defendant, caused by the negligence of the defendant, libellant was obliged to put into port for repairs, by reason of which she lost 11½ days' time in making repairs and waiting for a rise in the river sufficient to float her tows; having, by the delay, lost the benefit of the rise existing at the time of collision. *Held*, that the owner was entitled to recover as damages—(1) The amount of the repairs; (2) the loss sustained by reason of his failure, in consequence of the collision, to deliver certain coal contracted and in tow; (3) demurrage during the time the boat was delayed in undergoing repairs.

In Admiralty.

John H. Barton, for libellants.

John G. MacConnell, for respondents.

ACHESON, D. J. On the twelfth day of November, 1877, the libellant's steam-tug, the Joseph Nixon, with a tow of 11 pieces—nine thereof being loaded coal barges—was proceeding down the Ohio river on a voyage from Pittsburgh to Cincinnati. For several hours during the morning of that day the Joseph Nixon had been closely followed by the respondents' steam-tug, the George Lysle, which, with a tow of loaded coal barges, was also proceeding on a voyage down the Ohio. At about noon of said day, when the boats had reached a point nearly opposite the town of East Liverpool, in the state of Ohio, the forward end of the tow of the George Lysle collided with and ran into the wheel of the Joseph Nixon. The day was calm and clear. The Joseph Nixon was in proper place, and was properly navigated immediately before and at the time of the collision, and was plainly in sight of the pilot of the George Lysle. The latter boat gave the former no signal or warning. It was the clear duty of the George Lysle (which was the faster boat) to slacken her speed or adopt precautions to avoid collision. *Whitridge* v. *Dill*, 23 How. 448. By the exercise of ordinary care on the

part of the pilot of the George Lysle the disaster would have been averted.

Upon this branch of the case there is little conflict in the testimony, and I find, without hesitation, that the collision was entirely the result of negligence on the part of those in charge of and navigating the George Lysle, and that the Joseph Nixon was wholly free from blame.

By reason of the collision the wheel of the Joseph Nixon was partially broken, and was so disabled that the boat was unfit to proceed to her destination without stopping to make repairs. Immediately after the collision men were set to work to clear away the wheel and put it in condition to turn. While this was going on the boat and her tow floated down the stream. About the time the wheel was clear and free to move the captain consulted his pilot in respect to the best place to land for repairs, and the pilot recommended New Cumberland, Ohio, as a proper place for the purpose. New Cumberland is about 10 miles below the place of collision. Before reaching New Cumberland the tow of the Joseph Nixon got aground at a point in the river about seven miles below the place of collision, called "The Clusters," and in consequence the boat was detained there several hours. During the evening of the same day, however, the boat got afloat part of her tow, and proceeded with it to New Cumberland, and there landed and tied up for repairs. Subsequently, and before the boat resumed her voyage to Cincinnati, the rest of the tow was taken off the bar at "The Clusters," without loss.

It is claimed by the respondents that if the Joseph Nixon was in the disabled condition alleged by the libellant, the boat should have landed as soon as possible after the collision; that there were convenient and suitable places for speedy repairs above "The Clusters," and that it was improper to go so great a distance as New Cumberland before landing. Upon this point the testimony is conflicting. I think, however, that the captain and pilot of the Joseph Nixon were the best judges of what was proper to be done in the emergency which was upon them; and I am of opinion that the evidence as a whole

does not convict them of any error of judgment. Moreover, the short detention at "The Clusters" did not cause any material delay in repairing the broken wheel. It was found necessary to send to Pittsburgh for materials and a ship carpenter to make the necessary repairs, and the repairs were not completed until the end of three or four days, although all reasonable diligence was exercised. In the meantime the water had fallen so much that when the repairs were completed the boat could not resume her voyage, but was compelled to remain at New Cumberland until the next rise. By reason of the low stage of water the boat was not able to leave New Cumberland, with her tow, until November 23, 1877, when she resumed her voyage and completed it.

The libellant claims damages to the amount of $1,298.07. The claim is of a threefold nature, and embraces—(1) The sum of $198.80, being the cost of the repairs and necessary incidental expenses; (2) the sum of $486.98, being a loss on certain coal; (3) the sum of $612.49, being the loss of profits upon the trip or voyage.

First. The libellant is clearly entitled to recover the costs of the repairs and the necessary incidental expenses connected therewith; and these I find to amount to the sum of $198.80, the items thereof being specified in the bill of particulars annexed to the libel.

Second. The second item of the libellant's claim grows out of the following facts. The libellant was the owner of 64,906 bushels of the coal in the tow of the Joseph Nixon. This coal he had sold deliverable on that rise to certain parties at Cincinnati. The contract price was 8 cents per bushel for part of the coal, and 7¾ cents for the rest. In consequence of the collision, and the interruption of the voyage which ensued, the coal did not reach Cincinnati in time to be delivered to the purchasers according to the terms of the contract, and they supplied themselves with other coal. When the libellant's coal reached Cincinnati he was compelled to sell it, and did sell it, at the then market price, and thereby sustained an average loss of three-fourths of a cent per bushel, the difference between the

contract price and the market price. His loss was $486.78. The evidence on this subject appears in the testimony of Joseph Nixon, at page 67 *et seq.*, and of John F. Kelling, at page 146 *et seq.* It does not appear that there was any market for coal at New Cumberland, or that the libellant could have done anything to avert or lessen the loss.

The respondents insist that they ought not to be charged with this loss. But why not? Upon what just principle can it be thrown upon the libellant? His loss was neither remote, speculative nor uncertain. It was an actual loss, and the direct result of the collision. If the rule of indemnity or compensation is to prevail, the damages decreed to the libellant should embrace the loss he sustained on his coal. It has been held that the owner of the injured vessel may recover for freight lost by reason of the collision. *The Atlas*, 3 Otto, 307. And in *Van Tine* v. *The Lake*, 2 Wall. Jr. 52, there was an allowance for loss of profits to the vessel during the time she was being repaired. Was the libellant's loss on his coal any less direct or certain than such loss of profits, or a loss of freight earnings? I am of opinion that the second item of the libellant's claim is well founded and should be allowed.

Third. But the item as set down in the bill of particulars —"loss on trip, $612.49"—stands on a different footing. This estimate is made by the libellant upon a comparison of the net earnings of the boat upon a prior and subsequent trip. His opinion as to this supposed loss is no doubt an honest one. But his own witness, J. W. Clarke, in answer to a question as to the probable profits of that trip, said: "It is a pretty hard thing to figure that thing up. If she made a steady trip she wouldn't make very much." Page 187. If it be conceded that such loss of profits would be allowable in a proper case, the claim as here presented, it seems to me, is not satisfactorily established. It rests largely upon mere conjecture. Moreover, after the interruption of 11½ days, the trip was resumed and completed.

A more reasonable claim set up by the libellant is that for

demurrage or compensation for the detention of the Joseph Nixon while she lay at New Cumberland. The evidence tends to show the boat was worth $50 per day after all proper deductions. I do not, however, think the libellant has shown himself entitled to any demurrage for the seven and one-half days during which the boat lay at New Cumberland awaiting a rise in the river after she was repaired. The stage of water during that time was not sufficient to float the boat's barges, which drew six and one-half feet. But it does not clearly appear that the boat herself might not have been employed, nor was it shown that she would have been profitably employed during those seven and one-half days had she reached Cincinnati without interruption to her voyage.

The allowance of demurrage, however, during the four days the boat was undergoing repairs is justified, if not imperatively required, by the decision in *The Cayuga*, 14 Wall. 270. I have fixed the demurrage at $30 per day. In view of the inexcusable character of the collision, I do not think the respondents can justly complain of the amount so allowed.

The libellant's damages will, therefore, be assessed as follows:

Costs of repairs and necessary incidental expenses	$198 80
Loss on coal	486 78
Demurrage	120 00
	$805 58

—with interest from December 1, 1877.

Let a decree in favor of the libellant be drawn in accordance with the foregoing opinion.

WEIBYE *v.* DRESSEL, RAUSCHENBERGER & Co.

(*District Court, D. Maryland.* April 27, 1880.)

ADMIRALTY — CHARTER-PARTY — BREACH OF — BROKER — DAMAGES. — A charter-party stipulated that a vessel should be consigned to certain brokers *free of commission*; penalty for non-performance, estimated amount of freight. The only benefit to a broker in case of such consignment would have been a probability of employment to procure for the vessel an outward freight, but he would have acquired no legal right to render such service. There was a breach of the charter-party in the consignment of the vessel to a broker other than the one stipulated. *Held*, that the mere loss of a probable opportunity for employment was too uncertain and speculative a damage on which to base a claim for such breach by the broker named in the charter-party.

In Admiralty.

Marshall & Fisher, for libellant.

A. Stirling, Jr., for respondents.

MORRIS, D. J. This is a libel *in personam* by the libellant, who is the master of the Norwegian brig Gazellen, for the freight on a cargo of salt brought by the ship from Hamburg to Baltimore, and delivered to the respondents as indorsees of the bills of lading therefor. The ship received the cargo under a charter-party executed in Hamburg between the libellant and a merchant of that place named Kleimbst, who shipped that salt.

The answer alleges that the freight had been forfeited, for the reason that, by a stipulation contained in the charter-party, the ship was to be consigned at Baltimore to the respondents, who are ship-brokers, and that the libellant did not consign the ship to the respondents, but consigned her to another firm of ship-brokers at Baltimore, in breach of the charter-party, and without cause, in consequence whereof the respondents lost the fees and commissions for clearing the vessel, and procuring her a new charter for her homeward voyage, which they would otherwise have earned and received.

The answer alleges that by a well-known usage and agree-

ment among ship-brokers in Baltimore they will not accept employment in obtaining an outward charter for any vessel already consigned to another broker, so that if the ship had been consigned to the respondents, as stipulated, they would have earned the commission of 2½ per cent. paid for obtaining such outward charter, together with fees for clearing her for her homeward voyage; that by reason of the breach of said charter-party the said commission and fees were earned and received by another firm of ship-brokers, and that the ship was consigned to them for the purpose of enabling said firm to earn and receive said fees and commission, and with intent to deprive respondents of them.

The charter is for a voyage from Hamburg to Baltimore, and the stipulation is: "The ship is to be consigned to Dressel, Rauschenberger & Co., Baltimore, *free of commission*; * * penalty for non-performance of this charter-party, estimated amount of freight."

The libellant having safely transported and delivered the cargo there can be no forfeiture of the freight, and the extent to which recoupment on account of breach of the charter-party could in any event now be allowed would be actual damages.

The evidence offered by the libellants did not tend to prove any usage or custom by which a ship-broker, to whom a vessel was consigned, would have an absolute right to procure for her an outward freight. On the contrary, the evidence tended to show that when a vessel is consigned, as in this case, "free of commission," the ship-broker to whom she is consigned is not entitled to make any charge for attending to the business of the vessel while she is under that charter; and the only advantage to the ship-broker of having a vessel so consigned to him is that he has then the best chance of being employed by the master or owners to obtain for her an outward cargo, and that other ship-brokers would so far respect his position as consignee that, by common consent and usage, they would not interfere with him, and would refuse to take her out of his hands.

It was admitted that the master or owner might himself procure a homeward charter if he could, and would not then be bound to pay a commission to any one; or, if he pleased and could find another broker who would act for him, he might employ another broker without incurring any liability to the consignee.

It was, therefore, only a probability of employment and consequent compensation which the respondents would have acquired by having the vessel consigned to them, with the certainty that the business of entering her on her arrival and such other service as they might perform while she was under the existing charter they would have to perform gratuitously. In the case of *Phillips* v. *Briard*, 1 H. & N. 21, the stipulation in the outward charter-party was, "the ship to be consigned to charterer's agents in China free of commission on this charter;" language precisely similar in effect to the stipulation in the present case. The offer was to prove a usage by which consignees under such a stipulation were entitled to procure a homeward cargo for the ship and to charge the usual commission on the freight whether they procured it or not, provided they were prevented from procuring it by the owner or master procuring it himself or otherwise than through their agency.

But the court held that this usage was not admissible as against such a stipulation, as it would be adding to the plain language of the charter-party another and a different allegation, and would be in effect saying that because the vessel was consigned to the charterer's agents "free of commission" on the outward voyage, they were to be entitled to a commission on the homeward cargo, whether they were employed to procure it or not, which would be not explaining but adding to the written contract.

Now, if there could be no recovery under the present stipulation—supposing the owner to have actually consigned the ship to the ship-brokers, and then to have, immediately on her arrival, put her into the hands of another broker—it is difficult to see what positive and certain damage could arise from the breach of the stipulation to consign her to them.

The mere loss of an opportunity which might or might not have led to a profitable employment is too uncertain and speculative a damage on which to base a claim for breach of such a contract.

There was undeniably a breach of the charter-party. The ship was not consigned to Dressel, Rauschenberger & Co. as agreed. But if the ship had been consigned to them "free of commission," they would have acquired no legal right to perform any service or make any charge in respect to her, and the master could at any moment have declined to allow them to attend to the ship's business; and the fact that he then might have found it difficult to get another ship-broker in Baltimore to serve him does not, I think, alter the result.

I therefore pronounce in favor of the libellant for the amount of the freight, with interest; but as there was a breach of the charter-party, and the owner should not have allowed the stipulation to be put in the contract if he did not intend to observe it, I yield to the suggestion of respondents' proctor with regard to the costs, and shall give no costs.

CORWIN and others *v.* THE BARGE JONATHAN CHASE, etc.

(*District Court, E. D. New York.* ———, 1880.)

ADMIRALTY—SALVAGE FROM FIRE.—A tug that had brought up to a pier and within reach of the fire department a barge loaded with alcohol, upon which fire had broken out, *held*, entitled to salvage, but not as upon derelict property.

W. W. Goodrich, for libellants.

P. Cantine, for respondents.

BENEDICT, D. J. The barge Jonathan Chase, loaded with a cargo of 191 barrels of alcohol, on the twenty-eighth of February last was lying in one of the slips of the East river, moored by lines outside of the ship Montreal. At about daylight one of the men on board the barge, in passing over the cargo with a lantern, fell; the lantern was broken and the alcohol at once ignited. The flames at once enveloping the man, caused him to jump overboard, giving the alarm as he went. The other man on board the barge was then aroused and he at once left the barge; and the master of the ship to which the barge was moored cast off the lines and set the barge adrift. The tug Starbuck approaching at the time took hold of the barge, but the alarm being given that the cargo was alcohol and likely to explode the Starbuck cast off her lines, and thus the barge was left adrift in the stream with her cargo in full blaze. By the time that she was at a distance from the piers variously estimated at 60 to 100 feet, the tug Niagara approached her. As she approached she was warned from the Starbuck that there was danger of an explosion; notwithstanding which she made fast to the barge, and being hailed by the firemen, who by this time had arrived with engines upon the pier, to bring the barge within range of their streams, she moved the barge up to the end of the pier and within range of the fire engines, which immediately began to play upon the fire. By this time the Havemeyer, a public fire-boat equipped and used for the sole purpose of putting out fire on the waters of the harbor of New York,

had approached, and by her powerful engines the fire was subdued. The Niagara remained by until the fire was extinguished, holding the barge in position at the pier by one of her lines.

An hour or so of time elapsed between the breaking out of the fire and its subjugation. The time in which the Niagara was occupied in making fast to and getting the barge to the pier was but a few minutes. What would have been the result, had the Niagara followed the example of the Starbuck and declined to aid the barge, is left somewhat in doubt by the evidence; but, considering the inflammable nature of the cargo, it is plain that at the time the Niagara took hold every moment of delay added greatly to the risk of the total destruction of the cargo and serious injury to the barge. As it turned out, the barge was damaged to the amount of between $100 and $200. Twenty-three barrels of alcohol were lost, and 73 barrels so badly charred as to require new barrels. The value of the barge after the fire was $900 to $1,000. The sound value of the cargo before the fire was $3,060.84.

For the service thus rendered by the tug Niagara the libellants claim salvage compensation. The claimants deny that the service rendered was of value or entitled to be compensated as salvage. It cannot be doubted that the service rendered was a salvage service. It was a voluntary service, rendered in aid of property in danger of destruction on the sea. The only question open to serious discussion relates to the amount proper to be awarded.

The libellants claim that the property was derelict, and claim to be rewarded as in cases of saving derelict property. But while it is true that no person was on board the barge at the time the Niagara took hold of her, still the Havemeyer, a vessel maintained at the public expense for the sole purpose of affording aid in such a case, was within reach, and was sure to be able to come to her aid within a very few moments. And while it is true that the barge had been abandoned by those in charge of her, still she was in the East river, where she could not fail to receive assistance, if assistance could

avail anything to save her. Moreover, the service rendered by the tug would have been of no value whatever had it not been for the presence of the fire department. Indeed, had not the firemen been present on the dock, the barge could not have been aided in the least by the tug, as it would in that case have been impossible to have taken her to a pier for fear of igniting other vessels, and of no service to her to have been towed elsewhere. The presence of the firemen on the pier enabled the tug to place the barge where water could be got upon the fire a few moments sooner than would have been the case had the barge been left to be dealt with by the Havemeyer.

The barge was saved by the fire department, the tug contributing in some degree to that result. It is not a case, therefore, where the service of the tug can be rewarded as in case of saving derelict property. Nor can the tug be entitled to all the credit of saving the property; and, of course she has no right to compensation for what the fire department did.

The tug should have a compensation liberal for the time and labor expended, and increased by the fact that the service was rendered in the face of a supposed danger which caused one tug to abandon an attempt to render service; and this reward should also be such as to encourage tugs to render aid to vessels that may be similarly situated in the future. But the law of salvage, while it gives a liberal reward, does not encourage extortionate demands. In view of all the circumstances, I am of the opinion that $350 is a proper salvage to be awarded to the tug for her services on the occasion in question.

The libellants are entitled to a decree for that amount, and also to their costs. An apportionment among those entitled to share will be made when required.

LYLES and others *v.* THE STEAMSHIP SANTIAGO DE CUBA.

(*District Court, E. D. New York.* April 15, 1880.)

ADMIRALTY—PRACTICE—VACATING ORDER—APPEARANCE.—A motion will not be entertained to vacate, for irregularity, an order made seven years previous and with notice.

Beebe, Wilcox & Hobbs, for libellants.

Butler, Stillman & Hubbard, for respondent.

BENEDICT, D. J. This case comes before the court upon an application for an order directing the payment, into the registry of the court, to the credit of this cause, of sufficient of the proceeds of the sale of the above-named steamship to satisfy the demand of the libellant herein. Many difficulties in the way of the application, arising out of the proceedings had, could be stated. It is sufficient to notice two. The ground of the application is a supposed irregularity in the entry of an order of this court directing the surplus moneys in the registry of the court, to the credit of an action brought by Reynolds and others against the above-named vessel, to be passed to the credit of certain other actions then pending in this court against the same vessel, the vessel having been condemned and sold by decree of this court, made in the action of Reynolds and others.

At the time of making that order the proceedings in court instituted by these libellants had in reality been abandoned. It seems impossible, on any other theory, to account for the delay in their action, and the proceedings had in regard to the fund in court. It is too late for these libellants to question the regularity of an order made more than seven years ago, and with full knowledge thereof at the time by their proctor, and upon the understanding that this claim was to be prosecuted no further.

In the next place, the order complained of was made in an action brought by Reynolds and others, in which suit no ap-

pearance was ever entered in behalf of these libellants. If these libellants desired to be heard in regard to the funds remaining to the credit of that cause, an appearance in behalf of the libellants should have been entered therein, in which case they would have been entitled to notice of the order complained of. In the absence of such an appearance, the record in that cause wholly failed to give information that the libellants claimed to have any interest in the fund, and they cannot now be permitted to assert that want of a formal notice entitles them to ask to have the order set aside as irregular, or to require a return of the fund, which that order directed to be transferred to the credit of other causes, and which has been distributed in those actions.

The motion must therefore be denied.

WILLS *v.* CHANDLER and another.

(*Circuit Court, D. Nebraska.* May 8, 1880.)

JUDICIAL SALE—ORDER OF CONFIRMATION.—An order of confirmation of a judicial sale may cure all irregularities in the course of the proceeding, but can add nothing to the authority of the officer to make it.

SAME—DENIAL OF MOTION TO VACATE ORDER OF CONFIRMATION—ESTOPPEL.—A party is not estopped from bringing an action to set aside a judicial sale made without authority, by the fact that the court may have overruled the motion to set aside the order confirming such sale.

SAME—SAME—PRESUMPTION—COURT OF EQUITY.—Where a motion made in a state court of Nebraska, five years after a judicial sale, for a vacation of the order confirming the same, was denied, and no ground for denial appeared in the record, *held*, that it would be presumed to have been denied because made too late for the court to grant such relief, but that it was not too late for a court of equity to grant such relief as party was entitled to.

JUDGMENT—ENFORCEMENT AND SATISFACTION.—In the absence of statutory regulation no one but a party, or his attorney or agent, can satisfy a judgment, or direct its enforcement by execution.

SAME—SHERIFF—HAS NO CONTROL OVER JUDGMENT.—A sheriff has no interest in or control over a judgment, which may include his fees, that will authorize him to enforce it. If same is settled or discharged he must look to the plaintiff or his attorney for his fees.

SAME—CLERK—ISSUING EXECUTION.—A clerk has no authority, in the absence of statutory regulation, to issue execution without the direction of the plaintiff or his attorney.

SAME—SATISFACTION OF—ATTORNEY CANNOT CANCEL.—An attorney who has given a release and satisfaction of a judgment cannot, without the consent of the other, cancel the same, and authorize an execution to issue.

EXECUTION SALE—SHERIFF'S POWER.—In making an execution sale a sheriff acts by virtue of a power, and if no power exists nothing passes.

Kennedy & Gilbert, for plaintiff.

G. W. Ambrose and *J. M. Woolworth*, for defendants.

MCCRARY, C. J. This is a bill in equity to quiet plaintiff's title to certain lands in the city of Omaha. It is admitted that the plaintiff's title is perfect, unless it has been divested by a sale under execution issued upon a judgment for $251.31 and costs, in favor of Bancroft and others and against one Nuckolls, rendered by the district court of Douglas county,

Nebraska. At the time that judgment was rendered Nuckolls, the defendant therein, was seized in fee of the premises, and the judgment was therefore a lien upon the same. Subsequently to the rendition of said judgment W. P. Kellogg, under whom the plaintiff claims, became the owner of the land, subject to the incumbrance, and desiring to pay off the judgment and remove the encumbrance he applied to one Meredith, who was the attorney of record for the judgment plaintiff, and paid to him the amount of the judgment, including interest and all costs, except about six dollars due as clerk's costs, which latter was due to defendant Chandler, who was clerk of said state court when the proceedings resulting in said judgment were had. Meredith gave Kellogg a receipt in full for the amount of the judgment, interest and costs.

There is a conflict between Kellogg and Meredith as to the question how, and by whom, the clerk's costs were to be paid; Kellogg saying that Meredith promised to pay them, and Meredith insisting that Kellogg agreed to do so. The clerk to whom the costs were due (defendant Chandler) had gone out of office and was not then in Nebraska. When he subsequently returned and learned that Meredith had receipted in full for the judgment and costs, he called upon him and demanded his costs, which, not being paid, he applied to his successor in the clerk's office and procured the issuance of an execution therefor, under which the land in question was sold and bought in by Chandler. The sale was afterwards confirmed by said district court, by which it is claimed that certain grave irregularities were cured. A deed was made by the sheriff to Chandler, who afterwards conveyed to defendant Paxton. Five years after the judgment Kellogg moved to set aside the sale. The motion was overruled, but upon what ground does not appear.

1. It is insisted that the matters complained of by the plaintiff were finally adjudicated in the state court by the order confirming the sale and the subsequent order overruling the motion to set the sale aside. This renders it necessary for us to determine what is the effect of an order of confirmation in such cases. The rule that where a court has jurisdiction of a cause, but has committed errors in its proceedings, its judgment

is nevertheless final, if not appealed from, does not apply here. The order of confirmation cures all irregularities in the mode of making the sale, but can add nothing to the authority of the officer to make it. If the sale was without authority the ratification of it by the court must be considered as having been given inadvertently. "If given deliberately, and on a full examination of all the facts, still it must be regarded as an unauthorized proceeding." *Shriver's Lessee* v. *Lynn*, 2 How. 60.

Nor is the plaintiff or his grantor estopped by the subsequent order of the state court overruling the motion to set aside the confirmation of the sale. No greater validity was given to the sale by the latter order than by the original confirmation. Besides, that motion was made five years after the sale; and it is clear that the state court had, at that late day, no jurisdiction to entertain it. We must presume that it was overruled because it was made too late. It does not, however, follow that it is too late for a court of equity to grant relief if the plaintiff is entitled to it.

2. The validity of the sheriff's sale under which defendants' claim is attacked first upon the ground that the judgment was satisfied by the plaintiff therein, and that, therefore, the sale was void. The proof clearly shows that the attorney for the plaintiff executed to Kellogg a receipt in full for the judgment, interest and costs. This receipt may be explained by parol proof, and on explanation it is shown that the costs due Chandler, though receipted for, were not in fact paid. It remains, however, clear from the evidence that Meredith and Kellogg both intended that the receipt should satisfy the judgment and remove the encumbrance, notwithstanding the non-payment of Chandler's costs. Had they the power to accomplish this? I think it clear, under the authorities, that in the absence of statutory regulation only the plaintiff in a judgment, or his attorney or agent, has the power either to satisfy it, or direct its enforcement by execution. In this case Chandler (the clerk) was not the plaintiff, nor was he a party to the judgment. There was, in fact, no judgment for any particular sum as costs.

Johnson v. *Anderson*, 4 Wend. 474, is in point. That was,

like the present, a case where the judgment had been paid except certain costs, and the sheriffs to whom the costs were due undertook to sell property on execution for the purpose of collecting them. The court said: "It is not denied that the judgment was satisfied before the sale (except as to the sheriff's fees on the execution) by a settlement between the parties. * * * * * The sheriff had no right to sell for the purpose of collecting his fees after due notice of the settlement and discharge of the judgment. The sheriff has no interest in the judgment which will authorize him to interfere with or control any settlement or agreement which the parties may think proper to make. His fees are no part of the judgment. They are but an incident to it, and if the judgment itself is satisfied or discharged he must look to the plaintiff and his attorney for his fees. He cannot collect them from defendant by a sale of his property." And it was held that the purchaser at the sale in that case took nothing. To the same effect see *Lewis* v. *Phillips*, 17 Ind. 108, and *Hampton Ex parte*, 2 Gr. (Iowa,) 137.

In the absence of statutory regulation the clerk has no authority to issue execution without the direction of the plaintiff or his attorney. Herman on Executions, 66. This must be upon the ground that the clerk is not a party to the judgment, and has no control over it.

It is said in answer to these suggestions that Chandler obtained authority from the attorney of the judgment plaintiff to issue the execution. If this be so, it does not help the defence, because that attorney had previously given Kellogg a satisfaction in full of the judgment, upon which satisfaction the latter was relying for the security of his title. To say that the attorney for the judgment plaintiff could execute a valid release to Kellogg, and then, without notice to him, cancel it, and authorize Chandler to issue execution and sell Kellogg's land, would be to sanction a gross fraud.

In selling property under an execution a sheriff acts by virtue of a power, and if the power does not exist no title passes. *Carpenter* v. *Stilwell*, 11 Kernan, 61; *Laval* v. *Rowley*, 17 Ind. 36.

My conclusion is that at the time of the settlement between Kellogg and Meredith the latter, as agent for the plaintiff in the judgment, intended to and did cancel and satisfy the judgment, and remove the lien from the land in question. The judgment being satisfied, the sale was void and no title passed. There are other and probably fatal objections to the defendants' title—as, for example, the want of an appraisement and of sufficient notice of the sheriff's sale—but these need not be considered, as what I have said is decisive of the case.

Decree for plaintiff in accordance with the prayer of the bill.

SUTHERLAND *v.* STRAW and another.

(*Circuit Court, D. Maine.* ———, 1 80.)

COMPROMISE—AGREEMENT FOR ENFORCEMENT OF.—It would seem that where an agreement is made for the compromise of litigation, involving a great number of details, some not within the subject-matter of the suit, specific performance thereof cannot be compelled upon an interlocutory application.

PARTIES—TRANSFER BY COMPLAINANT OF HIS RIGHT—RIGHTS OF ASSIGNEE—DISMISSAL.—Complainant in this action having, before answer, transferred all his rights and interest therein to defendant Straw, and constituted him his attorney, irrevocable, to prosecute, compromise, etc., such action, *held*, that the defendant Straw is entitled, if he so desired, to a decree dismissing the bill, without costs.

Charles E. Clifford, for complainant.

Josiah H. Drummond, for respondents.

Fox, D. J. On the thirteenth day of September last this bill was filed, in which it was alleged that on December 10, 1875, Chapin had sold the complete 10 acres of land in Monson, in this district, part of lot 15, for the sum of $50,000, a portion of this amount having been paid by complainant's note for $15,000, secured by a mortgage of these premises; that these premises, with other parcels of real estate, were then under mortgage to the Dexter Savings Bank from said

Chapin to secure the payment of his note for $1,600, all which was unknown to complainant, and that there were also other encumbrances of the premises to the amount of $30,000; that February 24, 1876, the savings bank took steps to foreclose its mortgage, which were afterwards abandoned, the said mortgage having been paid, and on March 13, 1879, the bank released the 10 acres to D. R. Straw for $2,000, and on the same day deeded to Straw the residue of the premises conveyed to it in mortgage, and that this was done to defraud Chapin's creditors; that on the eleventh of April, 1877, the complainant, believing Straw's title to be valid, purchased of Straw the 10 acres, relying on the false representations of the respondents that the title of Straw, under the foreclosure by the savings bank, was valid, and that his mortgage of $15,000 was invalid; that the consideration for the purchase by complainant of the 10 acres from Straw was $15,000, of which $7,000 was paid by a mortgage of the premises to secure three notes of complainant; that Straw agreed to give a warranty deed of the premises, but by reason of certain clauses in the deed it was simply a release and quitclaim of Straw's interest, and the complainant was deceived, and induced to accept said deed as a deed of warranty, it being drawn on a blank of that description, and changed by the addition of these words and clauses; that complainant has paid the $7,000, and that the savings bank never acquired any title to the premises under their mortgage and pretended foreclosure.

It is also charged in the bill that subsequent to April 11, 1877, Straw pretended to convey to complainant, by deed of warranty, 85 acres of other lands, and that he paid about $15,000 as a consideration therefor, but said deed was fraudulently drawn on a warranty blank, and altered so as to be in effect a release. The prayer of the bill is that the respondents may be decreed to pay back all sums they have thus fraudulently obtained from the complainant. Before any answer was filed the parties to this suit arranged terms of settlement of this and other controversies, some of which were in litigation before the circuit court of Massachusetts,

and on the twenty-sixth of December last various documents were executed between them; six being made by the complainants, in completing such settlement, and two by the respondents. By one the complainant, with Chapin and E. B. Loring, in consideration of $8,000, released to Straw all of lot 15, with all machinery and fixtures connected with the quarries.

This deed was recorded January 13th. Sutherland also executed at the same time an assignment to Straw of all claims or causes of action in a certain bill in equity pending in the circuit court for the Massachusetts district, No. 1,273, against Abel Howe and others, with all right to any sums of money to be realized from said bill in equity. By the same instrument the complainant sold, assigned and transferred unto Straw all rights, claims, demands, actions or causes of action against both of the respondents in this bill in equity, now before this court, No. 216, together with all sums of money, benefits or advantages which can or may be obtained by reason of said bill in equity, and also assigned, sold and transferred unto Straw all rights, claims, demands, actions or causes of actions which he might have against said Albert W. Chapin in a certain action instituted by him against Chapin, October 7, 1879, and all sums of money, etc., which can or may be obtained by virtue of said suit. By the same instruments Sutherland constituted Straw his attorney irrevocable to prosecute, compromise, re-assign or discharge said bills in equity, suits, writs, or to consent to the entry of any and all judgments, orders or decrees thereon that he may desire, and to appoint other attorneys with like authority, saving said Sutherland harmless from all costs or damages; and the instrument concluded by a covenant on the part of Sutherland to deliver up to Straw all letters, papers, deeds, etc., relating to the matters thus assigned to him.

The third instrument thus executed was a general release by Sutherland of Chapin and Straw from all causes of action, claims or demands, excepting a note of Chapin for $500. The next instrument, No. 4, was complainant's transfer and assignment to Straw of all causes of action

against Howe & Higbee, The Higbee Company *et al.* No. 5 was Sutherland's receipt for $2,000 from Straw, on account of settlement of suits against Albert W. Chapin, and No. 6 was an agreement by Sutherland to act as an attorney for Straw in these matters so assigned, and other matters relative to the Monson slate quarries, without other charges than his traveling expenses, and 5 per cent. commission on the net proceeds, which may be received by Straw for the interest this day transferred to him in case he was personally instrumental in disposing of said interests.

Straw, on his part, made and executed an obligation to Sutherland to pay him not exceeding $4,400, as he should receive it, over and above $5,000 out of the suits and claims assigned by Sutherland, to be paid within 30 days after the money is received, but not to exceed the $4,400 and the 5 per cent. commission as agreed in No. 6; and the performance of this agreement was secured by a bond of Straw to Sutherland in the penalty of $8,000, on condition that Straw shall well and truly carry out his agreements without collusion with * * and John Y. Fichett *et al.*, to defeat the payment of said $4,400 upon the sale of certain quarries, etc.

The attorneys of Straw on his behalf now come and move that a decree be entered in the cause here pending, and that the bill be dismissed without costs to either party. The complainant on his part consents to the above entry, with the addition of the words " without prejudice," and if declined moves that the respondents be required to answer the bill, and upon these motions the cause has now been heard. The counsel of the complainant contends that the arrangements and contracts of December 26th, above recited, were obtained by fraud, and are not binding upon him, but are utterly null and void. The complainant, however, has not made affidavit to any facts or circumstances whatever to establish the charges of his counsel, and in fact has utterly omitted to present for the consideration of the court any affidavit in his own behalf, but has filed the affidavit of one John Y. Fichett, one of the parties named in the bond of Straw to the complain-

ant, with whom there was to be no collusion to defeat the payment of the $4,400 by Straw to Sutherland.

From this affidavit it appears that Fichett had arranged for the sale of the Eureka slate quarry for the sum of $30,000, on behalf of Straw and Chapin, and that these parties were desirous that the sale should not be communicated to Sutherland, but should be delayed and not completed until after his return to Chicago, when they would be ready to convey the property.

In the opinion of the court this affidavit is of but little or no consequence, as it does not show any collusion of Straw and Chapin with this affiant to defeat the sale, but rather an arrangement on their part to carry out and complete it after Sutherland returns home. There may have existed very satisfactory reasons for the respondents wishing to thus delay the disposal of this estate, and it would by no means follow that there was on their part, by such delay, any breach of the condition of Straw's bond to the complainant.

Straw has filed his affidavit denying all fraud in the settlement, and averring that at the time, December 20th, he paid complainant $1,000 in cash, and gave a note for $1,000, since paid; that he also gave him the bond for $8,000, upon which an action was commenced in this court, January 22, 1880, and served on him February 3d; that Sutherland has never offered to refund these payments made to him, and has assigned to these parties said bond now in suit.

Upon this state of facts have the respondents a right to have a decree entered dismissing the bill without costs? The counsel have not, on either side, referred the court to any authorities bearing upon the question here involved, and the researches of the court have not disclosed any case decisive of the matter. Many authorities are to be found in the decisions of the various courts of equity in Great Britain bearing upon the question of compromises of pending suits, and how far such compromises can be enforced by motion in the cause, and under what circumstances supplementary proceedings may be required to perfect and complete such settlements. The latest authority which I have met with is

Pryer v. *Gribble*, 10 Chan. (Appeal Cases,) 539, in which most of the prior authorities are referred to. *James*, L. J., in substance, states the practice to be that any agreement of this kind involving a great number of details, some of which could not have been within the subject of the suit, cannot be specifically performed upon interlocutory application. That suit was one for the redemption of a mortgage of a brick-yard, and the parties entered into an agreement by which the defendant was to receive all moneys due to him on account of the concern, and pay all he might owe, and guaranty the plaintiff against the payment thereof, the business to be carried on by defendant for a time, he paying all expenses in connection therewith, and receiving all moneys for sale of bricks, and accounting therefor.

James, L. J., further says: "An order to that effect could not have been made in the suit at all, nor could the court have made the order that the defendant should hand over to the plaintiff all deeds and other securities in his possession, relating to the brick-yard, or that both parties should execute all necessary legal documents to give effect to that agreement. It is a contract, the specific performance of which is beyond the scope of this suit, and cannot be obtained except by a suit regularly instituted for that purpose. If this were a simple agreement between the parties to stay a suit, or have a bill dismissed, very likely the court ought to give effect to that as it would give effect to any other agreement relating solely to the conduct and prosecution of the suit. But when these matters are mixed up with a great number of details, money to be paid, and acts to be performed, it is far beyond the scope, as it seems to me, of an interlocutory motion, and far outside the jurisdiction of this court on an interlocutory motion.

In the present instance the arrangement entered into by the parties in December involved not only the settlement and disposition of this suit, but of others pending in other tribunals, and the transfer of various parcels of other property, both real and personal, most of which were wholly without the present controversy, and could not, in any way, have been within the

subject of this suit, but were wholly beyond the scope of it. Upon an examination of this case and others therein referred to, and especially *Askew* v. *Wellington*, 9 Hare, 65, the court was at first strongly inclined to the opinion that the present case must be controlled by these decisions, and that the respondents were not entitled to have the decree as prayed for. Upon further reflection, however, the conclusion is that the instruments executed by this complainant on the twenty-sixth of December last are not to be deemed as the equivalents of a compromise, but are of a much more comprehensive and significant character, and by their legal operation and effect do confer upon Straw the entire control and direction of this cause.

By paper No. 2 the complainant conveyed to Straw his entire interest in lot 15, and by No. 3 he assigned absolutely, without any reservation, the present suit and cause of action, and constituted Straw his attorney, irrevocable, to dispose of said cause by such entry or decree therein as he should choose to make, saving the complainant from all liability for costs. A valuable consideration, to the extent of $2,000, was then paid to complainant, by Straw, for this assignment, and also a bond given for a further payment of $1,400, when realized from sales of the property. This sum of money the complainant retains, and does not propose to pay back any part of it, and by an action at law upon the bond is still persisting in enforcing the validity of the agreements of December 26th; and, what is of more significance, the complainant, up to the present time, has not, by his own statements under oath, advised the court that these agreements were invalid, or that in any respect any fraud was practiced upon him at the time they were agreed to by him.

By these instruments, thus recognized by the silence of the complainant as just and reasonable, he parted with all right, title and interest in this suit and the controversy therein involved, and conveyed the same to Straw, authorizing him to dispose of the same as he should elect. The complainant from that time had no further interest in this suit or any right to control the same, or to be heard or represented in

relation to it. He must be deemed as having withdrawn therefrom in behalf of Straw, who, from thence, was the only party interested in the cause, and who, by the complainant's withdrawal from and abandonment of the cause, was at liberty to make such disposal thereof as he saw fit. The only party to be recognized by the court in the management and control of the action was Straw, and he must from thenceforth, being the owner of the action and the claim, be permitted to do as he will with his own property, as he is not charged by the complainant with having practiced any fraud or deception in obtaining his title thereto. Such decree as he desires may be entered, but in making this order the court must not be understood as intimating any opinion as to the effect of the decree upon any subsequent proceedings which may hereafter be instituted in behalf of complainant. Whether, under the rulings in *Badger* v. *Badger*, 1 Clifford, 237, it will or not be a bar, must remain undetermined until the question is so presented as to require the court to pass upon it.

Bill dismissed, without costs.

WOOD and others *v.* SEITZINGER and others.

(*Circuit Court, E. D. Pennsylvania.* April 30, 1880.)

PROMISSORY NOTE—COLLATERAL SECURITY—HOLDER FOR VALUE.—The holder of a promissory note, taken as security for a pre-existing debt, is a holder for value, and entitled to be protected as such.

Thomas Hart, Jr., for plaintiff.

Samuel Dickson, for defendant.

PER CURIAM. Is the holder of a negotiable note, who has taken it as a security for a pre-existing debt, a holder for value, and so protected against any equities subsisting between the original parties to it? This is the only question presented by this case.

If the rule established in Pennsylvania by the decisions of her highest court is to be followed, it must be answered in the

negative. But these decisions are only persuasive, as may be said also of a recent decision in this court by a late eminent judge, comformably to the state rule. The question involved is not one of local law, but of general commercial jurisprudence; hence the duty of the court is imperative to follow the guidance of general judicial opinion concerning it. As to the preponderating weight of this opinion there is scarcely ground for doubt.

In perhaps the majority of the United States, the law is settled that the taking of a note as collateral security for a pre-existing debt is a holding for value. So it is held in England. See 2 C. M. & R. 180; *Percival* v. *Frampten*, and *Poirier* v. *Morris*, 2 E. & B. 89. It is stated to be the better doctrine in 3 Kent's Com. *81; in Story on Prom. Notes, § 195; in 1 Parsons' Prom. Notes, 218; and in Byles on Bills, by Sharswood, *28. It has the judicial sanction of Judge Story, in *Swift* v. *Tyson*, 16 Peters' R., whose adoption of it is distinctly approved by the supreme court in *McCarty* v. *Root*, 21 How. 439.

Such weight of authority must be regarded in this court as decisive, and judgment is, therefore, entered for the plaintiffs on the case stated.

THE MISSOURI RIVER PACKET CO. *v.* THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY.

(*Circuit Court, W. D. Missouri.* May 10, 1880.)

BRIDGES—MISSISSIPPI AND MISSOURI RIVERS—SECTION 2, ACT OF CONGRESS OF JULY 25, 1866—PASSAGE WAY BETWEEN PIERS—WIDTH OF.—Section 2 of the act of congress of July 25, 1866, authorizing the construction of bridges across the Mississippi river and across the Missouri river at Kansas City, construed as requiring that the passage way for vessels between the piers of any draw-bridge built under said act shall be 160 feet wide in the clear, measured by a line running directly across the channel, and at right angles with the piers of the bridge. Where a bridge is built diagonally across the river, a measurement along the line of the bridge is not the proper measurement.

SAME—SAME—GRANT, WHEN NO PROTECTION—The fact that a bridge has been constructed under said act of congress does not render it a legal structure, except in so far as it conforms to the terms and limitations of the act. If the powers granted by the act were exceeded, or were exercised in a manner different from that provided in the grant of authority, the grant will be no protection.

SAME—BRIDGE CONSTRUCTED WITH TOO NARROW A PASSAGE WAY—PASSING VESSEL—LIABILITY OF OWNER.—Although the width between the piers of such a bridge may be less than the act of congress requires, yet this will not render the owner of the bridge liable for damages to a passing vessel unless the unlawful structure caused or contributed to the injury.

SAME—SAME—SUNKEN PONTOON CONTRIBUTING TO VESSEL'S INJURY.—Where it was alleged that a sunken pontoon, placed and kept in the channel by the defendant, had caused a change in the current of the river which had thrown plaintiff's vessel over against a pier of defendant's bridge, and that the accident was the result of two causes combined, to-wit, the presence in the channel of the pontoons and of the bridge pier, both unlawful structures, *held*, that these facts being established plaintiff could recover.

NAVIGABLE STREAMS—WRECK IN—CHANGE OF CURRENT—LIABILITY OF ONE CAUSING.—Those navigating the river are under no obligation to to remove wrecks which may be made in the ordinary and proper course of navigation, but he who, for his own benefit, uses any part of a navigable river, is liable in damages to any party injured, if such use causes a change in the ordinary course of the channel.

SAME—SAME—DUTY TO REMOVE.—If defendant had a right to keep the pontoon in the river in connection with the bridge, and it was sunk by unavoidable accident, defendant was entitled to a reasonable time in which to raise and remove it, but was not at liberty to leave it in the channel for an indefinite period.

COLLISION—CONTRIBUTORY NEGLIGENCE—INSTRUCTION AS TO.—An instruction to the effect that if the plaintiff has proved the facts necessary to make out his case he must recover, "unless unskilfulness or neglect on the part of plaintiff in handling his boat caused or contributed to the collision," *held*, a sufficient charge on the subject of contributory negligence.

NAVIGABLE STREAM—OBSTRUCTION IN—PARTY NOT ENTITLED TO NOTICE TO REMOVE.—A person who places an obstruction in the navigable channel of a river is not entitled to notice to remove the same, or to abate the nuisance caused thereby.

VESSEL—COLLISION WITH BRIDGE—MEASURE OF DAMAGES.—The true rule of damages in suit for injuries done to a vessel by collision, is that the plaintiff shall recover the loss necessarily incurred in repairing the injured vessel, and also for the use of the boat during the time necessary to make the repairs and fit her for business.

On motion for new trial.

Gage & Ladd, for plaintiff.

Geo. W. Easley, for defendant.

McCRARY, C. J. This case was tried at the last term, and, at the request of Judge Krekel, the motion for a new trial has been heard before a full bench.

The plaintiff was, on the twenty-seventh of March, 1876, the owner of the steamboat Joe Kinney, and engaged in navigating the Missouri river with said vessel. The defendant is the proprietor of a railroad bridge across the Missouri river at Kansas City, which was constructed under the act of congress approved July 25, 1866. On the day above mentioned the said steamboat was damaged, in attempting to pass said bridge, in the course of one of her voyages, by being driven by the current against one of the piers thereof. Plaintiff claims to have exercised due diligence, and charges that the piers of said bridge, as well as certain pontoons connected therewith, were obstructions to the navigation of said river, and wrongfully maintained therein.

The act of congress under which the said bridge was constructed provides as follows:

"Section 2. And be it further enacted, that any bridge built under the provision of this act may, at the option of the company building the same, be built as a draw-bridge, with a pivot or other form of draw, or with unbroken or continuous spans: *Provided*, that if said bridge shall be made with unbroken and continuous spans, it shall not be of less elevation, in any case, than 50 feet above extreme high-water mark, as understood at the point of location, to the bottom chord of the bridge; nor shall the spans of said bridge be less than 250 feet in length, and the piers of said bridge shall be parallel with the current of the river, and the main span shall be over the main channel of the river, and not less than 300 feet in length; and *provided*, also, that if any bridge built under this act shall be constructed as a pivot draw-bridge, with a draw over the main channel of the river at an accessible and navigable point, and with spans of not less than 160 feet in length, in the clear, on each side of the cen-

tral or pivot pier of the draw, and the next adjoining spans to the draw shall not be less than 250 feet; and said spans shall not be less than 30 feet above low-water mark, and not less than 10 feet above extreme high-water mark, measuring to the bottom chord of the bridge, and the piers of said bridge shall be parallel with the current of the river; and *provided,* also, that said draws shall be opened promptly, and upon reasonable signal, for the passage of boats whose construction shall not be such as to admit of their passage under the permanent spans of said bridge, except when trains are passing over the same; but in no case shall unnecessary delay occur in opening the said draw, during or after the passage of trains."

The act from which this section is copied authorizes the building of a number of bridges across the Mississippi river, and in its tenth section provides: "And be it further enacted, that any company authorized by the legislature of Missouri may construct a bridge across the Missouri river, at the city of Kansas, upon the same terms and conditions provided for in this act."

The third section of the same act provides as follows: "And be it further enacted, that any bridge constructed under this act, and according to its limitations, shall be a lawful structure."

The motion for a new trial is based upon alleged errors contained in the charge given by the court to the jury. These will be considered in the order in which they are presented in the brief of counsel for defendant.

1. It is said that the court erred in construing the act of congress, and particularly that portion of the act which relates to the width of the passage-way between the piers of the bridge. Upon this subject the court instructed the jury as follows:

"The law regarding the Kansas City draw-bridge under consideration is that it shall have spans of not less than 160 feet in length in the clear on each side of the central or pivot pier of the draw. This means that the open span between the piers must be 160 feet when measured at right angles

with the pier. If you shall find from the testimony that the Kansas City bridge was built diagonally across the river, and not at right angles with the piers of the bridge, the measurement along the line of the track of the railroad or the chord of the bridge is not the proper measurement, and the distance of 160 feet thus obtained is not a compliance with the act of congress requiring 160 feet in the clear, and to the extent of this difference between a line at right angles with the piers and the measurement along the track or chord of the Kansas City bridge, it is an unauthorized structure; so far, at least, as any question pertaining to and connected with this case is concerned. Though you may find from the testimony that the width between the piers as constructed is less than the act of congress requires, yet this violation of law by defendant in the construction of its bridge is not available to plaintiff in recovering damages unless it has caused or contributed to the injury by plaintiff complained of."

The contention of the defendant is that the distance of 160 feet in length in the clear on each side of the central or pivot pier of the draw must necessarily be measured along the track of the railroad or the chord of the bridge. The construction given to the law by the court in its charge requires that the measurement should be *across* the channel, and if the superstructure was found to be not at right angles to the current, then the measurement along the line of the bridge was not the proper one. In construing the act of congress we must look to the spirit and reason of the law. It was an act authorizing a structure to be placed in one of the navigable rivers of the United States. The purpose of the second section was to reserve, for the purposes of navigation, a certain amount of open space; or, in other words, space "in the clear," wholly unobstructed and available for the passage of vessels. To accomplish this purpose the law requires that the piers must be parallel with the current of the river.

If it be granted that a measurement along a line which deviates from a course directly across the channel is the proper one, then it would follow that the actual passage way might be less than that required by the act. The greater the

deviation from such a direct line, the less would be the available space between the piers. Such a construction of the act would defeat the main purpose which congress had in view in its enactment. I am, therefore, clearly of the opinion that the construction of the act contained in the above-quoted extract from the charge given by the court to the jury was correct.

2. It is said that the bridge was an authorized structure, being erected at an authorized place and in an authorized manner, and that this constitutes complete immunity to defendant. The answer to this suggestion has been anticipated in what is said above. The fact that the bridge was constructed under authority granted by the act of congress of July 25, 1866, does not render it a legal structure, except in so far as it is found to be "according to its limitations." Such is the express provision of section 3 of that act. Besides, it is well settled that if the powers granted by the act were exceeded, or were exercised in a manner different from that provided in the grant of authority, the grant will be no protection. *Dugan* v. *Bridge Co.* 27 Penn. St. 303; *Judy* v. *Terre Haute Bridge Co.* 6 McLean, 237; *Columbus Ins. Co.* v. *Curtenius*, Id. 209.

3. It is insisted that the court erred in treating the bridge as a nuisance *per se*, and applying the common-law rule in such cases. By reference to the charge it will be seen that the court used the following language: "Though you may find from the testimony that the width between the piers as constructed is less than the act of congress requires, yet this violation of the law by the defendant, in the construction of its bridge, is not available to plaintiff in recovering damages, unless it caused or contributed to the injury by plaintiff complained of."

I am of the opinion that the court here states the true rule upon the subject. At all events the charge seems to have been, in this respect, all that the defendant had a right to ask. It is not necessary now to determine whether the bridge in question is so far unlawful and unauthorized as to be subject to removal as a public nuisance. It may be that in a

case presenting that question it might be held that the obstruction to navigation is so slight as to be tolerated, in view of the greater aid to commerce rendered by the structure. This point is not now before us, and no opinion is expressed upon it. It is sufficient to say that if the structure is not according to the limitations of the act of congress it is so far unauthorized, and the defendant is, therefore, liable for any injury to the plaintiff's vessel which was caused, or contributed to, by the unlawful structure; and this is all that was said by the court in charging the jury.

4. It is contended that, although the measurement sanctioned by the court should be adopted as the true construction of the act of congress, it does not follow that the plaintiff can recover, and that the charge is erroneous and misleading in so instructing the jury. The answer to this is that the court did not instruct the jury that the plaintiff must necessarily recover if the distance between the piers was less than that required by law, The instruction was, as already shown, that in order to recover the plaintiff must show that the width between the piers was less than the act of congress requires, and also that the unlawful structure "caused or contributed to the injury by plaintiff complained of."

Counsel for defendant insist that it was not claimed, on the trial, that the injury resulted from the unlawful construction of the bridge. They say that the gravamen of the charge is that the sinking of the pontoons caused a cross current to set in towards the bridge, the effect of which was to throw the plaintiff's boat over on the pier. It is quite evident, from the record, that the plaintiff charged the defendant with responsibility for two unlawful obstructions in the river, the combined effect of which was to produce the injury to the steamboat Joe Kinney, notwithstanding due diligence on the part of the officers and crew in charge of her. These were, first, the sunken pontoons; and, secondly, the bridge pier. It is also apparent that there was evidence tending to support the plaintiff's theory in this regard; and, based upon that evidence, the court instructed the jury, with reference to the bridge, in the language above quoted; and, regarding the

pontoons, further instructed them as follows: "Regarding the pontoons, at one time kept and maintained by the defendant company, extending from the south pier up the south bank of the river, testified to, you are instructed that the company owning the bridge was not, by law, required to put them there or keep them in position, yet, if the owners of the bridge, for the protection thereof, or for any reason, kept them there, and they were, from any cause, sunk, and thereby diverted the current of the river from its usual and ordinary course or channel, thus causing difficulty or danger in the approaching of the bridge draw by boats, and that such change of the current caused or contributed to the collision of plaintiff's boat with the draw-rest of the bridge, you are authorized to find for the plaintiff, provided the plaintiff company, navigating its boats on the occasion of the collision, did so with care and skill, and did not contribute to the injury by its own neglect or improperly handling its vessel. Those navigating the river are under no obligation to remove wrecks which may be made in the ordinary and proper course of navigation. While this is undoubtedly the law, it is also the law that he who, for his own benefit, and not for the purpose of navigation or commerce, uses any navigable part of a river, is liable in damages to the party injured if such use causes a diversion and change in the ordinary course of the channel of the river, and thereby increases the difficulty and danger of navigation, and injury results therefrom." The charge, upon this branch of the case, seems to me to have been in all respects correct.

5. It is insisted by the counsel for defendant that the sinking of the pontoons was caused by unavoidable accident, and that, under the circumstances, the defendant cannot be held responsible for the consequences. Assuming that the pontoons were, while kept afloat, lawful and proper structures, and no impediment to navigation, it would probably follow that in the event of their being sunk by unavoidable accident the defendant would be entitled to a reasonable time in which to raise or remove them. But as it appears from the evidence that the pontoons in question were sunk in the winter of 1873–4, more than two years before the accident com-

plained of, and that no attempt was made by defendant to raise or remove them, I am clearly of the opinion that the defendant was responsible for any injury resulting from their presence in the channel at the time plaintiff's vessel was injured.

6. Counsel for defendant also insists that the court erred in that part of the charge to the jury which refers to the question of contributory negligence on the part of the plaintiff. The language of the court upon this subject is as follows:

"While the defendant company were under no legal obligation to keep pontoons from the bridge pier to the banks of the river, as testified to, yet if for any reason they kept them there, and they were sunk by ice or otherwise, the company was bound to remove them; and if it failed to do so, and a change of current was caused by this neglect, and the plaintiff's boat was injured in consequence of such change, you are justified in finding for plaintiff, unless unskilfulness or neglect on the part of plaintiff in handling his boat caused or contributed to the collision."

This, certainly, left to the jury fully and fairly the question of contributory negligence. A more labored discussion of that subject could hardly have made clearer the true rule upon the subject.

7. It is insisted that it was necessary for plaintiff to prove notice to abate the alleged nuisance. There was some proof tending to show that notice was given to the agent of defendant having charge of the bridge; but whether notice to the agent, in this case, was notice to the principal, is a question upon which counsel differ. I do not think it necessary to consider that question, for the reason that, in my opinion, no notice was required. The rule requiring notice to abate, before an action for damages can be maintained, does not apply to the case of an obstruction to a navigable river or other public highway. It applies only to cases where the complaint is against the grantee of land on which a previous owner has erected a nuisance. He who erects a nuisance, even on his own land, is not entitled to notice. *Ray* v. *Sel-*

lers, 1 Duv. 254; *Slight* v. *Gutzlaff*, 35 Wis. 675; *Cochocton* v. *R. Co.* 51 N. Y. 573.

But the person who allows the continuance in its original state of a nuisance on his own land, erected there by his grantor, is entitled to notice. *Woodman* v. *Tufts*, 9 N. H. 91; *Snow* v. *Cowles*, 22 N. H. 296; *Johnson* v. *Lewis*, 13 Conn. 303.

For full discusion of the whole subject and citation of authorities, see *Plumb* v. *Harper*, 14 American Decisions, 333, 338.

It is entirely clear that the doctrine of notice has no application to the present case.

8. It is insisted that the charge of the court as to the measure of damages was erroneous. The charge upon this point is as follows:

"Regarding the rule of damages, in case you find for plaintiff, you are instructed to allow the amount shown to have been paid by plaintiff for repairs, together with 6 per cent. interest from the day of the beginning of the suit, which was on the sixteenth day of August, 1876; and for such a reasonable amount of charter rent, during the time the boat was repairing, as you may deem right under the testimony.

To this charge, in itself considered, no exception can be taken. But counsel insist that all the witnesses testified that they arrived at the charter value from the earnings of like boats in the same trade, it not being shown that any boats on the Missouri river were being chartered, or that there was any charter value established on that river.

The true rule of damages in such cases is that the plaintiff shall recover the loss necessarily incurred in repairing the injured vessel, and also for the use of the boat during the time necessary to make the repairs and fit her for business.

Williamson v. *Barrett*, 13 How. 110; *The Baltimore*, 8 Wall. 387; *The Cayuga*, 14 Wall. 278.

The evidence objected to seems to have been clearly admissible for the purpose of fixing the amount of plaintiff's damages, within this rule. If no boats were being chartered on the Missouri river, and therefore no established charter value

could be shown, it was certainly proper to show the value of the use of the vessel from the earnings of like boats in that river.

The motion for new trial must be overruled.

KREKEL, J., concurs.

SAHLGARD *v.* KENNEDY and others.

(*Circuit Court, D. Minnesota.* May, 1880.)

EQUITY—BILL TO SET ASIDE DECEEE—JURISDICTION.—If, in a direct proceeding to set aside the decree of another court, there are parties before the court other than those in the proceeding in which the decree was rendered, and it is charged that such decree was fraudulent, the court may entertain jurisdiction thereof, and prevent the parties before it from proceeding to enforce such decree or availing themselves of any advantages thereunder.

SAME—SAME—FRAUD.—An original bill is a proper mode of seeking redress against a decree obtained by fraud or covin.

SAME—SAME.—WHEN PROCEEDINGS SHOULD BE IN COURT RENDERING DECREE.—Where the proceedings to obtain relief against a decree are tantamount to common-law practice of moving to set aside a judgment for irregularity, writ of error, or bill for review, they should be in the court where the decree is rendered; but if they are equivalent to a bill in equity to set aside for fraud, they constitute a new and original proceeding.

SAME—SAME—SUFFICIENCY OF BILL.—A bill in equity by a bond holder to set aside a foreclosure decree and sale thereunder containing allegations tending to show that one of the trustees under the mortgage combined with the purchasers at the sale to bid in the mortgaged property at a sacrifice of the interest of the bond holders, and that the trustee permitted the control of the foreclosure proceedings to pass into the hands of such purchasers, states equities sufficient to require an answer.

Demurrer to Bill.

Gilman & Clough, for plaintiff.

Geo. B. Young, Geo. L. & Chas. E. Otis and *R. B. Galusha*, for defendants.

NELSON, D. J. The complainant, an alien, files his bill in equity on behalf of himself and other holders of any of the

$3,000,000 issue of bonds by the First Division of the Saint Paul & Pacific Railroad Company, of the date of March 1, 1864, who shall come in and contribute to the expenses of this suit. Relief is prayed against a decree charged to have been obtained in a state court of Minnesota by the fraudulent practices of some of the defendants, and a sale thereunder in fraud of the rights of complainant and others similarly situated.

The bill alleges that a suit was brought in the court of common pleas of Ramsey county, Minnesota, to foreclose a trust deed executed by the First Division of the Saint Paul & Pacific Railroad Company to secure $3,000,000 of bonds, and on March 24, 1879, a decree of foreclosure was entered by consent of parties to the record in said suit, no answer having been interposed to the complaint.

The relief prayed for is substantially that the said mortgage be declared by the court to be a subsisting and valid lien upon the property described therein, and the rights of the holders of all of said bonds outstanding be maintained, and they be allowed to prove them; that the sale of said property under the said decree of the said state court, and the deed executed to the purchaser thereupon, be declared to be fraudulent and void, and be set aside and cancelled; that a receiver be appointed to take possession of the property, the purchasers at said sale enjoined from interfering therewith, and account for the earnings and income while in their possession, and that the property be sold under the direction of this court for the benefit of all the *bona fide* bond holders. General relief is also asked. A demurrer is interposed by the defendants, alleging:

1. Want of jurisdiction in this court. The defendants' counsel argue, with great ability, that relief should be sought in the court rendering the decree; that this court has no jurisdiction to interfere with, set aside or annul the decree of the court of common pleas, that court pertaining to another sovereignty. As I understand the rule, it is this: that in all cases where, in a direct proceeding, there are parties before a court other than that in which a decree has been

rendered, and it is charged that the decree was fraudulent, the court can entertain jurisdiction, and, if the fraud is proved, can prevent all parties who are before it from enforcing the decree, and, of course, from obtaining any advantage by virtue of a sale made thereunder. The court acts upon the decree and sale through the parties who are before it, not directly upon the decree of the other court, but adjudges that, notwithstanding the decree, the parties who obtained it, and those before the court who claim property by virtue of a sale under it, with knowledge of the fraud, shall not appropriate to their use the property thus acquired.

It is true, relief may sometimes be had by motion in the same court, or by a bill in the nature of a bill in review, but such relief is not always adequate, and an original bill is a proper mode of seeking redress against a decree obtained by fraud or covin.

The rule is clearly and concisely stated by Justice Bradley in *Barrow* v. *Hunton*, 9 Otto, 82. In speaking of the distinction between the two classes when an original suit may be entertained, and when the application for relief should be made to the court granting the judgment or decree, he says: "If the proceeding is merely tantamount to the common-law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review, or an appeal, it would belong to the latter category, and the United States court could not entertain jurisdiction of the case. * * * * * On the other hand, if the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding, * * * * and the case might be within the cognizance of the federal courts. In the one class there would be a mere revision of errors and irregularities, or of the legality and correctness of the judgments and decrees of the state courts; in the other, the investigation of a new case, arising upon new facts, though having relation to the validity of an existing judgment or decree, or to the right of the party to claim any benefit by reason thereof."

I think the jurisdiction of the court to entertain this suit

not doubtful, and the bill must stand, unless there is no equity stated therein, and this brings me to the consideration of the other ground of demurrer.

2. The defendants demur for want of equity in the bill. The bill alleges, in substance, that the trustees, in the deed to secure the $3,000,000 issue of bonds, in May, 1874, at the instance of John S. Kennedy, one of the defendants in this suit, and the agent of a committee of Amsterdam bond holders, having in their hands and under their control a majority of the bonds of this series, commenced a suit against the First Division of the St. Paul & Pacific Railroad Company and others to foreclose the trust deed, and that after the commencement of the suit Kennedy, the agent, entered into an agreement with the defendant company for the suspension of the prosecution of the suit, and the trustees who instituted it, at his instance, suspended the prosecution of the same for several years, and until requested by him to proceed; that sometime in 1878 one of the trustees resigned, and Kennedy was appointed as trustee and co-complainant in said foreclosure suit, and thereafter acted in the capacity of trustee in said trust deed and foreclosure suit, and as the special agent of the committee, and of the bond holders who had placed their bonds in the hands of the committee for control and manage ment; that on the ninth of October, 1876, the trustees, including Kennedy, under the authority conferred in the deed of trust, took possession of the railroad appurtenances and property covered by the trust deed, and operated the road, and that in 1876 or 1877 Donald A. Smith, George Stephen, N. W. Kittson, James J. Hill and others formed a syndicate for the purpose of acquiring the line of railroad, etc., covered by the mortgage, under the foreclosure proceedings and a sale, and made a proposition, through Kennedy, to the committee of Amsterdam bond holders for the purchase and control of the bonds in their hands, and that Kennedy, the agent of a committee of bond holders, and trustee for all the bond holders, entered into an agreement with Smith, Stephen, Kittson and Hill for the purchase and control of the bonds held by the committee, and into negotiations which contemplated the

acquisition of the line of railroad of the First Division of the St. Paul & Pacific Railroad Company, etc., by purchase at the foreclosure sale to be made in said pending foreclosure suit, and payment therefor in bonds; that the suit should proceed under the advice and instruction of said parties, Smith and others; that the negotiation for the sale of the bonds was consummated with Kennedy, who approved the proposal and recommended its acceptance, and that the suit was prosecuted, conducted and concluded under the advice and instruction of Smith, Stephen, Kittson and Hill, through Kennedy as agent, and with a view to obtain a transfer of said road to them under the forms of judicial proceedings in fraud of the rights of bond holders who had not contracted to sell their bonds to said parties; that Kennedy, as agent, paid and controlled the counsel in the foreclosure suit; and, further, in substance, that the result of the suit and the decree, by consent, was in the interest of the parties who had so negotiated with Kennedy, they having become *domini litis* in respect to the foreclosure proceedings. It is also charged that the trustees, through Kennedy, fraudulently connived and combined with the syndicate to allow the property and railroad to be purchased at the foreclosure by the St. Paul, Minneapolis & Manitoba Railroad Company at a nominal price, compared with its true value.

"PROPOSAL MADE AT NEW YORK MEETING OF JANUARY 3, 1878, BY CANADA PARTY.

"[TRANSLATION.]

"The proposal embraces all certificates which have been issued by the committee, and must be accepted by at least the same proportion of certificates which acceded to the former proposal. It is offered to pay for first section bonds ($1,200,000) net 75 per cent. in gold; consolidated bonds ($2,800,000) net 28 per cent. in gold; second section bonds ($3,000,000) net 30 per cent. in gold; 1869 bonds ($6,000,000) net 35 per cent. in gold; St. Vincent & Brainerd bonds ($15,000,000) net 13¾ per cent. in gold, of the nominal amount of the bonds,

including the past-due coupons, which pass with the bonds for this price.

"Upon acceptance of this proposal these bonds shall be deposited in the Mercantile Safe Deposit Company of New York, in the name of trustees, for which the committee proposes the Messrs. J. S. Kennedy and John S. Barnes, chiefs of the firm of J. S. Kennedy & Co. These bonds shall be delivered to the purchasers by the trustees, as agents of the committee, against the payment of the purchase price in the manner hereinafter named.

"The aforesaid purchase price must be paid within six months after the date, which, by virtue of the last foreclosure decree of each court has been declared as the day of sale of the bonds, as described in the trust deeds by which the above-named issues of bonds have been respectively secured. The aforenamed purchase price for said bonds shall bear interest from the twenty-second of December, 1877, at 7 per cent. per annum, payable half yearly in gold, in the city of New York. The principal of the above-named purchase price shall be paid—*First*, either in gold; *second*, or in first mortgage gold bonds of the newly to be created company, bearing 7 per cent. interest, payable half yearly in gold at par; but the purchasers shall also add to every bond of $1,000 the amount of $250, in first preferred stock of the new company; *third*, or, at the option of the certificate holders, or any of them separately, the same first mortgage gold bonds as described under No. 2, calculated at 90 per cent., but in that case without addition of the preferred stock.

"It is further expressly agreed that on the reorganized road no further first mortgage shall be issued than the above-named, so that the rate of $12,000 per mile on the completed road shall not be increased.

"As soon as '*bonds*' shall be offered in payment the form and contents of the trust deeds must be subjected to the approval of the agents of the committee. The trust deeds must comprise all property of any and every kind belonging to the new company at the time that the mortgage is created, in-

cluding the land grant, and these bonds shall be received at par in payment for the lands of the company.

"The total amount of the above-named *preferred stock* shall be limited to 25 per cent. of the whole issue of bonds of the first mortgage, and the dividend on this preferred stock not to exceed 6 per cent. per annum in currency shall be paid, but only after the receipts of the new company, after payment of all necessary expenses and the interest on the bonds, shall have been provided for.

"The option of payment named under No. 1 and No. 2 is left, primarily, to the purchasers, but should they choose to pay in money the seller shall have the right to demand bonds, as described—sub. 2 and 3—either at par with preferred stock or at 90 per cent. without preferred stock.

"The purchasers further bind themselves:

"*a.* As soon as they have received the notice that their offer is accepted, and the bonds have been delivered to the above-named trust company, to restitute the costs caused by them to the committee, as well as the amount of the committee costs resting on the assenting certificates.

"*b.* To complete the extension to St. Vincent as speedily as possible; if possible within this year, and agree to furnish sufficient security for the execution hereof, which will be acceptable to the agents of the committee, Messrs. J. S. Kennedy & Co.

"*c.* To restitute the cost of the construction of the Breckenridge-Barnes line *in cash*, at the same time with the payment for the bonds, and in the meanwhile to pay interest at 7 per cent. per annum, half yearly.

"*d.* The now pending foreclosure suits, and other suits, shall be continued by the committee and its agents, under advice and instruction of the purchasers, free of all costs for the holders of the assenting certificates."

It is unnecessary to recapitulate all the allegations in the bill which are conceded to be true by the demurrer, nor is it necessary to determine whether all the relief prayed for can be granted. The charges are sufficient to require an answer, for they tend to show that Kennedy combined with Smith,

Stephen, Kittson and Hill to aid them in acquiring the property mortgaged at a sacrifice of the interests of bondholders not parties to the contract, to secure the road, etc., and that the former permitted the control of the litigation to pass to Smith and his associates, consenting that they might assume the functions of trustees; the co-trustees of Kennedy in the trust deed having accorded to him the right to determine and control the action of the trustees in all matters appertaining to the trust property and the execution of the trust.

While there is no doubt that creditors may combine to purchase the property of their debtor, and such action is proper and will be sustained, yet if a trustee, holding the property for the benefit of all the creditors, combine with a part to aid them in purchasing it to the exclusion of the other creditors, and the trustee also has in his possession, as agent, the evidences of debt belonging to the creditors with whom he has combined, and the property, by the act of the trustee, passes into the possession of those creditors at a price much less than its value, it can hardly be claimed that a purchase thus consummated is not inequitable. Such is one of the charges in the bill, and it requires an answer so that the court may determine upon the proofs, at the final hearing, whether it is true or not.

The demurrer is overruled, with leave to answer at the July rule day.

KROPHOLLER *v.* THE ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY CO. and others.

(*Circuit Court, D. Minnesota.* May, 1880.)

MORTGAGE—CREDITORS MAY COMBINE TO PURCHASE PROPERTY. — The creditors of a mortgagor may fairly combine to purchase the property of the debtor at mortgage sale, and other creditors are not, by such combination, deprived of the right to bid at such sale.

BILL TO VACATE DECREE AND SALE—WANT OF EQUITY.—Bill in equity in this case not showing the complainant clearly entitled to all the relief claimed, and as he may, on proper petition and showing, be admitted as a party to the original suit, the bill in which he seeks to attack the decree and sale is dismissed.

Demurrer to Bill.

Gilman & Clough, for plaintiff.

Geo. B. Young, Geo. L. & Chas. E. Otis and *R. B. Galusha*, for defendants.

NELSON, D. J. The only question, raised by the demurrer, to be considered in this case is whether the bill is wanting in equity. The complainant makes no substantial charge of fraud against any trustee in the deed to secure the $15,000,000 issue of bonds, and his bill alleges no grievance which determined the court to overrule the demurrers in the cases of *Stricker* v. *Kennedy et al.*, *Messchaert* v. *Kennedy et al.*, and *Sahlgard* v. *Kennedy et al.* Kennedy was never a trustee in this trust deed, and his acts as the agent of the committee of bond holders of the $15,000,000 issue are not subject to the criticism made in the other cases.

The fact that Kennedy, who is not a trustee in this deed, as agent of the foreign committee, entered into an agreement for the sale of the bonds held by the committee with Smith, Stephen Kittson and Hill, and consummated it, and such agreement contemplated the purchase of the railroad and appurtenances, would not call for the interference of a court of equity. These creditors could fairly combine to purchase the property of their debtor, and other bond holders and creditors are not by such combination deprived of the right to bid at a sale under the decree.

The charges made against the order of the court authorizing the receiver to issue debentures and complete the unbuilt portion of the road, and the manner in which it was built and the amount of debentures issued and paid over for such construction, afford no ground of equitable relief. The court, before the decree was made, examined the objections in respect thereto, and only issued an amount of debentures equal to the cost of construction as clearly established by proof.

The charges against the decree are not such as in my opinion would authorize a court to disturb it, and the sale was made under the decree, for anything that appears in the bill, fairly and for more than the upset price fixed by the court. That the purchaser was authorized to pay all of the bid ex-

cept $50,000 in the debentures issued by the court, and in the bonds of the $15,000,000 issue at the percentage upon their fair value equal to the dividend to which they would be entitled upon a distribution of the proceeds of the sale, is not inequitable. Substantially, such a provision in a decree met with the approval of the United States Supreme Court in *Ketchum* v. *Duncan*, 6 Otto R. 659.

The bill, also, in attacking the sale charges the trustees with neglect in respect thereto, amounting to fraud. I am not prepared to admit that the allegations of the bill in that behalf entitle the complainant to any relief.

In the order confirming the sale the following provision was inserted: "This order is made by and upon the consent and at the request of the trustees, the complainants, and upon the consent of the parties defendants, * * * and the right to make any further order order is reserved." In view thereof I think the complainant, if entitled to any relief against the sale and the confirmation thereof, on petition and proper showing, might be admitted a party to the original foreclosure suit, and his objections would then be considered. He can have such opportunity at the next June term of the court.

The demurrer is sustained and the bill dismissed.

WASHBURN *v.* THE FARMERS' INS. CO.

(*Circuit Court, S. D. Ohio.* ——, 1880.)

INSURANCE—EXPLOSION CAUSED BY FIRE—CONDITION IN POLICY.—The destruction of a building by an explosion caused by a fire is a loss by fire within the meaning of a provision in the policy of insurance providing that the company shall not be liable for any loss or damage caused by explosion of any kind, unless fire ensues, and then for the loss by fire only.

Sage & Hinkle, for plaintiff.

Matthews, Ramsey & Matthews, for defendant.

SWING, J., (*charging jury.*) This action is brought by the

plaintiff to recover from the defendant the sum of $2,100, the amount of a policy of insurance issued by the defendant to the plaintiff on the thirteenth day of February, 1878, upon his flouring mill, situated in Minneapolis, Minnesota, and the mill machinery, tools, implements and fixtures therein and attached thereto, insuring the plaintiff against loss and damages by fire to the extent of the amount named in said policy, $700 of which was placed upon the building, and $1,500 upon the machinery, tools, implements and fixtures.

The plaintiff alleges that other insurance to a large amount was placed upon the property; that on the second day of May, 1878, the said mill, machinery, tools, implements and fixtures were damaged by fire to an amount largely in excess of all the insurance upon the property; that on the twenty-fifth day of May, 1878, due notice and proof of loss was given and made to the defendant, according to the conditions and terms of the policy; and the plaintiff further avers that he has duly performed all the conditions of said policy upon his part, and prays judgment against the defendant for the sum of $2,100, with interest from the twenty-fourth day of July, 1878.

The defendant, by its answer, admits the issuing of the policy as alleged by the plaintiff, but denies that the property was injured or destroyed by fire within the meaning of the policy; but says that the injury thereto was caused by an explosion of some substance in said mill building, against which the policy did not insure the plaintiff.

By this policy of insurance the defendant, in consideration of $63, the premium paid it by the plaintiff, agreed to indemnify the plaintiff against loss and damage by fire to the property described therein, according to the terms and conditions of the policy, one of the conditions of which is "that the defendant shall not be liable for any loss or damage caused by explosion, including steam boilers, unless fire ensue, and then for the loss and damage by fire only."

It is admitted, by counsel for the defendant, that the property insured was damaged to an amount in excess of all the insurance thereon; and it is also admitted that due and

legal notice and proof of the loss were given and made, as required by the terms of the policy. It is admitted that at the time of the destruction of this property there was an explosion by which the entire structure was demolished. By the plaintiff it is claimed that the explosion was produced by a fire which existed prior thereto in the mill; and, therefore, the damage was produced by fire. By the defendant this is denied, and it is claimed that the damage was caused by the explosion.

There is, therefore, but one question of fact for you to ascertain under the law which I shall give you, and that is, by what cause was the damage to this property produced? The defendant, by its contract, agreed to indemnify the plaintiff against damage and loss by fire to the building and machinery of a flouring mill. Whatever may, therefore, be necessarily connected with the building and machinery, in their use in the manufacture of flour, or growing necessarily out of and resulting from such use, by which the property would be rendered more liable to fire than ordinary property, must be held to have been in the contemplation of the defendant at the time of the issuing of the policy, and it must be held to have been contracted in reference thereto; and, if the damage to the property was produced by fire, it must be liable therefor.

In law the cause to which the result must be attributed is not the cause nearest the result, but it is that cause which sets the other causes in operation. In the language of Justice Strong in *Ins. Co.* v. *Boon*, 95 U. S. 130: "The proximate cause is the efficient cause—the one that necessarily sets the other causes in operation. The causes that are merely accidental, or instruments of a superior or controlling agency, are not the proximate causes, and the responsible ones, though they may be nearest in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster." The rule of law announced in the foregoing case, by the learned justice, is clearly applicable to the present case.

If, therefore, the evidence satisfies your minds that there

existed a fire in this mill, and the fire produced an explosion, the fire would be the proximate cause. Although the explosion thus produced may have contributed in a large degree to the destruction of the property, it would nevertheless be a loss by fire, within the meaning of the policy, and the defendant will be liable to the plaintiff for such loss. But if there was no fire, and an explosion from some other cause than fire occurred, by which the property was damaged, it would not be a loss by fire, within the terms of the policy, and the defendant would not be liable for such loss.

The plaintiff must satisfy your minds, by a preponderance, that a fire existed which produced the explosion. If he has done so he is entitled to your verdict. If he has failed to do so your verdict will be in favor of the defendant.

Verdict for the plaintiff.

IN THE MATTER OF CORSE, Jr., Bankrupt.

(*District Court, S. D. New York.* May 3, 1880.)

HUSBAND AND WIFE—WIFE'S SEPARATE PROPERTY—GIFT.—Facts in this case considered, and *held* that certain property conveyed to the wife under the will of her father, and held in trust for her by his executors, which by arrangement was by them transferred to the husband, was not intended as a gift to him.

SAME—SAME—SALE OF REAL ESTATE TO HUSBAND.—The transfer to the husband of certain real estate as part of such property, *held*, to have been a sale, and not held by him as trustee for the wife.

SAME—CLAIM OF WIFE AGAINST HUSBAND'S BANKRUPT ESTATE.—Wife *held* entitled to prove her claim for such property against the husband's estate in bankruptcy, and also entitled to interest thereon.

P. Cantine, for creditors.

C. Whitaker, for claimant.

CHOATE, D. J. This is a proceeding for the re-examination of a proof of debt filed by the wife of the bankrupt for the sum of $38,672.10. In the proof of the claim it is described as "a balance due deponent for real estate, bonds, mortgages, notes and drafts conveyed, consigned, transferred and set

over to the said Henry Corse, Jr., by deponent, and by the executors of deponent's father's estate, with deponent's consent, being in part the interest of deponent in said estate, and for moneys lent and advanced to said Henry Corse, Jr., by deponent. The above amount includes principal and interest to the date of filing the petition. Several creditors object to the proof on the grounds—(1) that the transaction out of which the claim grew was a gift from the claimant to the bankrupt; (2) that it is barred by the statute of limitations; and (3) that it has been wholly paid and satisfied.

The point most strenuously insisted upon on the argument was that the husband received the real estate and other property as trustee, having been substituted for the executors, under the will of his wife's father, by the concurring action of the executors, the wife and himself; that the personal property has been all invested in improvements upon the real estate, and that the real estate was afterwards transferred to the wife, whereby the trust under which the property was held was fully performed, and that in this way the claim has been satisfied and paid, or that the personal property, with her consent, has been expended on the land and the whole conveyed to her. While this position was not taken at the outset as the objection, but payment simply was alleged, yet the point has been argued as if there was no formal objection to the contesting creditors resting their defence to the proof of debt on this ground, and I have examined it upon the merits.

The wife of the bankrupt was the daughter of Samuel Knapp, of Haverstraw, who died, leaving a will dated February 18, 1859. He left one son and one daughter, who intermarried with the bankrupt February 2, 1865. At the time of her marriage she was a little over 18 years of age. By the will the residue of the estate was equally divided between testator's son and daughter. The executors were appointed guardians of the children, and by the terms of the will the executors were made trustees of the daughter's half till her marriage, or until she should arrive at the age of 21 years. As to the continuance of this trust after that time it was left to the

discretion of the executors. They were directed to pay over to her on her marriage, or coming of age, the income on her share which should have accrued during the next preceding year, and as to the principal the will provided as follows:

"I leave it discretionary with my said executors to pay to my said daughter the whole or such part of the share coming to her, and at such time or times after she shall have arrived at the age of 21 years, as they or the survivor of them shall deem fit and proper; but it is my will if she shall marry a steady, temperate and prudent man, then, and in that event, I direct my executors to pay her one-third of the accumulated principal of her share in one, one-third in three, and the remaining one-third thereof in five years after she shall have married, and after she shall have arrived at 21 years of age; it being understood that it is my will that my said daughter shall receive annually, after she arrives at 21 years, the interest, income or profits of the share belonging to her and remaining in the hands of my executors."

The will gave the executors full power to sell the real estate and invest the proceeds in bond and mortgage on unencumbered property. Until the sale of the real estate the will empowered the executors "to take possession" of it, "to cultivate, work and lease the same in such manner as shall be most productive and beneficial to the interests of my said estate," and "to apply so much of the annual profit, increase and income of the said real estate to the necessary improvements and repairs thereof."

Soon after the marriage of the daughter—this claimant—she became dissatisfied with the executors' management of the estate, and they were cited before the surrogate to account. This proceeding led to an arrangement being made by them with the bankrupt and his wife, by which all the daughter's share of the property was to be transferred to her husband at her request, he giving them a bond of indemnity. To carry this arrangement into effect the following written instruments were executed: Mrs. Corse executed, under seal, an agreement with the executors, dated March 3, 1866. It recited her interest under her father's will, her marriage, and the

fact that she was under age, and that it was her wish "that the said Henry Corse, Jr., my said husband, should take into his possession and have the management of the estate and property which is so bequeathed to me in and by the said will of my father, and which is therein and thereby placed in the hands of the said executors as trustees thereof for me."

It then proceeds: "Now, therefore, I, etc., do hereby consent that the executors, etc., shall and may, and I do hereby direct, authorize and empower them, etc., to assign, transfer, set over and deliver unto the said Henry Corse, Jr., my said husband, my share, etc., of the estate of my said father, to which I now am, or shall hereafter become, entitled, under and according to the provisions of the said will, and to make, execute and deliver unto him all instruments which shall be requisite and necessary in the law for the full and absolute assignment and transfer of the same unto him forever; hereby as fully ratifying and confirming each and every act which the said executors and trustees shall do, by virtue of this consent and authority, as I might or could do if I had attained my majority; and hereby as fully, and in all respects, exonerating, and holding harmless and free, and discharged from every and all liability, the said executors and trustees, and each of them, etc., as I might or could do if I had attained my majority, for each and every act and thing whatsoever that they, or either of them, may do by virtue of this consent and authority."

It then continues: "Now, therefore, in consideration of the assignment and transfer so to be made, etc., I, etc., do hereby consent, promise and agree to and with the said executors and trustees, for myself, my heirs, etc., that when I shall have attained the age of 21 years I will make, duly execute and deliver unto them, or the survivor of them, etc., all necessary and proper releases and acquittances in the law wherein and whereby they, and each of them, shall forever be released and discharged from all liability, claim and demand whatsoever, for or on account of any legacy, bequest, or provision contained in the said will, in my favor or behalf, etc., and for or on account of any act or thing they, or either

of them, shall or may do by virtue of the foregoing consent and power."

The executors and the bankrupt executed under seal an agreement of the same date, March 3, 1866. It recites the provisions of the consent and agreement executed by Mrs. Corse. It also recites that said Henry Corse, Jr., had agreed to deliver to the executors a good and sufficient bond, with surety to indemnify and keep them harmless in the premises.

It then proceeds as follows: "Now, this agreement witnesseth, that in pursuance of the consent and authorization aforesaid, of the said Nancy J. Corse, and in consideration of the covenant and agreement herein contained, on the part and behalf of the said party of the first part, (*i. e.*, Henry Corse, Jr.,) the said parties of the second part, as executors, etc., agree to and with the said party of the first part that they will assign, transfer, set over and deliver unto him, by good and sufficient assignments in writing, all the share or proportion of the estate of the said Samuel Knapp, deceased, to which his said wife now is or shall hereafter become entitled by virtue of the bequests and provisions contained in his said will, etc., in her behalf and for her benefit, upon the said party of the second part delivering unto them the indemnity bond aforesaid. And the said party of the second part, in consideration of the agreement herein contained, on the part and behalf of the said parties of the first part, covenants and agrees to and with the said parties of the first part, as such executors, etc., that he will faithfully and in all things carry out and fulfil each and every of the provisions of the said will in respect to the legacy therein bequeathed to his said wife, and all the directions therein given with reference to the disposition of the same, and all property which he shall take in right of his said wife, as a legatee under said will."

By a deed executed by the executors, and dated the seventh of March, 1866, and purporting to be executed under the power of sale given to them in the will, they conveyed to the bankrupt, for a price or consideration named of $10,000, a farm belonging to the estate of the testator at Glasco, in the county of Ulster and state of New York. The conveyance was

in fee, with special covenants against encumbrances. It was not acknowledged till November, 1866, nor recorded till January, 1867. It is assumed in his argument by the contestant's counsel that this deed, though apparently a sale by the executors under their power of sale, was merely the means of transferring to Mr. Corse a part of his wife's share of the property pursuant to the agreement. The bond of indemnity dated March 3, 1866, recites that Nancy J. Corse had executed a consent in writing, and thereby directed, authorized and empowered the executors and trustees to assign, transfer and set over unto the above bounden Henry Corse, Jr., all the share, etc., of the estate to which she is now or shall hereafter become entitled as such legatee, etc. It also recites that the executors have, "in pursuance of such consent and authority, entered into an agreement with said Henry Corse, Jr., so to assign, transfer and set over unto him the share, etc., of said estate to which she is or will hereafter become entitled as such legatee," etc. The condition of the bond was that said Henry Corse, Jr., "shall, in all respects, carry out and fulfil the provisions and directions of the said will as to the legacy therein bequeathed, and the provisions therein contained, to and for the benefit of the said Nancy J. Corse;" and, also, indemnify and save harmless the said executors from all claims of Mrs. Corse, her heirs, or next of kin, on account of said transfer, or on account of her said share of the estate.

The property at Glasco consisted of a farm and brick-yards. The house on the premises was dilapidated and out of repair, and the brick-yards were in similar condition. Besides this property, and soon after its transfer to him, the executor also transferred to Mr. Corse bonds and mortgages and notes belonging to the estate as part of her share. Mrs. Corse was also entitled to certain property which came from her mother's father, and which was paid over to Mr. Corse in the year 1867, amounting to $8,858. Soon after the property at Glasco was conveyed to Mr. Corse he began to make improvements on it. He built a new house and rebuilt the brick-yards. He went there to live with his family, and went

into the brick making business, which he continued to carry on till he failed, in 1875. The counsel for contestants claims that he expended in these improvements and in the purchase of adjoining property, which was, or was thought, necessary for carrying on the business successfully, about $26,000, and it is insisted that all the personal property received from the executors, together with that received from his wife's grandfather's estate, were so expended with her consent, and for the benefit of the property, by him as trustee. Most of this money was invested in these improvements before she came of age.

After Mrs. Corse came of age she executed a release of the executors under seal. It is dated March 25, 1868. It recites that her father by his will gave and bequeathed to her "the equal undivided one-half of the residuary personal and real estate," and that she had intermarried with Henry Corse, Jr., and then was his wife, and had attained her majority on the first day of October, 1867, and that the executors on or about October 1, 1865, rendered an account and settled the estate "under the arrangements and stipulations then made and entered into by and between the said executors and the residuary devisees and legatees under said will," and that the said executors did, "in pursuance of such settlement, arrangement and stipulation, deliver to and pay over unto the said Nancy J. Knapp her property in and share of the said estate in cash and in securities thereof."

It then proceeds as follows: "Now, therefore, I, etc., do hereby acknowledge the receipt from the said executors of the property and legacies so given and bequeathed to me in and by said will; and I do hereby acquit, release and forever discharge the said executors of and from all legacies, dues and demands whatsoever, under and by virtue of the will of the said Samuel Knapp, deceased, or to which I am or may be entitled out of his said estate."

At the same time the bankrupt also executed a release to the executors on the same paper, as follows: "Whereas, I, Henry Corse, Jr., the husband of said Nancy J. Corse, received from said executors of the will of Samuel Knapp, deceased, in right of my said wife, the cash, property and securities to

which she became entitled under said will, and gave to said executors an indemnity bond against any claim which my said wife, or her heirs, or next of kin might make against them, pending her attaining her majority, and the making of the foregoing release for them; and I do for myself, etc., upon the redelivery to me of said bond, etc., release, acquit and discharge the said executors of and from all claim and demand whatsoever, which I now have or have had against them, etc., or against or out of the estate of the said Samuel Knapp."

On the third day of March, 1875, the bankrupt conveyed to one Friend Hoar, for a nominal consideration of $10,000, the real estate which had been conveyed to him by the executors, excepting certain lots previously sold off. The same day Hoar conveyed the same premises to Mrs. Corse for a nominal consideration of $10,000, subject to two mortgages, one dated January 3, 1868, for $4,000, and the other dated August 2, 1869, for $3,000, both mortgages being executed by Corse and his wife, and which she assumed in the deed from Hoar to her. The property was at the same time, together with the adjoining property, which had been purchased by Corse to improve the brick-yards, subject to a mortgage for $6,000, executed by Corse and his wife, not mentioned in the deed. This last-named mortgage has been foreclosed, and Mrs. Corse's equity in the property has been thereby extinguished. But in her account she gives the bankrupt credit for $10,000 on account of the transfer to her of this property. He was at that time embarrassed, and she undertook, for a few months after the transfer, to carry on the business, her husband acting as her agent.

The bankrupt and his wife both testify that at the time the release to the executors was executed, in the year 1868, an agreement between them was drawn up by Judge Suffern, county judge of Ulster county, respecting the property which Mr. Corse had received on her account, which agreement was destroyed by fire when their house was burned.

Mrs. Corse is unable to state the contents of the paper, further than that it was an agreement to repay the moneys received by him as a loan. Mr. Corse testified that it was to

the effect, "that he was to return her, on demand, either the same real estate or the value of it, and the amount received from the executors of her father's estate, and grandfather's estate, and to give her security, as she should demand it at any time."

They also both testified that she had frequently made demand for payment, or for security, and that she had asked for a mortgage on the real estate. He had refused on the ground that it would injure his credit.

It is claimed on the part of the contesting creditors that there is not sufficient proof of the existence of the lost paper. But it is evident that if there was no such paper drawn up, or if its contents were substantially different from what is testified to by these two witnesses the contestants could have called Judge Suffern to contradict them. He drew the releases from these parties to the executors, and took their acknowledgments. The fact that such an agreement was executed, even if its terms are a little uncertain, repels entirely the theory that the transfer of all this property to the husband was a gift from the wife. The question is, therefore, upon what terms and under what obligation in respect to it did he hold what he so received. It is argued by the learned counsel for the contesting creditors that he took it as trustee for the wife; that he invested the personal property in the real estate, and by the conveyance through Hoar, in 1875, has transferred the whole, both the real estate and the personal property, in the form of improvements on the reality, to her, and so that he has discharged his trust and performed his agreement with her, made in 1868, if there was any such agreement, and it was binding on him.

It is doubtless true that by accepting from the executors this property, with full knowledge of the trust under which they held it, the bankrupt became chargeable upon the suit of his wife, or her legal representatives, with those trusts. At any time before she came of age he would have been charged as her trustee of this property, in any suit brought for that purpose, in the same way in which the executors would have been. By no agreement between them and him,

or between them and his wife, could the property be discharged from the trusts of the will during her minority. But the will gave the executors full power and authority, in their discretion, to terminate the trust at her majority, and then to transfer the property to her absolutely; and what was done in March, 1866, seems to me clearly to have been done in anticipation of this termination of the trust in October, 1867. Of course they could not legally, and so as to absolve themselves from any liability as trustees, thus surrender it to her before October, 1867. They recognized this in their agreements with her, and with her husband, and guarded against the liability by requiring of him a bond of indemnity. The stipulation in the agreement with her for a release, to be given when she came of age, shows clearly that they treated the property as being held by them on such terms that they would be at liberty to surrender it absolutely to her at her majority; and when the releases were given in March, 1868, the time had come when they could absolutely surrender the estate to her, free from the trust, and her release acknowledges, on her part, that they have done so. The release given by him strongly confirms the view that the purpose of the instruments was to terminate the trusts.

The contemporaneous agreement between the husband and wife shows also, I think, that both the husband and wife treated the trust as at an end, and they undertook to deal with each other on the basis that property belonging to her had come into his hands. From that time, therefore, if not from an earlier time, I think he held the property as having been transferred to him on her account as money and other property of hers received by him, which, or its value, at her election, she could at any time in equity demand, with or without an express promise to restore; the circumstances of the transfer not being such as to imply a gift of the property to him. Nor under the will, if he is to be treated as a trustee while holding the real estate, between the date of its transfer to him and the date of the release, had he any authority to invest any part of the principal of his wife's residuary legacy in improvements, or in rebuilding the house or the brick-

yards. The only power given is to invest part of the income of the real estate in its improvement. He cannot, therefore, as a trustee, justify the disposition that he made of any part of the personal property, and if he held it as trustee he is now liable for its value, with interest, on that ground. The wife has the right certainly, to treat the transfer of the real estate to him as a purchase, which it purported to be on its face, and to charge him with the receipt of the agreed price, $10,000, as part of her legacy. The executors had power to sell and convert the real estate into personalty. In the exercise of that power they conveyed it to him for $10,000. He retained the price as the money of his wife, part of the legacy coming to her on her majority, and which the executors agreed with her to pay to him in advance of that event on being indemnified by bond, and on her promise to release them when she came of age.

I do not see how the husband could object to this being treated as a payment to him as $10,000 in money on her account. In the release which she gave to the executors it is recited that the executors did deliver to her her share of the estate "*in cash and in securities thereof.*" And in the release given by the bankrupt to them at the same time he recites that he received from them, in right of his wife, "*the cash, property, and securities to which she became entitled.*" Thus all parties seem to have treated the transfer of the real estate as a sale. He took the title in fee in himself, and improved and used it in his own business. As against her claim to account for the price which belonged to the estate he would be estopped to claim that he held it on a trust that he did not acknowledge, and to make that trust a defence to her claim.

I do not see in the evidence any proof that the wife has ever waived her right to treat it as a purchase by him. All his subsequent acts show that he treated the land as his own. Her joining in the mortgages, or her knowledge of his use of her money in improving his real estate, cannot affect her claim to reimbursement. The investments were his own, and made upon his own responsibility and in his own business. It is not proved that they were made at her request, or that she

assumed the risk of them. When this property was transferred to her in 1875, as it then was, with three mortgages on it not in existence when he first took it, the understanding was that the transfer should be on account of her claim, as payment of $10,000. This might have been attacked, perhaps, as a preference; if bankruptcy had then followed by other creditors; but the understanding, as testified to, is in no way inconsistent with the other evidence, going to show that both parties regarded the husband as indebted to the wife for the amounts received from the estates of her father and grandfather, including this sum of $10,000, the price at which he bought the land of the executors. Therefore, because the land was his own and not hers, as well as for the reasons already given, the laying out of the proceeds of the personal property on the real estate did not operate as a repayment to her of those proceeds; and I see no reason why, in equity she cannot claim against him the balance of her legacy, which he has received. No part of it has been paid except the $10,000, in 1875, which has been credited.

The claim is misdescribed in the bankrupt's schedules. This is a circumstance impairing somewhat, possibly, the weight to be given to his testimony. But I do not think it of sufficient importance to overthrow the case made in favor of the proof of debt. There is proof that the schedule was prepared by counsel on imperfect information. As the wife has frequently demanded payment or security I think she has the right to interest, which, perhaps, she might not be entitled to if she had consented to his using her money for a long course of years without any demand, and in the business upon which they both depended for support. The circumstances might be such as to imply that the use was a gift from the wife. But such is not this case.

As some objection is made to the amount of interest as computed in the proof of debt, there may, if the contesting creditors desire it, be a reference to the clerk to compute the interest. Otherwise the proof of debt is sustained.

In re JORDAN & BLAKE. ELIZA J. YORK, Adm'x *de bonis non*, claimant.

(*District Court, D. Maine.* ———, 1880.)

BANKRUPTCY—PROVABLE DEBTS.—Every debt recoverable, either at law or in equity, is provable in bankruptcy.

TRUST PROPERTY—PERSON TAKING WITH NOTICE.—Any person receiving trust property with notice of its character takes the same subject thereto, and is chargeable therewith as trustee.

SAME—USE OF BY TRUSTEE, IN HIS PARTNERSHIP BUSINESS—LIABILITY CREATED.—Where an administrator, a member of a partnership, used the funds of the estate in the firm business, and the other partners had notice thereof, *held*, that the firm and its members became jointly and severally liable for such funds.

SAME—SAME—PROOF OF CLAIM BY ADMINISTRATRIX DE BONIS.—Where in such case the administrator died, and an administratrix *de bonis* was appointed in his place, and the firm of which the former administrator was a member became bankrupt, *held*, that she might prove the claim for such fund against both estates.

In Bankruptcy.

W. L. Putnam, for Eliza J. York, adm'x.

T. J. Haskell, for assignee and general creditors.

Fox, D. J. Dexter Jordan, one of the firm of Jordan & Blake, was administrator on the estate of Robert M. York, and having collected considerable sums of money as administrator used them for firm purposes—an account being opened on the firm books of Jordan & Blake by which the "Estate of R. M. York" was, from time to time, credited with all sums thus received by Jordan, and charged with all disbursements made by him for the estate. The firm having been adjudged bankrupt, and Jordan having since died, Mrs. York, as administratrix *de bonis non*, claims to prove against the firm estate and also the individual estate of Jordan this balance due from Jordan, there being assets of both of said estates. The register allowed the proof against Jordan's estate, and disallowed the proof against the firm estate, and from this an appeal is taken.

The construction given by Judge Lowell in *In re Blandin*, 5 B. R. 41, to the provisions of the bankrupt act respecting

proofs of debts relieves these matters of some objections of a technical nature which otherwise might perhaps occasion doubt. In that case the wife of a bankrupt had loaned her husband money, and claimed to prove for the same against his estate, although by the laws of Massachusetts she could not sustain an action at law for its recovery. Judge Lowell there held that equitable claims were within the scope of the bankrupt act, and that it was the intent of the act to give all creditors an equal share of the assets without regard to the mode in which their rights might have been enforced if there had been no bankruptcy; that as to both debtors and creditors the act is highly remedial, and the district court is vested with most ample equitable powers to enable it to work out full remedies to all persons; that, although the twenty-fourth section provided, on appeal, the ordinary remedy by a suit at law, the circuit court might take such order in relation to appeals not fully provided for by section 24 as may be necessary to conform the proceedings to the nature of the case. *James*, L. J., in *Ex parte Adamson*, L. R. 8 Ch. Div. 820, states the law as follows: "It being the established rule in bankruptcy that every debt which a person could, either in his own name or in the name of any other person, recover at law or in equity was a provable debt in bankruptcy."

Jordan, as the administrator of York's estate, was not authorized to appropriate to the use of Jordan & Blake the funds held by him in that capacity. It was in law a breach of his trust as administrator, and, although no fraud was intended by him, his act was in violation of law. By the entries upon the firm books of the various sums thus paid to the firm his copartner, Blake, became cognizant of the transaction, and the firm thereby became chargeable as trustees for the amount thus loaned to the firm by Jordan as administrator. In England there is a uniform current of authorities that when trust funds are thus misappropriated and loaned by an executor or trustee, under a will, to a firm, with the sanction of its members, this amount constitutes a joint and several claim, provable against the firm and the individual members of the firm who have knowledge of the transac-

tion. Under the law, as it was formerly declared in England, and so long as double proof was not permitted, it might be that the creditor was put to his election whether to proceed eventually against the firm estate or that of its members, though at the present day, since the act of 1869, it may be that double proof might now be permitted. No such question of election can here arise, as our bankrupt act and the decisions of the courts here allow of double proof in cases where a joint and several liability exists.

The following are some of the English cases which permit proof of debt to be made when the executor or trustee has committed a breach of trust by improperly loaning the funds in his hands: *Ex parte Watson*, 2 V. & B. 414; *Ex parte Heaton*, Buck's Bankruptcy Cases, 35, in which the vice chancellor says: "Those who receive trust property from a trustee, in breach of his trust, become themselves trustees, if they have notice of the trust;" *Ex parte Poulson*, De Gex, 79; *Ex parte Woodin*, 3 Mont. Dea. & De Gex, 399; 6 De Gex, M. & G. 795, 801; *Ex parte Carne*, L. R. 3 Ch. 463; *Ex parte Norres*, L. R. 4 Ch. 280; *Ex parte Adamson*, L. R. 8 Ch. Div. 807.

In *Adair* v. *Shaw*, 1 Sch. & Le Froy, 262, Lord Redesdale says: "Trusts are enforced, not only against those persons who rightfully are possessed of the trust property as trustees, but also against all persons who come into possession of the property bound by the trust, with notice of the trust, and whoever so comes into possession is considered as bound, with respect to that special property, to the execution of the trust." Many of the authorities will be found in 2 Lindley on Part. 1247.

Judge Treat, in *In re Tesson*, 9 B. R. 379, held that where an executor had invested funds of the estate in his partnership business, with the knowledge and assent of his copartners, the parties entitled to the fund may prove their debts against the partnership, although they have proved against the estate of the executor. The only point upon which the learned judge appears to have entertained any doubt was whether they could pursue both the firm and individual

estates. By later decisions this point is clearly established. It is clear, therefore, from these authorities, that for this wrongful use of these trust funds by the partnership the partnership and its members have become chargeable, and that a joint and several claim was thereby created against the joint and several estates.

Can an administratrix *de bonis non* sustain such proofs? It is certainly for the interest of all concerned in the York estate, whether as creditors, legatees, heirs, or sureties on his administrator's bond given by Jordan to the judge of probate, that these proofs should be sustained, if possible, in behalf of the administratrix *de bonis*, so that the fund may pass under her control and be administered according to law as part of the assets of the estate; and, after some deliberation, I am satisfied that it may be so done.

By the law of this state, (Rev. St. c. 72, § 15,) the judge of probate may expressly authorize any party interested to commence a suit on a probate bond for the benefit of the estate, and the judgment and execution, by section 17, are recovered by the judge of probate in trust for all parties interested in the penalty of the bond, and he shall require the delinquent administrator to account for the amount of the same, if still in office; but if not, he shall assign it to the rightful administrator, to be collected and the avails thereof accounted for and distributed, or otherwise disposed of, as assets. This statute has so far changed the common law, as declared by the supreme court of the United States in 16 Wallace, (*Bull* v. *New Mexico*,) that that decision is no longer applicable in this state. As the law now is, not only the funds belonging to the estate in the hands of the administrator at his death or removal are assets which go to the new administrator, but all sums recovered from him and his bondsmen for breach of his duty as administrator are to be received by the new administrator and treated as assets.

Any difficulty which might otherwise arise from a want of privity between the old administrator and the new is thus obviated, and by a reasonable construction of this statute it follows that in a proceeding of this nature the new adminis-

trator should be at liberty to reach the assets, whether in the hands of the former administrator or of other parties who are chargeable with holding them in violation of law.

Under the law as it now stands in this state, (it being the duty of the administrator *de bonis* to administer upon the whole estate, to collect and apply to the common benefit all that has not been so done,) the bankrupt court, acting as a court of equity, will aid him to reach whatever property has been wrongfully misapplied by his predecessor, and which is chargeable as assets of the estate. It is indisputable that Jordan & Blake were accountable to some one for this amount. From some quarter a claim should be made therefor. There is no way in which it can be so directly applied where it belongs as by allowing the administrator *de bonis* to receive it. It is needed to meet the various claims still remaining unadjusted against the York estate; and I think that, upon the ground of trust, aided by the statute above referred to, the proof may well be sustained against the firm estate, and also against the individual estate of Dexter Jordan. I hold also that under the statute proof might be supported against Jordan's estate upon the bonds given by him as administrator.

In Massachusetts there is a statute quite similar to the one in this state; and in *Wiggin, Adm'r de bonis*, v. *Sweet*, 6 Met. 198, *Shaw*, C. J., says, "that by virtue of this statute such administrator *de bonis* becomes the sole representative of the estate—the trustee for all persons having an interest in it; that he is personally interested in the estate, and is aggrieved in his property if there be a failure to account for all that is due to the estate, and therefore may appeal." And this view is sustained by the opinion of the court in *Newcomb* v. *Williams et al.* 9 Met. 538.

The proof, I hold, may be sustained upon another ground. Jordan, as administrator, loaned the money of the estate to the firm. It became a debt due to him in that capacity, which, if he had not been one of the firm, he could have enforced against the firm as administrator, and when collected the avails would have been assets. There was an implied promise to pay to the estate of York these funds belonging to York's

estate, and this implied promise, I hold, would be the foundation of an action at law in behalf of the administrator *de bonis non* against the firm.

In *Catherwood, Adm'r de bonis*, v. *Chaband*, in 1 B. & C. 155, the plaintiff sustained an action on a bill of exchange indorsed to the former administrator, in payment of a debt due the estate. *Holroyd*, J., in his opinion, says: "The decisions in the old cases proceeded upon the principle that contracts made with an administrator were personal to him, and that he must sue upon them in his own right and not in his representative capacity. That principle has since been altered, and it has been ruled in several modern cases that upon such contracts an administrator may sue in his representative capacity." In the same case *Bailey*, J., says: "An administrator may sue in his representative character upon promises made to himself, when the money will be assets when received. Now, if the administrator dies intestate, without having sued upon such a promise, the *administrator de bonis non* may sustain an action upon it, for he succeeds to all the legal rights which belonged to the administrator in his representative capacity. By this mode of proceeding the money received is immediately applicable to the right fund, as assets of the first intestate, whereas, if the action had been brought by the personal representative of the first administratrix, it would in the first instance have become a part of his estate, and must afterwards have been transferred from that to the estate of the first intestate."

In *Moseley* v. *Randall*, 6 L. R. 2 B. 342, *Cockburn*, C. J., says: "If the promise was made to the original administratrix, as administratrix, the proceeds of the action would be assets, and the administrator *de bonis non* is the proper person to sue." *Sullivan, Adm'r de bonis*, v. *Holker*, 15 Mass. 374, is to same effect. The entry on the books of Jordan & Blake of the credit to estate of R. M. York, of these sums, conclusively shows that the promise was to that estate, the loan was made by the estate, the firm thereby became the debtor of the estate, and the debt still remains due from the

firm to the estate, and should be paid to or collected by the representative of the estate.

The decision of the register is overruled, and the proof allowed against the joint estate.

SIMMS and another, Assignees, etc., *v.* MORSE and Wife and others.

(*District Court, D. Maryland.* May 3, 1880.)

WIFE—PURCHASE OF PROPERTY BY—CONTEST WITH HUSBAND'S CREDITORS.—Purchases of real or personal property, made by wife during coverture, are justly regarded with suspicion, and in contests with creditors of her husband the burden of proof is upon her to show affirmatively and distinctly that she paid for it with funds not furnished by her husband.

PROPERTY PURCHASED BY WIFE—BONA FIDE PURCHASER.—The same rules applicable in a contest between a wife, who has purchased real estate during coverture, and her husband's creditors, do not apply where such contest is one between the creditor or assignee and one claiming the property as a *bona fide* purchaser thereof.

FRAUD—NOTICE—MERE SUSPICION IS NOT.—Circumstances amounting to mere suspicion of fraud are not to be deemed notice, and where an inference of notice is to affect an innocent purchaser it must appear that the inquiry suggested, if fairly pursued, would result in the discovery of the defect.

WIFE—PAYMENT OF HUSBAND'S DEBT.—The fact that a wife, in disposing of property standing in her name, in part payment thereof, cancelled a debt due from her husband, does not render such conveyance assailable by his creditors.

In Bankruptcy.

Tuck & Tuck, for complainant.

John H. Keene, Jr., for defendant.

MORRIS, D. J. Bill in equity to set aside certain deeds as fraudulent and void, and in fraud of the provisions of the bankrupt act.

It appears from the proceedings and testimony that in 1868 Augustus Morse was the proprietor of the City Hotel, in Annapolis, which he had purchased, but had not paid for; that the furniture of the hotel belonged to his wife; that he

was generally known to be in doubtful credit, difficult to collect any money from, and was, in reality, insolvent. In 1868 a property adjoining the hotel, on the Duke of Gloucester street, was offered at auction by the heirs of John Campbell, and was knocked down to Morse for $1,800, and he then ostensibly became the owner of it; that on the fifth of November, 1869, a deed was put on record, signed by the heirs of Campbell, conveying the property to Morse's wife, the deed being dated and acknowledged on the third of August, 1868, which was about the date of the sale; that on the eighth of November, 1869, a deed was executed and recorded, conveying the property from Mrs. Morse to Samuel Barth, in consideration of $2,300; that on the tenth of May, 1869, a lease was executed and recorded, by which, in consideration of $1,000 and the reservation of a rent of $48 a year, extinguishable upon the payment of $800, the property was conveyed by Barth to Martha R. Wilson; that on the twenty-first of April, 1869, Morse, on his own petition, was declared a bankrupt, and the complainants were, subsequently, appointed his assignees.

The bill alleges that the consideration for the property conveyed by Campbell's heirs to Caroline Morse was not paid by her but by her husband, and that Morse procured the deed to be made to her with design to defraud his creditors, and that the deed was kept unrecorded for fifteen months in furtherance of that design, he, in the meantime, holding himself out as the owner; that the consideration in the deed from Caroline Morse to Barth was not paid to her but to her husband, and that Morse caused said deed to be made to Barth, who then had reasonable cause to believe Morse was insolvent or acting in contemplation of insolvency, with a view to prevent his property from coming to his assignee in bankruptcy, and in fraud of the provisions of the bankrupt act.

The bill prays for a decree against Barth, and that Mrs. Wilson may be decreed to hold the property under the lease to her for the benefit of the assignees, and prays for other relief.

The answers aver the good faith of all the transactions.

The testimony of Barth shows that he lived in Baltimore, and for a year or more prior to 1868 he had been dealing with Morse, and supplying the hotel with liquors, and that in November, 1868, Morse owed him a balance of $398.75; that prior to the fifth of November, 1868, he cashed a draft for Mrs. Morse for $625, drawn by her on her son-in-law in Massachusetts, with which money she proposed to pay a balance due on the purchase money of the property in question; that the draft came back to him protested, and he went to Annapolis to see Mrs. Morse about it; that she said to him she had expected the money from Massachusetts, but had been disappointed, and proposed to sell him the property for $2,300; that he consented to take it at that price, provided she allowed him, as a payment on account of the purchase, the debt of $398.75 due him by her husband, together with the draft he had cashed for her; that upon these terms he made the purchase, and paid to her the balance of the purchase money.

The contention of the complainants is that Barth knew that Morse had for a long time been insolvent, and knew that the property conveyed to his wife was paid for by him and conveyed to her in fraud of his creditors, and that Barth's purchase of the property was a method of securing the debt due him by Morse, and for that reason he aided Morse in conveying away the property in fraud of the bankrupt act.

The testimony shows that Barth in November, 1869, had good reason to believe that Morse was insolvent, and had been so for some time; but there is no evidence to show that he had any knowledge that the property had not been bought by her, or that the money which had been paid on account of the purchase of the property in question was not Mrs. Morse's money, as she claimed. The testimony of Mrs. Morse, and of her husband and her son, tend to show that she did pay the money out of her own funds. Mrs. Morse, in her testimony, says: "I purchased the house on the Duke of Gloucester street, in Annapolis, from Mary A. Campbell and others. The deed was not put on record, because the purchase money was not all paid until November, 1869. The last payment was pro-

cured by a draft on my son-in-law for $600 or $700, indorsed by Barth, which he paid. The balance of the money I obtained from the sale of real estate in Massachusetts belonging to myself, conveyed to me by deed, and I received some money from my sister."

The son testifies that he knows that his mother received the money from the sale of property in Massachusetts belonging to her from being present at the sale; and Mr. Morse, the husband, testifies that all the money paid for the property belonged to his wife, except what was furnished by Barth. It was held by the supreme court of the United States, in *Leitz* v. *Mitchell*, 94 U. S. 580, that purchases of real or personal property made during coverture by the wife of an insolvent debtor are justly regarded with suspicion, and that she cannot prevail in contests with his creditors unless the presumption that it was not paid for out of her separate estate be overcome by affirmative proof, and that the burden is upon the wife to prove distinctly that she paid for it with funds not furnished by her husband. This doctrine has been fully adopted and applied by the court of appeals of Maryland, in the recent case of *Henkle* v. *Wilson*, October 7, 1879. And in the present case it may well be that if this was a contest between Mrs. Morse and her husband's creditors, or his assignees in bankruptcy, the testimony given by herself, her husband and her son, although not contradicted or impeached, or shaken in any way, (it having been taken in Brooklyn, under commission and without cross-examination,) might not satisfy the court as to the source from which she obtained the money paid for the property, other than that furnished by Barth. But this is not a contest with her, but a contest with one claiming to be a *bona fide* purchaser from her without knowledge of any weakness in her title.

If the deed from Campbell's heirs had been made to Morse and the property then conveyed to his wife, the case would be clearly within the rule in *Green* v. *Early*, 39 Md. 223. The deeds would have disclosed that it was an acquisition of property by her from her husband, and Barth would have taken from her no better title than she had, and if she could

not defend her title neither could he; but in the present case there was nothing, so far as the proof shows, to affect Barth with notice of any defect or latent equity in her title, except the fact that, at the time he was negotiating with her, her husband was insolvent, and had probably been so for a considerable time previous. Granting that this was sufficient to have put him upon inquiry, what could he have learned? Both Mr. and Mrs. Morse then asserted that her money had been paid for the property, and they now, when they have less interest in the matter, solemnly swear to it, and the husband's creditors have been able to produce no direct evidence to discredit their statements.

Circumstances amounting to mere suspicion of fraud are not to be deemed notice, and where an inference of notice is to affect an innocent purchaser it must appear that the inquiry suggested would have, if fairly pursued, resulted in the discovery of the defect, where the title of the wife does not come through a conveyance from the husband, and is in form perfect, although impeachable by his creditors. I know of no case in which the title of a purchaser from her, having no knowledge of the weakness of her title, has not been upheld; and in the present case, without some authoritative decision, in the face of the affirmative testimony in support of the payment by her of the consideration of the deed to her, I should not feel justified in setting aside her conveyance to Barth. *Sedwick* v. *Place*, 12 Blatch. 174, affirmed, 95 U. S. 3; *Fletcher* v. *Peck*, 6 Branch, 133; *Anderson* v. *Roberts*, 18 Johnson's Rep. (N. Y.) 515; *Ledyard* v. *Butler*, 9 Paige, 132.

The fact that in the purchase of the property by Barth he secured a debt due to him by the husband does not render the conveyance by the wife to him assailable. If the property was hers, and she chose to appropriate any part of it to the payment of any particular creditor of her husband, it is not a matter by which his assignee in bankruptcy or creditors are affected. *Stewart* v. *Platt*, Sup. Ct. U. S., October 7, 1879, reported in 12 Chicago Legal News, 201.

Bill dismissed.

PAGE, Administratrix, etc., and another *vs.* THE HOLMES BURGLAR ALARM TELEGRAPH COMPANY.

(*Circuit Court, S. D. New York.* May 6, 1880.)

EQUITY PRACTICE — PETITION FOR REHEARING — VERIFICATION OF. — A petition for a rehearing, on the ground of newly discovered evidence, which is signed by the petitioner's solicitor and is verified by him, to the effect that petitioner is a corporation and he is its solicitor, and that such petition is true of his best knowledge, information and belief, is not sufficient. It must show, by some positive testimony, that the evidence, with the use of reasonable diligence, could not have been procured in time for the former hearing, and so the court may judge if reasonable diligence was used.

PATENT—ACTION FOR INFRINGEMENT—PRACTICE WHERE PATENT HAS BEEN HELD VALID IN ANOTHER SUIT.—After a patent is adjudged valid in one action, it may always be shown in another suit against a different defendant, and even in an application for preliminary injunction, in such suit, that the right claimed in the new suit was not fairly in controversy in the former action, or that material facts were not known or considered when the former suit was tried, or that there are relevant matters which were not adjudicated therein.

COURT—ACTS ONLY BETWEEN PARTIES AND AS TO ACTUAL ISSUES.—Courts take proofs and render decisions only between parties litigant and as to actual issues.

David Dudley Field, William Dorsheimer, John F. Dillar and *Charles T. Polhamus,* for the petitioners and the defendant.

Edward N. Dickerson and *John K. Porter,* for the plaintiffs.

BLATCHFORD, C. J. In this case a decision has been filed sustaining the validity of the patent sued on as respects its eleventh, twelfth and thirteenth claims, and holding that the defendant has infringed those claims by making and selling telegraph burglar alarms, in which a circuit breaker acts automatically to break the circuit, so that by the movement of an armatur to and from an electro-magnet a bell is rapidly struck by a hammer, and which alarms contain the inventions covered by said three claims.

The defendant now, before the usual interlocutory decree in favor of the plaintiff is entered, presents to the court a petition, the prayer of which is "that a rehearing of this cause may be had, and that preparatory thereto further reference

may be taken in respect of the matters" mentioned in said petition. It is not set forth in the petition that any questions of law or of fact, which arise on the record in the case, were not presented to or considered by the court, or that any questions of fact or of law arising on the record, which were presented to or considered by the court, were not properly disposed of by it. The petition sets forth "that a rehearing of this cause, and permission to take further evidence preparatory thereto, would tend to the furtherance of justice," for reasons therein stated. Those reasons, as so stated, are—

"*First.* That, since the decision, the defendant has discovered that a machine was made by one Hall, in Boston, in 1847, and then used for receiving and sending telegraphic messages, which machine contained the device described in the thirteenth claim, and reference is made to the affidavit of Hall; that, at the time the evidence in the cause was taken on the part of the defendant, it had used, as it supposed, all due diligence to obtain all competent evidence of past inventions, but it failed to find said machine until the information thereof was communicated to it by Mr. Hall himself, after the publication of the decision in this case, until which time the machine made by Hall in 1847 was not known by the defendant to be in existence; and that the said machine, a description thereof, and the time when it was made and used, are material and necessary facts to establish the defendant's right to use the machine which the plaintiffs claim to be an infringement of their patent, and will show that the combination and devices described in the thirteenth claim of the patent were in use prior to the year 1854.

"*Second.* That legal evidence as to when the Morse model instrument was made, and by whom, for want of which such instrument was rejected when before offered in evidence, can now be supplied by the testimony of two persons, to whose affidavits reference is made; that the defendant has acquired knowledge of such fact only since the decision of this cause, and that, by making proofs in relation thereto by the testimony of said two witnesses, the defendant expects to be able

to prove a right to the use of the combination devices described under the thirteenth claim of the plaintiffs' patent.

"*Third.* That it can be shown by expert testimony that the combination and devices claimed under the twelfth claim of the plaintiffs' patent were the essential features of the Morse telegraphic instruments, operated by Morse electrical circuit breakers, in use under the Morse patents since about the year 1845, and without which said combination and devices Morse telegraphic instruments and apparatus would have been practically useless and inoperative; that such combination of devices upon said Morse telegraphic apparatus have, since about the year 1845, been in general use in local or short electrical circuits as well as in longer main electrical circuits; that said devices could not be made use of in combination with either long or short electrical circuits without infringing Morse's patents during their existence; that ever since the year 1840 there has existed, as generally understood by practical electricians, a material and essential difference in the use and functions of the devices described under the twelfth and thirteenth claims of the plaintiffs' patent, upon Morse's electrical circuit breakers and telegraphic instruments in use on longer main circuits, for telegraphing, as compared with their use and functions upon Page's automatic circuit breakers, used in combination with an inductive or secondary circuit for applying electricity as a remedial agent; and that, upon bringing in such testimony, it will more clearly appear that a distinction, under the decree in this case, should be made, so that the defendant may be accorded the right to use the combination and devices described under the twelfth and thirteenth claims of the plaintiffs' patent, when used in combination with a long or main circuit for telegraphing, without thereby becoming liable as having violated any injunction that may issue under said decree. This petition is signed only by the solicitor of record for the defendant in the suit, and is verified only by said solicitor to the effect that the defendant is a corporation, and he is its solicitor, and that the petition is true "of his best knowledge, information and belief."

To this petition the plaintiffs demur, and show for cause of demurrer that, according to the constant practice of this court, the defendant has not set forth and proved such a state of facts in respect to newly discovered evidence as to entitle it to a new trial of the merits of the case, but, on the contrary, the petition shows that all the pretended newly discovered facts were easily accessible to the defendant, and that it had full knowledge and notice of the existence of whatever facts were true in relation to the subject-matter of said petition, and could easily have proved the truth in regard to such matters.

The third branch of the petition seems to suggest that the defendant may, perhaps, in the future, desire to use the combination and devices covered by the twelfth and thirteenth claims of the plaintiffs' patent in connection with a long or main circuit for telegraphing, and that if it does so it may, perhaps, be proceeded against for violating an injunction to be issued on the decree which may be entered on the decision which has been made in this case, and that it desires to have such decree so drawn as to accord the right to such use, and that, as a basis therefor, it desires to produce the testimony mentioned in that connection. It is quite sufficient to say that whenever the defendant shall use what is suggested in connection with a long or main circuit for telegraphing, and shall be proceeded against for doing so, an issue will be raised which it will be proper then to consider, but that no such issue has yet arisen.

Within the principles laid down in *Smith* v. *Babcock*, 3 Sumner, 583; *Baker* v. *Whiting*, 1 Story, 218; *Walden* v. *Bodley*, 14 Peters, 156; *Indiarubber Comb Co.* v. *Phelps*, 8 Blatchf. Cir. Ct. Rep. 85; *Hitchcock* v. *Tremaine*, 9 Cir. Ct. Rep. 550; *Prevost* v. *Gratz*, Peters' Cir. Ct. Rep. 364; *Livingston* v. *Hubbs*, 3 John Ch. Rep. 124; *Ruggles* v. *Eddy*, 11 Blatchf. Cir. Ct. Rep. 524; *Webster Loom Co.* v. *Higgins*, 13 Cir. Ct. Rep. 349; and *De Florez* v. *Reynolds*, in this court, June 9, 1879, this demurrer must be sustained. The defendant does not show that it could not with reasonable diligence have obtained, prior to the former hearing, the testimony which it

now seeks to adduce in regard to the Hall machine, the Morse model instrument, and the matters suggested as bearing on the right to use, in connection with a long or main circuit for telegraphing, the devices covered by the eleventh, twelfth and thirteenth claims of the plaintiffs' patent.

The sole case set forth is that the solicitor, according to his best knowledge, information and belief, is of opinion that the defendant supposed it had used all due diligence to obtain all competent evidence of past inventions. There is no oath of any officer of the corporation, or of any person who searched for evidence, or anything to show what search was made, or what knowledge or information was had or not had, or what diligence was in fact used, so that the court can judge whether such diligence was due or reasonable. The "best knowledge, information and belief" of the solicitor may be none at all. *Bogardus* v. *Trinity Church*, 4 Sandford's Ch. R. 369.

Without at all passing upon the question as to whether or how far the evidence sought to be adduced would be material and important, or immaterial and unimportant, on any point to which it might be sought to be applied, if it were in the case, the demurrer must be sustained, and the petition be dismissed, with costs, for the reason before set forth.

A petition entitled in this suit is presented to this court by three corporations, not parties to this suit, which operate lines of telegraph. The petition sets forth that it is claimed by the plaintiffs that devices used by them on their telegraph lines are an infringement of the plaintiffs' patent; that a judgment entered without qualification in this case in the usual form, and following the language of the decision which has been given, if it were to be held in other courts and in other cases in this court so far authoritative as to afford ground for a provisional injunction in the first instance, would seriously interfere with the petitioners and with every telegraph company in the country, and with every company using telegraph lines, if it did not put a stop to their use of the telegraph altogether; that the petitioners ought not in justice to be so affected by the judgment in this case for the following reasons: (1)

that the defence was imperfectly presented in various particulars which are set forth in the petition, in that the defendant could have proved various matters which it did not prove, and which it is alleged would affect the novelty and validity of the eleventh, twelfth and thirteenth claims of the plaintiff's patent; (2) that this suit is against a defendant which has no interest in using long or main circuits, and does not use a telegraph line; (3) that the defendant in this suit had practically, after the suit was brought, lost all interest in the controversy by reason of its having ceased, except to a small extent, to make the machines complained of; (4) that the decision in this case ought not to be extended to any apparatus used for telegraphing in long or main circuits; (5) that the eleventh, twelfth and thirteenth claims of the plaintiffs' re-issued patent ought to be confined to combinations of which an automatic circuit breaker is a part.

The petitioners pray to be allowed to exhibit to the court the machine made by Mr. Hall, (before mentioned,) and the Morse model instrument, (before mentioned,) and one of the machines now, and for many years past, used by the petitioners in telegraphing, so that it may be seen that the machine used by the petitioners, and that made by Mr. Hall, and that used by Professor Morse, are alike in their essential parts, and have, all of them, the devices mentioned in the eleventh, twelfth and thirteenth claims of the plaintiffs' re-issued patent; and that the judgment to be entered herein may be qualified by the following or other equivalent provision, namely: "But nothing in this judgment, or in the opinion or decision of the court in this cause, is to be deemed to relate to any aparatus, device or appliance other than such as is worked on short circuits, for medical or alarm purposes, and containing an automatic circuit breaker," or that the judgment may be limited in some other manner so as not to affect the petitioners. On the hearing it was stated by the counsel for the petitioners that they would be content with the following qualification: "Provided, however, that nothing in this decision or judgment shall be deemed to affect or relate to the right of any company or person to use, in telegraphy, the

instrument commonly known as Morse's relay or receiving magnet."

To this petition the plaintiffs demur, and show for cause of demurrer that the petitioners do not set forth any such right, title or interest in the subject-matter of the decree in this suit, either as parties or otherwise, or allege any such facts as to entitle them to be heard in the settlement or entering of such decree; and that, even if the petitioners have any such interest in the subject-matter of such decree, they have not set forth and proved any state of facts in respect to newly discovered evidence which would entitle them to be heard on the settlement of such decree.

In addition to the matters before referred to as contained in the petition, it is urged, for the petitioners, that the special act of congress did not contemplate a patent for any telegraphic device; that Page's invention was not a telegraphic instrument; that if an automatic circuit breaker is not an essential element in the twelfth claim of the patent, Page was not the first inventor of what is covered by that claim; and that it does not appear that the commissioner of patents adjudged that Page was the first inventor, as was required by the special act.

The petitioners do not allege that there was any fraud or collusion in the conduct of the suit, as it was presented to the court. They substantially ask the court, in view of the matters they lay before it, to give to the plaintiffs' patent, in this suit, a construction which does not arise out of any matters in issue in this suit, or which can properly be in issue in this suit. An investigation, on plenary proofs, into the matters now brought forward by the petitioners, would be an investigation into matters not in issue in this suit. The matters of fact and of law now sought to be raised, as not having been before raised, will be fully available to the petitioners if they shall be sued for infringing the patent, whether preliminary injunctions shall be applied for against them or not.

It is well settled that even after the validity of a patent has been established in a suit, and notwithstanding the presumption thereby raised that the patent is valid, it may

always be shown in another suit on the patent against another defendant, and even in answer to an application for a preliminary injunction in such suit, that the right claimed by the plaintiff in the new suit was not, either as to its nature or its extent, fairly in controversy in the former suit, or that material facts were not known or considered when the former suit was tried, or that there are relevant matters which were not adjudicated in the former suit. *American Nicolson Pavement Co.* v. *City of Elizabeth*, 4 Fisher's Pat. Cas. 189.

These principles govern all the circuit courts of the United States, and they apply to all the matters urged by the petitioners, for the petitioners allege nothing except what is claimed by them to fall under one or another of the heads above referred to. In this view the petitioners will have every benefit, if they should be sued, in raising in the new suits what they seek to raise in this suit. On the other hand, the plaintiffs, if contesting in this suit with the petitioners any new questions of law or fact, would be contesting them with persons who are not parties to this suit, and whom the plaintiffs may never sue. It will be entirely competent for this court, or any other court, to make in any new suit the qualification suggested by the petitioners in reference to the effect of the decision or the judgment in this suit, if it shall be a qualification proper to be made, because the record in this case will show the issues and the proofs, and the decision of the court will show what was considered and passed upon, and it is proper to make such qualification, if at all, only in a new suit.

It is the province of courts to take proofs and render decisions only between parties litigant before it, and in respect to claims brought against parties, and to issues actually raised. No case has been cited for the petitioners where a petition of *quasi* intervention, such as the present one, has been admitted. The case of *Cochrane* v. *Deener*, 5 Otto, 355, is not at all like the present case; and, in effect, the petitioners in the present case will have, in any future cases on this patent, to which they shall be parties, the privilege of a hearing in respect to what they seek to raise in this suit, as above set

forth, to the same extent which the supreme court indicated as proper in *Cochrane* v. *Deener*.

Without considering, on the merits, any of the questions of law or fact raised or discussed on the hearing, it results from the foregoing views that the demurrer must be sustained, and the petition be dismissed, with costs.

CAMPBELL *v.* JAMES and another.

(*Circuit Court, S. D. New York.* May 1, 1880.)

PATENT — ASSIGNEE — BILL FOR INFRINGEMENT — INFRINGEMENTS BEFORE ASSIGNMENT.—A bill filed by the assignee of a patent for infringement thereof set forth the infringement while owned by the assignor, an assignment *in hæc verba* of the patent to the plaintiff, and "all the right, interest and claim for and to the past use of said invention and improvements under the said letters patent," and, in addition to praying for an injunction and for an increase of damages "in addition to the profits and gains to be accounted for by the defendant," contained a prayer for "such other and further relief as shall be agreeable to equity," *held*, sufficient to entitle complainant to recover for infringements before, as well as after, the assignment to him.

SAME—SAVING IN COST—PROFITS.—Savings in cost by infringement of patent are recoverable as profits in an action for such infringement.

SAME—DEVICE USEFUL ONLY TO POSTAL DEPARTMENT.—The fact that a patented device can be used only in the postal service of the United States will not prevent the recovery of damages by the patentee for an infringement thereof by a postmaster.

SAME—LIABILITY OF POSTMASTER USING.—Nor does the fact that the postmaster, who infringed such patent, by making use of such device, turned the moneys saved by its use over to the government, affect his personal liability to such patentee for such infringement.

SAME—JURISDICTION OF CIRCUIT COURT.—Circuit courts of the United States have jurisdiction of all questions arising upon the title to a patent, and to recover for an infringement of it under the laws of the United States.

SAME—ASSIGNMENT OF.—All interests in patents are assignable in writing, and a purchaser thereof has a right to rely upon the title as appearing from the records of the patent office.

SAME—ASSIGNMENT OF PROPERTY NOT EXEMPT FROM SALE ON EXECUTION. A conveyance by a party of all his property, excepting such as is exempt by law from levy and sale under execution, will not pass the title to a patent, though it may operate upon a chose in action for past infringement.

EQUITY—PARTIES TO PROCEEDINGS.—It is not important in equity proceedings, for every purpose, that all the parties to the controversy should be upon opposite sides in the formal pleadings.

PATENT—ADJUSTMENT OF DAMAGES.—Rights of different parties to the damages allowed for certain infringements adjusted and determined.

In Equity.

Geo. H. Williams and *Marcus P. Norton*, for complainants.

Stewart L. Woodford and *Samuel Clark*, for defendants.

WHEELER, D. J. This cause has now been heard upon the report of the master, and exceptions thereto as to the liability of the defendant James; and upon the stipulations under which the other defendants became parties, and by which their rights, as between themselves and the plaintiff, were submitted to the court, and the evidence in support of their respective claims as to those rights.

From the report it appears that the defendant James became postmaster at the city of New York on the first day of April, 1873, while the patent in suit was owned by Helen M. Ingalls, and commenced using the patented invention, and has ever since continued the use in performance of his duties; that on the second day of January, 1877, she conveyed the patent to the plaintiff, and assigned to him her claims for past infringement; and that the gains and profits to the defendant James, in the saving of salaries of clerks to perform the duties required of him by the post-office department, have been $63,000, due to his infringement.

The principal and controlling questions arising upon the report and exceptions are whether the plaintiff is entitled to recover in this suit as well for the infringement before the assignment to him as for that after; and whether the defendant James is liable to account for the gains and profits received by him as postmaster, either as such or as damages.

It is not pretended, by or on behalf of the defendant, but that an assignee of such claims may maintain a suit upon them in his own name in equity, (2 Story's Eq. § 1007,) but it is insisted that the bill in this cause does not cover such claim, and that the evidence does not show an assignment of such claim from Miss Ingalls to the plaintiff. It is true,

as was stated when this cause was decided on the former hearing, that the pleader does not appear to have framed his bill with that aspect in mind; but what was said then was not said upon examination and deliberation, as a full disposition of the question, but only in passing, as illustrating the other question then being considered, so the question is open now whether the bill is sufficient to cover that claim.

As to that the bill sets forth the infringement by the defendant while the patent was owned by Miss Ingalls, and sets forth *in hæc verba* the assignment from her to the plaintiff of the patent; also of "all the right, interest and claim for and to the past use of said invention and improvements under the said letters patent;" and besides praying for an injunction and for an increase of damages, "in addition to the profits and gains to be accounted for by the defendant," has a prayer for "such other and further relief as shall be agreeable to equity." This, meagerly, it is true, but after all substantially, sets forth the claim and assignment, and a prayer for relief, as applicable to that as to the other part of the case. Perhaps there should be a special prayer for an account as to either aspect, but if one is required it is quite strongly hinted at if not very aptly inserted. The proof of the assignment consists of the instrument set forth, and that seems to be amply sufficient to cover this claim. The plaintiff is entitled to recover for the whole time, if any one is, as the case now stands, and it appears that he can now recover it in this suit, if anywhere, without doing violence to any of the settled rules of pleading.

The other is much the more important question. Whatever question there might be if the subject was new, it now seems to be settled that savings in cost by infringement of a patent may be recovered as profits. *Cawood Patent*, 94 U. S. 695; *Elizabeth* v. *Pavement Co.* 97 U. S. 126. The defendant saved the sum named by using the patented invention. It is said that the master erred, because the defendant might have used another form of stamp, which would not have been an infringement, and that the saving by using the patented invention, instead of that, would have

been much less than the saving reported. It does not appear, however, but that such use of the other form would have been an infringement; and, if that appeared, it appears that the other form was not known to the defendant, and that the saving reported was, in fact, saved by substituting the patent inprovement for what was known and would probably otherwise have been used. The saving, therefore, appears to be wholly due to the infringement.

It is said, too, that this patent is for a device that can only be used in the postal service, which is wholly monopolized by the government of the United States, which could send letters without postmarking them at all, or lessen the frequency of the mails, so that the postmarking could be done separate from the cancellation of the stamps by the old method, without increase of clérical force, at its pleasure, thus leaving this patented invention subject as to use or value entirely to the will of the post-office department, so that the use of it in the postal service would not deprive the owner of any opportunity to have it used otherwise, and could not damnify him, and that, therefore, no damages can be recovered in this case; and that no profits can be recovered because there is no party before the court, or that can be brought before the court, who has received any. If it was true that because those who can make use of a patented invention could also do without it, would show that no injury resulted to the owner of the patent from such use, and cut off all claim for damages, there are probably few inventions that would sustain claims for damages at all. People could do as was done before the discovery, and leave the inventor to the enjoyment of his invention by himself.

But the master has not reported any damages beyond the profits, and it does not seem that the defendant can be held liable for damages if he cannot be for profits, unless it may be for taking the profits and placing them beyond the reach of the plaintiff. The post-office department required the mails to be sent with certain frequency, and that the postage be paid by stamps on letters, and that the letters should be postmarked and the stamps cancelled separately, and required that the

defendant should do this at the New York office, either himself or by the employment of clerks. The defendant says in his testimony that the clerks are paid by the government. This is doubtless true, in practical effect, so far as he is concerned; still, it is to be presumed that the business is done according to the law, and he probably did not intend to testify that it was in any respect done contrary to the law. The law is that the postmaster general may allow to the postmaster at New York city, and to certain others, out of the surplus revenues of their respective offices—that is to say, the excess of box rents and commissions over and above the salary assigned to the office—a reasonable sum for the necesssary cost, among other things, of clerks, to be adjusted on a satisfactory exhibit of the facts. Rev. St. § 3860.

The defendent is, therefore, to be taken to have made this saving out of moneys actually received into his hands from the profits of his office. He saved it by using the invention in the performance of duties which he was required to do, and had just so much more money left in his hands by reason of the infringement when the duties were done. He did this as postmaster, but he was not obliged to do it. He could have refused the office, or resigned it, or have let this invention alone. He was not subject to any restraint, physical or moral, that he could not make subservient to his own choice. His choice was to use this invention and make this gain. When made it belonged to the orator. He paid it over to the government, and it passed beyond his reach and the orator's, unless it is recovered in this suit and reimbursed to him under the law. He has not these profits now, and would not have them if he had cast the money into the sea; he has had them as he would have had them then. The situation of the defendant is very different from that of the city of Elizabeth, in *Elizabeth* v. *Pavement Co.* 97 U. S. 126. The city had not saved or made anything by the infringement, and was not liable for profits in any view, whether any one else was or not, and never had been. Here the defendant has paid over to the government what belonged

to the owner of the patent, but that is no just answer to the claims of the owner now belonging to the orator.

Justice can only be done by requiring the defendant to restore the gains to those to whom they belong, and leave him to be protected as the law provides, and in doing this no injustice will be done to any one.

That his official character did not excuse the infringement has already been held, upon what seems to be abundant authority, in this case. If he is liable as an infringer as if he were an ordinary individual, he must be liable to the extent of the consequences as an ordinary individual would be, without regard to his reckoning over with the government. His official character is not any shield against the owners of the patent, although it may be a source of indemnity against the consequences.

The other questions relate to who, as between themselves, have the right to recover what is recovered, or the right to control the disposition of what is recovered, in which, apparently, the defendant James has no interest. These questions are of two kinds, one of the kinds is of questions relating to the right when the suit was commenced; the other, relating to rights since acquired. It is said by counsel for some of the claimants that this court has not jurisdiction of all these questions, because some of them rest upon contracts between the parties not citizens of different states, and do not involve any question under the patent laws of the United States. The suit was brought by the plaintiff alone against the defendant James alone. Objection was made by the defendant that Charles Eddy was an owner of an interest in the patent, and that the suit could not properly proceed without him; whereupon Eddy appeared and became a party to the suit, under a stipulation stating that he claimed that his rights were fixed and determined by an assignment of one-third of the patent to him, and a contemporaneous agreement, dated October 23, 1869; and the plaintiff that they were determined by an agreement in writing among the owners of the patent, dated October 7, 1871, and that the cause should proceed upon the evidence taken, unless the court should oth-

erwise direct, to a decree ascertaining the rights and interests of Eddy.

This agreement, as to what the court should decide, did not enlarge what would have been before the court with Eddy as a party defendant, without such an agreement, for it would all the while be necessary to determine his rights in order to settle what would be left to the plaintiff as the foundation of any decree that might be made in his favor. The court has directed further evidence to be taken as to whether the instrument of October 7, 1871, is still in force, or has been cancelled, and such evidence has been taken. Eddy was a trustee for Jacob Shavor and Albert C. Corse. Since the commencement of the suit the personal representatives have conveyed his title, Corse has conveyed his, and Eddy and Corse have made an assignment for the benefit of creditors, which the assignees, and those claiming under them, insist carried the patent, and Eddy insists that it did not.

It is quite obvious from this statement that all these questions are questions of title to the patent which arise under the patent laws. The whole question as to the instrument of October 7, 1871, according to the claims of counsel on each side of that question, is as to whether it affected the title by operating to convey a part or not, which is necessarily a question of title; and it seems to be agreed on all hands that if it did not affect the title the question as to cancellation of it afterwards would be quite different from what it would be if it did; for if it conveyed title cancellation of it would not re-invest the title, and if it was only an executory agreement as to the division of money it might well be cancelled by the parties to it. And if the court is to take notice at all of rights acquired since the suit was brought, those rights arise upon the acquisition of title, if they arise at all, so that all questions concerning them arise upon the title to the patent, and the right to recover for an infringement of it under the patent laws of the United States. It has never been doubted but that the circuit courts have jurisdiction of all such questions, whatever the doubts and decisions may have been when neither the title itself, nor any question as to whether there

was an infringement, was before the courts. *Hartell* v. *Tilghman*, 99 U. S. 547.

Conveyances *pendente lite* do not at all affect the litigation as between the parties to the original controversy, unless there are special statutes or circumstances to control; but courts of justice, even courts of law, and especially courts of equity, often protect the rights of the real owners to the fruits of a recovery, as against those who are nominal but not real owners, whenever their rights may have been acquired.

All parties claiming to have derived any title or right from the owners of the patent, according to the decision in the principal case since the commencement of the litigation, have become parties to the record, and submitted the evidence of their claim, and the questions arising therefrom are to be considered. This is not in anywise contrary to the stipulation made under which Eddy became a party to the suit; for these claims all arise under the right of Eddy as reserved to him in the stipulation, and, when that right is ascertained and distinguished from the plaintiff's, the plaintiff has no right nor apparent interest as to where it shall go—whether to Eddy himself, for himself, and those for whom he was trustee, or to those to whom he and his *cestuis que trust* may have conveyed that right.

As the case stands, on October 20, 1869, Norton owned and held the title to the patent. He made an agreement in writing with Eddy that he would convey one-third of it to Eddy in trust for himself, Shavor and Corse; and that $20,000 of the first money received on account of the patents should be received by Eddy for himself and them, to settle all claims between them and Norton; and that one-third of all further receipts should be received in like manner by him, and the other two-thirds by Norton. On the same day, or on the 20th, (the copies differ as to this date, and the originals are not here,) he conveyed the patent to Miss Ingalls. The conveyance to her was not recorded until after the other, and probably was not intended to be, for she mentioned it in an agreement with W. W. Secombe, dated October 4, 1870, as having been left unrecorded for a time and afterwards re-

corded in order that the patent might be re-issued to her; and it is not to be presumed that such a fraud was intended as would result from a conveyance of a third to Eddy after the whole had been conveyed to her. Whatever its date in fact was, whether the 20th or the 23d, it was not recorded until August 1, 1870, more than three months after its date, and it became subject to the conveyance to Eddy. Rev. St. § 4898. The parties concerned appear to have understood that her conveyance was so subject.

On the fifteenth day of August, 1870, Norton made an agreement in writing with Secombe that he should have the sum of $2,500 advanced and to be advanced on account of the patent, with 10 per cent. interest, out of any sum of money paid by the postmaster general for the use of the patent, and that if Norton should succeed in obtaining the one-third interest conveyed to Eddy in trust for himself, Shavor and Corse, Secombe should have only 6 per cent. interest, but one-fourth of the patent. On the fourth day of October, 1870, Miss Ingalls made an agreement in writing with Secombe referring to this agreement between Norton and him, and ratifying and confirming it as if made by her. The patent was re-issued to her on that day, and on the fourth day of March, 1871, she conveyed to him all her right, title and interest in and to the patent in trust for herself, and the wife and children of Norton, with full power to sell and assign, and to grant licenses and manufacture under the patents, to pay the expenses of the trust, reserve his compensation as trustee, and pay over the balance, according to a declaration of trust, which he then executed to her, by which he was to have two-fifths of the proceeds, and she the other three-fifths in trust for herself and the wife and children of Norton.

In this state of the title the agreement of October 7, 1871, was made and signed by Eddy, Shavor, Corse and Secombe. There had been a suit against the government in the court of claims for compensation for the use of the patent, which had failed because no contract had been proved; and the matter had been before congress for an appropriation to make compensation, which had not been disposed of by final action.

The meaning and effect of the agreement are to be judged of in the light of the situation. It recited that the parties to the agreement were interested in the prosecution of a certain claim against the government for the use of this invention, and stated that it was understood and agreed between them that Eddy, Shavor and Corse would "accept and receive in full payment and satisfaction of their claim and demand the sum of $30,000," to be paid out of the moneys to be received, provided it should amount to $62,000, and a *pro rata* sum if it should not amount to the sum stated, with parties whose interest was $20,000, and Secombe whose claim was $12,000. It is argued on the one hand that this was a conveyance which would cut the rights of Eddy, Shavor and Corse in the patent down to $30,000; and, on the other, that it is a mere executory agreement.

All interests in patents are assignable by instrument in writing. No particular form is required, but, still, there must be some operative words expressing at least an intention to assign, in order to constitute an assignment. There are no such words in this instrument. There is no consideration stated for their agreement to accept that sum in satisfaction, when received; there is not even an agreement to pay it. The substance is that if it is paid they will so receive it. Neither is there any consideration proved. They received no compensation or forbearance, nor Secombe any detriment, that is shown. It would not be even an accord and satisfaction of the claim, if Secombe had received the money, and could not even be pleaded as such, for it is a mere accord, without satisfaction, which is never a bar. It is wholly executory in character, as to whatever it applies to, depending on future events, and not presently operating on anything. But, if it was an assignment of anything, it makes no allusion to a patent further than to mention a claim for the use of a certain patented cancelling stamp, invented and patented by Norton. It is plain that the claim referred to is under the patent, but a conveyance of the claim would not carry the patent. The patent would still be left, so far as his instrument, in any view, is concerned.

This agreement was held by Secombe until the latter part of March, 1872, when, at the request of the other parties, he delivered it up to be cancelled, and it was cancelled. It was a mere agreement in the first place, and it required nothing more solemn than a mere agreement to end it. Such an agreement fully acted upon, is fully and satisfactorily proved. The conveyances afterwards, until they reached the plaintiff, were of the patent without the interests of Eddy, Shavor and Corse, and their interests remained intact as they were under the assignment of one-third to Eddy in trust, October 23, 1869. It is suggested that this agreement was recorded, and that the record of it may have misled the plaintiff, but this is not at all probable, and the result is not chargeable to Eddy or his *cestuis* if it did. That it was recorded would not make it an instrument of title, but would only complete its effect if it was one. If the plaintiff learned of the record, he is to be taken to have learned of it as it was, and to have known that it did not affect the title.

According to these views the plaintiff is entitled to a decree for the payment by the defendant James to him of two-thirds of the sum reported by the master, namely, $42,000.

This conclusion would dispose of the whole case as it was originally brought; but when the defendant objected that all the parties in interest were not before the court, so that complete justice could be done, and the whole controversy disposed of, he set out the conveyance to Eddy, as trustee for himself, Shavor and Corse, as showing an outstanding interest, and prayed that Eddy, as trustee, might be made a party to the cause prior to the final hearing. It was the duty of the defendant, in making that objection, to set forth what parties were wanting, that the plaintiff might supply them. This is required in pleadings at law to give the plaintiff a better writ before abating the one he has. The same is required in proceedings in equity, although not with the same strictness. Story's Eq. Pl. § 543. In complying with this requirement the defendant set forth who was lacking, and whose presence, as a party, was desired by him, namely, Eddy, as trustee, and that party was added accordingly, as he

had prayed. Since then all parties whose presence was desired by others have been before the court.

It is not important in equity proceedings, for every purpose, that all the parties to the controversy should be upon opposite sides in the formal pleadings. It is sufficient that they are citizens of different states, on opposite sides of the dispute, although not on opposite sides in the pleadings, for the removal of the cause to the federal courts. *Meyer* v. *Delaware R. Con. Co.* S. C. U. S., October term, 1879, (Chicago Legal News, January 3, 1880.) That the rights of the parties could be determined in the cause, notwithstanding their position, would seem to be a necessary ground to that conclusion. In this cause the pleadings cover all the grounds of claim upon and defence by the defendant, as well to that part claimed by Eddy as in respect to that claimed by the plaintiff, and the evidence has been taken in respect to all the issues made, and considered as bearing upon them. Under these circumstances, at least, it seems proper that the rights of Eddy, and of those claiming under him as trustee, to the fruits of the infringement of the defendant, should be considered and determined. All the parties except the defendant James have insisted upon this course, and he has only insisted that the proceedings should be such as to protect him from further suits for the same cause.

These proceedings, with these parties to them, appear to be ample for that purpose. Eddy was trustee by name in the conveyances for himself, Shavor and Corse. The presumption would be, in the absence of all proof, that he was trustee for himself and them in equal proportions. Whatever proof there is shows them to have been equal partners in cognate matters, and intensifies rather than rebuts the presumption. He could not be trustee for himself in any proper sense of the term, and must have been an absolute owner of his share of the third he held, or one-ninth of the whole. Shavor and Corse were equitable owners of their shares, or one-ninth each of the whole. Shavor died, and his personal representatives, by leave of court, became parties to the suit under the rights represented by Eddy. On the

twenty-seventh day of March, 1879, Corse assigned his right to Caroline G. Caswell, and she became a party in like manner. Corse and Eddy were partners with others, and they and their copartners, each as partners and as individuals, on the thirty-first day of March, 1879, assigned to J. Albert Clipperty and Charles N. Stannard "all and singular their copartnership and individual estate and property, real and personal, goods, chattels, effects, credits, accounts, debts, dues, demands, choses in action, and property of every name and kind whatsoever, whether held by and in the name of said parties of the first part, and each and either of them, or by and in the name of any other person, for them, or either of them, except such property, if any, held or owned by said parties of the first part, individually, as is exempt by law from levy and sale under execution," in trust, to be converted into money for the payment of the debts of the firm and its individual members.

These assignees, assuming that the assignment covered the patent rights, have assigned them to Samuel R. Clexton, who has become a party to this suit. The personal representatives of Shavor have assigned his right to Clexton. The rights of Caroline G. Caswell to the share of Corse, all rights of Corse, if there were any remaining to him after his assignment to her and the assignment to trustees, and all rights acquired by Clexton through the trustees, have been transferred to Horace T. Caswell, who has become a party to this suit also. So all the rights of Corse, without reference to the fairness of his conveyance to Caroline G. Caswell, so near to the time of the conveyance to trustees for the benefit of creditors, and without reference to whether that conveyance would pass any of these rights, have become vested in Horace T. Caswell, and all the rights of Shavor have become vested in Clexton, and the only question remaining is whether the rights of Eddy passed to the assignees and thence to Clexton, or remained to himself. All these assignments covered the claims for past infringement, as well as the title to the shares of the patent.

The infringement of the defendant had been ripening into

a cause or causes of action all the while from the time when he began to infringe to the time of the assignment in favor of Eddy. Eddy's right to recover upon these causes of action, so far as they had accrued up to that time, was a chose in action. Choses in action are expressly named in the assignment to trustees, and by force of those words it would carry this claim. But his title to the patent remained, and the further question is as to what became of that. The words of the assignment are probably broad enough to cover it. Similar words were held to be sufficient for such a purpose in *Railroad Co.* v. *Trimble*, 10 Wall. 367. Still there is excepted out of the individual property of the assignors all property exempt by law from levy and sale under execution. If this means such property as is specially exempt by express provisions of the statutes, the right to the patent is not included among the classes of such property.

But the exception is not of the property exempt from statute, but of the property exempt by law. Property can be levied upon and sold under execution at all only by force of law. Such property as cannot by law be taken is by law exempt. This patent-right could not, by law, be so levied upon and sold, and was, therefore, by law exempt. This conveyance, too, is understood to be such a conveyance for the benefit of creditors as the law of New York sanctions and upholds, for appropriating the property of debtors to the payment of their debts, in place of legal proceedings, to judgment, execution and levy for that purpose. It is to be construed like other written instruments, in the light of the circumstances, and its professed object for the purpose of ascertaining the intention of the parties.

In this view it may be well understood that the intention was to place in the hands of the assignees what the creditors could otherwise reach, and to except out of this clause what they could not reach. This consideration aids the conclusion that this patent-right was excepted and not conveyed.

Probably these distinctions were not actually thought of, and, very likely, the actual effect of the instrument upon other property was not; but the instrument was properly made

in that way, because the assignors were willing to stand by its effect upon their property of various kinds, situated under various circumstances, whatever the effect might turn out to be; and an assignment of what by law could be taken was all the creditors had any right to claim. So Caswell is entitled to one-ninth of the whole sum reported by the master, $7,000, and Clexton is entitled also to one-ninth, and so much of the profits of one-ninth as accrued before March 31, 1879, in addition; and Eddy is entitled to the profits of the same ninth which accrued subsequently to that time.

The profits allowed consist in money saved from salaries, at a uniform rate, so that the amount due to the ninth share of Eddy, for the time before March 31, 1879, and for the time subsequent, is readily computed. For the time before it is $6,125, and for the time subsequent $875.

Therefore, of the profits reported by the master, the orator is entitled to - - - $42,000
Samuel R. Clexton to - - - - 13,125
Horace T. Caswell to - - - - 7,000
Charles Eddy to - - - - 875

The defendant James has moved for a stay of proceedings in this cause, on account of a suit brought in this court against him for the same infringement, by the personal representatives of William W. Secombe, under whom the plaintiff claims title, in which it is alleged that the title to this patent did not pass from Secombe because the deed from him did not in terms cover it; and that, if it did, the contract pursuant to which the deed was made was that this patent should not be conveyed, and that the deed should be reformed to that extent. This motion has been heard at the same time with the exceptions to the master's report. As the cases now stand this plaintiff cannot be affected by any parol contract between the parties to that deed, as to what it should cover. He is a purchaser for valuable consideration, without notice of any such outstanding equitable claim to the patent, if it exists. The laws relating to patents require the title to the patent to be shown by the records of the patent office, and he had a right to rely upon the title there shown. That the

deed did not carry this patent has already been determined in this case, upon full argument and consideration.

There is no apparent ground upon which this motion can justly be sustained, and it must be denied. On account of the number of those found to be entitled to share in the avails of the recovery, and of the conflicting claims between them, it may be preferable to the defendant James, equally advantageous to those entitled, and perhaps more proper, as the case is made up, that he should have opportunity to make payment into the registry of the court for the benefit of those entitled, instead of being compelled to pay their shares to them severally.

The exceptions to the master's report are overruled, the report is accepted and confirmed, and a decree ordered to be entered that the defendant James pay to the clerk of this court the sum of $63,000, mentioned in the master's report, within 20 days from the entry of the decree, for the benefit of the parties to this suit—$42,000 for the plaintiff; $13,125 for Samuel R. Clexton; $7,000 for Horace T. Caswell; and $875 for Charles Eddy—and for execution therefor in default of such payment, and for costs to the plaintiff, to be taxed.

AMERICAN DIAMOND ROCK BORING CO. *v.* SUTHERLAND FALLS MARBLE CO.

SAME *v.* SHELDONS and another.

(*Circuit Court, D. Vermont.* May 8, 1880.)

PATENT — COMBINATION — NEW ELEMENTS — MAY BE SPECIALLY PROTECTED.—A patent for a combination of new elements with old may secure the new elements by themselves, as well as the combination.

SAME—BORING HEADS—USE OF AFTER EXPIRATION OF PATENT—INJUNCTION.—An injunction restraining the use of certain patented boring heads, manufactured during the term of the patent, is not violated by the use of such heads made after the expiration of the patent, in connection with propelling machinery, not patented, made during its term.

In Equity.

Charles F. Blake, for plaintiff.

Edward S. Phelps, Walter C. Dunton and *Aldace F. Walker*, for defendants.

WHEELER, D. J. These causes have been heard upon motions of the plaintiff for attachments for contempt for violation of the injunctions therein. The patent on which the suits are brought has been sustained for a continuously revolving and progressive boring head, armed with diamonds for cutting rock, having a hollow central drill-rod, through which water is carried to the cutting diamonds, combined and forming a part of a machine to be suitably constructed for imparting the motion. The injunction restrains the use of machines made in the infringement of the patent during its term, which has now expired. The defendants are using machines made during the term of the patent, which carry boring heads and drill-rods made since the patent expired, according to its specifications. The patented devices are themselves a machine to be operated by other machinery, connecting them with propelling power not described in the patent.

The claims of the patent do not cover, nor show any attempt to cover, any combination of these cutting devices with the propelling machinery. A patent for a combination of new elements with old may secure the new elements by themselves as well as the combination. *Sellers* v. *Dickinson*, 6 Eng. Law & Eq. 544; *Union Sugar Refinery* v. *Matthieson*, 2 Fisher, 601. This is as much as any patentee of such a patent is entitled to hold. *Prouty* v. *Ruggles*, 16 Pet. 336. Here the other machinery is neither an element of the combination patented, nor an element patented by itself, and is not drawn into the monopoly at all. It infringed upon no right secured by the patent to make and use that during the term. That is not machinery made in infringement of the patent, although it was made to infringe the patent with. As the devices made according to the patent have been both made and combined since the expiration of the patent, the defendants are not shown to be using anything made in infringement of the patent.

It is argued that because the other parts were made to be used with those that infringed, in violation of the plaintiff's right, the plaintiff has the same right to have their continuance in use restrained as the continuance in use of the infringing parts. But this ground does not appear tenable. There is no forfeiture of other property as a penalty for infringement of a patent. Had there been a decree for the destruction of the machines to prevent further infringement, it would have extended only to the infringing parts, if they could be destroyed without destroying the other parts; and these could be. *Needham* v. *Oxley*, 11 Weekly Rep. 852. The object of the injunction is merely to secure to the plaintiff its exclusive right during the term of preventing the defendants from taking any part of it out of the term and enjoying it, and not to punish the defendants for any wrong done by them, either during the term or after.

Motions denied.

AMERICAN DIAMOND ROCK BORING COMPANY *v.* THE RUTLAND MARBLE COMPANY.

(*Circuit Court, D. Vermont.* March 8, 1880.)

PATENT—BILL TO ENJOIN AFTER EXPIRATION OF PATENT—WHAT MUST BE ALLEGED.—A bill to enjoin the use of a patented device, after the expiration of the patent, must allege that the defendant is using machines manufactured during the existence of the patent, or that the orator fears such use.

In Equity.

Charles F. Blake, for orator.

Prout & Walker, for defendant.

WHEELER, D. J. This cause has been heard upon a motion for a preliminary injunction against infringement of a patent, the term of which has expired. The bill alleges that the defendants have, since the date of the patent, and since the title to it became vested in the orator, infringed by using machines embodying the patented invention, and that the orator fears the defendant will continue to use such machines;

but does not allege that the defendant is using machines made during the term of the patent in infringement upon it, nor that the orator fears such use. Without these allegations the case is not within the decision in *Crossley* v. *Derby Gas-Light Co.* 4 Law Jour. N. S. Pt. 1 Chan. 25, and shows no ground for relief by injunction. The other cases in favor of the orator, in which similar motions have been mado, stand in the same way, and are to follow this.

Motion denied.

AMERICAN DIAMOND ROCK BORING CO. *v.* RUTLAND MARBLE CO. and others.

(Circuit Court, D. Vermont. May 8, 1880.)

PATENT—INFRINGEMENT ENJOINED DURING TERM—NOT ENTITLED TO DISCHARGE UPON EXPIRATION.—A party who, during the term of a patent, has been enjoined from using a machine infringing thereon, is not, upon the expiration of such patent, entitled to be relieved from such injunction as to a machine manufactured during its existence.

In Equity.

Charles F. Blake, for plaintiff.

Edward J. Phelps, *Walter C. Dunton* and *Aldace F. Walker*, for defendants.

WHEELER, D. J. This is a motion to discharge the injunction on account of the expiration of the term of the patent. At the time of the expiration the defendants were using machines made during the term of the patent for use, in violation of the plaintiff's exclusive rights. It is argued for the defendants that to continue the restraint upon such machines after the expiration of the term of the patent is in effect to extend the term of the patent. The grant to the patentee was of the exclusive right to make, use, and vend to others to be used, the invention during the term. The right to exclude others from making, using and selling was the essential thing, and really all that was granted. He had the right to do all these himself, to any extent, without the grant. The exclusive right was

his property. Any making for use during the term was taking from him what belonged to him. To permit any others to make or produce such machines during the term, and hold them till the expiration and then use them freely, as if made after, would be to permit them to make off with so much of his property that the law had guaranteed to him. To restrain the use after the term, without his consent, gives nothing to him that he was not entitled to, and takes nothing from them that they had any right to. It gives him no right acquired beyond his term, and merely secures to him the full right he was entitled to during the term. The law would be open to reproach if it would not allow a court of equity, by its usual methods, in a case properly before it to accomplish a result so just. The argument upon this motion has confirmed rather than shaken the views expressed before upon this subject.

Motion denied.

SECOMBE, Administrator, *v.* CAMPBELL and others.

(*Circuit Court, S. D. New York.* May 1, 1880.)

PATENT—PURCHASER OF MAY RELY ON RECORD TITLE.—So long as he acts in good faith, the purchaser of a patent has a right to rely upon the apparent record title, the same as in the case of real estate.

SAME—BONA FIDE PURCHASER—INSUFFICIENT PLEA.—A plea by a defendant who claims the rights of a *bona fide* purchaser of a patent, which alleges that he purchased for a "good and valuable consideration," is insufficient, but the consideration should be set forth in amount, and in traversable form, so that plaintiff may traverse it if he choose, and the court see that it was adequately valuable.

In Equity.

David A. Secombe, for complainant.

Geo. H. Williams and *Marcus P. Norton*, for defendants.

WHEELER, D. J. This bill is brought upon re-issued letters patent, division A, No. 4,143, to Helen M. Ingalls, assignee of Marcus P. Norton, dated October 4, 1870, for an improvement in post-office postmarking and postage cancelling stamps, and alleges that she assigned this, with other pat-

ents, to the plaintiff's intestate, and others to the Secombe Manufacturing Company, of which he was president; that the Secombe Manufacturing Company and he, president, joined in a re-assignment to her, which, by the contract, was not to, and by what the plaintiff claims to be its true construction does not, include this one; but that, if by any construction this one is included, the assignment was drawn to include it by the fraud of her agent; that she had assigned it to the defendant Campbell, who had obtained a decree against the defendant James for an account of profits and damages for infringement; and prays that if the instrument of re-assignment is held to include this patent, it may be reformed so as not to include it, and that the profits and damages be decreed to the plaintiff.

The defendant Campbell has pleaded to so much of the bill as alleges fraud in making the instrument of re-assignment; that he is a *bona fide* purchaser of these letters patent, from Helen M. Ingalls, for a "good and valuable consideration, to-wit, a certain sum of money then advanced and paid by him to her," without notice of the fraud. This plea was set down for argument by the plaintiff, and the argument has been heard. There is no fair question but that the fact that the defendant was such a purchaser for a valuable consideration, without notice, would be a sufficient reason for his not answering that part of the bill, and be a good plea to it. Story's Eq. Pl. § 805. The titles to patents are required by law to be recorded, and a purchaser has the right to rely upon the apparent record title, so long as he acts in good faith, the same as the purchaser of real estate has where the title is required to be so shown. In either case the purchaser must have parted with a consideration large enough to make it inequitable for him to be required to give up the property to one who has not the apparent legal title. *Boone* v. *Chiles*, 10 Pet. 177.

In this plea there is no allegation of the consideration paid other than the one recited. The words "good and valuable" may refer to what would be good and valuable between the parties, which might be very slight, and a certain sum of

money might be a very small sum, and wholly inadequate to make his equity superior to Secombe's, if the fraud did in fact exist. The rules of pleading as to this are the same as at law, and the consideration ought to be set forth in amount in traversable form, so that the plaintiff can traverse it if he chooses, or the court see that it is adequately valuable if not traversed.

Although this plea is apparently good in other respects, it is wanting in this and must be overruled.

Plea overruled.

COVELL *v.* PRATT and others.

(*Circuit Court, S. D. New York.* May 7, 1880.)

PATENT—"IMPROVEMENT IN MACHINES FOR CLOSING SEAMS OF METALLIC CANS"—RE-ISSUE—INFRINGEMENT.

Benjamin F. Thurston and *Livingston Scott*, for plaintiff.

Edward N. Dickerson and *Charles C. Beamand*, for defendants

BLATCHFORD, C. J. This suit is brought on re-issued letters patent No. 4,777, division A, granted March 5, 1872, to Edward T. Covell, for an "improvement in machines for closing seams of metallic cans," the original patent having been granted to said Covell September 21, 1869, for 17 years, from September 10, 1869, and re-issued in two divisions. The specification of the re-issue states that the invention is "an improvement in machinery for closing and clamping the end-joints of sheet metal cans;" that the invention "relates to the construction of machinery for closing, clamping and pressing down the seams, forming projecting joints at the top and bottom of a sheet metal can or other vessel;" and that "it consists, third, in the use and arrangement of opposite clamping jaws or compressing plates, formed and shaped to fit upon and clamp between them the entire joint at either end of the can at one operation, in combination with a movable or stationary head plate or anvil, made to fit within the projec-

tion formed by the joint to be closed; the object of this part of my invention being, in the case of angular cans, to perfect the corners or angles at the top or bottom of the can simultaneously with the closing and clamping of the entire seam at the top or bottom of the can, and to produce thereby a more perfect joint than can be obtained in machines in which the top and bottom seams are closed by clamping jaws which, bearing only against the sides of the head, do not embrace the corners or angles thereof."

There are four claims in the re-issue, but claim 3 is the only one alleged to have been infringed in this case. It is in these words: "3. In combination with an intermediate fixed or movable supporting plate or anvil, angular clamping jaws, adapted to be moved against the angles or corners of the projecting end seams or joints of a rectangular sheet metal can placed thereon, and formed to embrace said corners, and to close and clamp between them the entire end seams or joints of the can, all substantially as herein set forth."

Figure 1 of the drawings annexed is stated to be a view in perspective of one form of machine embodying the invention, the clamping jaws of which have a vertical movement, the machine being adapted to close and clamp simultaneously the joints of both ends of the can. Figure 2 is stated to be "a view in perspective of a can, with its heads in ends placed loosely therein, ready to be closed and clamped." Figure 4 shows the clamping jaws opened and figure 5 shows them closed upon the joint or seam of the can. The specification states that the clamping jaws, of which there are two of each kind, are arranged to meet in pairs, one of each kind making a pair, the two lower ones in a vertical machine being alike, and the two upper ones in a vertical machine being alike; that each of the four is shaped or cut out to form a notch, *a*, "to embrace, and fit closely and accurately, upon a section or portion of the joint at the end of the can," so that when the two in a pair are brought together they will include and cover the whole joint, and bear evenly upon every point thereof.

In the vertical machines shown in the drawings the lower

jaw in each pair is secured to a bed-plate, and the upper jaws work between guides and close down on the lower jaws. The specification states that the four jaws may be worked horizontally on a bed-plate, and that, in such case, both of the jaws in a pair may be arranged to slide and meet upon and close over the end joint of the can. It also says: "W (figure 2) represents a can to be operated upon; L L are head-plates or anvils, adapted to fit accurately against either head or end, C, of the can, W, within the flange formed by its projecting end joint or seam, *c*, so as to afford an inner support to said joint to resist an outward pressure thereon. * * * In operating this machine the movable jaws are lifted or opened, as illustrated in figure 4, and the head-plate, L, withdrawn or retracted to permit the ready insertion of the can, W, against and upon the opposite head-plate. The unfinished can, having its heads or ends, C, placed loosely upon the body, with their projecting partially folded edges properly overlapped, as shown in figure 2, is then placed upon and against the head-plate, L, and the opposite head-plate, L, is suffered to close upon it, thus screwing it between said plates and affording an inner continuous solid support to the projecting joint at each end. The clamping jaws, D, are then closed by the power of the press. So soon as the jaws press upon the upper corners and edges of the can the head-plates yield until the lower corners and edges strike the lower jaws, B, when the resistance of said jaws and of the head-plates to the movement of the upper jaws will operate to clamp and tightly compress and close the seams of the joints. The corners embraced within the jaws are not only perfectly closed, but are very neatly finished. The other two corners are likewise closed and finished, but may be improved by turning the can and repeating the compressing movement. The head-plates, L L, and the jaws, B D, may all be so secured as to admit of being detached and replaced by other forms and sizes thereof, to hook upon various forms and sizes of cans.

"The drawing shows the notch, *a*, in each of the clamping jaws, B and D, to be a right angle, without any provision in the notch, by any enlargement or recess, to accommodate any

accumulation or thickness of metal at the corner of the can caused by the overlapping there of two or more thicknesses of tin upon each other. This notch, *a*, is the clamping angle of the jaw, and the drawing shows that its construction is such that it is intended, without any enlargement or recess in it, to fix tightly against the metal of the can which goes into the notch or angle, while the adjacent pieces of the jaw on each side fit closely against the two edges of the can. This can only be done so as to make a uniform pressure and bearing of the entire extent of the two faces and angle of the jaw, by getting rid of having any accumulation or thickness of metal at the corner of the can. Accordingly, the drawing of the can, (figure 2,) showing the can with its head or end placed loosely on it, ready to be clamped, shows the metal at the adjacent ends of two parts of the head to be cut away, so as thus to get rid of any overlapping at the corner of the metal of one part of the head over the metal of the adjacent part of the head, and to enable the angle of the clamping jaw to be strictly a right angle."

This was the structure and arrangement as shown in the drawings of the original patent. The drawings of the re-issue are the same. But in the specification of the re-issue these words, namely, "the object of this part of my invention being in the case of angular cans, to perfect the corners or angles at the top or bottom of the can simultaneously with the closing and clamping of the entire seam at the top or bottom of the can, and to produce thereby a more perfect joint than can be obtained in machines in which the top and bottom seams are closed by clamping jaws, which, bearing only against the sides of the head, do not embrace the corners or angles thereof," are found, which are not contained in the specifications of the original patent. The defendants' expert states that he does not find in the original patent any warrant for this language, because the head of the can shown in the drawing of the original patent "is a notched head, which has no corners to be perfected, and which, when used, would prevent pressure from being applied to the corner of the body of the can."

This is undoubtedly a correct view. The specification of the re-issue is framed so as to cover the machines with recesses in the angles of the jaws to act on corners that are not notched, while the specification and drawings of the original patent show that the inventor did not contemplate angles with recesses, and intended to operate only in cans, the corners of which were notched. The answer alleges that the re-issue is not for the same invention described or shown in the original; that new matter has been introduced into the specification of the re-issue not contained in the original specification; and that, therefore, the re-issue is invalid. It denies infringement.

The defendants' machine operates upon cans with solid corners, not notched, and although the jaws in their machine embrace the corners as well as the sides, and move to their work in a line diagonal to the square of the head, yet such jaws have recesses at the corners to accommodate the excess of metal there. In this respect the defendants' jaws have a pressure which existed in the broad side squeezers which existed before the plaintiffs' invention.

The plaintiff remedied existing difficulties in one way, and the defendant in another way, essentially different. The plaintiff discarded the recess at the corner, and notched the metal of the can. The defendants retained the recess, and did not notch the can, but made the jaws to embrace, at the same time, parts of two faces and a corner of the can.

The plaintiff set forth, in his original patent, no structure or invention which would warrant him in claiming the right to cover jaws moving diagonally to the square, and embracing parts of the two faces and a corner, if the angles of the jaws are recesses and the corner of the can is not cut away or notched. In this view, if the third claim of the re-issue be construed to cover the defendants' machine, it is invalid, as a claim not warranted by anything in the original; and, if such claim be limited to the plaintiff's real invention, the defendants do not infringe.

It seems, from these views, that the bill must be dismissed, with costs.

BROECK and another *v.* THE BARGE JOHN M. WELCH.

(*Circuit Court, E. D. New York.* April 22, 1880.)

WHARFAGE—LIEN FOR—EX PARTE EASTON, 5 OTTO, 68, DISCUSSED.—Construction to be given to the decision of the supreme court in *Ex parte Easton*, 5 Otto, 68, in the case of a boat or vessel belonging to the state in which the wharf is situated, considered, and views expressed by district court in this case dissented from.

SAME—VESSELS COMING FROM WITHOUT THE STATE—INTER-STATE COMMERCE—CH. 405, LAWS N. Y., 1875.—Chapter 405, p. 482, Laws of New York, 1875, and the acts of which it is amendatory, in so far as they authorize a charge for wharfage, in the case of certain boats coming from without the state, additional to that allowed to be made in the case of boats of the same character engaged exclusively in navigating waters within the state, is invalid, as an unlawful taxation of inter-state commerce, and the lien attempted to be given for such wharfage charges cannot be enforced.

SAME—LIEN UNDER STATUTE—RIGHT INDEPENDENT OF STATUTE NOT DECIDED.—The libel in this case claiming for wharfage solely under the laws of New York, and the only evidence being as to the statutory right and lien therefor, and it being *held* that there is no valid statute fixing any rate that can be charged, the questions of a reasonable compensation, and the right of a wharf owner to a general maritime lien therefor are not decided.

John J. Allen, for libellants.

Edward D. McCarthy, for claimants.

BLATCHFORD, C. J. On the 20th of October, 1876, the libellants filed a libel in admiralty, in the district court of the United States for the eastern district of New York, against the barge John M. Welch, in a cause of wharfage and dockage. It alleged that the libellants, being the lessees, and in possession of a wharf or pier, at or near the foot of Bank street, in the city of New York, and the slip or basin appertaining thereto, and, in accordance with the laws of the state of New York in such behalf made and provided, authorized to collect wharfage and dockage from vessels lying at said wharf or pier, or within said slip or basin, furnished for said vessel a berth, which she occupied from including October 9, 1876, to and including October 20, 1876; that thereby there became due and owing to the libellants, from said vessel,

$34.20, for wharfage and dockage as aforesaid; that payment thereof was duly demanded of and from said vessel, that said amount is a maritime lien upon said vessel; and is a lien thereupon by the laws of the state of New York; that neither the master nor the owners of said vessel have paid to the libellants the said sum; and that said sum, with interest, is still due to the libellants. On process issued on this libel the vessel was attached. On the return day, James T. Easton and James McMahon appeared and put in a claim to the vessel, and gave stipulation for her value, and then filed an answer containing exceptions. The answer alleged that process of condemnation ought not to issue against said vessel, because—(1) no maritime lien exists against the vessel, because of the matters set forth in the libel (2) no lien is given for wharfage, against vessels, by any law of the state of New York; (3) the law of the state of New York referred to in the libel as giving a lien for wharfage against boats and vessels, and which law was passed on the sixth day of May, 1870, is void and unconstitutional, for the following reasons: *First*, it imposes a restriction on commerce; *Second*, it imposes a duty of tonnage on all vessels of the character and description of the barge John M. Welch; *Third*, it draws a distinction, which is practical and effectual, between all such barges as the John M. Welch, owned by persons who are not citizens of the state of New York, and the same class of boats owned by citizens of the state of New York, which is done under cover of a nominal distinction between boats or barges plying on the canals, or between ports of the state of New York, and the same class of boats plying between any port of the state of New York and the ports of another state. The answer further set up that, while it was admitted that from the ninth to the twentieth days of October, 1876, the John M. Welch was given inside wharfage at the wharf aforesaid for which wharfage the claimants should pay a reasonable compensation to whomsoever said compensation is legally due, the claimants denied that for the use of said wharf for the period aforesaid, of eleven days, the sum of $34.20,

claimed in the libel, is a reasonable and just compensation. It further alleged that seventy-five cents a day, for the use of said wharf by said boat, is a reasonable and just compensation, and the only sum that can be reasonably and lawfully claimed for the wharfage of a barge of the character of the John M. Welch, because it had been the price invariably charged for the wharfage of such boats for many years previous to the year 1870, and still is, and ever since has been, the rate of wharfage per day of the same class of boats as is the John M. Welch, which were engaged in navigating the canals of the state of New York, and were employed upon its rivers.

The foregoing pleadings having been put in, the claimants made an application to the supreme court of the United States for a writ of prohibition, to restrain the district court from exercising jurisdiction of the suit. The application was founded on a petition, which set forth the following matters: The John M. Welch is a vessel of about 209 tons carrying capacity. She is without sails or self-motive power of any kind. She cannot be used independently of extra motive agency. On the twentieth of October, 1876, the day when the process was issued against her, she had completed a trip from the city of Baltimore, bringing a cargo of coal, and forming one of a tow of barges, all under the lead of a steam-tug, which made the trip from Baltimore to New York by way of the Chesapeake and Delaware canal, the Delaware river, and the Delaware and Raritan canal. She reached the port of New York on the tenth of October, 1876. She took wharfage at the pier or wharf at the foot of Bank street, North river, and remained there till the twentieth of the same month. A bill of wharfage was rendered by the libellants, charging for nine days inside wharfage, at $3.60 a day, and for one day outside wharfage, at $1.80 a day, amounting in all to $34.20. The petitioners are, and for many years have been, the owners of a large number of such barges as the John M. Welch, all of them of the same description and character, and of the same tonnage. The petitioners have been engaged in the said business of transportation for nearly 20 years. Some of their

boats, during this time, have plied between the ports of Buffalo and New York, by way of the Erie canal and the Hudson river. Others have plied on the Hudson river exclusively, while others, and much the largest number, have plied between Baltimore, Philadelphia and New York, by way of the Delaware and Raritan canal. But all of these boats have been and are of the same class, and the same boats have never exclusively been employed on the same waters. It has been, and still is, a matter of convenience simply whether the same boat should be sent to Baltimore or to Buffalo. From 1870 to 1874 the number of boats or barges thus owned and employed by the petitioners was about 300 each year. From 1874 to the present time the number has been about one-half as large each year. Previous to the year 1870, and, indeed, previous to the year 1875, (for until the year 1875 the distinction of rates of wharfage now complained of was not enforced practically, or, rather, generally,) the wharfage on all these boats or barges, at the port of New York, for the use of New York or Brooklyn wharves, was 50 or 75 cents per day for each boat, according as the boat had inside or outside wharfage. No question was made as to where the boat or barge came from. Her owners were required to pay only 50 or 75 cents per day, for use of the wharf, to the wharf owners. At the present time, and always heretofore, no greater sum is or has been demanded for wharfage of canal boats or barges plying on the canals and rivers of the state of New York than 50 cents or 75 cents per day for each boat. At this rate, the wharfage of the John M. Welch, for the period of 10 days, would have been not more than $5 or $7.50, which is about one-sixth of the amount claimed in the libel. No greater wharfage than $5 or $7.50, for ten days' wharfage, would have been demanded of the owners of the John M. Welch, as the petitioners, from their own experience, know, if the said barge had, on the tenth of October, 1876, completed a voyage from Buffalo to New York, instead of from Baltimore to New York. In respect of the petitioners' own business this distinction of wharfage rates, so far as any accurate calculation can be made, and speaking from the data given by the business transactions of the

years from 1870 to 1874, would not be less than $5,000 per year. In the years 1875 and 1876 the distinction would amount to less, because the petitioners' business was lighter then than in the preceding years. For the coming season this distinction may be greater or less than $5,000. As regards the subject of any single lien sought to be enforced in a court of admiralty, the excess of wharfage on any one canal-boat or barge would seldom, if ever, be $50.

The statute of the state of New York as to wharfage and dockage, referred to in the libel, is the statute enacted on the sixth of May, 1870. This law was subsequently amended in the years 1872, 1875 and 1876, but its essential feature as to distinction of wharfage between canal-boats plying on the waters of New York state exclusively, and all other canal-boats and barges, has not been changed. "The same rates as heretofore," which are required by said statute to be paid by "all canal-boats navigating the canals in this state," are the rates of 50 cents and 75 cents per day for each boat. The district court of the United States for the eastern district of New York, sitting as a court of admiralty, enforces a lien against canal-boats or barges, in causes of wharfage, and in favor of wharf owners, under the provisions of the said law of the state of New York, on one or both of the two following grounds: (1) That the law of the state of New York gives a lien, enforceable in admiralty, for wharfage, at the rate of two cents for every ton up to 200 tons burden, for each day's wharfage, against all canal-boats except those which navigate the canals of the state of New York; (2) that there is a general maritime lien for wharfage against canal-boats, enforceable in admiralty, the amount of which lien is to be determined by the law of the state of New York; that, as to canal-boats navigating the Erie canal, the amount of lien, as so determined, is 50 cents per day; and that, as to the same kind of craft navigating the Delaware and Raritan canal, it is from $3.50 to $4 per day. A lien has been enforced by the said district court, for wharfage, against the canal-boat Ann Ryan, on a state of facts identical with the facts above set forth. The proceedings therein were under, and to enforce

the provisions of, the same statute, and the same rate of wharfage, as in the case now pending. Reference is made to *The Ann Ryan*, 7 Benedict, 20. If the petitioners have any grievance that can or ought to be redressed, no other remedy than by writ of prohibition is available or possible to them. Being citizens of the same state as the libellants, they cannot ask equitable relief by original action in any federal court. The amount involved in the pending cause being less than $50, there is no appeal open to the petitioners, if their boat should be condemned by the district court; and that it would be condemned, on final hearing, they can have no doubt, in view of the decision of the same court in the case of the *Ann Ryan*. But the amount actually involved to the petitioners, if presented in one cause of appeal, would be large enough to give the supreme court of the United States jurisdiction. They are advised that they ought not to apply to the courts of the state of New York for relief against proceedings which wharf owners contemplate taking in a federal court, much less against proceedings already begun in a federal court. Should the supreme court grant the petitioners' motion for an alternative writ of prohibition to the said district court, sitting as a court of admiralty in said cause, the petitioners, on the return to the same, will submit in their behalf the following propositions, the contrary of which they believe to be error: (1) That, in a cause of wharfage, there is no lien given by the general maritime law; that the laws of the state of New York give no such lien; and that, therefore, the said district court, as a court of admiralty, cannot proceed *in rem* to enforce a wharfage claim; (2) that, if there is a general maritime lien, the law of the state of New York cannot be invoked to determine the amount of such lien; that the law of the state of New York, enacted May 6, 1870, and its amendments, is repugnant to the constitution of the United States, in so far forth as it makes a distinction in wharfage rates between canal-boats plying on its own waters and all other canal-boats. A law which makes such a distinction does not impose on vessels, for the use of wharves, a mere compensatory payment. A compensatory payment merely

must be general and uniform. The excess of wharfage demanded of all other canal-boats than those navigating New York waters is a duty of tonnage. The law is, moreover, such a restriction of commerce as a state has no right to make, even in the absence of federal legislation. It is also repugnant to the federal constitution, because its practical effect, as was its undoubted intention, is to draw a distinction between small craft owned by citizens of the state of New York, and the same kind of vessels owned by citizens of other states, in favor of the former.

The statute above referred to, enacted May 6, 1870, (Laws of New York, 1870, *c.* 707, § 1,) was in these words: "It shall be lawful to charge and receive, within the cities of New York and Brooklyn, wharfage and dockage at the following rates, viz.: From every vessel that uses or makes fast to any pier, wharf or bulk-head, within said cities, or makes fast to any vessel lying at such pier, wharf or bulk-head, or to any other vessel lying outside of such vessel, for every day, or part of a day, as follows: From every vessel of 200 tons burden and under, two cents per ton; and from every vessel over 200 tons burden, two cents per ton for each of the first 200 tons, and one-half of one cent per ton for every additional ton, except that all canal-boats navigating the canals in this state, and vessels known as North river barges, shall pay the same rates as heretofore; and the class of sailing vessels now known as lighters shall be at one-half the first above rates; but every other vessel making fast to a vessel lying at any pier, wharf or bulk-head within said cities, or to another vessel outside of such vessel, or at anchor within any slip or basin, when not receiving or discharging cargo or ballast, one-half the first above rates, and no boat or vessel shall pay less than 50 cents for a day, or part of a day; and from every vessel or floating structure other than those used for transportation of freight or passengers, double the first above rates. And every vessel that shall leave a pier, wharf, bulk-head, slip or basin, without first paying the wharfage or dockage due thereon, after being demanded of the owner, consignee, or person in charge

of the vessel, shall be liable to pay double the rates established by this act."

The supreme court denied the petition for the writ of prohibition. *Ex parte Easton*, 5 Otto, 68. The opinion of the court was delivered by Mr. Justice Clifford. It holds that the admiralty jurisdiction extends to wharfage, as an essentially maritime contract, claim or service; that where a wharf is used without an agreement as to the measure of compensation, there is an implied contract, under which the proprietor is entitled to recover what is just and reasonable for the use of his property; that the nature of the service and the character of the contract are not changed by the circumstance that the water craft which derives the benefit is, as in this case, without sails or masts, or other motive power of her own; and "that the contract for wharfage is a maritime contract, for which, if the vessel or water craft is a foreign one, or belongs to the port of a state other than that where the wharf is situated, a maritime lien arises against the ship or vessel in favor of the proprietor of the wharf." The opinion further states that the question whether the district court has or has not transcended its jurisdiction, in entertaining the suit in question, must depend not on facts stated *dehors* the record, but on those stated in the record on which the district court is called to act, and by which alone it can regulate its judgment; and that mere matters of defence, whether going to oust the jurisdiction of the court, or to establish the want of merits in the libellants' case, cannot be admitted, under a petition for a writ of prohibition, to displace the right of the district court to entertain suits, the rule being that every such matter should be propounded by suitable pleadings, as a defence, for the consideration of the court, and be supported by competent proofs, provided the case is one within the jurisdiction of the district court. These remarks mean that the supreme court could only look at the allegations of the libel. The libel was the only record on which the district court was called to act when it entertained jurisdiction of the suit, by issuing process of attachment against the vessel. The libel alleged that there was a maritime lien on the vessel for the wharfage, and that

there was also a lien therefor on the vessel by the laws of the state of New York. The libel alleged facts which showed that there was a maritime lien on the vessel, if she was a foreign vessel or was a vessel belonging to a port of a state other than the state of New York. The libel did not show where the vessel belonged, nor did the answer. The supreme court said, in effect, that it could not prohibit the district court from exercising jurisdiction *in rem* over the vessel, because if the vessel was a foreign one, or belonged to a port of a state other than the state of New York, the district court would have such jurisdiction *in rem* in the case; and, as the libel did not show that the vessel was not a foreign one, or did not belong to a port of a state other than the state of New York, it was not shown that the district court was proceeding without jurisdiction; and that a matter of defence, going to oust the jurisdiction of that court, such as the fact that the ownership of the vessel was such as to oust the jurisdiction, not being shown by the libel when the process was issued, could not be shown on the motion for the writ of prohibition by the petition, or by a reference to the answer, but must be left to be shown by proofs under an answer alleging such fact. Therefore, the opinion goes on to say: "Viewed in the light of these considerations, it is clear that a contract for the use of a wharf by the master or owner of a ship or vessel is a maritime contract, and, as such, that it is cognizable in the admiralty; that such a contract, being one made exclusively for the benefit of the ship or vessel, a maritime lien, in the case supposed, arises in favor of the proprietor of the wharf against the vessel for the payment of reasonable and customary charges in that behalf for the use of the wharf, and that the same may be enforced by a proceeding *in rem* against the vessel, or by a suit *in personam* against the owner." The language is that the lien arises "*in the case supposed.*" The case supposed, in the prior part of the opinion, is stated to be, "if the vessel or water craft is a foreign one, or belongs to a port of a state other than that where the wharf is situated." Judge McKennan, in the recent case of *The Bob Connell*, 26 Int. Rev. Rec. 101, says that in the case of *Ex parte Easton* the supreme court affirmed

that "a lien for wharfage furnished to a domestic vessel does not exist." Certainly, that court did not decide, in that case, that a lien by virtue of the general maritime law, for wharfage furnished to a domestic vessel, does exist. Nor did it decide that a libel *in rem* in admiralty could not be brought against a vessel for wharfage, on the basis of a lien against the vessel, where such lien was created by a valid statute of the state.

After the writ of prohibition was refused, the libel in the district court was amended, by inserting in it allegations that the vessel left the pier, wharf and slip without first paying the wharfage or dockage due thereon; that the libellants, therefore, became entitled to demand from the vessel, for wharfage, double the amount before named, to-wit, $60; that the vessel came to said wharf having on board a cargo of coal, from the city of Baltimore, Maryland, and made said trip by way of the Chesapeake and Delaware canal, Delaware river, and Delaware and Raritan canal; and that the owners of said barge reside in the state of New York. The amended libel claims to recover the $60, with interest, and retains the averments as to the maritime lien, and as to the lien by the laws of the State of New York. It was stipulated that the answer before filed should stand as the answer to the amended libel.

The parties then agreed, in writing, upon the following as the statement of the facts in the action: "*First*, that, at the times stated in the libel, the libellants were lessees of, and in possession of, the wharf named in the libel, and authorized to demand and collect wharfage from vessels lying thereat; *second*, that the barge John M. Welch lay at said wharf during the period named in the libel, and left without payment of wharfage, and that the amount of wharfage due the libellants on such account, as fixed by the wharfage law of New York, a copy of which is annexed, is $60, and the same has not been paid to the libellants; *third*, that said barge is owned by persons residing in the state of New York; *fourth*, that said barge came to said wharf, as aforesaid, with a load of coal, from Baltimore, Md., as set forth in the libel."

On such pleadings and statement of facts the case was

tried by the district court. It gave a decree for the libellants for $60, and $5.79 interest, and $65.37 costs. The claimants have appealed to this court.

The district judge, in his decision in this case, states, that the questions, *first*, whether a contract for wharfage is a maritime contract, and so within the jurisdiction of the admiralty, and, *second*, whether, by the maritime law of the United States, a lien upon the vessel arises out of such a contract, were set at rest by the determination of the supreme court in *Ex parte Easton;* that the case before that court was that of a domestic vessel; that the libel claimed a lien by the maritime law alone, without any reference to the statute of New York, or to any claim or right based thereon; that, from the pleadings, the petition, and the petitioner's brief before the supreme court, there was no room to doubt that the case was understood by that court to present the question, whether the contract of wharfage, by the maritime law of the United States, gives rise to a lien on the vessel; that the question of a lien for wharfage by the maritime law upon a foreign vessel was not the question presented by the case before that court; that the question of a lien for wharfage by the maritime law upon a domestic vessel was the question presented to that court for its decision; that the opinion of that court declares the law to be, without exception, not only that the contract for wharfage is a maritime contract, but, also, that a maritime lien arises in favor of the wharfinger against the vessel, for the payment of reasonable and customary charges for the use of his wharf; and that, therefore, the question is no longer open whether the rule applied to the demands of material-men against a domestic vessel is to be applied to demands for wharfage.

The review before given of the decision of the supreme court in *Ex parte Easton* shows that this court does not concur with the district court in its interpretation of that decision. Having decided that there was, in this case, a maritime lien, the district court did not consider the question as to whether there was a lien by the law of New York, as alleged in the libel, which the court could and would enforce

in admiralty, by a suit *in rem* against the vessel. It proceeded to examine the question as to the constitutionality of the wharfage statute of New York, applicable to wharfage at wharves in New York and Brooklyn, and held it to be valid, and a statute to be resorted to in order to determine the rate of wharfage for the wharfage service rendered by the libellants.

The statute of New York, of 1870, before set forth, was followed by the act of 1872, hereafter referred to, and that again by the act of May 21, 1875, (Laws of New York, 1875, *c.* 405, p. 482.) The present case arose after the latter date. The act of 1875 amends section 1 of the act of 1872, so as to read as follows: "Section 1. It shall be lawful to charge and receive, within the cities of New York, Brooklyn and Long Island City, wharfage and dockage at the following rates, namely: From every vessel that uses or makes fast to any pier, wharf or bulk-head within said cities, or makes fast to any vessel lying at each pier, wharf or bulk-head, or to any other vessel lying outside of such vessel, for every day or part of a day, as follows: From every vessel of two hundred tons burden and under, two cents per ton, and for every vessel over two hundred tons burden, two cents per ton for each of the first two hundred tons, and one-half of one cent per ton for every additional ton, except that all canal-boats navigating the canals of this state, vessels known as North river barges, market boats, and sloops employed upon the rivers of this state, and schooners exclusively employed upon the rivers of this state, shall pay the same rates as such boats or barges were liable to pay under the provisions of the act passed April tenth, eighteen hundred and sixty; but no boat or vessel shall pay less than fifty cents for a day, or part of a day, and the class of sailing vessels now known as lighters shall be at one-half the first above rates; but every other vessel making fast to a vessel lying at any pier, wharf or bulkhead within said cities, or to another vessel outside of such vessel, or at anchor within any slip or basin, when not receiving or discharging cargo or ballast, one-half the first above rates; and from every vessel or floating structure other

than those above named, or used for transportation of freight or passengers, double the first above rates, except that floating grain elevators shall pay one-half the first above rates; and every vessel that shall leave a pier, wharf, bulk-head, slip or basin, without first paying the wharfage or dockage due thereon, after being demanded of the owner, consignee or person in charge of the vessel, shall be liable to pay double the rates established by this act."

The act of April 10, 1860, (Laws of New York, 1860, c. 254, p. 416,) contained these provisions: "Section 1. It shall be lawful to charge and receive wharfage or dockage at the following rates, from every vessel that uses or makes fast to any pier, wharf or bulk-head within the cities of New York or Brooklyn, for every day, or part of a day's use of the same, viz.: From every vessel of two hundred tons burden or under, one cent per ton; and for every vessel over two hundred tons, one cent per ton for each of the first two hundred tons, and for every additional ton burden, one-fourth of one cent per ton; and from every vessel making fast to another vessel lying at any pier, wharf or bulkhead, and for every vessel lying at anchor within any slip or basin, one-half of the above rates. Sec. 2. The captain or owner of any vessel that shall leave a wharf without paying for the wharfage due thereon, and shall neglect to pay the same for twenty-four hours after demanded of the captain, owner or consignee, shall forfeit and pay to the owners of the wharf double the rates of wharfage hereby established, and the wharfage shall be a lien on the vessel. * * * Sec. 6. Nothing contained in this act shall be construed as altering the rates of wharfage chargeable on lighters, canal-boats or barges, by existing laws. Sec. 7. The collection of the rates of wharfage established by this act shall be enforced in the manner prescribed in the two hundred and seventh section of the act of ninth of April, eighteen hundred and thirteen."

The act of 1860 is entitled "An act in relation to the rates of wharfage, and to regulate piers, wharves, bulk-heads and slips in the cities of New York and Brooklyn." It was followed by the act of 1870, before recited, which is entitled "An act to

amend an act in relation to the rates of wharfage, and to regulate piers, wharves, bulk-heads and slips in the cities of New York and Brooklyn, passed April 10, 1860." Section 3 of the act of 1870 repeals all acts and parts of acts inconsistent with its provisions. It does not repeal, in so many words, any part of the act of 1860. In respect to the single and double rates of wharfage imposed by the first and second sections of the act of 1860, and to the rates of wharfage on lighters, canal-boats and barges, the act of 1870, by its first section, alters such rates, and imposes, in certain cases, double rates. But the act of 1870 does not take away any lien given by the act of 1860. The act of 1860, when amended, by inserting in it the rates prescribed by the act of 1870, contains a provision for a lien for those rates to the same extent it did for the rates of the act of 1860. There is nothing in the continued existence of such lien, under the new rates, inconsistent with the mere substitution of new rates. The act of 1870 was followed by the act of April 23, 1872, (Laws of New York, 1872, *c.* 320, p. 799,) which is entitled "An act to amend an act in relation to the rates of wharfage, and to regulate piers, wharves, bulk-heads and slips in the cities of New York and Brooklyn, passed May 6, 1870." Section 1 of the act of 1872 does not vary at all from the same section as amended by the act of 1875, as before recited, except that that section, as so amended, includes Long Island City as well as New York and Brooklyn. Section 3 of the act of 1872 repeals all acts and parts of acts inconsistent with its provisions. It does not repeal, in so many words, any part of the act of 1860. Being an amendment, on its face, of the act of 1870, and that being an amendment, on its face, of the act of 1860, the act of 1872 must be regarded as an amendment of the act of 1860, in respect to single and double rates of wharfage, and as not taking away any lien given by the act of 1860. The act of 1860 is to be regarded, after the passage of the act of 1872, as containing the rates prescribed by the act of 1872, with the provision for a lien. The lien is not inconsistent with the mere substitution of new rates. The act of 1872 was followed by the act of 1875, before recited. It is entitled "An act to

amend chapter 320 of the laws of 1872, entitled 'An act to amend an act in relation to the rates of wharfage, and to regulate piers, wharves, bulk-heads and slips in the cities of New York and Brooklyn.'" Its first section amends section 1 of the act of 1872, so as to read as before recited. The act of 1875 repeals nothing. For the reasons before stated, it must he regarded as an amendment to the act of 1860, in respect to rates, and as not taking away any lien given by the act of 1860. The act of 1860 is to be read as containing the rates prescribed by the act of 1875, with the provision for a lien.

Before reaching the question as to whether there was a lien on the John M. Welch, enforceable in admiralty, by a suit *in rem*, either by the maritime law or by the state statute, it is necessary to examine the provisions of the act of 1875 to see whether that act is a valid and constitutional enactment, in its application to that boat. The district court held that it is.

Objection is made to that clause of the act of 1875 which subjects canal-boats navigating the canals of the state of New York to a less charge for wharfage than canal-boats not navigating the canals of that state. It is urged that that clause makes a discrimination between the property of citizens of different states; that it discriminates against the claimants' barge in this case, because it did not come through a canal of this state, but came from Baltimore, with a load of coal, through other canals; and that the reasonable compensation for the wharfage of two canal-boats of equal tonnage must be the same, although one comes through the canals of this state and the other comes through other canals. It is contended that the statute is in conflict with section 8 of article 1 of the constitution of the United States, which provides that the congress shall have power "to regulate commerce with foreign nations, and among the several states;" and with section 9 of article 1, which provides that "no preference shall be given, by any regulation of commerce or revenue, to the ports of one state over those of another;" and with section 10 of article 1, which provides that "no state shall, without the consent of congress, lay any duty of tonnage;" and with section 2 of article 4, which provides that

"the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Although the statute of New York does not provide, in terms, that a canal-boat of a given tonnage, owned by a citizen of New York, shall pay less wharfage than a canal-boat of the same tonnage owned by a citizen of another state, yet it is urged that the same result is accomplished indirectly, for the reason, that, when the canal-boat which does not navigate the canals of the state of New York, but comes from another state, through another canal, is owned by a citizen of another state, and brings a cargo from another state, the extra wharfage she must pay must be added to the charge for carrying the cargo, effecting thus a discrimination against citizens of other states; and that, in any event, such increased charge would, in practice, be an extra burden on merchandise coming from other states, or on canal-boats coming from other states.

The John M. Welch, it is admitted, came to New York through the canals named in the libel. Consequently, she does not fall within the exception of a canal-boat navigating the canals of the state of New York. Her exact tonnage is not stated, but it is inferred to have been 180 tons. At two cents per ton per day, her single rate of wharfage would, under the act of 1875, be $3.60 per day. If she were a canal-boat of 180 tons, navigating the canals of the state of New York, her rate of wharfage, under section 6 of the act of 1860, would be the rate prescribed by section 212 of the act of April 9, 1813. 2 Rev. Laws of 1813, 429. That rate would be 87½ cents per day. Under all circumstances, whatever her tonnage, (if over 25 tons,) her wharfage rate would be higher under the act of 1875, if not navigating the canals of New York, than if navigating those canals.

In the case of *The Ann Ryan*, 7 Benedict, 20, the district court for the eastern district of New York held that the act of 1870 was valid, even though a regulation of commerce, in the absence of any statute of the United States on the subject of wharfage, and that, while the act made discrimination in favor of the canal navigation of the state of New York, it made none in favor of the citizens of that state.

In its decision in the present case the district court considered the proposition that the act of 1875, under the name of wharfage, allowed a greater sum to be charged against the John M. Welch than was a reasonable compensation for the use of the wharf, as the reasonable compensation must be the same whatever canal the boat navigated, and that the extra charge was, in substance, a burden imposed by the state upon commerce and navigation among the states, and that the act was, therefore, an illegal regulation of commerce in that respect, and repugnant to the constitution of the United States. The court held that it could not decide that the sum charged against the John M. Welch by the act of 1875 was more than a reasonable compensation for the service. It said: "If want of apparent reason—I do not say that reasons do not exist—for the distinction in rate made by the statute between canal-boats engaged in navigating the canals of this state, North river barges, market boats, sloops employed upon the rivers of this state, schooners exclusively employed upon the rivers of this state, lighters and other vessels, permits the conclusion that some of the rates are unreasonable, how can it be declared to be the higher rate rather than the lower rate that is the unreasonable rate? Moreover, if the state of New York has the right to fix rates of wharfage, I am unable to see how any rate declared by this statute to be legal, can by the courts be declared unreasonable, and for that cause illegal. The power of the state over the subject-matter of wharfage rates includes the power to discriminate as to the rate between vessels belonging to different classes and between vessels engaged in different occupations; and, when distinctions of that character are found in the statutes of the state, it must be presumed by the courts that those distinctions are founded upon some good reason. One reason may be found in the fact that vessels engaged in certain kinds of navigation are necessarily compelled to spend a greater portion of their time at the wharf than is ever spent by vessels in different employment, and so may justly be allowed to obtain their wharfage at a less rate per day." Again, the court said: "The statute in no way

favors the tonnage owned by citizens of New York, nor does it directly or indirectly establish an inequality in commercial intercourse. While its effect, taken in connection with the other statutes of the state, is to allow wharfingers to charge different rates of wharfage, according to circumstances prescribed in the act, still, neither in words nor in operation, does it create a distinction between the citizens of different states, or between commerce among the states and purely internal commerce. Those citizens of New York whose canal-boats navigate the harbor of New York and the East and the Hudson rivers, pay the same rate of wharfage as do those citizens of other states whose boats are engaged in the same business; and those citizens of other states whose boats are engaged in navigating the canals of this state, pay the same rate of wharfage as do the citizens of New York who are engaged in that business. The most that can be said is that the statute has an indirect effect to favor the navigation of the canals and rivers of this state, by reducing the amount of port charges incident to voyages upon those waters. But the act is, nevertheless, in substance and effect, a wharfage act, and I am unable to see how the indirect effect above indicated renders it repugnant to any provision in the constitution of the United States. For these reasons, I am of the opinion that the present wharfage act of New York, above set forth, is a valid enactment, and, therefore, to be resorted to by this court in order to determine the rate of wharfage which the libellant is entitled to charge for the wharfage service shown to have been rendered."

In the recent case of *Guy* v. *The Mayor, etc., of Baltimore*, (12 Chicago Legal News, 262,) decided by the supreme court of the United States, it is said that it must be regarded as settled, in view of the decisions of that court in *Woodruff* v. *Parham*, (8 Wall. 123,) in *Hinson* v. *Lott*, (8 Wall. 148,) in *Ward* v. *Maryland*, (12 Wall. 418,) in *Welton* v. *State of Missouri*, (91 U. S. 275,) and in other cases, that no state can, consistently with the federal constitution, impose upon the products of other states brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation

thereto, of the products of other states, more onerous public burdens or taxes than it imposes upon the like products of its own territory. In the case referred to, Guy, a citizen of Virginia, as master and part owner of a vessel, brought from Virginia to Baltimore, in Maryland, a cargo of potatoes, raised in Virginia, and landed his vessel at a public wharf in Baltimore, belonging to the city, and discharged therefrom potatoes and was charged wharfage, which he refused to pay. He was sued by the city, and the judgment for the amount was recovered against him. The claim arose under an ordinance of the city, authorized by an act of the legislature of Maryland. The ordinance made the master or owner of a vessel landing or depositing on the wharf articles *other than the production of the state of Maryland*, liable for the wharfage fixed by the ordinance on such articles. The supreme court held that the ordinance and the act were, in the above respect, in conflict with the power of congress over the subject of commerce. In the decision it is said: "It is admitted that such wharfage dues are not and never have been assessed against parties or vessels bringing to that port potatoes or other articles grown in the state of Maryland. The argument in support of the statute and ordinance upon which the judgment below rests is that the city, by virtue of its ownership of the wharves in question, has the right, in its discretion, to permit their use to all vessels landing thereat with the products of Maryland; and that those operating vessels laden with the products of other states cannot justly complain, so long as they are not required to pay wharfage fees in excess of reasonable compensation for the use of the city's property. This proposition, however ingenious or plausible, is unsound both upon principle and authority. The municipal corporation of Baltimore was created by the state of Maryland to promote the public interests and the public convenience. The wharf at which the appellant landed his vessel was long ago dedicated to public use. The public, for whose benefit it was acquired, or who are entitled to participate in its use, are not alone those who may engage in the transportation to the port of Baltimore of the products of Maryland.

It embraces, necessarily, all engaged in trade and commerce upon the public navigable waters of the United States. Every vessel employed in such trade and commerce may traverse those waters without let or hindrance from local or state authority; and the national constitution secures to all so employed, without reference to the residence or citizenship of the owners, the privilege of landing at the port of Baltimore with any cargo whatever not excluded therefrom by, or under the authority of, some statute of Maryland enacted in the exercise of its police powers. The state, it will be admitted, could not lawfully impose upon such cargo any direct public burden or tax because it may consist, in whole or in part, of the products of other states. The concession of such a power to the states would render wholly nugatory all national control of commerce among the states, and place the trade and business of the country at the mercy of local regulations, having for their object to secure exclusive benefits to the citizens and products of particular states. But it is claimed that a state may empower one of its political agencies, a mere municipal corporation, representing a portion of its civil power, to burden inter-state commerce by exacting from those transporting to its wharves the products of other states wharfage fees which it does not exact from those bringing to the same wharves the products of Maryland. The city can no more do this than it or the state could discriminate against the citizens or products of other states in the use of the public streets or other public highways. The city of Baltimore, if it chooses, can permit the public wharves which it owns to be used without charge. Under the authority of the state it may also exact wharfage fees, equally, from all who use its improved wharves, provided such charges do not exeeed what is a fair renumeration for the use of its property. *Northwestern Packet Co.* v. *City of St. Louis*, 12 Chicago Legal News, 225, and *City of Vicksburg* v. *Tobin*, Id., decided at the present term; *Packet Co.* v. *Keokuk*, 95 U. S. 80. But it cannot employ the property it thus holds for public use so as to hinder, obstruct or burden inter-state commerce, in the interest of commerce wholly internal to that

state. The fees which it exacts to that end, although denominated wharfage dues, cannot be regarded, in the sense of our former decisions, as compensation merely for the use of the city's property, but as an expedient or device to accomplish, by indirection, what the state could not accomplish by a direct tax, viz.: build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other states. Such exactions, in the name of wharfage, must be regarded as taxation upon inter-state commerce."

These views cover the question in the present case. It is a burden upon inter-state commerce to exact from a canal-boat of a given tonnage, bringing a cargo of coal from Baltimore, through canals not in the state of New York, and discharging it on a given wharf in the port of New York, larger fees per day for the use of such wharf than are charged to a canal-boat of the same tonnage bringing a like cargo from Buffalo through the Erie canal. The same thing is true in respect to the two canal-boats, if coming to the same wharf empty, to load with like cargoes; the one to go to Buffalo through the Erie canal, and the other to go to Baltimore through canals not in the state of New York. Boats are presumed to bring or take cargoes, and to seek wharf accommodations to discharge or receive cargoes. The increased wharfage rates must, presumably, be added by the carrier to the charge of carriage, and then added by the owner of the cargo to the price of the cargo, and thus become a tax to the prejudice of inter-state commerce, and the building up of the purely internal commerce of the state. The wharfage fees are not equal on two canal-boats of the same tonnage, but a discrimination is made against one of them because she does not ply from the city of New York to places situated on a canal in the state of New York, but plies to and from Baltimore through canals not in the state of New York. The state of New York authorizes the wharf owner to obstruct inter-state commerce, in the interest of commerce wholly internal to the state of New York. This view of the act of 1875 further appears by its placing in the same category

with "canal-boats navigating the canals of this state" these other vessels, "sloops employed upon the rivers of this state, and schooners exclusive y employed upon the rivers of this state." The additional fees which the state authorizes to be exacted from other canal-boats, sloops and schooners, of equal tonnage, although called wharfage dues, cannot be regarded, in view of the decisions of the supreme court, as compensation merely for the use of the wharf, but as an expedient to accomplish, by indirection, the building up of the domestic commerce of the state of New York by means of unequal burdens on vessels not navigating the waters of this state. The present case is no different from what it would have been if there had been no wharfage charged against canal-boats navigating the canals of this state, and wharfage dues had been exacted from other canal-boats.

The suggestion that it does not appear that what is charged the John M. Welch is more than a reasonable compensation, is met by what is said by the supreme court in the case of Guy. The power to discriminate as to the rate of wharfage, between vessels engaged in different occupations, must be exercised without conflicting with the power of congress over the subject of inter-state commerce.

The question under consideration was not passed upon in the case of *The Virginia Rulon*, 13 Blatchf. C. C. R. 519. The point there ruled was only that, by the terms of the act of 1875, the double rate was wharfage, and that that act created a lien for such double rate, under the circumstances there presented, which could be enforced by a suit *in rem* in admiralty.

Under the foregoing views, the act of 1875, and the act of 1860, as amended by the act of 1875, cannot be upheld as a valid law, in so far as it prescribes a charge for wharfage against the John M. Welch.

Inasmuch as the libel claims to charge wharfage solely under the provisions of the statute of New York, and claims a lien only in respect to the amount of wharfage claimed as authorized to be charged by that statute, and does not claim

any sum as being a reasonable compensation, or any lien for a reasonable compensation, and the only evidence in the case, the agreed statement of facts, is as to the amount of wharfage due, as fixed by the statute of New York, and that statute is the act of 1875, or the act of 1860, as amended by the act of 1875, it follows, as the statute is invalid in regard to such amount, there is no valid statute fixing any rate or amount of wharfage for the John M. Welch, and the libellants have no lien, maritime or statutory, for any amount of wharfage, which they can enforce in this suit, on the pleadings and the evidence. Although the new rate for the John M. Welch, according to the act of 1860, as amended by the act of 1875, is invalid, the old rate for her, found in the act of 1813, as preserved by section 6 of the act of 1860, was repealed by the operation of the enactments subsequent to the act of 1860, because the old rate was inconsistent with the new rate. The repealing clauses in the acts of 1870 and 1872 are not invalid, and they destroyed the operation of the old rates as to the John M. Welch, even though it be held that the new rates are invalid as to her. The holding of the new rates invalid cannot have the effect to revive the old rates as to her. The old rates are repealed as to her, whether the new rates stand as to her or not. The legislature has abolished the old rates. The court cannot re-enact them. It can only declare that the new rates cannot apply to the John M. Welch.

These considerations show that the libel must be dismissed, and that no decision need be made, in this case, as to the existence of a maritime lien for wharfage on a domestic vessel, or as to the circumstances under which any lien for wharfage may now exist against a vessel under the statutes of New York.

The libel is dismissed, with costs to the claimants in this court and in the district court.

BROOKS v. THE STEAMER ADIRONDACK, etc.

(*District Court, S. D. New York.* May 4, 1880.)

SALVAGE—EXCESSIVE ALLOWANCE.—Double or excessive salvage is not allowable, except where the circumstances are such as to warrant it.

SAME—AGREEMENT TO PAY EXCESSIVE AMOUNT—NOT ENFORCEABLE.—Where a steamer, with no passengers and a cargo not perishable, was temporarily disabled, but in no present peril, and a passing vessel refused to render any assistance towards towing her into port except upon an agreement for a sum, under the circumstances, unjust and unreasonable in amount, which was finally assented to, *held*, that such agreement would not be enforced, and the aiding vessel would be allowed only an amount proper, considering the circumstances and the risks attendant thereto.

J. E. Parsons, for libellant.

T. E. Stillman, for claimants.

CHOATE, D. J. This is a libel brought by the master of the steamer Plainmeller to recover against the steamer Adirondack the sum of £4,000 sterling, upon an express agreement in writing made by the master of the latter steamer to pay that sum for a salvage service. The defence is that the amount agreed upon is exorbitant and unreasonable; that the contract was entered into improvidently, and under circumstances of distress which render it invalid as a contract. And the claimants, admitting that the service rendered was a salvage service, offer to pay $7,500, of which they have made a tender, and which they insist is a full and just salvage compensation.

The Plainmeller was a steamer of 1,196 tons register. She was bound from Hull, England, to Philadelphia, in ballast, under a charter to load there with grain for Europe. The Adirondack was a steamer of 1,302 tons register. She was bound from New York to Liverpool. Her cargo consisted of cotton, grain and salt beef. The value of the vessel and cargo was $300,000. The present value of the Plainmeller is not proved, but she cost in 1877, when she was built, £31,000, and that may be taken as her value approximately for the purposes of this case.

The Adirondack had compound nautical engines of 225

horse-power. On the second day of October, 1879, about 8 o'clock in the evening, the low-pressure piston broke, knocking out the cylinder bottom, knocking down the escape valve and the stuffing box, and bending the piston-rod. This rendered the low-pressure cylinder useless, and, for the time being, she was entirely disabled in her machinery. The high-pressure cylinder was uninjured, but could only be brought into use by at least two days' work. It would, however, have been practicable in two or three days, with the appliances on board, to have got the ship under steam with the use of the remaining engine. In fact, she afterwards crossed the Atlantic with the use of that engine alone. After the accident they disconnected the propeller, and attempted to proceed under sail, but in this they do not seem to have succeeded. She had two masts, with square sails on the foremast, and fore and aft sails on the mainmast.

I think the evidence will not warrant the conclusion that she could have made her port under sail alone. She burned blue lights as a signal of distress, which were seen by the Plainmeller about 2 o'clock on the morning of the third of October. When first seen she bore a little on the port bow of the Plainmeller. It was a clear moonlight night. The place where the vessels met was latitude 40 degrees, 24 minutes, north; longitude 59 degrees, 44 minutes, west, or very near that. The nearest port was Halifax, about 450 miles distant. The distance to New York was about 662 miles. The drift of the gulf stream at that point is a little to the southward of east, and the Adirondack was drifting to the southward of the usual track of westward bound vessels. The Plainmeller came up under the stern of the Adirondack and hailed her. The master of the Adirondack told the master of the Plainmeller that his machinery was disabled, and asked what he would tow him into Halifax for. The master of the Plainmeller at first named £5,000, and then £4,000, for either Halifax or New York. The master of the Adirondack offered £1,000, refused the offer of £4,000, and told the master of the Plainmeller to report him in New York. The Plainmeller, however, stood by her, drifting away and coming up again three

times under her stern; and the fourth time she came up, upon the invitation of the master of the Plainmeller, the master of the Adirondack came off in his boat and came on board the Plainmeller. The captains had a brief conference on deck.

The captain of the Plainmeller asked the other captain if he was entirely disabled, and the captain of the Adirondack explained that his engineer said they could get up steam again in two days. They had some haggling about the price. The captain of the Plainmeller insisted that £4,000 was a fair and reasonable amount, and refused to tow her in for less. He testified that he offered to do it for that, or to leave the amount open. This is denied by Captain Roberts, of the Adirondack, and I am not able, on the whole evidence, to find it proved. No inquiry was made as to the value of the cargo of the Adirondack. Captain Roberts finally consented to the price of £4,000, and they went into the cabin to reduce the agreement to writing, but, when they got there, Captain Brooks, of the Plainmeller, said it required consideration to word it properly, and suggested that he would have the paper drawn up and send it on board the Adirondack for signature. To this Captain Roberts assented, and this was done after daylight, on the third of October. The agreement bound the owners of the Adirondack to pay to the master and owners of the Plainmeller £4,000 sterling, "provided the aforesaid ship tows the Adirondack to within a safe distance of the port of New York." It recites that the Adirondack was "totally disabled in her machinery." After making the agreement the Plainmeller got under way, with the Adirondack in tow, and arrived in New York on the eighth of October, about 3 o'clock in the afternoon, without any mishap, except the breaking of a wire hawser belonging to the Adirondack. After that broke the towing was done with a cove hawser furnished by the Plainmeller.

There was some evidence offered for the purpose of showing that the machinery of the Plainmeller was injured by the strain upon her occasioned by the towage, but I am unable to find that the slight repairs found necessary upon her arrival at New York are properly attributable to this cause. From

New York the Plainmeller, after putting her machinery in order, proceeded to Philadelphia, where she waited several days before her cargo was ready for her. The ordinary speed of the Plainmeller, as she was before taking the Adirondack in tow, was nine and a half knots. Her speed with the other vessel in tow was about seven knots.

Upon these facts I think there can be no question that the sum demanded by the captain of the Plainmeller and finally assented to by the captain of the Adirondack—£4,000—was very largely in excess of that liberal compensation which courts of admiralty award for similar services, and that the amount tendered, which is a little more than £1,500, is fully up to the measure of salvage award which any court of admiralty would give for the service rendered.

The Adirondack was in no present peril. She was temporarily disabled in her machinery, but unless overtaken by very tempestuous weather her machinery could have been soon repaired, so that she could proceed on her voyage. Her cargo was not perishable. There is no proof that the broken machinery endangered the safety of the ship. She was otherwise sound and able to keep the sea for an indefinite time. The place where she was was the open ocean, with no risk of going ashore. She had no passengers. The Plainmeller deviated very little from her voyage. She had neither cargo nor passengers. Although her compensation was contingent on her success there was little risk of failure to complete the service, as she was a powerful steamer, well able to tow the Adirondack. She incurred very little appreciable danger in rendering the service beyond that incident to every sea voyage. The necessary delay was not, under the circumstances in which she was placed, such as involved any special damage or inconvenience to her. In no one of the several elements which the courts of admiralty consider, in estimating the amount of salvage, was the case such as to require an extraordinary reward. See *The City of Berlin*, 37 L. T. 307; *The Herman Ludwig*, Vice Adm'y Ct. of Nova Scotia; *Pacific M. S. S. Co.* v. *Ten Bales Gunny Bags*, 3 Sawy. 187; *The City of Richmond*, 25 Mitch. Mar. Reg. 271; *The Yorkshire*, Id. 114;

The Cleopatra, L. R. 3 P. Div. 145; *The Colon*, S. D. N. Y., unreported.

The cases cited by the libellant's counsel do not conflict with these cases. Every case of salvage has its own peculiar circumstances, and where the amount awarded for a salvage towage service seems to be large, an examination of the special service will disclose a reason in some extraordinary feature of the case—either the great peril from which the property saved was rescued, or its great amount, or the unusual risk run, or inconvenience and expense incurred, in rendering the service. *The Paris*, Spinks' E. & O. Rep. 289; *The Nimrod*, 14 Jur. 944; *The Hotspur*, 15 Mitch. Mar. R. 1649; *The Mo*, 16 Mitch. Mar. R. 401; *The Mary*, Id. 1425; *The African*, 5 Mitch. M. R. 911; *The Araxes*, 7 Mitch. M. R. 585. See, also, *The Seagull*, 16 Mich. Mar. Reg. 1425; *The Emily B. Souder*, 7 Ben. 550; S. C. in Cir. Ct. not reported. It is true, as argued by the learned counsel for the libellant, that the recovery of any reward is contingent on success, and that the merit of the service ought not to be measured with reference to the apparent ease with which it was, in fact, rendered; that the undertaking was attended by all those possibilities of delay, danger, and final disaster from which service on the ocean is inseparable. But all these possibilities are taken into consideration by the courts in determining the amount of salvage compensation, and the rates of salvage are intended to be and must be assumed to be based upon a consideration of all the circumstances in which the two vessels are placed at the time the service is undertaken, including all these adverse possibilities.

In respect to the special contract for £4,000, in this case, it must be held that it was unjust and unreasonable in amount. While there is no charge of any fraudulent practice by which the agreement upon this sum was procured, there is evidence enough that the agreement was improvident, and entered into without much consideration of the proper elements of a salvage reward. The contract recites that the Adirondack was totally disabled as to her machinery. This was true as to her temporary disability, but misleading as a statement of absolute

disability. The captain of the Plainmeller insisted on his own terms, and made the agreement to them a condition of rendering any assistance. I think he took advantage of the situation of Captain Roberts to exact from his circumstances of present distress an exorbitant and grossly excessive amount. The master of the Adirondack was inexperienced. This was his first voyage as master. He knew little or nothing of machinery, and seems not entirely to have relied on what his engineer told him as to their ability to repair and go on under steam. His judgment was overborne, by the pressure of the circumstances in which he was placed, to that degree which fully justifies a court of admiralty in relieving owners of his ship from the inequitable bargain into which he improvidently entered.

It is not because the bargain proves to be a hard one that the courts of admiralty set aside such a stipulation. It is because it is obviously unjust, and the parties do not deal on equal terms. The apprehension expressed by the learned counsel for the libellant, that the setting aside of such contracts will tend to discourage the rendering of salvage services, is unfounded so long as the courts award, as they endeavor to do in every case, such as a sum as will be not only a *quantum meruit* for the time and labor employed in the service, but a reliable reward for the assistance rendered and the perils voluntarily incurred. If the amount agreed upon exceeds somewhat the accustomed measure of this liberal reward, it will not be disturbed, if deliberately and understandingly assented to, without the judgment of the promising party being overborne by the distress in which be is placed; but where the amount agreed upon is more than double, or, as in this case, nearly treble, that measure of liberal reward, the upholding of the contract would invite rapacity, and tend to prevent the rendering, upon just and proper terms, of salvage service under circumstances in which it is for the interests of commerce that it should be offered and not refused.

If it were understood that double salvage, if insisted on and agreed to, must be paid, except in case of actual fraud, some masters to whom assistance is offered would refuse to agree,

although they thereby would take risks that are improvident; and many by whom assistance is offered would succeed, by the persistency of their demands, in extorting from the fears or the necessities of the other party a reward to which they are not entitled. *The Emulous*, 1 Sumn. 209; *The A. D. Patchin*, 1 Blatch. 424; *The Wexford*, 6 Ben. 119; *The Homely*, 8 Ben. 495; *The Jacob E. Ridgway*, Id. 179; *The Jeremiah*, S. D. N. Y. March 3, 1879, unreported; *The Helen and George*, Swabey, 368. The claimants having tendered and paid into court the full amount to which the libellant is entitled, together with the costs of libellant up to the time of such payment, the libellant is entitled to a decree for that sum, and the claimants will recover their costs subsequent to that time, to be paid out of the same.

Decree accordingly.

GILBERT HUBBARD & Co. *v.* ROACH and another.

(*Circuit Court, N. D. Illinois.* ——, 1880.)

ADMIRALTY—JURISDICTION—STORAGE OF SAILS.—The storage of sails, when stripped from the vessel, is not a service pertaining to her navigation, and a claim for such storage is not a subject of admiralty jurisdiction, either by proceedings *in rem* or *in personam*.

Claim for Storage.

Mr. Kremer, for libellants.

Mr. Condon, for respondents.

DYER, D. J. An important question in this case is whether or not libellants have a remedy by maritime action for storage of the vessel's sails. This appears to be a new question. No adjudicated case directly bearing upon it has been presented. In Benedict's Admiralty, § 283, it is said: "The master and owner of a ship, and the ship herself, may be proceeded against in admiralty to enforce payment of wharfage, whether the vessel lie along-side the wharf or at a distance, and only use the wharf temporarily for boats or cargoes. Of the same nature is the charge for storing a sail or

other furniture in a warehouse on shore, and that kind of rent or storage is also the subject of a maritime action."

In support of the last proposition the author cites *Gordon* v. *The New Jersey*, 1 Peters' Admiralty Reports, 223; *Ex parte Lewis*, 2 Gal. 483; *Jonson* v. *The McDonough*, Gilpin, 101; and *The Phœbe*, Ware, 354.

I have examined all of these cases, and find that, with the exception of the case of *The Phœbe*, none of them decide that a charge for storing the outfit of a vessel is the subject of a maritime action, nor do they touch that precise question. In the case of *The Phœbe*, which was a case of distribution among different claimants of proceeds which were in the registry of the court, there is indirect allusion to storage as a privileged debt, constituting a lien on the property, but the question is not discussed or distinctly decided. It has been decided in numerous cases that wharfage is the subject of admiralty jurisdiction, and this may well be because it directly pertains to the navigation of the ship. Mr. Benedict inclines to the opinion that the service of stevedores at the port of delivery of the cargo is maritime, but the contrary has been directly held by authority entitled to weight. Attempt has been made to support the right to maintain an action in the admiralty for storage, under the twelfth rule, which provides that "in all suits by material-men for supplies or repairs or other necessaries for a foreign port, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*. And the like proceeding *in personam*, but not *in rem*, shall apply to cases of domestic ships for supplies, repairs, or other necessaries."

And it has been argued, in the case at bar, that the storage of the sails of a vessel ought to be classed as one of the necessaries mentioned in this rule; but I understand "necessaries" for a vessel, as the term is used in this rule, to mean those things which pertain to the navigation of the vessel, and which are directly incidental to and connected with her navigation; that is, those things which directly aid in keeping her in motion, for the purpose of receiving, carrying and deliver-

ing cargoes; and this, in general, will be found to be the nature of claims which constitute a lien in the admiralty upon the *res*, or which are made the foundation for maritime actions *in personam*. Now, it is true that when sails and outfit are stripped from a vesel they should be stored for safe preservation; and, in the course of business, what are known as sail lofts, in which the sails and outfit may be stored, are established at ports along the lakes, and the business of such storage, for which compensation in the nature of rent is charged, has grown up; but is this a service which pertains to the navigation of a vessel, and which necessarily attaches to her, in the course of her employment, as does a claim for supplies, repairs, furnishings, wharfage, mariners' wages, and other like demands, which are indispensable to enable the vessel to perform her voyages? It is wholly shore service, performed in store-houses on land, and, as was said in *Cox* v. *Murray*, 1 Abb. Adm'y Rep. 342, "the maritime quality of a service arises only when the matters performed or entered upon pertain to the fitment of the vessel for navigation, aid and relief supplied in preparing for and conducting a voyage, or the freighting or employment of her as the instrument of a voyage."

The main argument in support of the claim that storage is or should be the subject of a maritime action is that the sails and outfit cannot be safely stored on board the vessel; that this would be attended with the hazards of fire, robbery, and deterioration from various causes; and that to avoid these hazards it is necessary that they be stored in other places.

But that is an argument addressed rather to the question of degree of safety than to that of absolute necessity. The storage of sails and outfit does not seem to be so immediately and necessarily connected with the navigation of the vessel as to make it a maritime service or claim; and, in the absence of any other authority than has been mentioned, I shall hold that it is not a subject-matter of admiralty jurisdiction, either by action *in rem* or *in personam*, and the exceptions to the commissioner's report upon the item for storage charged in libellant's account will, therefore, be sustained.

SMITH *v.* SIXTY THOUSAND FEET OF YELLOW PINE LUMBER, etc.

(*District Court, S. D. New York.* April 12, 1880.)

CHARTER PARTY—"CUSTOMARY DISPATCH" IN DISCHARGING CARGO—DEMURRAGE—A charter-party provided that the vessel to be loaded with lumber should have "customary dispatch" in discharging her cargo at New York, and fixed the demurrage for each day's detention by the default of the charterers. *Held*, that such "dispatch" meant in accordance with or consistently with all known and well-established usages of the port; that charterers were bound to find her a berth where the cargo could be discharged with "customary dispatch," and without interruption during customary hours, and was liable for the detention, at the agreed rate of demurrage, caused by failure so to do.

In Admiralty.

F. A. Wilcox, for libellant.

C. & N. Weller, for claimant.

CHOATE, D. J. This is a libel for demurrage against part of the cargo of the schooner Florence & Lilien, which was chartered for a voyage from Port Royal, South Carolina, to New York, to carry yellow pine lumber. By this charter-party it was agreed that the rate of demurrage is fixed at $35 per day for each day's detention "by the default" of the charterers, and that the vessel was to have "customary dispatch" for the discharging at New York. The charter-party also provided that the cargo was "to be received and delivered alongside within reach of the vessel's tackles." The vessel arrived in New York on the thirtieth of June, 1878, and the master reported to the charterer and was given a berth at pier at foot of Twenty-second street, North river, on July 1st. They commenced discharging the deck load upon the pier, over the side of the vessel, on Tuesday, the second of July. They remained at this place till about noon of Saturday, the sixth of July, when the vessel was moved, by direction of the charterers, to the slip on the south side of the pier at the foot of Chambers street, at which place about 80,000 feet were discharged into the water. On Wednesday afternoon, July 10th, she was taken back to pier at foot of Twenty-second street, and given

a berth at the bulk-head on the north side of that pier, and there discharged the remainder of her cargo, through her bow ports, on to the bulk-head. This bulk-head was in the exclusive occupancy of the charterers.

The pier at which the first discharge of cargo was made was a public wharf, which the charterers obtained permission to use for this purpose, their own bulk-head being then so obstructed that it was not available for the purpose of discharging the vessel. The discharge was completed on Wednesday, the seventeenth of July, at about 2 o'clock in the afternoon. The entire cargo was 210,000 feet of resawed lumber.

The libellant claims that the discharge was delayed, by the fault of the charterers, seven days; that she would have discharged her cargo by the tenth of July, if not prevented by the charterers.

It appeared by the evidence that the custom of the port is to allow the charterer in this trade three days to find a berth for the vessel. The claimants insist that a special agreement was made between them and the master in this case, whereby it was agreed that the vessel should go to the pier, to which she went before there was any berth ready for her to discharge at, the purpose being to accommodate the master and allow him to discharge his crew, which he could not do if she lay in the stream, waiting there three days before getting her berth. Such an arrangement is testified to by one of the claimants. It is denied by the master. Upon the whole testimony I am not satisfied that any such special agreement was made. The claimant who testifies to it is evidently on many points greatly at fault in his recollection, and I think he is mistaken on this point, and that the master did not, by any special agreement, waive his right to commence the discharge and deliver the cargo immediately on coming to the pier.

A great deal of testimony has been taken upon the question, what is the amount of lumber of the description of that of which this cargo consisted, ordinarily discharged per day from vessels like the Florence & Lilien. The evidence is very conflicting as to the average amount thus discharged per

day during the period of the discharge, but the testimony satisfies me that, with an ordinarily good place to discharge at, the ship can, with an ordinarily diligent and skilful stevedore, discharge 30,000 feet in a day. It may be that the *average* amount actually discharged daily is less than this, as claimant's proofs tend to show, but that average would be reduced by all those accidents of unreadiness to receive on the part of consignee's negligence, or delay of stevedores, bad weather, and other causes which in particular cases may have interposed to protract the discharge; but if 30,000 feet is ordinarily a fair day's work, as, on the evidence I think it is, then there is nothing in this charter-party which excuses the charterer from receiving and taking it away as delivered from the ship's tackles, if the master is ready and able so to deliver it; and upon the proofs I also find that the master was ready and able so to discharge and deliver his cargo at the rate of 30,000 feet per day. An attempt was made on the part of the claimants to show that whatever delay there was was owing to the fault of the stevedore. There is considerable conflict in the testimony on this point, but I think that the master, if a credible witness, is the person having the best opportunity to observe the causes of the delay, and the most likely to remember the facts with accuracy. He was interested to have the discharge go forward without interruption, and I think that his positive testimony as to the hindrances to the discharge is not overborne or discredited.

There was some hindrance while they were discharging the deck load on the pier, on account of the passing of people up and down the pier, but the testimony is that notwithstanding this that berth was an ordinarily good one for discharging the cargo. The principal cause of delay was the fact that the consignees did not, at their own bulk-head, keep a sufficient space clear of lumber to enable the vessel to put out her cargo continuously, and did not receive and take away the lumber as it was discharged.

What the vessel was entitled to under the charter-party was "customary dispatch." That does not mean the acceptance of the cargo in that period of time which is found to be

the average time taken to discharge all like cargoes in this port, as the claimants seem to have assumed. It means "dispatch" in accordance with, or consistently with, all known and well-established usages or customs of the port. Thus the customs proved as established in this port, in this particular trade, of allowing the consignee three days to procure a berth, and of allowing him to remove the vessel to a second place of discharge, as to a part of the cargo, are, by the expression "customary dispatch," adopted and made part of the contract.

But the first of these customs does not excuse the consignee from receiving the cargo immediately when a berth is procured, nor can it be said that the average period of all discharges is a "customary" period. There are no elements of "custom" about such an average period of time. A "custom" is a practice which is universal, or almost universal, in the trade in question. It may limit the length of a day's work, determine what days are holidays, and similar matters, but the right of the vessel to discharge and to have the consignee to receive the cargo continuously, subject to such customs, is a right established by the law merchant, and one not to be abridged by custom unless the custom is clearly made out; and the average time which masters, stevedores and consignees take to discharge vessels laden with a certain description of cargo cannot be said to establish any custom as to time of discharge. So far from being the "customary" time, it may well be that no one vessel ever did discharge in that particular period of time.

The expression, "customary dispatch," as affecting the time of discharge, seems to me only to limit the master's right to discharge continuously in this, that he cannot claim the right to discharge during hours of a day, or during days, which by the established usage of the trade in the port are not working hours or days; nor can he claim the right to discharge so rapidly during any day that the amount to be delivered on any one day is more than the consignee can, according to the customs of the port, with the use of ordinary facilities, be required to receive and take away. No usage or custom is

shown limiting the amount of lumber which a consignee is to receive and take away in a day. Nor is it shown that 30,000 feet is an extraordinary and unusual amount to be discharged and received in a day. On the contrary, the testimony is to the effect that the discharge and delivery of that amount in a day is a common thing.

The consignees were bound to find a berth where the vessel could have "customary dispatch." This they did not do, either at Twenty-second street or at Chambers street. At the pier and bulk-head they allowed the discharge to be obstructed by the accumulation of lumber, and at Chambers street they gave the vessel a place where she could not discharge continuously, but had to be unmoored from time to time to allow other vessels to pass. The necessary delay in moving the vessel between Twenty-second street and Chambers street was authorized by custom and the vessel must bear that loss. The removal both ways took less than half a day. There was no proof of any delay by reason of bad weather beyond three hours, if so much as that.

As a result of all the evidence I find that the vessel was able to discharge her cargo in eight working days, including the loss of time by bad weather, and by her removal, and that the delay in discharge beyond eight days was caused by the fault of the consignees. The discharge commenced on the morning of the second day of July, and should have been finished on the eleventh day of July, excluding Sunday and the fourth of July. The libellant is, therefore, entitled to six days' demurrage, which is fixed by the charter at $35 per day.

Decree for libellant for $210, with interest from July 17, 1878, and costs.

SCOTT and others *v.* THE IRA CHAFFEE.

(*District Court, E. D. Michigan.* April 26, 1880.)

CONTRACT OF AFFREIGHTMENT—BREACH OF—LIEN FOR.—The owner of a cargo has no lien upon the vessel for the breach of a contract of affreightment until the cargo, or some portion, has been laden on board, or delivered to the master.

In Admiralty.

This was a libel *in rem* to recover damages for a breach of contract made by the master of the propeller Ira Chaffee to carry a certain boiler from Detroit to Oscoda. The boiler was never actually put on board the propeller, nor delivered to her master, as master, although he received it on behalf of the schooner Louisa, on which it was laden and carried to Oscoda. It seems that the Louisa was caught in the ice and detained, whereby the arrival of the boiler was delayed. The libellant claimed damages for detention.

James J. Atkinson, for libellant.

Moore, Canfield & Warner, for respondent.

BROWN, D. J. Upon the argument of this case I was satisfied, from the correspondence of the parties, that a legal contract of affreightment had been made, but that nothing had ever been done by the propeller toward its execution. The boiler was never laden upon the propeller, nor delivered to any one having authority to receive it on her behalf. The question of jurisdiction was reserved.

There is an abundance of *dicta* to the effect that the obligation of the cargo to the ship, and of the ship to the cargo, does not arise until the cargo or some portion of it has been laden on board, or at least legally delivered to the vessel, but no case directly in point has yet been decided by the court of last resort.

Whatever be the rule with regard to contracts of affreightment, which are purely executory, it must now be considered as settled that if the ship enters upon the performance of its work, or any step has been taken towards such performance, the ship becomes pledged to the complete execution of the

contract, and may be proceeded against *in rem* for a non-performance. Such was the view taken by Judge Emmons in the case of *The Williams*, 1 Brown's Adm. 208; and although the court went much further in that case, and held that every maritime contract, from the moment of its inception, pledged the vessel to its complete performance, the case cannot be considered as a controlling authority for this proposition. In that case a tug was hired to go to the assistance of a vessel which had been reported aground on the shore of Lake Huron. On arriving at the spot it was found that the vessel had been gotten off, and the tug returned home without rendering her any actual assistance. It was held that a proceeding *in rem* would lie to recover the stipulated compensation. I have no doubt whatever of the correctness of this ruling. I have had occasion myself to apply the same doctrine in several cases which have arisen in this district since I have been upon the bench. Judge Baxter also adopted it in the recent unreported case of the Melissa.

Prior to the decisions of the supreme court in the case of *The Freeman*, 18 How. 182, and *The Yankee Blade*, (in *Vanderwater* v. *Mills*,) 19 How. 82, the question of jurisdiction in the cases of executory agreements was unsettled, and even those cases cannot be said to have definitely fixed the measure of liability. They seem rather to have announced in general terms a doctrine from which the supreme court has not as yet shown any disposition to recede.

The question does not seem to have been settled in England, although in the case of *The City of London*, 1 Wm. Robinson, 88, Dr. Lushington was disposed to concede that "if a seaman is engaged on board a vessel, and the owners think fit to abandon the voyage for which the seaman has been engaged, he would not be entitled to sue in admiralty for his redress, but must seek his remedy at common law, by an action on the case." This is the only intimation I have found upon the subject in the English admiralty, probably owing to the fact that it had no jurisdiction over contracts of affreightment until recently. The case of *The Schooner Tribune*, 3 Sumner, 144, decided by Mr. Justice Story,

favors the view taken by the libellant here. This was a contract under which the Tribune engaged to be ready within three days to load for the libellant, and proceed without delay to Lubec to take in a cargo, and proceed to Havana. After this memorandum was made a number of cedar posts were put on board of her by the libellant, as a part of her cargo, but before the schooner sailed the owners of the vessel ordered the cargo so laden to be put on shore, and attached it under process for an asserted debt due them on a former voyage, for which they insisted libellant was liable. The charterer proceeded against the vessel, and Mr. Justice Story held her liable—*First*, upon the ground that the agreement constituted a charter and not a preliminary contract; and, *second*, because a portion of the cargo was actually taken on board, and the voyage was voluntarily broken up by the owners of the vessel. Here, again, however, there was a part performance, which was evidently considered a material fact, although the opinion is not expressly put upon that ground. Indeed, the court intimates (page 149) that the question of jurisdiction depended rather upon the maritime character of the contract.

The case of *The Flash*, Abbott's Adm. 67, was very similar. The master of a New York vessel contracted at the port of New York to transport a cargo across the East river to Brooklyn. He took a part of the cargo on board, but afterwards refused to take on the residue or to deliver that already laden. It was held that an action *in rem* would lie, both for the refusal to receive on board and the refusal to deliver. While a portion of the cargo was actually laden on board, the court apparently sustained the jurisdiction (page 70) upon the authority of the master to contract for the employment of the vessel, and upon the general doctrine of the maritime law that the vessel is bodily answerable for such contracts of the master made for her benefit. In the case of *The Pacific*, 1 Blatch. 569, the libellant had contracted for a passage to California; had prepared for the voyage at considerable expense, went to New York at the time appointed for sailing, and found that the accommodations were not such as he had bargained for,

and that the vessel was overcrowded and dangerous to life. He declined to embark and demanded back his passage money, which was refused. He then filed a libel *in rem* for a return of the passage money and for his damages. Objection was made to a recovery upon the ground that at the time of the filing of the libel no cause of admiralty cognizance had arisen; that to give jurisdiction over a maritime contract the ship must have entered upon the performance, and the breach must have occurred in the course of the performance. Mr. Justice Nelson held this objection untenable, and said that the obligation resulted directly from the contract and not from the performance, which is simply in fulfilment and discharge of it. "The owner is bound as soon as he or the master settles the terms upon which the ship is to enter upon the service, and it is difficult to perceive why the liability of the latter should be postponed till the inception of the performance." The reasoning of this case is, undoubtedly, in favor of the libellant. But it would seem that the decision might also be supported upon the ground that the libellant himself had partly performed his contract by the payment of his passage money, and his preparations for settlement in California. I do not deem the case inconsistent with the other authorities, which hold that in cases of purely executory contracts the libellant cannot proceed against the vessel.

All of these cases were prior to those of the Freeman and Yankee Blade. In the case of *The Freeman*, 18 How. 182, the question arose as to the liability of the ship for contracts made upon the faith of fraudulent bills of lading given by the captain for property purporting to have been shipped on board. In delivering the opinion Mr. Justice Curtis observed: "The law creates no lien on a vessel as security for the performance of a contract to transport cargo until some lawful contract of affreightment is made, and a cargo is shipped under it." The case did not call for this opinion, and it must be considered as a *dictum*. At the same time it has been repeated so often in the same court, and has been so often acted upon as the doctrine of that court by courts of inferior jurisdiction, that it is difficult to say that it must not now be

considered as settled law. In the case of *The Yankee Blade*, 19 How. 82, there was a contract between the owners of certain steamboats, of which the Yankee Blade was one, to convey freight and passengers between New York and California. Among other things it was agreed that the America should proceed to Panama, and the Yankee Blade should leave New York at such time as to connect with the America. The owner of the Yankee Blade refused to employ his vessel according to this agreement, and sent her to the Pacific under a contract with other persons. For this breach of contract the libellant sued, assuming the vessel subject to a lien, which might be enforced *in rem*. The court held this contract to be nothing more than an agreement for a special and limited partnership in the business of transporting freight and passengers, and that the mere fact that the transportation was by sea was not sufficient to give a court of admiralty jurisdiction. In delivering the opinion Mr. Justice Grier said, in commenting upon the reciprocal obligations of the ship and cargo: "If the cargo be not placed on board it is not bound to the vessel, and the vessel cannot be in default for the non-delivery, in good order, of goods never received on board. Consequently, if the master or owner refuses to perform his contract, or for any other reason the ship does not receive cargo and depart on her voyage according to contract, the charterer has no privilege or maritime liens on the ship for such breach of contract by the owners, but must resort to his personal action for damages, as in other cases. The case did not necessarily call for the expression of this opinion, as the contract was not, properly speaking, maritime.

Since these cases were decided I have found none in which the courts have sustained a libel upon a purely executory contract except that of *Oakes* v. *Richardson*, 2 Lowell, 173, which was *in personam*. In *Rich* v. *Parrott*, 1 Cliff. 55, Mr. Justice Clifford, in alluding to these cases, intimated the opinion that if the master or owner refuses to perform his contract, or for any other reason the ship does not receive the cargo, the charterer has no privilege or lien on the ship for such a breach of contract by the owners, but must resort to his personal

action for damages. The case, however, went off upon another point. In *The Hermitage*, 4 Blatch. 474, the charterer put a cargo on board and then took it out and refused to fulfil the charter-party, alleging that it had been violated by the owner of the vessel. It was held that the lien attached as soon as the cargo was put on board, and that the owner could libel the cargo for the breach: but Mr. Justice Nelson put his opinion upon the express ground that the case did not fall within that class of cases where nothing has been done under the charter—that is, where no goods have been placed on board—in which case he says there can be no lien upon the vessel or cargo under the charter-party. In *The Pauline*, 1 Biss. 390, the vessel had been chartered to the libellant, but nothing was done under the charter when the owners refused to comply with its covenants. The libel was dismissed, the court drawing a distinction between that and the case of *The Bark Winslow*, 4 Biss. 13, where the master had contracted to receive on board a quantity of wheat from a warehouse. Through the negligence of the vessel a portion of the wheat was lost in the process of delivery from an elevator, and it was held that the wheat was delivered to the vessel when it passed from the elevator to the pipe, and that she was liable for the wheat lost. The decision was put upon the express ground of such delivery. The case of *The Bark Edwin* (*Buckley* v. *The Naumkeag Steam Cotton Co.* 24 How. 386) contains nothing inconsistent with the *dicta* in the former cases. The loss was occasioned by the explosion of the boiler upon a lighter upon which the cargo was being carried from the shore to the vessel. It was held that a delivery to the lighter was a delivery to the vessel, and that the vessel became liable from that moment. The court cited and distinguished the former cases, and held that there was no necessary physical connection between the cargo and the ship as a foundation upon which to raise a liability.

In the case of *The General Sheridan*, 2 Benedict, 294, Judge Blatchford refused to sustain an action *in rem* to recover damages occasioned to the charterer by the refusal of the vessel to proceed under her charter, basing his de-

cision expressly upon the *dicta* in the cases of *The Freeman* and *The Yankee Blade*, "any duty that may be violated by the owner or master, before the cargo is put on board, is not a duty of the vessel, or one for the breach of which a lien on the vessel is created or can be enforced." In *The Keokuk*, 9 Wall. 517, the *dicta* in the former cases are repeated, but otherwise the case is not of value here, as there was no contract to carry the wheat in question, and no delivery of the barge into the custody of the steamer. In *Oakes* v. *Richardson*, 2 Low. 173, the learned judge for the district of Massachusetts held that a court of admiralty had jurisdiction of a personal action by the charterer against the owner of the vessel for damages, in not proceeding to the port of loading, and that such jurisdiction did not depend upon the fact of the cargo or some part of it having been put on board the vessel, but intimated the opinion that until some service had been begun there would be no privilege against the vessel under such circumstances. So in *Cox* v. *Murrey*, Abbott's Adm. 340, it was said that the court was incompetent to sustain an action for a mere breach of contract when no services had been rendered nor any material furnished, nor any other acts done under it upon the vessel. See, also, *Hannah* v. *The Schooner Carrington*, 2 Law Monthly, 456.

From this review of the cases it will be seen that, with the exception of the *dictum* in the case of the Williams, there is no authority for saying that a court of admiralty has jurisdiction *in rem* for the breach of a purely executory contract. There is reason as well as authority for the proposition. If the owner of a cargo has a privilege upon the vessel for a breach of his contract, the vessel would be entitled equally to a lien on the cargo for a refusal of the owner to put it on board, and it might be seized upon the dock or anywhere else for the satisfaction of such lien. If the jurisdiction is sustained in this class of cases it ought also to include cases of contract to repair the vessel or supply her with stores, in which the material-man would be entitled to a lien, though nothing had been done under the contract. I find it impossible to say with Judge Emmons, in the case of *The Williams*,

that the *dicta* in *The Freeman* and *The Yankee Blade* are "now expressly overruled." While the point has not been directly adjudicated in the court of last resort, I find no intimation in any of the later cases of a disposition on the part of that tribunal to recede from the doctrine there announced.

The continental authorities are explicit to the effect that there is no privilege upon the ship until the goods are laden on board. Indeed, they seem to go further, and hold that even after they are shipped they may be withdrawn by the freighter at any time before the vessel breaks ground. By section 191 of the French commercial code, among the debts which are termed privileged are damages due to shippers for a failure to deliver merchandise which they have put on board, or for reimbursement of injuries suffered by the cargo through the fault of the captain or crew. By section 280 the ship, her tackle and apparel, the freight and the cargo, are respectively bound to the covenants of the parties. These sections are substantially repeated in the codes of Belgium, §§ 191, 280; Italy, §§ 285, 288; and Spain, §§ 596, 797.

In commenting upon these provisions Dufour observes, (1 Maritime Law, 325:) "With regard to cases which give birth to a privilege in favor of the shippers it will be seen that by the Code they are limited to two, viz.: damages—*First*, for failure to deliver the merchandise shipped; *second*, for reimbursement of the damages suffered through the negligence of the captain or crew." These are the same theories that obtain in the *Consolato del Mare*, as the foundation of the privileges of merchants, and experience has not indicated that it is necessary to extend them to other cases. I believe, then, that I ought to add, with Valin, that this disposition is limited. Thus, although article 280 declares that the ship is bound to the performance of the charter-party, this obligation does not confer a lien in favor of the merchant, if the non-performance of which he complains does not fall within one of the cases provided by our article, (191.) Valin cites as example, in this regard, the damages obtained by a shipper who, upon the occasion of the seizure of the ship or otherwise, has been obliged to withdraw the merchandise which he has put

on board, or has been hindered from completing his lading. It is evident that in this regard, adds Valin, his debt is simple and ordinary, without any sort of privilege.

Caumont, in his Dictionary of Maritime Law, title, "Armateur," p. 234, § 54, says: "Article 280 of the Code of commerce is limited to cases specially provided for by article 191, either to damages due the shipper for failure to deliver the merchandise taken on board, or for injury done it by the negligence of the captain. Aside from these cases, and especially when no merchandise is laden on board, there is no room for a lien upon the vessel, although the shipper might obtain, by judgment, an allowance for damages for the non-performance of the contract of affreightment."

See, also, 2 Boulay Paty Droit, Com. et Mar. 299, cited in *The Yankee Blade*, 90; 1 Hoechster et Sacre Droit Mar. 74. In 2 Malloy, *c.* 2, § 2, the law is stated as follows: "And, therefore, so soon as merchandise and other commodities are put aboard the ship, whether she be riding in port, haven, or any other part of the seas, he that is *exercitor navis* is chargeable therewith.

I think the law is too well settled to be disturbed. The libel must be dismissed.

STANDARD SUGAR REFINERY *v.* THE SCHOONER CENTENNIAL.

(*District Court, D. Massachusetts.* May 8, 1880.)

VESSEL—UNSEAWORTHINESS OF—DEFECTIVE LIMBERS.—A vessel sent upon a voyage with her limbers in such defective condition as to prevent the water coming in at a leak, opened during the voyage, from passing to the pumps, until a large quantity of water had collected in the hold, is unseaworthy, and liable for the damage caused to the cargo by the presence of such water.

SAME—PAYMENT OF LOSS BY UNDERWRITERS—NOT AN ADMISSION THAT LOSS WAS NOT CAUSED BY VESSEL'S UNSEAWORTHINESS.—Payment of a loss by the underwriters in such case is no admission by them that such loss was not caused by the unseaworthiness of the vessel.

Henry M. Rogers, for libellants.

C. T. and *T. H. Russell*, for claimants.

NELSON, D. J. This is a libel *in rem* against vessel and freight for failure to deliver goods according to the terms of a bill of lading. It appears by the bill of lading and indorsements thereon that in May, 1879, the schooner Centennial, then lying in the port of Cardenas, in the island of Cuba, bound for Boston, received on board, in good order and well conditioned, 500 hogsheads of sugar, to be delivered in like good order and condition (the dangers of the seas only excepted) to the libellants, at Boston, they paying freight for the same. On her voyage to Boston she sprung a leak, and a considerable portion of the sugar was destroyed by the action of sea water. The question in the case is whether the loss arose from dangers of the seas, within the exception in the bill of lading, or from the unseaworthiness of the vessel.

The Centennial is a three-masted, two-decked, center-board schooner, of 554 tons register. Her length is 135 feet on her keel, her breadth of beam 35 feet, and her draft of water when loaded is 13½ feet. She sailed from Cardenas May 27th. In her passage through the straits of Florida she encountered the cross seas usually met with in that region, which caused her to labor heavily, owing to her great length and breadth of beam as compared with her light draft, a peculiarity common to center-board vessels of her class. Her after-pumps were regularly tried or sounded once in four hours, from the time she left Cardenas until she arrived off Cape Hatteras, June 3d, without disclosing the presence of water, when all at once it was discovered that she had seven and a half feet of water in her hold. As soon as this was known her course was immediately changed, and she proceeded to Philadelphia, her home port, where she was pumped out and her cargo discharged. She was then placed in a dry-dock and examined, and it was ascertained that she had suffered no strain in her timbers and planking, but that her seams were generally slack, and a space seven inches long was found in the seam next the garboard streak, at about the center of the hull, where the oakum was entirely gone. She was then newly caulked throughout, her cargo reloaded, and she proceeded to Boston with what was left of her sugar.

I have no doubt the schooner was light when she left Cardenas, and that the leak was caused by her heavy laboring in the straits of Florida. The quantity of water in the hold would indicate that the leak had existed for several days before it was discovered. It was proved, from what occurred afterwards, that had its existence been known in season the vessel could easily have been kept clear by pumping; for after the leak became known the crew were able, by pumping all hands at both forward and after pumps for 11 hours, to lower the water in the hold two feet, and afterwards the water was kept at that level by the use of the forward pumps alone until the vessel reached Philadelphia. So it appears that the damage to the sugar was caused not merely by the leak, but by the failure to discover it until the injury was done.

It seems to me if this vessel sailed from Cardenas in a condition by which water could enter and accumulate in her hold by leaking to a depth of seven and a half feet, without showing itself in the pump well, she was not fit to undertake the voyage; and it is certain she did leave Cardenas in that condition, unless the theory put forward by the claimants to account for what took place can be established. They have attempted to account for it upon the theory that the drainage of the sugar leaking through the hogsheads and the ceiling of the vessel and settling about the bottom of the timbers stopped up the limber-holes, and thus prevented the water from passing to the pumps.

Very little evidence was offered to sustain this theory. It does not seem to me probable, in the short space of time which elapsed between the loading of the vessel and the springing of the leak, the drainage could have accumulated in such quantities, or could have become sufficiently solid, to produce the result claimed. That the limber-holes were stopped there can be no doubt, but that it was by the molasses draining from the sugar casks seems to me impossible. But it does appear that the Centennial's voyage to Cardenas was from an English port, with a cargo of coal, and that the limber-holes were not examined or cleared out at

Cardenas, after the discharge of the coal, and before the loading of the sugar. It is much more probable that the limbers were stopped by coal than by sugar or molasses. At all events, I do not think they are shown to have been stopped by the latter.

I must, therefore, hold that the schooner was not fit for the voyage, and was unseaworthy, on account of the defective condition of her limbers, and that this caused or contributed to the damage to the sugar.

It appears that the loss on this sugar has been paid by the underwriters, and this suit is prosecuted for their benefit; and it is argued on the part of the claimants that the payment is an admission that the loss was not caused by the unseaworthiness of the vessel. But all the authorities are opposed to this claim, and it cannot be sustained. *Monticello* v. *Mollison*, 17 How. 152; *Insurance Co.* v. *The C. D. Jr.* 1 Wood, 72; *The Amazon Ins. Co.* v. *The Steamboat Iron Mountain*, 4 Cent. L. J. 103.

The entry is to be: Interlocutory decree for libellants.

WILLIS and others *v.* THE STEAMSHIP CITY OF AUSTIN, etc.

(*District Court, S. D. New York.* April 16, 1880.)

BILL OF LADING—DELIVERY ON WHARF—LIABILITY OF VESSEL.—A bill of lading provided that the goods should be at the risk of owner, consignee or shipper as soon as delivered from the tackles of the steamer at her port of destination. The evidence showing a discharge of the goods upon the wharf at such port, and that they were afterwards taken away by the drayman of the party to whom they were directed, though not the one for whom they were intended, *held*, that the liability of the vessel had ceased.

Creevy, Bush & Clark, for libellants.

Butler, Stillman & Hubbard, for claimants.

CHOATE, D. J. This is a libel *in rem* to recover damages for the failure of the steamship to deliver a case of merchandise conformably to the bill of lading issued for the same. The answer is that the case was delivered according to the terms

of the bill of lading. The bill of lading contained the following clause: "It is expressly understood that the articles named in this bill of lading shall be at the risk of the owner, shipper or consignee thereof, as soon as delivered from the tackles of the steamer at her port of destination; and if not taken away the same day by him they may, at the option of the steamer's agents, be sent to store, permitted to *lay* where landed, or return to the port of shipment at the expense and risk of the aforesaid owner, shipper or consignee." The steamer carried upon the same voyage over 1,000 cases and packages for a firm called L. & H. Blum, and some 700 for the libellants. Both the libellants and L. & H. Blum were merchants doing business at Galveston, Texas, and the voyage was from New York to Galveston.

It is claimed on the part of the steamer that, under the bill of lading, the ship is not liable for the loss of the goods if it happened after they were landed on the wharf at Galveston; that the consignees, these libellants, had notice of the time and place at which the ship was to discharge her cargo, and actually attended at the wharf by their agents during the discharge before this particular case was put out on the wharf; that they, therefore, had due notice of the landing. In the case of *The Santee*, 2 Ben. 595, 7 Bl. 186, a construction was given to a bill of lading similar to this, except that in that case the bill of lading also provided that the goods should be received by the consignee "package by package, as so delivered," *i. e.*, "from the tackles of the steamer." It was held that under such a bill of lading the ship's liabliity ceased when the goods were put on the wharf from the the tackles of the ship, and that the fact that the mate afterwards attempted a separation of the goods of the several consignees, and took receipts for them, did not affect the question.

I do not think there is any material distinction between the two cases. The words held, in the case of the Santee most distinctly to show the purpose of the parties to limit the liability of the ship to the time when the goods were placed on the wharf from the tackles of the ship, was that clause which provides that if the goods, after being so deliv-

ered from the tackles, should not be taken away the same day, they might, at the option of the agents of the vessel, be "sent to store" or "permitted to *lay* where landed," at the expense and risk of the consignee. As to that, Judge Blatchford says, (2 Ben. 525:) "This provision is not ambiguous, and plainly shows that the parties intended that a landing of the cotton on the wharf, at the place of destination, should be regarded as a delivery of it from the tackles of the vessel." This remark applies with full force to the present case.

It is, however, insisted that there is no proof that the case in question was landed on the wharf before it was taken away. There is evidence showing that the cartmen employed by L. & H. Blum, and cartmen employed by the libellants, went to the wharf and took and carried away cases and packages of goods, and that Blum received one package more than his bills of lading called for, and the libellants one less than theirs called for. There is also evidence tending to show that this particular package was misdirected, having upon it the name of "L. & H. Blum," instead of "P. J. Willis & Co.," as stated in the bill of lading. It is shown that some time after the discharge of the cargo the goods contained in this case were found in Blum's store, where, after they were so discovered, they were destroyed by fire. It also was shown that the delivery clerk of the steamer at Galveston was present during the discharge of the cargo, and the carting away of the goods, and that he took note of the number of packages taken away by the cartmen of each consignee, as they were taken away. This witness testifies that "the freight was discharged from the vessel by stevedores; that the draymen selected the freight as it lay on the wharf."

This, it seems to me, is sufficient proof that the case in question had been already delivered upon the wharf before it was taken, as, upon the proofs, it appears that it was taken by Blum's drayman. The subsequent acts of the delivery clerk, which in his testimony he described as a delivery of the goods to the drayman—that is, the checking off of the number of the cart, name of drayman, etc.—are in no way different in character or effect from what was done by the

mate in the case of the Santee. It is observed, in that case, that an actual delivery from the tackles of the ship upon the cart of the wrong person would make the ship liable. 2. Ben. 525; 7 Bl. 188. The evidence does not show any such direct delivery to Blum as that. On the contrary, the proof is that the goods were landed on the wharf, and afterwards taken away by Blum's draymen. I think, therefore, the case is governed by the case of the Santee, and that the ship is not responsible, because the goods in question were delivered, within the meaning of the bill of lading, and the consignees had full notice to attend, and did, in fact, attend, upon the discharge of the vessel to receive their goods. Libel dismissed, with costs.

SIMONETTI *v.* FOSTER and others.

(*District Court, D. Massachusetts.* May, 1880.)

CHARTER-PARTY—GUARANTY OF VESSEL'S CAPACITY.—A charter-party guaranteed the vessel to be able to stow and carry, on the draft of water allowed by the surveyors of the board of underwriters, at least 1,000 tons dead weight. A survey indicated that the capacity to so stow and carry on such draft was but 925 tons. *Held*, that the charterers were not bound to accept and load such vessel.

C. T. & T. H. Russell, for libellant.

A. & J. R. Churchill, for respondents.

NELSON, D. J. This is a libel to recover damages for refusing to load a vessel. The libellant is the owner of the Italian bark, Caterina S., and by a charter-party executed between the parties, December 3, 1878, in which she is described as of "619 tons, or thereabouts, register measurement," let the bark to the respondents for a voyage from Boston to a port in the United Kingdom, or on the continent between Havre and Hamburg, both inclusive, for which the respondents agreed to pay a lump sum of £1,050 British sterling. The charter-party recited that the bark was then "in a Mediterranean port, ready to proceed to Trapani, and there to take a cargo of salt for Boston direct, after discharging which she is to load under this charter," and it contained this clause:

"The said party of the second part (the respondents) doth engage to provide and furnish to said vessel a full and com plete cargo of wheat and (or Indian corn and) or other lawful merchandise, say as much as she can reasonably stow and carry, (*which is guaranteed by vessel not to be less than 1,000 tons dead weight,*) on the draft of water allowed by the surveyors appointed by the marine underwriters, under whose inspection the vessel is to load." On the arrival of the bark in Boston, in May, 1879, freights had fallen, and it having been ascertained by a survey that she could stow and carry, on the draft allowed by the underwriters' inspection, only 925 tons dead weight of Indian corn, (corn being the cargo for which the charter was obtained,) the respondents refused to load her. The question in the case is whether, upon the breach of the libellant's guaranty that the vessel should stow and carry not less than 1,000 tons dead weight of Indian corn, under the circumstances stated, the respondents were justified in throwing up the contract.

It seems to me too clear to admit of any doubt that they were. The guaranty is not a mere descriptive statement as to the capacity of the vessel, or a stipulation that something should be done or happen in the future, but it is an absolute warranty as to an existing state of things, expressed in clear and definite terms. It was intended as a substantive part of the contract, and is to be regarded as a condition upon failure of which the respondents might repudiate the contract altogether, no part of it having been executed in their favor. No case has been cited where a stipulation of this nature has been held to be independent, and not a condition precedent. This contract, like all mercantile contracts, is to be construed according to its plain meaning to men of sense and understanding; and I think those parties never could have intended by this charter-party to require the respondents to load a vessel of less capacity than is called for by the libellant's guaranty. *Lowker* v. *Bangs*, 2 Wall. 728; *Fearing* v. *Cheeseman*, 3 Cliff. 91; *Graves* v. *Legg*, 9 Exch. 709; *Behn* v. *Burgess*, 8 Law Times, 207; *McAndrew* v. *Chapple*, L. R. 1 C. P. 643. The entry is to be: Libel dismissed, with costs.

CAMPBELL *v.* CRAMPTON.

(*Circuit Court, N. D. New York.* May 17, 1880.)

CONTRACT—CAPACITY TO CONTRACT—LAW TO GOVERN.—Where a contract is made in one state, to be performed in another, the capacity of the parties to make the contract is, as a general rule, to be determined by the law of the place where it is entered into.

SAME—AGREEMENT TO MARRY—NEPHEW AND AUNT.—Where a contract for marriage between nephew and aunt was entered into in Alabama, where such marriages were declared incestuous, upon the trial of an action for a breach of such contract in New York the court charged that, if the parties could lawfully marry in New York, and by the terms of their promises they were to be fulfilled by a marriage in New York, the agreement was valid, and damages for the breach of such contract recoverable. *Held*, erroneous.

MARRIAGE—VALIDITY OF.—Generally, a marriage valid at the place of solemnization is valid every where.

SAME—PLACE OF PERFORMANCE.—It is not the mere place of solemnization of a marriage ceremony, but the place where the parties are to be domiciled, that is to be deemed the place of performance of the marriage contract.

SAME—NEPHEW AND AUNT—CONTRACT TO MARRY.—While, under the laws of the state of New York, a marriage between nephew and aunt may not be voidable for consanguinity, it by no means follows that an agreement to marry between parties so related will be tolerated, or damages be permitted to be recovered for breach thereof.

Ransom & Joyce, for complainant.

Wm. Douglas and *A. K. Potter*, for defendant.

WALLACE, D. J. The plaintiff having recovered a verdict for $10,000 for breach of contract of marriage, the defendant now moves for a new trial, alleging error in the rulings upon the trial.

The plaintiff is a half-sister of the defendant's mother. She was temporarily residing at Mobile, Alabama, which was the domicile of the defendant, when the marriage engagement took place. Subsequently the plaintiff returned to the state of New York. The evidence authorized the jury to find that at the time of the engagement to marry the parties did not contemplate an early marriage; that it was not until after the plaintiff had removed to the state of New York that any definite plan as to the time or place of the marriage was enter-

tained, and that then it was contemplated that the parties should be married at some convenient future time in the state of New York. No question was raised upon the trial of an intent to marry in New York for the purpose of evading the laws of Alabama.

By the statutes of Alabama marriage between the son and the sister of his mother is declared to be incestuous and void, and such persons who marry or who cohabit together are declared guilty of crime and punishable by imprisonment. By the statutes of New York marriages between parents and children, including grandparents and grandchildren of every degree, ascending and descending, and between brothers and sisters of the half as well as of the whole blood are declared to be incestuous and absolutely void.

The jury were instructed that while the parties could not lawfully contract marriage in the state of Alabama, and the promises for such a marriage would be void, they could lawfully marry in the state of New York; and if, by the terms of their promises of marriage, the promises were to be fulfilled by a marriage in New York, the agreement was valid, and plaintiff, upon proving a breach, could recover damages. If this instruction was erroneous the motion for a new trial must prevail.

This ruling involves several novel questions of law, which could not be satisfactorily considered upon the trial. Some of these questions arise under that difficult and perplexing branch of jurisprudence which relates to the conflict of laws of different states, as to which it was well remarked by *Porter*, J., in *Saul* v. *His Creditors*, 17 Mart. (La.) 570: "Our former experience has taught us that questions of this kind are the most embarrassing and difficult of decision that can occupy the attention of those who preside in courts of justice."

The first question which the instructions present is whether the agreement of the parties is controlled by the law of Alabama or by that of New York. As the statute of Alabama declares a marriage between persons related, as are the parties, void and criminal, if the law of Alabama controls, no agreement having such a marriage as its consideration can be

enforced. The ruling upon the trial proceeded upon the theory that the agreement was governed by the law of New York, because the promises were to be fulfilled in New York.

It would seem that the question whether the validity of a contract, made in one place and to be performed in another, is to be determined by the law of the place where the contract is made, or by the law of the place of performance, could not, at this day, be a doubtful or open one. There is, certainly, very high authority to sustain the ruling on the trial. In Story's Conflict of Laws, § 242, the rule is stated thus: "Generally speaking, the validity of the contract is to be decided by the law of the place where it is made, unless it is to be performed in another country; for, as we shall presently see, in the latter case the law of the place of performance is to govern." Again the learned author says: "The rules already considered suppose that the performance of the contract is to be in the place where it is made, either expressly or by tacit implication. But when the contract is either expressly or tacitly to be performed in any other place, then the general rule is in conformity with the presumed intention of the parties that the contract, as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance." Conflict of Laws, § 280.

In *Andrews* v. *Pond*, 13 Peters, 65, the doctrine is briefly stated thus: "The general principle in relation to contracts, made in one place to be executed at another, is well settled. They are governed by the laws of the place of performance."

On the other hand, the rule is laid down in a very recent case as follows: "Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with the performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitations, depend upon the law of the place where suit is brought." *Scudder* v. *Union National Bank*, 1 Otto, 406. The question in that case was whether a parol promise made in Illinois to accept a bill payable in

Missouri was a contract governed by the laws of Illinois or Missouri, and it was held to be an Illinois contract, and governed by the law of that state. The court say: "The contract to pay the bill was a different contract from that of acceptance."

The parol promise, being valid by the law of Illinois, was valid everywhere. This was all it was necessary to decide; and while the statement of the general principles of the law relative to contracts made in one state to be performed in another is entitled to great respect, from the high authority of the court from which it was enunciated, it is not controlling upon the present question, and will be found quite inadequate in its application to a great variety of cases which present questions of the conflict of laws. So far as the validity of a contract depends upon the formalities requisite to its binding force, the general rule expressed by the text writers is that the test depends upon the law of the place where the contract is made. Westlake, art. 175. An illustration is the case of an unstamped contract, made in a country where a stamp is required. Even in this case the authorities conflict, and Judge Story says it might be different if the contract were payable in another country, where no stamp is required. See Story Confl. of Laws, § 260, and notes. Wharton, (Conflict of Laws, § 401,) states the general rule thus: "Obligations, in respect to their modes of solemnization, are subject to the *locus regit actum.*" The validity of a contract may depend upon the capacity of the parties, or the forms of authentication, or the nature of the consideration; and it certainly cannot be accepted as an universal criterion that the validity or invalidity of a contract is to be determined by the law of the place where the contract is made.

As respects the capacity of parties the law of domicile may dominate the law of the place of the contract when rights of person as distinct from rights of property are concerned, (see 2 Parsons on Cont. 572, 574, and notes, 5th Ed.;) and, as respects the consideration matter, a contract may be invalid by the law of the place of the making, because prohibited by the local law, and yet be valid when to be performed in

another place or where brought in question elsewhere. In disposing of the many vexed questions that arise under the qualifications of the general rules the courts are frequently obliged to fall back upon the principle that only such claims will be regarded as having a legal foundation as are maintainable in the place where the suit is brought. Wharton, § 401.[o]

In the present case the question arises whether the validity of the contract, as respects the capacity of the parties to it, depends upon the law of Alabama, where the contract was made, or of New York, where it was to be performed. Although the laws of Alabama do not, in terms, incapacitate persons related, as are these parties, from agreeing to marry each other, the statute does incapacitate them from contracting the marriage relation. Neither party could acquire any rights or be subjected to any liabilities by the agreement, because of the statutory disability. To all intents and purposes the agreement was void, because of the disability of the parties by the laws of Alabama, unless it is saved because it was to be performed in New York.

As to the capacity of parties to enter into a contract, it must be accepted as the general rule that the law of the place where the contract is made must be the test. Story Conflict of Laws, § 103. The right of every state to prescribe the conditions which determine the personal *status* of its own citizens is unquestioned. 1 Burge Col. & For. Laws, 196. But the most contradictory opinions prevail as to the extra-territorial operation of these conditions. By some of the authorities it is held that when a statute of domicile confers, abridges or destroys capacity, whether this capacity be generally for the possession of rights or specially for the exercise of business, then such *status* attaches to the subject wherever he may stray, and is to be regarded as conclusive by all foreign courts. Wharton, § 91; 2 Parsons Cont. (5th Ed.) § 572; Story, § 65. But the result of the English and American authorities is to the contrary, and the incapacity of the domicile of the party is not permitted to shield him from obligations which he could otherwise lawfully assume at the place

where they are incurred. Story Conflict of Laws, §§ 101–102; Wharton, § 115.

That this contrariety of opinion still exists is shown by a very recent case in England, (*Sattomeyer* v. *De Barros*,) decided by the high court of justice, in which Sir James Haunen takes occasion to criticise the views expressed by the lord justices, in the court of appeals, in the same case. Upon an appeal from the decision of Sir R. Pillimore, Sir James Haunen says: "The lord justices appear to have laid down as a principle of law a proposition which was much wider in its terms than was necessary for the determination of the case before them. It is there expressed: 'It is a well-recognized principle of law that the question of personal incapacity to enter into any contract is to be decided by the law of domicile.' And, again: 'As in other contracts, so in that of marriage, personal capacity must depend on the law of domicile." It is, of course, competent for the court of appeals to lay down a principle which, if it forms the basis of the judgment of that court, must, unless it be disclaimed by the house of lords, be binding on all future cases. But I trust I may be permitted, without disrespect, to say that the principle thus laid down has not hitherto been 'well recognized.' On the contrary, it appears to me to be a novel principle, for which, up to the present time, there has been no English authority. What authority there is seems to be distinctly the other way.

"This is the case of *Meade* v. *Roberts*, 3 Exch. 183. The contract on which defendant was sued was made in Scotland. The defence was that the defendant was an infant; but Lord Eldon held the defence bad, saying: 'If the law of Scotland is that such a contract as the present could not be enforced against an infant, it should have been given in evidence. The law of the country where the contract arose must govern the contract.' Sir E. Simpson, in the case of *Schrimshire* v. *Schrimshire*, 2 Cons. 395, when dealing with the subject, says: 'These authorities show that all contracts are to be considered according to the laws of the country where they are made; and the practice of civilized countries has been

conformable to this doctrine, and, by the common consent of the nations, has been so received.' This is the view of the subject which is expressed by Burge, vol. 1, § 4132, and by Story Confl. Laws, § 103; and Sir C. Cresswell, in *Simonen* v. *Mallac*, 2 Sw. & Tr. 67, says: 'In contracts the personal competency of individuals to contract has been held to depend on the law of the place where the contract was made.' If the English reports do not furnish more authority on the point, it may, as Mr. Westlake has said, in his work on private international law, he referred to its not having been questioned. In the American reports the authorities are numerous, and uniformly support Sir C. Cresswell's statement of the law which I have quoted. I cannot but think, therefore, that the learned lord justices would not desire to base their judgment on so wide a proposition as that which they have laid down with reference to the personal capacity to enter into all contracts." 20 Albany Law Jour. No. 23, 450.

Upon principle no reason can be alleged why a contract void for want of capacity of the party at the place where it is made should be held good because it provides that it shall be performed elsewhere, and nothing can be found in any adjudication or text-book to support such a conclusion. It is a solecism to speak of that transaction as a contract which cannot be a contract because of the inability of the persons to make it such.

When the authorities which declare that the obligation, interpretation, nature and validity of a contract made in one place, which is to be performed in another, are to be determined by the law of the place of performance, are examined, it will be found that the term "validity" refers to the conditions of the contract, and the extent and nature of its obligation, as to which the agreement will be upheld or defeated, according to the sanction or the prohibitions of the law of the place where the parties have located the transaction.

But if it should be conceded that the law of the place of performance of the contract is the law which determines its validity, in all respects, the question then arises whether the

place of performance of an agreement to marry is the place where the marriage is to be solemnized, or whether it is not that place where the parties are to reside, and discharge their marital relations. The instructions on the trial assumed that the place of solemnization was the place of performance.

The word "marriage" is used in two different senses: the one denoting the act of entering into the marriage relation; the other the relation itself. In the latter sense it is defined as the civil *status* of one man and one woman, united in law for life, under the obligation to discharge to each other and to the community those duties which the community, by its laws, imposes. 1 Bishop on Marriage and Divorce, § 3.

The general rule is, undoubtedly, that a marriage, good by the law of the place of solemnization, is good everywhere.

It is unnecessary to refer to the exceptions, such as polygamous or incestuous marriages. The rule rests upon considerations of policy. "Infinite mischief must necessarily arise to the subjects of all nations with respect to legitimacy, successions, and other rights, if the respective laws of different countries were only to be observed as to marriages contracted by the subjects of those countries abroad, and therefore all nations have consented, or are presumed to consent, for the common benefit and advantage, that such marriages shall be good or not, according to the laws of the country where they are celebrated. By observing this rule few, if any, inconveniences can arise. By disregarding it infinite mischiefs may ensue." *Scrimshire* v. *Scrimshire*, 2 Hagg. Cons. 417, 418.

The question here is not whether the place of solemnization of a marriage controls the *status* of the parties, but whether the place of solemnization is the place of performance of an agreement to marry. The promise is to enter into a relation to which the state, where the parties are to be domiciled, can attach its own conditions, both as to the creation and duration of the relation. If the parties here contemplated making Alabama their domicile, their promise to marry could not be substantially fulfilled without abandoning their intention; because, in Alabama, they would have been not only social outlaws but criminals.

It cannot be said that the domicile which the parties to an agreement of marriage contemplate is not one of the material elements of the transaction in view. On the contrary, it is of the very essence of the contract; and when it is found that the parties cannot enter into the marriage relation without expatriating themselves, it would seem that either party would be justified in receding from the arrangement. It is, therefore, the most reasonable conclusion that the place where the parties are to be domiciled is the place of performance of the marriage contract; both because the substantial consequences of the act to be performed are fixed by the law of the domicile, and because the presumed intention of the parties to the agreement cannot otherwise be effectuated.

It will thus be seen that whether the validity of the agreement depends upon the law of the place where the contract was made, or that of the place where it was to be performed, the ruling at the trial cannot be upheld.

If these conclusions are correct it is unnecessary to decide whether or not an agreement to marry between persons related as are the parties is one which will be enforced by the law of this state. But as this point has been fully argued by counsel, and will, quite probably, require decision upon another trial, in view of some of the evidence offered on the former trial, it is proper that it be considered now.

It is insisted for the defendant that if the agreement between the parties is a New York contract, yet it cannot be enforced—*First*, because a marriage between the parties would have been a voidable marriage, which either party could procure to be annulled at any time during the lives of both; and, *second*, if the marriage would not have been a voidable one, an agreement to marry between persons related as are the parties is contrary to public policy, because offensive to decency and the purity of domestic life, and, therefore, will not be enforced.

The case is to be considered as though the parties were nephew and aunt; as relatives of the half-blood are, equally with those of the whole blood, included in those degrees of consanguinity within which marriages are deemed incestuous.

Horner v. *Horner*, 1 Hagg. Cons. 353; *Queen* v. *Brighton*, 1 Ell. Bl. & Son, 447; *Regina* v. *Brighton*, 1 Best & Smith, 447; *People* v. *Jeuners*, 5 Mich. 318; 1 Bishop's Mar. & Divorce, § 317. Marriages between persons in the direct lineal line of consanguinity, and between brothers and sisters in the collateral line, are incestuous and void as against the law of nature. *Sutten* v. *Warren*, 10 Met. 451; *Hiram* v. *Pierce*, 45 Maine, 367; *Wightman* v. *Wightman*, 4 John. Ch. 343. In the last-cited case Chancellor Kent expressed the opinion that, in the absence of legislation, it could not be maintained that marriages between persons of a remote degree of consanguinity can be declared void.

A marriage between nephew and aunt was prohibited by the canon law of England, and the prohibition was incorporated into various statutes of Henry VIII., and the distinction between void and voidable marriages has become crystallized into the later law of England. Such marriages, while not void, were voidable by the sentence of the ecclesiastical courts pronounced during the life-time of both parties.

Whether this distinction has ever obtained in our own country is an open question, but that it has never obtained in this state is authoritatively settled.

The commentators recognize it as a part of the body of law brought to the colonies by our ancestors and adopted by us; but in *Burtis* v. *Burtis*, 1 Hopk. 557, the question was examined by the chancellor, in the light of the provincial history of New York, and he concluded that the law of England concerning divorces and matrimonial causes was never adopted in the colony of New York, in fact or practice, and was never the law of the colony; and that the statutes of the state were clearly original regulations, intended to authorize divorces in cases in which no divorce could before be obtained, and he says "to consider them as an adoption of the English law of divorces would be a violent perversion of the language and intention of the legislature." This case is followed by *Palmer* v. *Palmer*, 1 Paige, 276, to the effect that the court of chancery had no power to decree a dissolution of the marriage contract except in the special cases provided for by statute,

and has never been questioned by the courts of this state. See, also, *Perry* v. *Perry*, 2 Paige, 501.

It must be held, therefore, that the consanguinity of the parties would not render their marriage a voidable marriage in this state. But it by no means follows that an agreement to marry between persons thus related will be tolerated. It is one thing to adjudge that after marriage the consanguinity of the parties cannot be invoked to annul the marriage, and quite another to decide whether an agreement for marriage between persons so nearly related should be sanctioned. In the one case the bastardizing of the issue, and the unsettling of successions, would furnish decisive reasons why the marriage should not be annulled. When the parties have not consummated their agreement these reasons cannot apply.

Notwithstanding the extensive research of counsel no case has been found which determines whether an agreement for a marriage between a nephew and aunt is obnoxious as contravening morality or public policy. Such marriages are expressly prohibited by the civil law, by the laws of England, and by the statutes of many of our own states. Where such marriages are prohibited the question would not arise, because it would not be attempted to recover damages for the breach of an unlawful contract; and it is not improbable that the question has not been presented to the courts of the states where there is no statutory prohibition, because such marriages are felt to be so unnatural and revolting that they have been very rare, and but few persons have been found willing to contemplate such a union.

The peculiar circumstances of the present case went far to justify the jury in an attempt to punish the defendant. He was a man of education, a physician of prominence, many years the senior of the plaintiff, and, having overcome her scruples against the engagement, held her to her promises until she had lost her youth and health, and sacrificed her prospects in life; and the jury, doubtless, were satisfied that she brought this action rather to punish him for his selfish and dishonorable treatment than to obtain pecuniary recompense for her own injury. These considerations, of course,

can have no influence here, and her case must stand or fall by the inflexible rules which, while they may be harsh in the particular case, are, nevertheless, the universal test.

The fact that marriages between persons so related are so commonly prohibited by legislation in those communities which are among the most advanced in moral and intellectual progress, must be deemed high evidence of the generally prevailing sentiment on the subject. Whether this sentiment finds its origin in the mandate of divine law or the belief that such unions are a violation of the physical laws of nature, or in the conviction that to tolerate such alliances would impair the peace of families and lead to domestic licentiousness, its existence must be acknowledged, and traced to some or all of these sources.

The statutes of Henry VIII., prohibiting such marriages, are but a re-affirmation of the Levitical law. *Regina* v. *Chadwick*, 12 Eng. Jurist, 174. While the Levitical law is not binding as a rule of municipal obedience, it has been judicially declared to be a moral prohibition, and as such binding upon all mankind, (*Harrison* v. *Buswell*, 2 Vent. 9,) and is now incorporated into the statutes of England by the acts of 5 and 6 William IV., *c.* 54. In Illinois it is held that such a marriage "is prohibited by the laws of God," within the meaning of a statute of that state. *Bonham* v. *Badgley*, 2 Gilman, 622. In *Parker's Appeal*, 44 Penn. St. 309–312, the court, while holding that such a marriage was not void under the laws of Pennsylvania, took occasion to say: "We cannot refrain from stating that such connections are destructive of good morals, and should be frowned upon by the community."

Between what degrees of consanguinity the line is to be found, which determines what marriages are unobjectionable and what are not to be tolerated, it is not necessary to decide; but the better opinion would seem to be that marriages should not be sanctioned in any nearer degree than that of cousins-german. A marriage between uncle and niece, or nephew and aunt, would certainly shock the sentiment of any enlightened community, and this, in the absence of any other test of the

propriety or decency of things, should be accepted as controlling. It can hardly be doubted that if the parties here had become husband and wife they would have been regarded as joined in an unnatural union, and as victims of a corrupted moral taste, to be pitied and avoided, if not as objects of detestation; and in this view the plaintiff may consider herself fortunate that she has been saved from such a future by the selfish and perfidious conduct of the defendant.

A new trial is granted.

RAMSEY *v.* THE PHŒNIX INSURANCE COMPANY.

(*Circuit Court, N. D. New York.* March, 1880.)

INSURANCE — EQUITABLE OWNER — INSURABLE INTEREST. — A party in possession of insured premises, under a valid subsisting contract for purchase of the same, is the equitable owner, and has an insurable interest therein.

SAME — SAME — REPRESENTATION AS TO OWNERSHIP. — It is not a breach of warranty of ownership for such party, upon an application for insurance of such property, to represent that it is his property, although he may not have paid the entire amount of the purchase money.

SAME — CONDITIONS IN POLICY — REPRESENTATION. — A policy of insurance contained a provision that if there was any false representation by the assured as to the condition, situation, or occupancy of the premises, omission to make known every fact material to the risk, * * * or if the property should be sold or transferred, or any change take place in the title or possession, whether by judicial decree, legal process, voluntary transfer or conveyance, or if the assured was not the unconditional and sole owner, or if his interest was not fully stated, the same should be void. The assured was the vendee in possession, under contract of sale; the policy was also made payable to vendor, to the extent of his interest. In an action upon the policy by such vendor, *held*, that it was not a misrepresentation for such vendee, in applying for such insurance, to represent himself as the owner of such premises.

SAME — CHANGE IN OCCUPANCY. — Nor was it a "change of title or possession" for him to have the same occupied by tenants, instead of himself; but that the change thereby contemplated referred to the possessory right, and not mere occupation.

SAME — PROOFS OF LOSS — WAIVER OF DEFECTS IN. — Imperfections in preliminary proofs are deemed waived by a repudiation of any liability under the policy to the person entitled to demand payment.

WALLACE, D. J. The policy upon which this action was brought insured the dwelling-house of one Zimmer, and the loss was, by the terms of the policy, payable to the plaintiff "as his interest may appear."

The policy contains the following conditions: "Any false representation by the assured of the condition, situation or occupancy of the property, or any omission to make known every fact material to the risk, or an overvaluation, or any misrepresentation whatever, either in a written application or otherwise; or if the property be sold or transferred, or any change take place in title or possession, whether by legal process, judicial decree, voluntary transfer or conveyance; or if the assured is not the unconditional and sole owner of the property; or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, mortgagee, lessee or otherwise, is not truly stated in this policy, then, and in every such case, this policy shall be void."

After the policy was issued, and before the loss, Zimmer failed to make payments according to his contract with plaintiff, and moved out of the dwelling. The dwelling was thereafter occupied by tenants. The question of fact was submitted to the jury whether Zimmer had surrendered or abandoned his contract to the plaintiff, with instructions that if there had been such surrender or abandonment the plaintiff could not recover. The jury found there had been no surrender or abandonment, and, by implication, that the tenants who occupied the premises were Zimmer's tenants.

A verdict having been found for the plaintiff, the defendant now moves for a new trial.

It is insisted for the defendant that the policy is void because Zimmer was simply a vendee in possession of the premises under an executory contract to purchase of the plaintiff when the policy issued, and, therefore, "not the unconditional and sole owner of the property," within the condition of the policy. It is also insisted that because Zimmer stated to defendant's agent, at the time of applying for the insurance, that he "wished his house on Porter street insured," without stating specifically the nature of his interest, there was an

"omission to make known every fact material to the risk," within the conditions which render the policy void. The objections to plaintiff's right to recover may be considered together, and may be disposed of by the answer that Zimmer was the equitable owner of the property, and was the unconditional owner, except as to the plaintiff, and plaintiff's interest was sufficiently indicated by notice that he had such an interest in the premises that the loss would be payable to him.

A party in possession of insured premises under a valid subsisting contract of purchase is the equitable owner, and has an insurable interest, although he has not paid the whole consideration money. He is not guilty of a misrepresentation if he represents the house as *his* when he applies for insurance, and there is no breach of warranty if the house is described as "his dwelling-house" in the policy. The statement and the state of facts are consistent with each other. There is no misrepresentation, because an intent to deceive cannot be inferred. There is no breach of warranty, because the representation is true in substance. *Strong* v. *Manuf'rs Ins. Co.* 10 Pick. 40; *Ætna Fire Ins. Co.* v. *Tyler*, 16 Wend. 385; *Davis* v. *Quincy Mutual Fire Ins. Co.* 10 Allen, 113; *Niblo* v. *North American Ins. Co.* 1 Sandf. 551; *Laidlow* v. *Liverpool, etc., Ins. Co.* 13 Grant Ch. 377.

It was not incumbent upon Zimmer to make a fuller disclosure of his interest in the premises when he applied for insurance. His failure to do so was not an "omission to make known a fact material to the risk," within the meaning of the policy. This clause in the policy is to be read with the other clauses of which it forms part, and applying the maxim "*noscitur a sociis*" the word "omission" is equivalent to concealment in the contemplation of the policy. The cases cited are authorities to the effect that in view of Zimmer's interest as equivalent owner of the premises, in the absence of specific inquiry, he communicated all that was material to the risk, and was not bound to specify the precise extent or nature of his interest. The fact that Zimmer moved out of the dwelling-house and let it to tenants is not a defence

within the condition that avoids the policy "if any change take place in title or possession." The change of possession contemplated is something more than a change of occupation. It is a change effected "by legal process, judicial decree, voluntary transfer, or conveyance;" one which refers to his possessory right, and not to the occupancy of the insured. The possession of Zimmer's tenants was his possession, within the meaning of the policy.

Finally, it is insisted for defendant that plaintiff should be defeated because the proofs of loss were made and verified by him and not by Zimmer; and, inasmuch as the policy requires the proofs to be made by the insured, a condition precedent to a cause of action on the policy has not been complied with. It is a sufficient answer to this position that the defendant received and retained the proofs of loss served by the plaintiff, at the same time repudiating all liability upon the policy, upon the ground that Zimmer had no interest in the premises at the time of the fire. The plaintiff was the person to whom the whole loss was payable by the terms of the policy, and the proper party to bring an action to recover it. By repudiating any liability under the policy to the person entitled to demand payment, the defendant waived any imperfections in the preliminary proofs. Angell on Insurance, § 244.

POOR *v.* HUDSON INSURANCE COMPANY.

(*Circuit Court, D. New Hampshire.* May 1880.)

INSURANCE—PROPOSITION FOR CANCELLATION OF RISK—CONDITIONAL ACCEPTANCE.—An insurance agent proposed as to a certain risk to cancel the policy in whole or in part, place the risk in another company named, or return the premium. The agent of the insured returned the policy to him, directing that the risk be placed in the company named. The insurance agent wrote "cancelled" upon the policy, but before reinsuring, the building was destroyed. *Held*, that as the condition upon which the cancellation was authorized had not been complied with, the insurance company could not insist upon the attempted cancellation as relieving it from liability.

FAMILY—DEFINITION OF.—A family is a number of persons living together in one house and under one management or head. No specific number is requisite to constitute such family, nor is it necessary that they eat in the same house.

INSURANCE—CONDITION AS TO OCCUPANCY.—A policy of insurance upon a building used as a summer hotel provided that a family should live in it throughout the year. It was destroyed by fire in November, and at the time of its destruction two men servants and employes of the insured were staying therein, taking their meals at an adjoining hotel, and working around the premises. *Held*, sufficient to support a verdict for plaintiff.

SAME—SAME—INSTRUCTIONS.—Instructions as to whether such condition was complied with *held* proper.

SAME—STATEMENTS MADE TO AGENT AT TIME OF INSURANCE.—Evidence of what was said to the insurance agent at the time of the insurance, as to how the house had been occupied the previous year, *held* competent, as aiding to arrive at the intention of the parties and true interpretation of the contract.

John S. H. Frink and *A. R. Hatch*, for plaintiff.

S. C. Eastman and *G. Marston*, for defendant.

CLARK, D. J. This was an action on a policy of insurance issued by the defendants upon the Oceanic Hotel, at Star island, one of the Isles of Shoals, against fire. The policy was dated July 25, 1875, for $2,500, and the hotel was burned November 11th, following, at 3 o'clock in the morning. The insurance was procured by Reed Bros., of Boston, as agents for Mr. Poor, through Mr. Craig, of Portsmouth, as agent of the company. At the trial of the cause before a jury two principal questions arose—*First*, whether the policy, which was for one year, had been cancelled by agreement of parties before the loss occurred; and, *second*, whether the hotel was occupied, at the time of the fire, as stipulated in the policy.

Some time before the loss happened the defendant company became dissatisfied with the risk, and instructed Mr. Craig, their agent, to procure a diminution of it in part, or in its entirety. Thereupon Mr. Craig wrote to Reed Bros., at Boston, stating the wishes of the Hudson company, and proposing to reduce the risk one-half or in the whole; and stating further that he could place the risk in the Lancashire company, or he would return the premium. Reed Bros. returned answer that they did not wish the risk divided, half in the

Hudson company, and half in the Lancashire company; but that the policy might be cancelled, and the whole risk put in the Lancashire, and the unexpired or return premium used for re-insurance, and they inclosed the policy to Craig for that purpose.

Upon receiving the policy, November 9, 1875, Craig immediately wrote "cancelled" upon it. But he did not place the risk in the Lancashire company, or any other. He made up the return premium and placed it with the policy, thus marked "cancelled," in the safe, intending to go to Boston the next morning, the tenth. But he did not go; and the next morning, the eleventh, the fire occurred, with the policy and premium still in Craig's safe. He gave no notice to Reed Bros., or Mr. Poor, that he had not re-insured the property. The next day, the eleventh, after the fire, Craig sent the return premium to Reed Bros., at Boston, by express; but they declined to receive it. Of this proceeding, or negotiation for cancellation of the policy, Poor had no knowledge, nor had he given any authority for it, other than that the Reed Bros. were agents to procure the insurance for him.

Upon this evidence the court ruled that there was no contract for cancellation of the policy completed which could bind the parties; that, waiving the question of authority in Reed Bros. to make a contract for cancellation, they had consented to it only with the understanding that Craig should procure a re-insurance in the Lancashire company; and, failing to do this, the Hudson company could not insist that the policy was cancelled and leave Poor to bear the loss, especially as they had not given him notice that they had not re-insured or returned him the premium. To this ruling the defendant excepted. But it was, we still think, correct.

The first proposition of the Hudson company was to cancel the policy in whole or in part; to place the risk in the Lancashire company or return the premium, as the plaintiff might elect. He assented that the policy might be cancelled for the whole, and the property re-insured by them in the Lancashire company. The two were coupled together, and there is no evidence that the plaintiff agreed that the policy should

be cancelled without a re-insurance, and as the Hudson company did not re-insure they cannot insist upon the cancellation. There was no agreement of parties. 1 Parsons on Contracts, 6.

There was a stipulation in the policy that the defendant company might terminate the insurance "at any time, on giving notice to that effect, and refunding a ratable proportion of the premiums;" and the defendant's counsel insist that Craig, in writing to Reed Bros., had this provision in his mind, and acted in reference to it. This may be so. But before he could have the benefit of that stipulation, even if acting upon it, he should have conformed to it, and given notice, and returned the required part of the premium. This he did not do.

The counsel for the defendant requested the court to instruct the jury that the letter of Craig contained a proposition to cancel or reduce the Hudson policy, and that this was made by him as the agent of that company; but that the proposition to re-insure in the Lancashire company was made by him (in the letter) as the agent of the Lancashire company, and that the letter of Reed Bros. was an acceptance of the proposition of the Hudson Insurance Company to cancel the policy, without including the other, to re-insure. The court declined so to instruct, and properly.

It was a question of fact and not of law whether Craig acted as the agent of one company or the other, or both; and if Craig was the agent of the Lancashire company in offering to procure a re-insurance, it can make no difference, because Reed Bros., in accepting the proposition to cancel the Hudson company's policy, coupled it with a re-insurance of the property in the Lancashire company, which was not done by Craig, whether as agent of one company or the other.

In support of the second ground of defence, that the hotel had not been occupied as agreed in the policy it should be, to-wit, that a family should live in it throughout the year, there was evidence tending to show that the house was occupied as a hotel in the summer, but not at other seasons; that the defendant's agent, at the time of the insurance, knew the

manner of its occupation; that the plaintiff, with his wife and sons, were at the hotel in the summer, managing the hotel, and had in their family a large number of employes and servants; that part of the family ate at the Oceanic, and part at the Atlantic, a house used as a part of the hotel arrangement; that the plaintiff, with his wife and sons, left the hotel at the close of the hotel season, but left there a large number of their employes, at work about the premises and in charge of the property, under the direction and management of the plaintiff; that all of these employes ate at the Atlantic House, and most of them slept there; but that two of them roomed and slept in the Oceanic, having their clothing there, and working outside and about the house, going in and out several times a day; that they had been in the employ of the plaintiff for months, and one of them was a porter in the hotel—the Oceanic—and that both were in the building at the time of the fire, and escaped through the window; that the plaintiff was often at the island and "stopped" at the Oceanic; that he was there the day before the fire; that Craig, the agent of the defendants, knew how the hotel was occupied and was satisfied; and that another agent of the defendant knew of it, and was satisfied that the employes should eat at the Atlantic House.

Upon this evidence the defendant's counsel requested the court to instruct the jury:

"*First.* That the occupation of the premises insured by two hired men, in the plaintiff's employ, who slept in the house and took their meals elsewhere, being employed during the day elsewhere, was not such an occupation of the premises as complied with the warranty that a family should live in the house.

"*Second.* That if the jury should find Poor and wife and children had left the Oceanic and were living at his residence at Somerville, and that the only occupation of the hotel was by two laborers sleeping in it, taking their meals elsewhere, and spending their days elsewhere in labor or matters outside of the house, such occupation would not be a compliance with this warranty.

"*Third.* That under such circumstances two laborers would not be a part of Poor's family.

"*Fourth.* That under such circumstances the two laborers would be a part of the family living at the Atlantic House; the foreman in charge of the island living at the Atlantic House, and furnishing at that house the meals to all persons in the employ of the plaintiff, including the two laborers who slept in the Oceanic House.

"*Fifth.* That upon all the evidence the jury would not be warranted in finding that the warranty had been complied with."

The court declined to instruct the jury specifically as requested, but did charge them that the warranty in the policy "that a family should live in the house throughout the year" was a contract which must be substantially complied with in its terms to enable the plaintiff to recover; that it was not sufficient that there were watchmen in the house, or that it was equally safe by some other means, but that the defendant had the right to insist that it should be occupied as agreed; that the words "family" and "live" were used in the policy in their ordinary signification, as a collection of persons dwelling together in a house under one head; that no definite, particular number of persons was necessary to constitute a family, but it should be a family as ordinarily constituted, and living in the ordinary way; that a knowledge on the part of the defendants that the house was occupied in any other manner could not affect the contract, unless assented to by the defendants, or they acted in such a way as to leave the plaintiff to believe that they did assent to it.

To these instructions the defendants take no exception; but they do except that the specific rulings desired by them were not made.

But upon mature reflection we are satisfied that they have no legal cause for complaint; the jury were sufficiently instructed in the law applicable to the case.

Whether a house is or is not occupied by a family is a question of fact, and should be decided by the jury, and not by the court; and whether a given number of persons consti-

tute a family is oftentimes, perhaps always, to be decided in the manner in which they live, which is, as before stated, a question of fact.

The most comprehensive definition of a family is, a number of persons who live in one house and under one management or head. There is no specific number required to constitute a family; but they must live together in one house and under one head. Nor is it necessary they should eat in the house where they live. There are many families, it is well known, who live in one place and eat outside of it. Nor was it necessary that they should be employed in the house or about it; nor was it material that they were hired. The precise question is, were they living there together, under one head or management? This is one of fact and not of law.

The evidence tended to show that these two men lived at the Oceanic; that they were in the employ of the plaintiff, and under his direction, control and management. He owned the house in which they abode—not as tenants, but as servants or employes. It could not be decisive of the question, as matter of law, that the wife and sons of the plaintiff lived at Somerville, and that he passed most of his time there. He was often at the Shoals, and stayed at the Oceanic when there. Many persons have residences in town, and at the seaside or mountains, or in the country, at the same time, and may be said to live in both places; they have their servants and employes at both places.

The court could not instruct the jury, as requested, that the two laborers would not be a part of the plaintiff's family, under these circumstances; the evidence rather tended to show the contrary—that they were a part of his family; he so testified.

Nor could the court instruct the jury, upon all the evidence, that they would not be warranted in finding that the warranty had been complied with, as there was evidence tending to show that the defendants' agent, who contracted the insurance, knew how the house was occupied, and was satisfied with it, and this evidence might be weighed by the jury in determining whether the defendants knew how the house was

occupied and assented to it as a compliance with the contract, or waived a more strict compliance.

The defendants are mistaken in supposing there was no evidence to go to the jury in regard to a waiver. There was evidence that Craig said that he knew how the house was occupied, was satisfied with that occupancy, and considered it safer than a family.

The defendant says, in the brief of his counsel, "what was really left to the jury was the meaning of the terms used," and "the legal effect of the instruction of the court was to advise the jury as to the legal effect of the acts in the contract, leaving them to construe the laws."

In this there is a mistake. The court did not leave to the jury "the meaning of the terms used." It instructed the jury as to the meaning of the words, and the counsel say, in their brief, the explanation given of the word "family" was correct and satisfactory. Nor did the court leave the laws to the jury. It instructed that the provision in the policy that a family should live in the house was a contract binding on the plaintiff, and must be performed by him, or waived by the defendants, before he could recover. The court instructed the jury what a family was. With that instruction the defendant was satisfied. The court left it to the jury to find *the fact* whether such a family was living in the house at the time of the fire. That duty belonged to them.

At the trial the court admitted evidence that, at the time the insurance was effected, the plaintiff's agent told the defendant's agent how the house had been occupied the previous winter. To this evidence the defendant's counsel objected, on the ground that whatever was said at the time of the contract was merged in the contract, and could not be received to control, enlarge, or restrict the contract.

Such is undoubtedly the law; but the court did not admit the evidence for such purpose, but as tending to show the previous occupation and condition of the property, as aiding to arrive at the intention of the parties, and the true interpretation of the contract. For this purpose we think the evidence was competent.

The defendant also objected that the plaintiff's witnesses were permitted to testify that Craig, since the fire, had said that he knew how the house was occupied, and was satisfied with that occupancy, and considered it safer than a family. But, as he does not notice the objection in his brief, it may be that he does not, after reflection, rely much upon it. However that may be, the evidence was competent upon either of of two grounds—*First*, as tending to show a substantial compliance with the contract by the plaintiff; and, *second*, a waiver by defendant of a more strict compliance.

Judgment on the verdict.

BROWN *v.* LEETE.

(Circuit Court, D. Nevada. March 15, 1880.)

ADVERSE POSSESSION—DIVISION LINE.—Where one claiming title by virtue of a deed, describing the land according to the United States survey, took possession, marked the dividing line, and occupied thereto exclusively, claiming title as to the true boundary, *held*, that, although such line was not the true one called for in the deed, the possession was adverse, and, when continued long enough, a bar.

ACQUIESCENCE—DIVISION LINE.—Acquiescence in a dividing line for a period equal to that fixed by the statute of limitations for gaining title by adverse possession, binds the party acquiescing to that line.

William Webster, for plaintiff.

Lewis & Deal, for defendants.

HILLYER, D. J. This is an action of ejectment for the possession of a narrow strip of land in the S. W. ¼ of section 1, township 19.

Both parties derive title from the United States; and the controversy has reference to the true lines dividing the quarter section into quarters, in one of its aspects, and in another to the character of the defendant's occupation of the premises in dispute.

The defendant claims the disputed territory by virtue of his deed for the S. E. ¼ of said S. W. ¼, and the plaintiff, by virtue of his deeds, for the other three-quarters thereof.

The lines in dispute are the north and west lines of the the defendant's S. E. ¼.

The strip of land in question contains about three acres. The testimony does not establish the position of the original and true boundary line beyond doubt, but, for the purpose of this decision, we shall concede that that line is as claimed by plaintiff, for the reason that we are convinced the defendant has a valid, legal title to the land in controversy by operation of the statute of limitations.

Upon that point it appears in evidence that the defendant Leete went into possession of the aforesaid S. E. ¼ and set up monuments to mark the west and north, line as he claimed it then to be, in the year 1871. In the year 1873 he set out along this line a hedge, intending and claiming and believing it to be on the true boundary line between his own and the plaintiff's land. In January or February, 1872, the defendant built a fence outside of and five feet from his proposed hedge to protect it. This was a substantial board fence, and has been there ever since. The defendant also set out 640 shade trees, and altogether had expended on the land in dispute about $1,700 at the time this suit was begun. In 1871 one Osbiston, then superintendent of the Nevada Land & Mining Company, from which the plaintiff derives title, pointed out the S. E. ¼, afterwards purchased by defendant, to him, and advised him to buy it. Defendant did so, and built his hedge and fence while Osbiston remained superintendent, and often passed by and saw the improvements being made by defendant without objection. All the superintendents who succeeded Osbiston were cognizant of defendant's improvements. They lived near, at the mill of the company, were often seen by Leete, but never made any objection to his improvements.

In Leete's deed the land was described according to the government subdivision, and he says that he claimed no other land; that he has never yet discovered his hedge is not on the true line, and claims it to be so now. The land between the hedge and the fence he never did intend to claim, although

since it was built he has exercised control of all within his enclosure.

The defendant has been, since February, 1872, in the open, peaceable, notorious, exclusive possession of all within the fence, and claiming title and exclusive ownership of all within his hedge.

This action was begun in November, 1877, so that the period of five years, during which defendant's occupation continued, had fully passed when the complaint was filed and the summons was issued. The plaintiff endeavors to take this case out of the statute, upon the ground that Leete took possession under his deed, describing this land as the south-east quarter of the southwest quarter, and, upon his own statement, did not intend to mark off or claim more land than his deed called for.

A possession so taken, it is argued, can only be adverse up to the true boundary line, because, as to anything over that, the occupation is by mistake and not under claim of right. This position will not bear examination, for every act of the defendant in entering and occupying this land was an assertion of title in himself. His actual, substantial enclosure of it was, both by the statute of Nevada and the general principles of law, decisive proof of his adverse possession. Comp. Laws Nev. §§ 1024, 1026; Angel on Lim. § 395; *Ellicott* v. *Pearl*, 10 Pet. 412, 442.

The fence, together with the planting of the hedge and the shade trees, are acts evincing "an intention of asserting ownership and possession," and it is "the intention which guides the entry and fixes its character." *Ewing* v. *Burnett*, 11 Pet. 41–53; *Bradstreet* v. *Huntington*, 5 Pet. 410; *Ellicott* v. *Pearl*, *supra*.

Had it appeared by any manifestations on defendant's part, at the time of his entry, that his claim of title was conditional upon the line marked by him being the true line, there would be some support for the plaintiff's position. But the evidence is clear that he marked out the boundary, not as a doubtful one, but as the true one, and all his actions agree with this.

view. He could not then have contemplated the discovery of an error, and a future adjustment of the line to correct it. His expenditure of $1,700 in improving this strip of land is very satisfactory evidence that the line he had marked was then believed by him to be the true one, and that he claimed title up to it. That there was, in fact, an error made by the defendant when he ran out the line may be true, but having been located as the true boundary, and possession taken, and title claimed to it for five years, (the statutory period,) that is certainly sufficient to give the possession an adverse character and bar the plaintiff.

"It cannot be disputed," says the supreme court of Pennsylvania, "that an occupation up to a fence for 21 years, each party claiming the land on his side as his, gives an incontestable right up to the fence, and equally whether the fence is precisely on the line or not. It is time that it should be settled beyond dispute that where a person is in possession by a fence as his line, or by a house, or stable, for more than 21 years, his possession establishes his right. A possession, claiming as his own, is in law and reason adverse to all the world, and as much so if he has never heard of an adverse claim as if he had always known of it." *Brown* v. *McKinney*, 9 Watt. 565.

Occupation, up to a recognized line, for 15 years, would establish it as the division line. *Clark* v. *Tabor*, 28 Vt. 222; Angel on Lim. § 393.

In many cases, where title is gained by adverse possession, the entry is founded upon some mistake of fact. Very rarely will it be found that one man has entered on the premises of another knowingly, wilfully intending to usurp the possession and acquire title by lapse of time.

One who enters under a void deed and occupies the land, claiming title against the world, possesses adversely; and if he continues in possession the required time will acquire title, yet his whole possession is founded in mistake as to the validity of his deed.

If, in such case, a mistake as to the whole title does not impair the quality of the possession, how can it be said to do

so in this case, in which the mistake has been about a small part of the title only? It is true, the defendant claimed that under his deed he was entitled to hold up to the hedge. His possession, however, was continued for the required time under a claim of title in fee. He did not take possession admitting the possibility of some mistake, and saying, "I only claim to the true line, and if this hedge is not on the true line I do not claim to it;" but he openly claimed the hedge to be the true boundary, and always claimed title up to it as such, exclusive of plaintiff and all others.

The cases relied upon by plaintiff to sustain his position, that if the defendant intended to set his fence on the true line, and it is not so, his possession has not been adverse, all, upon examination, come short of doing it. Expressions can be found in some of the opinions which, when separated from the context and the facts, give some countenance to the doctrine contended for by plaintiff. But it will be found that the possession which has been held not to be adverse has been taken and kept without an unqualified claim of title. Thus, in *Howard* v. *Reedy*, 29 Ga. 152, it was proved that the defendant had agreed at one time, within the statutory period, to put his fence upon the true line when he should reset it. The expressions of the court must be read with this fact in view.

So in *Phelps* v. *Henry*, 15 Ark. 297, the possession which will not ripen into title is said to be one held without title or *claim of right, and only* in ignorance of the true boundary. Also in *Brown* v. *Cockerell*, 33 Ala. 38, 45, a case as favorable to plaintiff as any cited, the court says, in one place: "If a party occupies land up to a certain fence, because he believes it to be the true line, but having no intention to claim up to the fence if it should be beyond the line, an indispensable element of adverse possession is wanting," (*i. e.*, claim of title.)

The intent to claim does not exist, and the claim which is set up is upon condition that the fence is on the true line. This quotation, standing alone, is seemingly an authority for plaintiff; but further on the court use other language which

materially modifies it, for it is said that "possession up to an agreed line is certainly adverse, *and the law would be the same* if one of the coterminous proprietors should build a fence *as the dividing fence*, and should occupy, with a claim manifested by words or acts, that such was the line up to which his land extended." So in *Lincoln* v. *Edgecombe*, 31 Me. 345, the charge held right was, "that if the tenant claimed title to the fence that would, in connection with the fence, amount to a disseizin; but if it was built by mistake, and if the tenant had not *claimed* to own *beyond the true line*, it was no disseizin." Again, in *Major's Heirs* v. *Rice*, 57 Mo. 384, the distinction is clearly taken between a conditional and unconditional possession and claim of title. Thus, although a line may have been established under a mistake of the real field notes, the statute, says the court, runs: "It is no sort of odds how a line is made so that it be taken and considered the true line by the adjoining proprietors, and the party possessing up to it claims the land, adversely to all others, as his own. If he maintained his possession and claim for ten consecutive years the land becomes his, under the statute of limitations, by virtue of adverse possession. But where parties assume a line as the true line, but with the understanding all the time that they only claim to the extent of their paper titles, and are to relinquish the fenced land if it should turn out to be a mistake, a claim thus conditionally made will not support a plea of the statute."

The supreme court of the United States uses this language: "Whenever the proof is that one in possession holds for himself to the exclusion of all others, this possession must be adverse to all others." * * * *Bradstreet* v. *Huntington*, 5 Pet. 402, 440. And again, in *Ewing* v. *Burnett*, 11 Pet. 41, 52: "It is well settled that to constitute an adverse possession there need not be a fence, building, or other improvement made." * * * "It suffices for this purpose that visible and notorious acts of ownership are exercised over the premises in controversy for 21 years after an entry under claim and color of title." * * * "Where acts of ownership have been done upon land, which, from their nature, in-

dicate a notorious claim of property in it, and are continued for 21 years, with the knowledge of an adverse claimant, without interruption, * * such acts are evidence of an ouster of a former owner and an actual adverse possession against him."

The foregoing citations show that the defendant's possession must be regarded as adverse as to all the land inside the hedge, and having been continued uninterruptedly under the eye of the plaintiff and his grantees for more than five years, the right of the plaintiff to maintain this action is barred.

Upon another ground, also, the defendant has a good defence; that is, acquiescence in the location of the division line on the part of plaintiff for more than five years. This defence is entirely distinct from, and independent of, the statute of limitations. The doctrine in regard to it is thus stated by the supreme court of California: "The authorities are abundant to the point that when the owners of adjoining lands have acquiesced for a considerable time in the location of a division line between their lands, although it may not be the true line, according to the calls of their deeds, they are thereafter precluded from saying it is not the true line." *Sneed* v. *Osborn*, 25 Cal. 619. That court inclines to the opinion that the time mentioned must at least equal that fixed by the statute of limitations to bar a right of entry; citing *Jackson* v. *Ogden*, 7 John. 238, and numerous other cases. Acquiescence in an agreed line for more than twenty years is conclusive against a right of recovery. *Boyd* v. *Graves*, 4 Wheat. 513. And it is held that acquiescence for a great number of years is conclusive evidence of an *agreement* to that line. No express agreement need be shown. *Rockwell* v. *Adams*, 7 Cow. 761. A line which parties have agreed to, either expressly or by acquiescence, will not be disturbed. *McCormick* v. *Barnum*, 10 Wend. 105. See *Riley* v. *Griffin*, 16 Ga. 141. Standing by, while a party subjected himself to expenses in regard to the land which he would not have done had not the line been located as it was, may perhaps warrant the presumption of a grant within the statute

period. *Adams* v. *Rockwell*, 16 Wend. 285, 302. Long acquiescence in the location of a fence, as a dividing line, estops the parties from controverting the correctness of the location. *Columbet* v. *Pacheco*, 48 Cal. 395.

The acquiescence in this case has been for more than the period prescribed by the statute of limitations of Nevada, and the plaintiff cannot now question the boundary so long agreed to.

The defendant has never claimed title to the land lying between the hedge and the fence. He says that he claimed title to the hedge as upon the true line, but set the fence a little outside of it as a protection to his hedge.

The judgment will have to be in favor of plaintiff for the possession of so much of the land described in the complaint as lies outside of the hedge, and no more.

SULLIVAN *v.* THE UNION PACIFIC RAILROAD COMPANY.

(*Circuit Court, D. Nebraska.* ———, 1880.)

DAMAGES—NEGLIGENCE.—In the absence of a statute damages cannot be recovered by a father from a railroad company for causing the death of a minor son.

The petition states the following facts, viz.: The plaintiff, a citizen of Omaha, was the father of James Sullivan, who, on the twelfth day of July, 1872, was killed by the negligence of defendant, the Union Pacific Railroad Company; that at the time of said killing said James Sullivan was hired by plaintiff to defendant at two dollars per day. Plaintiff sues to recover wages at that rate during the minority of the deceased, about four years.

A. J. Poppleton, for defendant, on hearing on demurrer, claimed that there could be no recovery, there being no statute providing for such a case.

J. I. Redick, for plaintiff, argued that the action being grounded in contract no statute was necessary.

McCRARY, C. J., (*orally.*) This is an action for damages by a father, who seeks to recover from the railroad company by reason of negligence in causing the death of a minor son. There is a demurrer to the petition.

The supreme court have decided in a recent case that there can be no such recovery in the absence of a statute.

The demurrer will be sustained.

BENTON, Assignee, etc., *v.* ALLEN and others.

(*Circuit Court, D. New Hampshire.* May, 1880.)

BANKRUPTCY—ASSIGNEE—ACTION BY, TO VACATE CONVEYANCE.—In an action by an assignee in bankruptcy to vacate a conveyance made by the bankrupt as being in fraud of creditors, the burden of proof is upon him to prove such fraud clearly and decisively.

SAME—SAME—SAME—SUFFICIENCY OF EVIDENCE.—Evidence in this case *held* insufficient, as against the sworn answers of defendants, to show a conveyance made by a bankrupt to have been in fraud of creditors.

ACTION TO VACATE CONVEYANCE—RELIEF DENIED.—Prayer that one of defendants be required to pay amount of a certain note to complainant as assignee, and that the other defendant be required to surrender the same to complainant, denied; it appearing that the holder of such note was dead, and the maker thereof had a valid set-off to the same, and it had been adjusted between the parties.

SAME—PARTIES.—In an action by an assignee in bankruptcy to set aside a conveyance made by the bankrupt upon the ground the same is fraudulent as to creditors, the bankrupt is not a proper party.

In Equity.

H. Heywood and H. S. Clark, for complainants.

Ray, Drew & Heywood, for defendants.

CLARK, D. J. On the seventeenth day of October, 1873, Horatio N. Allen was seized of certain lots of land in the town of Stratford, in the county of Coos, in the state of New Hampshire.

On that day, by deed of warranty, he conveyed these lots of land to Willis Wilder, of Bethlehem, in the state of New Hampshire, and Richard H. Wilder, of Guildhall, in the state

of Vermont, for the sum of $3,000, and the taxes due and unpaid thereon.

In payment of his undivided half of said lands Willis Wilder "turned out" to Allen two notes, one against the Waumbeck Lumber Company, and one against John Pierce, Jr., both amounting to about $1,200, and his own note for the balance of the $1,500, all of which, within two or three months thereafter, were paid to said Allen.

For payment of his half of said lands Richard H. Wilder gave his individual note of $1,500, which has never been paid. The taxes have been paid by the grantees, or one of them.

On the ninth day of January, 1875, Richard H. Wilder quitclaimed his interest in said lands to Willis Wilder, and in payment took his note of $1,500 and interest from the seventeenth of October, 1873, the date of the original purchase of the lands from Allen.

On the twelfth day of January, 1875, Allen filed his petition in bankruptcy in the United States district court for the district of Vermont, and the complainant was appointed his assignee; and on the twenty-fifth day of May, 1875, he filed his bill of complaint against Allen, the bankrupt, and the two Wilders, alleging that said conveyance by Allen of the lots of land in Stratford, October 17, 1873, was made to hinder, delay and defraud the creditors of said Allen, and was void as against the complainant and said creditors, and praying that said conveyance may be decreed to be null and void, and the said Wilders enjoined from ever claiming any right, title, or interest in said real estate, by virtue of said deed of the seventeenth of October, 1873.

The bill also prays that, if said deed is not held null and void, the said Willis Wilder be ordered and decreed to pay the complainants the amount of the note given by him to Richard H. Wilder, and that said Richard be ordered to surrender said note to the said complainant.

To this bill the defendants have filed their several answers, each denying, under oath, distinctly and positively, that said conveyance was made to hinder, delay, or defraud creditors, and alleging that it was made in good faith.

These allegations on the one side and denials on the other present the issue in the case, and it is one of fact, chiefly, if not entirely.

Was, then, this conveyance of October 17, 1873, of the lots in Stratford, made to hinder, delay, or defraud creditors, or was it not?

If it was, under the provisions of section 5046, page 981, of the United States Revised Statutes, the complainant would be entitled to recover the land, as against these respondents, and to have the conveyance set aside and decreed null.

But if the conveyance was not made for such a purpose on the part of either of said respondents, or was not made for such a purpose on the part of the Wilders, and they had no knowledge of such a purpose on the part of Allen, and there was nothing to put them on an inquiry as to such a purpose, and the trade by them was made in good faith, then the conveyance must stand.

On this issue the burden of proof is on the complainant. He must prove the fraud which he alleges, and make his proof so strong as to overcome the answers which have been made, under oath, by the respondents.

This, we think, he has failed to do. He has produced many witnesses, but much of the testimony is very remote from the case, and some entirely immaterial.

We have, however, considered the whole of it carefully, and have endeavored to give it its proper weight; but upon the whole evidence, on the one side and the other, we do not find that the conveyance was made to hinder, delay, or defraud creditors, by either Allen or the Wilders, or that there was anything connected with the transaction which should have put the Wilders on inquiry.

Allen desired to sell the land because it had been unprofitable to him, and the Wilders bought it for the younger to take off the lumber. As to the other prayer of the bill, that Willis Wilder be ordered and decreed to pay to the complainant the amount of the note given by him to Richard H. Wilder for his half of the land, and that Richard be ordered to surrender said note to the complainant, it cannot be granted

for two reasons, especially, without referring to any other—*First*, the evidence shows that at the time Willis Wilder gave this note to Richard H. he held notes against Richard, which he had a right to have set off against this note, so long as this note should remain in the hands of Richard, and which were so set off and adjusted by the parties; *second*, because Richard is now dead, and no decree can be made against him, and no executor or administrator of his has come in and been made a party to this proceeding.

The bill is dismissed with costs—one bill to the Wilders, and another and distinct bill to Allen, because it is difficult to see why he was made a party to this proceeding.

The assignee has all his property rights and credits, and a right to recover all property conveyed by him in fraud of his creditors. He might have been used as witness without making him a party.

A decree of nullity against the two Wilders would, by operation of law, vest the estate in these lands in the assignee without any decree of nullity of the deed as against the bankrupt.

He should not be brought into court without reason, and dismissed without pay.

PERKINS *v.* NASHUA CARD & GLAZED PAPER CO.

(*Circuit Court, D. New Hampshire.* May 15, 1880.)

PATENT—TWO YEARS' PUBLIC USE.—Use of machine by a patentee in his business for more than two years before applying for a patent, and by workmen under no pledge of secrecy, though the general public were not permitted to visit the shop where it was being used, is such public use as will vitiate the patent therefor.

SAME—SAME.—To constitute public use actual knowledge of an invention need not have been derived by any one interested to practice it. It is sufficient if one or more persons, not under a pledge of secrecy, saw the invention practiced, or even might have seen it had they used their opportunities, provided it was, in fact, practiced in the ordinary way after being completed.

In Equity.

Geo. D. Noyes, for complainant.

Wadleigh & Fish and *H. S. Clark*, for defendant.

LOWELL, C. J. There is very little conflict of evidence in this case. The patentee made a machine containing his invention in the year 1857, and in 1863 he substituted for it another varying in form and proportions, but not in principle. These machines he used successively in the ordinary way of his business, as a maker of card and pasteboard, until he applied for his patent, in 1876. The specification and model represent precisely the machine of 1863. During the time that the machines were used they stood in the room with several other machines necessary for the other processes of making, drying and coloring pasteboard, and were operated chiefly by one man, Moulton, who was sometimes assisted by one other. About 23 workmen were employed upon the other parts of the manufacture. The doors of the factory were usually kept locked, and each of the 25 workmen had a key. How many visitors came to the factory is one of the disputed points. There were occasional visitors, but not many persons came to the factory from mere curiosity. During some months Mr. Denison, a friend of the patentee, was given the use of an upper room for making tags, and his workmen passed in sight of the pasting machine. It is not proved that any workmen, visitors, or other persons acquired or divulged a knowledge of the mode of operation of the machine, until the workman Moulton gave that information to the defendants, in 1876.

Was the invention in public use for more than two years before Perkins applied for his patent? The time was enough. Was the use a public use? The law desires to encourage inventors to make their discoveries known for the improvement of the art, and to discourage an extension of the monopoly beyond the statutory period. For these reasons, and because of the difficulty of ascertaining the amount of knowledge which may have been derived from the exhibition, publication or use of the invention, it has always been held that when the public have had means of knowledge they have had knowledge of the invention. Thus, if a book has been pub-

lished describing the invention, it is not important that no one has read it. *Stead* v. *Williams*, 7 M. & G. 818. If a pier has been placed in the bed of a river, or a pipe under ground, it is conclusively presumed to be known to all men.

It has been intimated that a use in a workshop, where the workmen are pledged to secrecy, may not be a public use. *Kendall* v. *Winsor*, 21 How. 322; *Charge of Curtis*, J., —; *Bevin* v. *Easthampton Bell Co.* 9 Blatch. 50; *Heath* v. *Smith*, 3 Ellis & B. 255. In the last of these cases it is held that if the invention has been worked in the ordinary way, without an injunction of secrecy, the use is public. In *McClurg* v. *Kingsland*, 1 How. 202, it is said by Mr. Justice Baldwin, *obiter*, that use in a factory is a public use.

A use very trifling in amount, or a publication purely technical, or a single sale, have often been held to deprive an inventor of his patent, without evidence that any one interested to acquire knowledge of the invention had acquired it. *Henry* v. *Prov. Tool Co.* 14 Off. Gaz. 855; *Egbert* v. *Lippman*, Id. 822; *McMillan* v. *Barclay*, 5 Fish. 189; *Re Adamson's Patent*, 6 D. G. M. & G. 420; *Patterson* v. *Gas-Light Co.* 3 App. Cas. 239; *Lange* v. *Gisborne*, 31 Beav. 133.

The difference between this case and *Manning* v. *Cape Ann Isinglass Co.* is that in that case the inventor, after dissolving his partnership, permitted his partner to continue to use the invention. Neither of the partners used the invention except in their respective factories. The circumstance makes that case a little stronger, but my opinion was that the use by the firm before they dissolved their partnership was a public use. Taking these decisions together, I understand the law to be that actual knowledge of the invention need not have been derived by any one interested to practice it; it is enough that any one or more persons, not under a pledge of secrecy, saw the invention practiced, or even might have seen it if they had used their opportunities, provided it was in fact practiced in the ordinary way after being completed. And it must be held either that the workmen and visitors were a part of the public, or that they were persons from whom the public might have acquired the art without a breach of trust.

There was no pledge of secrecy proved here, and there was some evidence that none was exacted from anybody. There was no evidence of concealment except that the factory was not open to chance visitors. It was understood, I suppose, as most factories are conducted with no intention of divulging any secrets, and none to have curious and prying persons admitted; but without any special precautions beyond what prudent men, who do not care to be interrupted in their business, would usually adopt. For my own part I should have some doubt whether a pledge of secrecy, exacted of a number of workmen who had nothing to do with the machine in question, and had opportunity to examine it if they chose, would make the use a secret one. There is some evidence intended to prove that the use was experimental; but, upon the whole record, it is clear that the machines were used for about 20 years in the ordinary business of the patentee, and worked so well that when Moulton first expressed an intention of leaving the factory and building a machine for the defendants the plaintiff raised his wages one-third. He did not say it would involve a breach of trust. A short time before the patent was applied for some experiments were made, which resulted in nothing of importance, and, I fear, were intended to benefit the patent rather than the machine. An improvement has now been made, but it is not described in the specification or shown in the model. At all events, a machine which, whether entirely satisfactory or not, has been run in the ordinary course of business for 20 or for 30 years, and which is patented precisely as it was used, cannot be properly called an experimental machine.

The decree must therefore be: Bill dismissed, with costs.

MATTOCKS, Assignee, etc., *v.* BAKER.

(*District Court, D. Maine.* February, 1880.)

BANKRUPTCY — ASSIGNEE — RIGHTS ACQUIRED.—An assignee in bankruptcy, except as to property attached within the prescribed time before the commencement of bankruptcy proceedings, and that transferred by conveyances fraudulent and void, takes the property of the estate subject to all equities, liens and encumbrances existing against it in the hands of the bankrupt, and takes no greater interest than the bankrupt himself had.

JURISDICTION—ASSIGNMENT OF CLAIM TO CONFER—FRAUD—VALIDITY OF JUDGMENT.—The formal assignment of a cause of action to another person, citizen of another state, for the purpose of bringing suit in his name and thereby conferring jurisdiction upon the circuit court that it would not otherwise possess, is a fraud upon the court; but if the defendant in such action, knowing the fact, fails to raise the objection, and the court assumes jurisdiction in the premises, the judgment rendered therein will be valid.

SAME—SAME—ASSIGNEE IN BANKRUPTCY.—Where, in such case, the defendant is subsequently declared a bankrupt, the fraud in obtaining the judgment is not one that the assignee or creditors can complain of.

ASSIGNEE—FRAUD OF BANKRUPT.—An assignee in bankruptcy is not estopped by the fraud of the bankrupt, but the fraud that he can act upon must be one detrimental to the rights of creditors.

In Equity.

Charles P. Mattocks, for complainant.

Sewall C. Strout, for respondent.

Fox, D. J. The established rule is that except in cases of attachment against the property of the bankrupt, within a prescribed time, preceding the commencement of proceedings in bankruptcy, and except in cases where the disposition of property by the bankrupt is declared by law to be fraudulent and void, the assignee takes the title subject to all equities, liens or encumbrances, whether created by operation of law, or by act of the bankrupt, which existed against the property in the hands of the bankrupt. 95 U. S. S. C. R. 766; *Yeatman* v. *Savings Institution*, 93 Otto, 634. If there be no such liens, and the property has not been conveyed in fraud of creditors, the assignee has no greater interest in or better title to it than the bankrupt. *Kenny* v. *Ingalls*, 126 Mass. 488.

It is alleged in the bill that the notes which were the

causes of action upon which the judgment of *Sunderland* v. *Jacob C. Baker* were had were without consideration. Whether the assignee is now in a position to present this objection to the judgment it is not necessary to determine, as the evidence establishes that the present defendant was a *bona fide* holder of each of them, having paid full value therefor.

It is also claimed that William J. Sunderland, the plaintiff, never existed; that he was a false and fictitious party; but these allegations are contradicted by the defendant's answer, which avers that she, through her counsel, transferred and delivered the notes to Sunderland, a citizen of New York, and as she is informed and believes, Sunderland afterwards brought said suit upon said notes in the circuit court of Maine. The record of the judgment establishes the existence of the plaintiff, *prima facie*, at least, and the testimony as to his name not being found on the New York directories for a number of years is not sufficient to establish the contrary. That prior to the commencement of that suit a person claiming to be William J. Sunderland, of New York, did authorize the commencement of that suit, in his name, the court has no question, and it is equally clear that he had no interest in the claims thus to be collected from these negotiable securities, which were indorsed and transferred to him by Mrs. Baker, without any pecuniary or valuable consideration. His name was used to give the circuit court jurisdiction, and the only party beneficially interested in the claim was the respondent, Mrs. Baker, who received nothing for the transfer of these securities, and who still continued the equitable owner of them.

It is insisted that such proceedings were fraudulent, and that through this fraud the jurisdiction of the circuit court was obtained, which Mrs. Baker could not, in her own name, accomplish, and which was a fraud upon the law thus to procure. As between the parties to that suit it is not apparent that the bankrupt was in any way injured by this proceeding. The demands would be subject to the same defence, whether the action was prosecuted by Mrs. Baker or by Sunderland, he having become the holder of them long after they had

become due; and, so far as is disclosed, the same principles of law would control the decision of the circuit court as would have been administered if the case had been tried in the state court. Baker's rights would have been equally assured to him in one court as the other, and the court cannot discover in what manner any fraud has been practiced upon him by the action being instituted in the circuit court.

From the testimony it is quite certain that Jacob C. Baker was fully advised about these proceedings, and that the suit against him was to be commenced for his wife's benefit before the circuit court in the name of Sunderland. No steps were taken by Baker to prevent this course. He might easily have defeated it if he had chosen so to do, but on the contrary he assented thereto, if he was not the originator and promoter of the purpose, and he cannot, therefore, in any sense, claim to have been the victim of any fraud by jurisdiction thus obtained. *Consensus tollet errorem.*

But, it is said, if these proceedings did not in any way defraud Baker, they were a fraud upon the circuit court, and that jurisdiction was thereby devolved upon that court, and it was made to assume jurisdiction, and pass upon the rights of parties when they were both citizens of Maine, and that, within the principles of *Barney* v. *Baltimore*, 6 Wall. ——, a fraud was practiced upon the court. It is sufficient to say that the course here adopted does not meet with the approval of the court; and, if the objection had been properly taken at the right moment, the circuit court would not have assumed jurisdiction thus improperly thrust upon it. In that case it is said that when there is a fictitious transfer of property, the grantor retaining all his real interest, and the deed being made merely to give jurisdiction, the court will not, under such circumstances, give effect to what is a fraud upon the court, and is nothing more.

The fraud, therefore, in such a case, according to this opinion, is practiced upon the court, and not upon the bankrupt. This objection was one which, so far as the rights of the bankrupt are involved, he could waive or assert as he should think best, and, if he intended to rely upon it, should, by

plea, have duly presented the same to the court, or otherwise he would be debarred from asserting it. This was not done by him. The defence of want of jurisdiction under such circumstances is purely technical, and the bankrupt has chosen not to present it and insist upon it. Creditors of the bankrupt are in no respect damnified by the conduct of the bankrupt. Whatever their rights may have been they are still in full force, and nothing has transpired which can in any way injure any one of the creditors. It is said very often in the books that an assignee in bankruptcy is not estopped by fraud of the bankrupt, but by this is understood a fraud which in some way may prove detrimental to the rights of creditors.

The circuit court has prescribed its rules as to the methods and times at which objections to its jurisdiction must be presented for determination, and if, upon the record as it stands, the court has jurisdiction, and the defendant does not, within the rules, make manifest his objection, he will be forever estopped from availing himself of it; and so, likewise, will be all other parties who are in privity with such defendant. If a party has in apt words duly averred his citizenship, in an action instituted by him in the circuit court, and the defendant at the proper time fails to controvert it, the question of citizenship is no longer open to inquiry, either on the part of the defendant or any one claiming under him, and according to well-settled principles his assignee in bankruptcy cannot be heard to deny such citizenship of the plaintiff. The case is clearly within the rule hereinbefore stated, as taken from the opinion of the supreme court in *Yeapman* v. *Savings Institution.*

If the court is willing to accept the allegations and assume jurisdiction, and hear and determine the cause, all the fraud which has been perpetrated has been practiced upon the court, and in the present case, in the opinion of the court, each party has been alike involved in it. The court has thus been induced to act and assume a jurisdiction which it should not have been called upon to do, but the judgment itself is entirely valid, and the rights of the parties cannot be said to

have been fraudulently affected by the mutual action of both parties.

The act of 1873 having authorized an assignee of commercial paper, who is a citizen of a state other than that of the defendant, to maintain a suit upon such paper in the circuit court, and the rule which was stated by Judge Story in 5 Mason, (*Thatcher* v. *Winslow*,) having been repudiated, and it being now well settled that at common law an action may be sustained upon a negotiable promissory note, indorsed in blank in the name of any party authorizing it, although he may have no interest in the note, and the citizenship of the parties having been duly averred in the action of *Sunderland* v. *Baker*, in the circuit court, and upon the face of the writ, that court having jurisdiction which was not in any way controverted, the judgment rendered in such cause was valid and conclusive upon the defendant thereon, and the complainant as his assignee, so far as the citizenship of Sunderland was involved. This view of the case renders unnecessary any inquiry whether Sunderland was or not a necessary party to this proceeding, if otherwise it might be sustained.

Bill dismissed, with costs.

WILSON, Assignee, etc., *v.* THE ATLANTIC & ST. LAWRENCE RAILROAD CO.

(*District Court, D. Maine.* February, 1880.)

BANKRUPTCY—CORPORATE STOCK—FAILURE OF ASSIGNEE TO SECURE CERTIFICATES—ACTION AGAINST CORPORATION.—A person at the time of his being adjudged a bankrupt was the owner of a share of stock in a corporation. Subsequently he fled from the jurisdiction, taking the certificate with him, and the assignee in bankruptcy had good reason to believe that it was at all times thereafter beyond the jurisdiction. He demanded a transfer of the same on the books of the corporation, and the issuance of a new certificate, tendering a sufficient bond of indemnity. They refused to comply. *Held*, that the refusal was without justification, and the assignee had an appropriate remedy by bill in equity against the corporation.

In Bankruptcy.

Webb & Haskell, for complainant.

John Rand, for respondent.

Fox, D. J. Knight was adjudged a bankrupt February 24, 1875. At that time he was the owner of one share in the defendant corporation, then, and ever since, standing in his name on the books of the company. Soon after his adjudication as a bankrupt Knight fled to Canada, taking with him the certificate of this stock, which he sometime afterwards transferred and delivered, in Canada, to one Melvin Stow, of Newry, in this district. The complainant was never informed of this transfer until a few days since, February 6th, when, having summoned Stow to give evidence in this cause, he produced the original certificate, and thereupon assigned the same to the complainant, and the same is now filed in court.

The complainant had been informed that Stow had been to Canada, and procured the certificate from Knight, but upon inquiry of Stow he was told that he had returned the certificate to Knight in Canada, and the assignee believed he had so done until he produced the certificate on the sixth of the present month.

The complainant, as assignee, before the commencement of the present action demanded of the company a transfer of this share, and a new certificate to be issued to him as assignee, at the same tendering a sufficient bond of indemnity, to which no objection was taken either as to its form or the surety; and, the company refusing to comply with the demand, the present suit was instituted on the twenty-ninth of September last. In the answer the defendant admits that on the twenty-fourth of February one share of the stock stood and still remains in name of C. P. Knight; that dividends to the amount of $30 have been declared on this share and are unpaid, but whether said C. P. Knight is the bankrupt it has no knowledge. It also alleges that it is informed and believes that C. P. Knight, in August, 1874, transferred this share to one Clara P. Knight, and that the same is still her property; that no assignment of the share has ever been pre-

sented by said Clara, but that she has demanded the dividends and a new certificate.

A letter purporting to be written at Guelph, Canada, January 9, 1877, by Clara P. Knight, said to be the wife of the bankrupt, and addressed to the treasurer of the company, is produced, in which she says "the share was transferred to her in August, 1874," and calls for the dividends and a transfer to herself. The original certificate does not show any transfer to Clara P. Knight. Stow received the same in Canada from the bankrupt, the only transfer thereon being from the bankrupt to Stow, without date, and it is not pretended that the bankrupt was not the owner of the share, holding the certificate when proceedings in bankruptcy were commenced. The assignment by the register vested in the assignee all the rights and property of the bankrupt on the twenty-fourth day of February, 1875, and the bankrupt act confers upon the district court the fullest equity powers in administering the estate.

When the demand for a new certificate was made by the complainant he believed that the old certificate was beyond the jurisdiction of the court, as Stow had informed him he had returned it to Knight, in Canada; and there can be no question that the treasurer of the defendant was of a like opinion, as he was advised by the letter of Mrs. Knight, from Canada, in January, 1877, that she then held this certificate. The rights of the parties, therefore, should be determined as they existed at the filing of the bill, and the production and surrender of the certificate by Stow at the last moment, under the circumstances detailed, cannot change the result. The property in this share having vested in the assignee, and it being his duty to administer the bankrupt's estate in a manner most beneficial to all parties interested, what course should be adopted by him, with respect to this share, to accomplish this result?

It is said he might have sold his interest in the share, leaving it to the purchaser to enforce his rights. It is true, he might have so done if the court in bankruptcy would have conferred upon him the authority, and it is equally true that,

if this plan had been adopted, the estate would have derived no benefit. A public sale of a share of stock in a corporation, by an assignee, who admits he has not the certificate and can not procure it, and that, on application to the company, it has refused to recognize his ownership and issue to him a new certificate, would result in a complete sacrifice of the property, and a court of bankruptcy, therefore, would never authorize such a course to be adopted.

That this complainant could have sustained an action at law to recover the dividends unpaid and damages sustained by the refusal of the company to issue a new certificate may, for the present hearing, be conceded; although in 2 Bing. 391, the court restricted the damages to the dividend, holding that as the stock belonged to the plaintiff he could not recover its value; but if the value of the stock is to be taken as the rule in determining the damages, it would be of so uncertain a nature, changing from day to day with the market, that a party ought not to be compelled to pursue that remedy.

In 1 Redfield on Railways, 157, it is said: "The more effectual, and at present the more usual, remedy against corporations for refusing to allow the transfer of stock upon their books into the real name of the owner is by bill in equity." See, also, 123 Mass. 110, and cases there cited. This remedy is more complete, perfect and certain than by an action at law, and enforcing it cannot possibly injure the parties. The complainant obtains by the decree just what he is entitled to; the real owner acquires the evidence of title to that which is his property; and, to quote the words of *Best*, C. J., 2 Bing. 391: "We cannot do justice to the party unless we hold these shares are still his. Being his, if he elects a remedy which confers upon him the possession and control of them, and evidence of his interest, the court is bound to sanction his election and afford him the necessary aid to obtain his property. A title to stock in the abstract, without a legal evidence of such title, without the power of sale, or of obtaining dividends," is not the ownership which the complainant should enjoy, and of which he has been deprived by the corporation denying his right to the stock.

Sewall v. *Boston Water-Power Company*, 4 Allen, and vari-

ous other cases, are referred to, in which the transfer of a certificate of stock had been forged or fraudulently altered, and, thereupon, surrendered to the corporation, and new certificates issued. In these cases the original owners, by suits in equity, compelled the corporations to issue to them new certificates in place of those the transfer of which had been forged or altered. It is said these cases are not analogous to the present. The only difference is, in those the original certificates had been surrendered up to the corporations, and, therefore, could never have been used against them; but a like result would have followed in the present instance. If the company had issued a certificate to the complainant when demanded, Knight would no longer have appeared on the books of the company as owner of the share. The title would have passed from him by the proceedings in bankruptcy, and if the original certificate had subsequently been produced, with a transfer by Knight, the company would have been under no obligation to recognize it. The false and fraudulent notice from Mrs. Knight that the share had been transferred to her in August, 1874, did not justify the company in denying the rights of the complainant, as it was, in fact, false, and was unsupported by any evidence, not even by the production of the certificate; and by the satisfactory indemnity tendered by the complainant to the defendant company it would have been fully protected, not only against the claim of Mrs. Knight, but of all other parties, who could have had their remedy against the assignee if their equity was superior.

The case demonstrates that the assignee was the only party who had any right or interest in the share. Proper evidence of this was tendered to the defendant, and it became the duty of the company to acknowledge the claim of the assignee in bankruptcy. It should have issued to him a new certificate and accounted with him for the dividends. *Telegraph* v. *Davenport*, 7 Otto, 372. The refusal so to do is without justification, and there must therefore be a decree in his behalf, with costs.

PERRY, Trustee, etc., *v.* LITTLEFIELD and the LITTLEFIELD STOVE MANUF'G CO.

(*Circuit Court, N. D. New York.* April 26, 1880.)

INJUNCTION—MOTION TO DISSOLVE—SPECIAL NOTICE—FORMER DECISION AFFIRMED.

Hamilton Harris, for plaintiff.

Edward F. Bullard, for defendants.

BLATCHFORD, C. J. This case has again been presented to the court on a second motion to dissolve the injunction granted against the use by the defendants of the invention claimed in the re-issued patent granted to Littlefield May 31, 1870, the surrendered patent having been granted to him March 13, 1866.

1. A large part of the defendants' papers on this motion are addressed to a point not involving anything pertinent to the motion, namely, an allegation that this court was mistaken in saying, in its decision on the demurrer in this case, that the patents of December 19, 1862, and August 18, 1863, were the subjects of controversy in the former suit. I see no reason now to think that an error was made.

2. The "special notice" of January 24, 1866, set out in the answer, cannot have, of itself, the effect to vary the rights of the parties under the formal agreement of that date.

3. No ground is seen for doubting that the result arrived at in the decision of this court on the demurrer was correct, nor is any satisfactory reason shown for dissolving the injunction.

DINSMORE, President, etc., *v.* THE LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY COMPANY.

(*Circuit Court, D. Kentucky.* May 26, 1880.)

THE SOUTHERN EXPRESS COMPANY *v.* THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY COMPANY.

(*Circuit Court, M. D. Tennessee.* May 26, 1880.)

RAILROAD—CARRIERS—CANNOT DO EXPRESS BUSINESS.—Railroad companies, as common carriers, are not authorized to carry on an express business.

SAME—SAME—RIGHTS OF EXPRESS COMPANIES.—As such carriers they are bound to provide for those doing an express business over their road reasonable and necessary facilities for such business, and to all upon equal terms. They cannot insist upon the exclusive right to do such business over their lines of road, nor grant such right to one express company to the exclusion of others, but are bound to carry for every one offering to do the same sort of business upon the same terms.

EXPRESS COMPANY—RAILROAD REFUSING TO CARRY FOR.—Where an express company had, under special contract, been for many years engaged in that business over the system of roads controlled by defendants, and had built up a large and valuable business, and established valuable connections, all of which would be much depreciated if defendant should be allowed to refuse to further allow it to carry on such business over its line of road, *held*, that for that reason an injunction restraining such action might be granted.

Stanley Mathews, Clarence A. Seward and *F. E. Whitfield*, for Adams' Express Company and Southern Express Company.

Russell Houston, Judge East, H. W. Bruce, Andrew Barnett and *W. O. Dodd*, for railroad companies.

BAXTER, C. J. The case against the Nashville, Chattanooga & St. Louis Railway will be the first disposed of. We have not the time to state fully, and in detail, all the reasons for the decree we feel bound to enter in this case. The question is both novel and interesting, as well to the public as to the parties, and may be thus stated:

The express business, as it is understood and carried on in the United States, was initiated in 1839. About that time one Alvin Adams began the carriage of small packages of

value between the cities of Boston and New York over the line of the Boston & Worcester Railroad, and the line of steamers connecting therewith, and plying between New York and Norwich. This enterprise proved remunerative. His success induced others to establish and maintain similar express lines between New York and Philadelphia, and Philadelphia and Baltimore, and other important commercial points. These all succeeded well, and grew into general favor, and continued in actual operation until July, 1854. At this time, by the mutual consent of the parties interested, these several express companies were consolidated and merged into the Adams Express Company, a voluntary association or partnership, which was formed and organized under the authority of the laws of New York. This company, upon its organization, entered actively upon business, and prosecuted the same with unusual energy and success; it extended its operations over many of the most prominent railroads and water lines, and earned, as it justly merited, the confidence of its patrons and the general public. At the commencement of the rebellion it was doing an extensive and profitable business within the southern states, but the exigencies of war forced a suspension of its business within the insurrectionary territory, of which exigencies the complainant, the Southern Express Company, was born.

The complainant is a corporation organized under and pursuant to a charter granted by the state of Georgia, and by purchase succeeded to the property, business and goodwill of the Adams Express Company, within the southern states; but the two companies, notwithstanding their separate existence, sustained close business relations, and agreed to the interchange of freights on terms beneficial to themselves and to their customers. By this friendly co-operation and judicious interchange of business they so far preserved their unity as to secure to their patrons all the conveniences that could have been afforded by one company doing the business within the territory occupied by them both. Among other business of the Adams Express Company, to which complainant succeeded, was the business which the former company

was then doing over the several railroads, so far as they were then in existence, which now constitute the property of the Nashville, Chattanooga & St. Louis Railway Company, which complainant has continued from its organization to the present time. But it did said business under special contracts. These contracts contained stipulations reserving to the respective parties the right, upon giving the notice prescribed therein, to terminate the same.

Recently, many changes in the ownership and consequently in the management of railroads in Kentucky, Tennessee and contiguous states have taken place, whereby the Louisville & Nashville Railroad Company's power has been greatly augmented. The managers of this company, by leases and otherwise, have acquired the control, it is said, of about 4,000 miles of railroad. The bill alleges that they have recently organized the Union Express Company, to transact the express business over the several railroad lines controlled by it; and that, with the view of supplanting the complainant, and substituting the Union Express Company as express carrier on said roads, they caused notices to be given complainant terminating the contracts under and in virtue of which complainant has been carrying over said roads. This charge, however, is denied. But, if such was defendant's purpose, on being better advised the programme has been abandoned, and defendant now concedes that it cannot legally thus discriminate between express carriers; that if it carries for any it is legally bound to carry for every one offering to do the same sort of business on the same terms. But defendant is, it seems, determined to exclude complainant from the use of its roads, and now proposes, as the only alternative left for the effectuation of its determination, to exclude all express carriers, and do the express business over its road itself. And hence the question is squarely presented, can defendant legally refuse to carry for complainant, and extend to its messengers and agents all the facilities hitherto extended to it, and undertake and do the express business over its road itself? This is the question which the facts present.

In order to a correct solution thereof let us contemplate

briefly the objects for which railroads were created, and the obligations and duties imposed on them by law.

Railroads are *quasi* public institutions; they are authorized to facilitate, and not to control or force from legitimate and natural channels, or hinder or obstruct, the business of the country. Hence, the companies organized to construct them were invested with the right of eminent domain, with authority to condemn private property necessary to the full enjoyment of their franchise, on paying just compensation therefor. The authority to do this could only be conferred upon the theory that the public interests which they are supposed to represent require such seizure and appropriation. Under our government private property cannot be taken for any other than public uses; vested rights can be made to yield only to the public necessities. Railroads are held to be such necessities, and it is solely on this ground that their construction has been encouraged by liberal grants of power, and aided by private and public contributions. As *quasi* public instrumentalities, organized to promote the public good, they are, unless plainly and constitutionally exempted from such liability, amenable to such just regulations as the legislative department may choose from time to time to prescribe. All laws deemed necessary to insure good faith in the exercise of their franchises, or to enforce an honest, impartial and efficient discharge of their legal duties and obligations, may be enacted, and if the right has not been contracted away the legislature may prescribe their schedule of charges, compel every necessary facility to the public and to individuals, to the extent of their means, enact police regulations, limit the speed of trains, command the use of signals, and order or inhibit the doing of any and everything expedient to advance the general interest of commerce and intercommunication, insure safety to travelers, and generally to subserve the purposes of their creation, restricted only by the constitutional limitation that vested rights are not impaired without just compensation; and they are as amenable to the unwritten (as it has been judicially expounded) as to the statute law.

The first, and perhaps the most important, of these princi-

ples settled by judicial decisions is that railroad companies, as common carriers, are bound to the extent of their corporate means to supply all the accommodations and facilities demanded by the regular and ordinary business of the country through which they pass. Railroad carriage has, in a large measure, suspended every other means of inland transportation. Everybody, whether they will or not, is forced to patronize them. And as they were created to subserve the public good, and undertook to carry persons and property, they are, if able, bound to supply every facility needed for that purpose. They must keep pace with improvements in machinery, furnish easy access to and egress from their trains, stop at convenient points for the admission and exit of passengers, make adequate provision and tender suitable cars to carry on the business offered, and generally to carry passengers and freight, and from time to time adapt their rolling stock and equipments to the varying necessities of advancing civilization and approved methods of doing business. And next in importance to this leading idea is the obligation to do exact and even-handed justice to everybody offering to do business with them. If derelict in the performance of any one of the obligations imposed by law, they may be quickened thereto by the mandatory power of the courts, or compelled to surrender their franchise, which they thus refuse or neglect to exercise in the spirit of their several charters.

But defendants deny that any one or all of the foregoing familiar principles reach and control the question in this case. Its position, as we understand it, is that, notwithstanding it is a *quasi* public instrumentality, it is also private property belonging to defendant, and that it is ready, able and willing, and now offers, to render to the public every service which the public has a right to demand, including the carriage of express matter over its road, and protests that complainant has no legal right to use its road against its wishes and in the manner claimed, and by a forced use thereof enter into competition with it in the carriage and delivery of express freights. At first blush this position seems to be well taken, but on

further consideration is found to be more plausible than substantial. As a common carrier the defendant is as much bound to carry for another common carrier as it is to carry for other persons. The proposition, as it is stated, will not be controverted. Defendant cannot, and does not, deny its obligation to carry for the complainant. Its claim is that it is only bound to carry for the complainant when complainant, like other forwarders, delivers its freight into its care and custody to be handled, transported and delivered by it through its own agents and servants, and that complainant has no legal right to demand and enforce the use of defendant's passenger trains for the purpose of carrying freight in the special keeping of its own employes, to be by them handled in transit, and delivered at way stations and other places of consignment, and to have provided therefor special accommodations, such as have been heretofore supplied to it under special contracts. It is upon this point the contest is to turn. The issue is not, therefore, whether the defendant is bound to carry for the complainant, but can it be compelled to carry in the manner and with the divided responsibility proposed. Herein lies the novelty and importance of the question.

No such question could have well arisen a half a century ago, because the methods of doing business and the facilities then provided for inland transportation were not such as to raise it. But we have made wonderful progress since that time in physical as well as mechanical development, and no instrumentality subject to man's service has been more potential in bringing about the change than railroads. Tropical fruits, fish from the oceans and lakes, and oysters from the bays, are now, through the co-operative energies of railroads and express carriers, within the reach of almost every community. These facilities, making possible and suggesting never-ending changes in the methods of business, and gradually, but certainly, making changes in the habits and tastes of the masses of our people, have opened up the way for and called express transportation into use. The duties and offices of railroads and express carriers are widely different and totally distinct. The former was created to fur-

nish motive power, and to receive, carry and deliver such freights as are appropriate to such a mode of transportation; but the legislatures granting them charters, with, perhaps, few exceptions, never contemplated nor expected them to carry money, gold or silver bullion, bonds, bank notes, deeds and other valuable papers, jewels and other small articles of great value, fruits, fresh meats, fish or oysters, or other like commodities liable to rapid decay, or live animals requiring special care and attention during their transportation. Nor are railroad companies authorized by their charters to receive notes, drafts, or other choses in action for collection and return of proceeds, nor to receive and forward freight with the bills and charges of forwarders attached, to be collected from the consignee on delivery and returned to the shipper, and in connection with such business to afford to the public, under a single carrier and an assured responsibility, safe, reliable and speedy transportation from and to all points accessible by the use of two or more railroads. Nor are railroads, under their charters, required to render such services.

Much of the services rendered by express carriers, and appropriate to their peculiar functions, is not such as is by law imposed on railroads. If express carriers were ejected from the railroads the latter could not be compelled to supply their places, and, consequently, the country would be without such facilities, unless the railroad companies would exceed their corporate obligations and voluntarily undertake to do what they are not legally required to do, and to do many things which, under their charters, they have no right to do. As they are under no legal obligation to render such accommodations to the public, and could not be compelled to render them, they could, after ejecting the express carriers, monopolize the business, and dictate oppressive rates, while affording less safety, celerity and convenience to customers. As a substitute for the expeditious, reliable and necessary services of expressmen, the country would be dependent upon an illegal assumption of authority by railroads—an assumption, in some respects, in contravention of public policy, because it would enlarge their powers and influence for controlling the

business of the country, which, to say the least, is already sufficiently formidable.

It is enough to say that railroads were not created to do an express business, and possess no legal rights to engage in it, cannot be required to undertake and perform it, and, I may add, ought not to be permitted to engage in those branches of the express business *ultra vires* their corporate powers. And as they are not legally bound to render express facilities to the country themselves, can they, by excluding the expressmen, deprive the public altogether of these necessary facilities, or else exact such concessions as the petty resentments or the cupidity of their managers might prompt them to exact? We think not. On the contrary, if the express business, as we have hereinbefore asserted, has become a convenience to the general public, we think it the duty of all railroad companies, through their managers, and in the exercise of the trusts confided to them for the public good, to make proper provision for everybody wishing to carry express matter over their respective roads, as, in doing so, they would be accommodating the public and fulfilling to that extent the objects and purposes of their creation.

The express business, which had its inception as herein previously stated, now extends all over the states, is carried on by numerous organizations which meet the requirements of the several localities in which they do business, and occupies every railroad line in the country available for the purpose. They have an invested capital of over $30,000,000, and the Adams and Southern Express Companies are in daily use and occupation of 21,216 miles of railroad; employ 4,297 persons; make 911 daily trips over 64,560 miles, aggregating 19,884,420 miles travel annually, and in the transportation of their freight they pay the railroad companies over $2,000,000 per year. It is further alleged, as showing the extent and magnitude of the express business, that these companies carried for the government $1,200,000,000 in 1878, and $661,000,000 in 1879, and for private parties in the last-named year the enormous sum of $1,080,000,000; and that the Adams Express Company alone receives and disburses an average in

New York city of 14,000 packages daily, employing therefor, in connection with its general business, 918 horses, with the necessary number of wagons.

From this summary it will be seen that the express carriage of the country is only second in importance to railroad transportation, and that the express business has so interwoven itself into the present methods that it cannot be dispensed with without producing an abrupt and disastrous revolution in the present mode of carrying on trade. It has grown into immense proportions, and has become a necessity that cannot be dispensed with. It has obtained its present enlarged usefulness under the fostering care of the railroads themselves, including the defendant company. It is profitable to the railroads, and useful and convenient to the public. The right of the public to have quick, reliable and safe carriage of goods through expressmen has been recognized for forty years. This general recognition by the public and by railroad corporations, in connection with its admitted utility, stamps it as a legitimate mode of railroad carriage. It is legitimately within the scope of their charters; it is a legal duty imposed by law upon them. Endowed with extraordinary privileges, to enable them to fulfil the purposes of their being, they may be coerced to adapt their accommodations to the varying wants and necessities of general trade. They must keep abreast of advancing thought as well as of mechanical development. If they are under a legal obligation to attach a Westenhouse air brake, or a Miller platform, as insuring greater safety to employés and passengers, they are likewise bound to adapt their facilities for transportation to the growing demand and conveniences of trade. Such requirements can work no injustice to them, and is no invasion of their vested rights. For such improved service they are entitled to compensation to the extent of the maximum allowed by their respective charters. No express carrier can lawfully demand the carriage of his goods without paying reasonable rates therefor. The carriage of such freights is in the strict line of railroad duty. It is a class of business that pays well, and such as the railroads have heretofore

sought after. If the custody of the freights is retained by the express carriers, the railroads will not be liable for anything more than the safe carriage of them. If they provide for the carrying and safely transport such freight, they will have done their full duty. And by doing this the railroads will receive their freight charges, the expressmen will be enabled to fulfil their engagements and continue their business, keep up the continuity of their connections, and the public will be supplied with an indispensable facility, and no injury or injustice will be done to any one, unless it may be that railroad companies and railroad managers may be deprived thereby of incidental profits and advantages to be obtained through unauthorized pursuit, and forced from the public by reason of the monopoly secured through the exclusion of lawful competition. We conclude, therefore, that upon the naked obligation which the law imposes upon railroad companies, and without reference to the consideration to be hereafter adverted to, that the defendant is bound to render the services demanded by complainant, and that this court, in the exercise of its discretion, ought to require defendant to discharge its legal duty in this regard.

The second ground on which we think the relief prayed for may be granted is this: Complainant and the Adams Express Company have for more than twenty years done business over the system of roads now directly and indirectly under the control of the managers of the Louisville & Nashville Railroad Company. By energy and fidelity, and the expenditure of a large amount of money, complainant has succeded in building up and establishing a lucrative business over these lines, which constitute important links, securing continuity in its operations. It has trained and reliable servants, suitable chests, safes, wagons, horses, and trucks for collecting, transferring and delivering their freights; erected permanent shops and warerooms at various stations; established rapid communication, and fixed and published a schedule of charges, and have a good and profitable, steady and reliable business, and an enviable and widely-advertised reputation; all of which has been accomplished and the rights incident thereto

acquired under the friendly auspices of those who are now seeking to deprive complainant of the use of defendant's road.

If defendant possessed the legal right, which he here claimed, to refuse the accommodation which it has heretofore extended to complainant, it ought not to be permitted to exercise it under the facts of this case. Defendant's long acquiescence in complainant's right to have transportation of its freight, the holding itself out for so long a time as a carrier of express matter, the encouragement it has always given to this class of business, considered in conection with the investments made and the rights of the public to such service, must, in our judgment, estop it from exerting its authority to exclude complainant, if it had any at this time.

A refusal to carry as heretofore for the complainant would inevitably do it great pecuniary injury, dissever its connections, cause it to lose the good-will of its customers, and depreciate its valuable property and equipments along defendant's road perhaps one-half. Complainant ought not to be held to be so dependent on the mercy of its adversaries and interested competitors seeking to drive it from the field in order to secure a monopoly to themselves.

Defendant responds, saying that hitherto the complainant has occupied its road under and by virtue of special contracts, and it contends that complainant's enjoyment of the privileges thus granted confers nothing more than was accorded by its contracts. The position, in a qualified sense, is correct. But it is equally correct that complainant lost nothing thereby. A farmer or other person wishing to ship one or more car loads of stock or grain, or other commodity, may, with a view to convenience, specially contract for a car or cars suitable for the particular purpose, to be furnished at a specified time and place, and for such other facilities as he may need. But his doing so is no surrender of his legal rights, existing independently of contracts or special agreements, to demand of a railroad company the shipments of all suitable freights tendered for the purpose. The same principle is applicable here. It was altogether proper that the complainant and defendant, in view of the magnitude of their business,

should by special contract stipulate for the facilities to be furnished by the one to the other, and fix the terms and conditions upon which the business should be done. But no right arising to the complainant from public considerations or the charter obligations of the defendant was thereby waived. Their contracts were in affirmance of the pre-existing legal rights of the complainant, and an admission by defendant that the business proposed was within the scope of its duties and reasonably remunerative. It was in reliance upon these rights conferred by law and public consideration, and thus recognized by defendant, that the complainant made the investments mentioned, and built up and established its business; and it would be no less than a fraud upon it for the defendant to exclude it from all further use of its road, rob it of its established, extensive and profitable business, and transfer it to another or appropriate the business to itself. It will not be permitted to perpetrate such injustice.

We do not wish to be misunderstood. The fact that the complainant had preoccupied defendant's road confers no priority of right. The defendant, to the extent of its corporate authority, the Union Express Company, and all other persons or companies wishing to engage in the carrying of express matter over defendant's road, can enter upon that business on equal terms with the complainant. Neither the railroad companies nor the courts can discriminate in favor of one or more parties as against others. All are entitled to the same measure of accommodation who may offer to do the like business, and it is the duty of the court to enforce, whenever applied to, this legal rule of impartial justice. We have no disposition to discourage or hinder any one from entering into competition with the complainant. The more of them the better it will be for the railroads, as well as for the public; the railroads will thereby have more business, and the public be better protected against exorbitant prices and the exactions of aggregated wealth and business combinations. Equal protection to all will do this. It can never, however, be obtained by taking the fruit of one man's labor and giving it to another.

Antagonisms between railroads and the public exist more or less in every locality, and is too often manifested in the verdicts of juries, unjust legislation, and various other ways. This is to be regretted. But the surest way of counteracting these popular resentments is to require the railroad companies and their managers to keep within their legitimate spheres, and compel them in good faith to administer the trusts confided to them for the public good. The court is as ready to protect railroad companies in the full enjoyment of their franchises, and against the injustice mentioned already, as it is to compel them to do their duty to the public.

Judge Gresham, of Indiana, Judge Treat, of Missouri, and Judge Wood, of the fifth district, indicated the bent of their minds by granting restraining orders similar to the one issued in this case. I have consulted two of the district judges in this circuit who concurred in the conclusions herein announced. Judge Harlan, as I understand his recent decree, decided the same question in the same way; and the associate justice assigned to this circuit, on being requested, a few days since, to sit with me on the hearing of this motion, said that he had confidence in the learning and accurate discrimination of Justice Harlan, and that he had no idea that he would, after investigation, etc., dissent from the decision made by the former. These intimations and concurrent views, coming from so many and such high sources, have very materially strengthened the convictions which I have myself entertained in relation to the questions involved. I shall follow the ruling of Justice Harlan, and continue the restraining order until a final hearing can be had.

The following order was then entered:

"The motion of the complainant for a preliminary injunction herein, according to the prayer of the original and supplemental bill herein, having been brought on to be heard, and counsel for the respective parties having appeared and been heard, and the court having duly considered the questions involved, does hereby order that a preliminary injunction be issued herein restraining the said defendant, its agents, officers and servants, during the pendency of this suit, from

interfering with, or disturbing in any manner, the enjoyment by the Adams Express Company of the facilities now accorded to it by the said defendant upon its lines of railway, for the transaction of the business of the said Adams Express Company, and of the express business of the public confided to its care; and from interfering with any of the express matter or messengers of the Adams Express Company; and from excluding or ejecting any of its express matter, or messengers, or employes, from the depots, cars and lines of said defendant, as the same have been heretofore and are now enjoyed and occupied by the said Adams Express Company; and from refusing to receive and transport in like manner, as the said defendant is now doing, over its lines of railway, express matter and messengers of the said Adams Express Company; and from interfering with or disturbing the business of the said Adams Express Company in any way or manner whatsoever, and from refusing to permit the Adams Express Company to continue the transaction of its said business over the lines of the defendant on the same terms, conditions, privileges, facilities and accomodations as are or may be permitted or accorded to any other express company, or to or by the defendant itself, in the conduct of an express business over its railway lines, upon the payment by the said Adams Express Company of all lawful and reasonable charges which may be properly demanded by the said defendant, or paid by such other express company or by the public to the defendant therefor, not in excess of the rates authorized by its charter, and not in excess of the rates charged to others for similar services, nor of those received by the defendant from shippers of express matter to be carried by the defendant as such; in the last case, less the reasonable cost of the accessorial service rendered by the railroad lines, and at the stations and on the trains of the said defendant, and with liberty to the parties to make such further application herein to the court as they may be advised is necessary to fix what is and shall be a lawful and reasonable compensation, or for any other matter growing out of the case. In event of a dispute between the

parties, pending the preparation of this cause, as to what is reasonable compensation for the services performed by the defendant company, and what is a reasonable rebate to be allowed for such accessorial service, such difference shall be referred to the court, after due notice, and pending such reference the complainant shall not be disturbed by the defendant company in the transaction of express business over its line."

ALBION LEAD WORKS *v.* WILLIAMSBURG CITY FIRE INSURANCE COMPANY.

(*Circuit Court, D. Massachusetts.* May 7, 1880.)

INSURANCE—ORAL APPLICATION—FORCE-PUMP—CONTINUING WARRANTY. True construction of the insurance policy in this case *held* to be an agreement to insure, according to the policy, and not the plan, the building shown upon a written plan used and referred to in making an oral application for insurance; and the fact that a force-pump was marked on such plan did not create a continuing warranty that any particular kind of pump should always be maintained ready for use.

SAME—CONTINUING WARRANTY.—To make words used in an application for insurance in the present tense a continuing warranty for the future, it would seem from the weight of authority that the fact referred to should be an important one, as the employment of a watchman, and if it is not important it will not be deemed such warranty.

SAME—SAME—ORAL STATEMENT OF FACT.—Where the contract of insurance is in writing it would seem that an oral statement of fact in regard to the risk in the application could not be construed into a continuing warranty.

INSURANCE—INCREASE OF RISK.—If there is a single change in a building the jury are to say whether there is an increase of risk; but where there are two or more changes, one of which increases the risk, it is no answer to the forfeiture provided in case of increase of risk, to say that something else diminishes it.

SAME—SAME.—An insurance policy provided that the policy should be void if there was any increase of risk from means within the control of the insured. *Held*, that such condition referred to some permanent change purposely undertaken, and not to something the result of mere negligence on the part of the assured, such as neglecting to have a pump repaired, etc.

SAME — MILL — BUILDING BECOMING UNOCCUPIED. — A condition in an insurance policy upon a mill providing that the insurance shall be void if the premises become unoccupied, refers to something more than a mere temporary suspension of work in the mill; and where, in such case, work had been stopped for five days, the mill, in the meantime, being used for the storage and delivery of goods requiring daily visits by one or two persons, *held*, that the policy was not void.

Action at law to recover for a loss by fire of the lead works and other property of the plaintiff corporation. The policy was dated May 26, 1875, and was renewed from year to year; the fire occurred May 2, 1878. The jury having found a verdict for the plaintiffs for $3,838.81, a new trial was moved for on the law and the facts. The facts material to the motion were as follows:

Mr. Robbins, an insurance broker in New York, was applied to in 1873 by one of the directors of the company to procure insurance upon their property, and went to Dighton, in Massachusetts, where the works were situated, examined the premises, and made such inquiries as he thought fit of one of the persons employed there. On his return to New York he drew out in ink a sketch of the building which he had made on the spot, and wrote at the bottom a statement of certain facts connected with the risk in these words: "Building two stories high; first story brick, second story frame; roof, shingles laid in mortar. No fire in the building except under the boiler and lead furnace. Lighted with mineral sperm oil. Watchman day and night. Water runs all the time. Tanks filled with water, with hose covering the floor below; 50 fire buckets. On second floor, ores, drying pans; all the settling tanks, filled with water; 13 tanks—hold 1,000 gallons each. Second floor, storage. The nearest building to the works is a small store-house, 40 feet distant; no other building within 85 feet. Lead ground in oil and water. Nothing used in the works of an explosive nature."

He procured insurance in 1873, but not with the defendants. When he applied to the defendants for insurance, in 1875, he carried this paper in his hand, and answered questions about the risk in part from the paper and in part from memory. The president of the defendant company said he

would take the risk, if Mr. Robbins would send him a copy of the plan and of what he had told him. He sent a copy of the plan and of what was written upon it, as above quoted, and nothing more. The policy sued on was then issued. The parts of it relied on by either party were as follows; the words in italics being written, and the others engraved or printed:

"The Williamsburgh City Fire Insurance Company, in consideration of sixty-two 50-100 dollars, to them paid by the assured hereinafter named, the receipt whereof is hereby acknowledged, do insure *Albion Lead Works* against loss or damage by fire to the amount of *five thousand dollars: $1,920 on the two-story brick and frame building situate on the south side of the main road leading from the depot to the village in the town of Dighton, Bristol Co., Mass., as per plan in the office of M. P. Robbins & Co., New York city, a copy of which is filed, No. 168,732, in this office; $2,300 on engine, boilers, steam and water pipes, machinery, shafting, belting, pulleys, hangers, apparatus, tools, implements and fixtures; $770 on stock, manufactured, unmanufactured, or in process of manufacture,—all contained in above building.*"

Below were many stipulations, of which a part of the first is as follows:

"1. The application, survey, plan or description of the property herein insured, referred to in this policy, shall be considered a part of this contract, and a warranty by the assured during the time this policy is kept in force. Any false representation by the assured of the condition, situation or occupancy of the property, or any omission to make known every fact material to the risk, or an overvaluation, or any misrepresentation whatever, either in a written application or otherwise; or if the assured shall have or shall hereafter make any other insurance on the property hereby insured, or any part thereof, whether valid or not, without the consent of this company written hereon; or if the above-mentioned premises shall, at any time, be occupied or used so as to increase the risk, or the risk be increased by the erection or occupation of neighboring buildings, or by any means whatever within the control of the assured; or if the premises

became unoccupied without the assent of the company indorsed thereon; or if it be a manufacturing establishment, running in whole or in part over or extra time, or running at night without special agreement indorsed on this policy; or if the property be sold or transferred, or upon the passing or entry of a decree of foreclosure, or upon a sale under a deed of trust; or if the property insured be assigned under any bankrupt or insolvent law, or any change takes place in title or possession, except in case of succession in consequence of the death of the assured, whether by legal process or judicial decree, or voluntary transfer or conveyance; or if this policy be assigned before a loss without the consent of this company indorsed hereon; or if the interest of assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee or otherwise, be not truly stated in this policy; or if the assured keep gunpowder, fireworks, nitro-glycerine, phosphorus, saltpetre, nitrate of soda, petroleum, naphtha, gasoline, benzine, benzole or benzine varnish, or keep or use camphene, spirit gas, or any burning fluid composed in whole or in part of petroleum, or any of its products, or any chemical oils, without written permission in the policy, then, and in every such case, this policy shall be void."

There was evidence that the processes of manufacture, when the works were in operation, consisted of corroding pig lead in vats by means of acids, and afterwards grinding the corroded lead with oil and water by steam power. The pump was fitted to run by the power, but had been broken some three months or more before the second of May, 1878, the day of the fire. The manufacture of the red and white lead had been stopped April 27, 1878, and all the persons employed in it, except the superintendent and one hand, had been discharged, and the watchman had been discontinued. There were from 150 to 200 tons of lead in the corroding vats, and a good deal of manufactured lead stored for sale. The corroding vats were not in the insured buildings. The superintendent and man had occasion to visit the premises daily, and had delivered several tons of lead to a purchaser

on the first of May. The fire was at night, and was supposed to have been purposely set.

There was no evidence that any of the representations or statements made to the defendants when the insurance was effected were untrue, but they insisted that there was a warranty that a watchman and an effective pump should be kept; that the risk had been increased, and that the premises had "become unoccupied."

The judge ruled, for the purpose of the trial, that the words written upon the paper, called a plan, were not a part of the contract; that no continuing warranty or stipulation, in respect to the pump or the watchman, was made by the assured; that the jury must decide whether the risk had been increased, and, in so doing, might take into consideration the whole state of things at the time of the fire, setting diminution against increase, if there were both; that the provision avoiding the policy, if the premises became unoccupied, did not necessarily mean if the manufacturing was stopped, but if the premises considered as lead works were unoccupied.

G. W. Parsons and *R. D. Smith*, for defendant.

G. Allen and *J. Fox*, for plaintiff.

LOWELL, C. J. This case has been very carefully argued, and I have examined all the cases cited by counsel. One of the principal questions is whether there is a continuing warranty or stipulation on the part of the plaintiff to keep a watchman and an effective pump. The first printed condition, or set of conditions, makes the "application, plan, survey or description" of the property a part of the contract, and a warranty by the assured, so long as the policy is kept in force. No language could more fitly describe a continuing warranty, or at least one renewed every year; but being in print, and intended for all cases, it must be fitted to each risk according to its particular circumstances.

A careful study of the cases will show, what was likewise testified by experts on the stand, that "plan," "application," and "survey" are often used in the contracts as meaning the same thing. "Survey" is the word employed most commonly, and it is not difficult to discover how it came to be used

instead of "application." When a person wrote to a company for insurance upon his house or mill, his letter was an application, but not often a full and satisfactory one, and the company would send back a form for a more full application. This paper usually had a caption, stating that it was to be the basis for the insurance, and contained printed questions, with directions how they should be answered. This paper was filled out and signed by the assured, or by his agent, or by the agent of the company, and was the final application; but to avoid misunderstanding it came to be called a survey, as, in many cases, the original letter might be called an application.

The printed condition or stipulation, making the survey or plan or application a warranty, is found in a great many of the reported cases, and is often in substantially this form: "If the insurance is made upon a written plan, survey, or application, the same shall form a part of the policy, and be a warranty," etc. See, upon both these points, *Glendale Mfg. Co.* v. *Protection Ins. Co.* 21 Conn. 19; *Sheldon* v. *Hartford Fire Ins. Co.* 22 Conn. 235; *May* v. *Buckeye Mut. Ins. Co.* 25 Wis. 291; *First Nat. Bank* v. *Ins. Co. N. A.* 50 N. Y. 45; *Garcelon* v. *Hampden Fire Ins. Co.* 50 Me. 580. These are samples of the cases, and the meaning is substantially the same in all, that the written application, by whatever name it may be called, shall be a warranty. In this case the application was oral. There is no conflict of evidence upon this point. Mr. Robbins went to the defendant's with a paper in his hand and described the risk and answered questions. I suppose he answered them as they stand upon the memorandum, so far as that goes; but it contains nothing about a pump, or about some other matters concerning which there were oral representations. Whether he read from his memorandum or not, or whether he read correctly or not, is immaterial, because it was what he said that was the foundation of the contract. Nor do I understand that the president asked for a written application. He said: "Send me a copy of the plan and your statements, and I will insure." He did not ask for a written statement, as an

application, but, an oral application having been made, he asked for a copy of it. At any rate, if he asked for a written application he did not receive one. The plan, with its memorandum, does not purport to be, and has none of the *indicia* of, such a document. The memorandum is a memorandum, and nothing more. There is in this case, therefore, no such plan, survey or application as this printed condition mentions.

The reference to the plan in the written part of the policy is, in its form, like the ordinary reference in a deed, for the purpose of identifying the subject-matter, and has a similar meaning. The true construction of the policy is not that the company agree to insure "as per plan," but they agree to insure according to the policy, and what they insure is the building shown on the plan. A force-pump is shown on the plan, but this cannot be considered as a warranty that any particular kind of a pump shall always be maintained, ready for use. One would wish to know the character of the pump, and how it was worked, etc., as to all which there is no information. If it depended upon the steam which carried the works, it would probably not be useful on Sundays and holidays, nor when the mill was stopped, and there is surely no warranty that the mill shall never be stopped. It is impossible to reconcile the decisions upon this question of continuing warranty. When an underwriter asks about the particulars of a risk he probably takes for granted that things will remain as they are; but when the courts are asked to convert this impression into a covenant, and make words in the present tense operate as a stipulation for the future, there is difficulty, and the authorities are doubtful and divided. The result, as far as I can gather it, is that when the fact appears to the courts to be a very important one, such as employment of a watchman, a majority of them have said that this ought to be considered a part of a continuing engagement. When the fact does not appear to be so important, as that a dwelling-house is occupied, or that a clerk sleeps in a store, it is not of that character.

There is great objection to these continuing warranties when they are conventional, or made up from words which do

not purport a future warrant, because, if the attention of the assured had been called to them as continuing covenants, they might have been qualified. Thus, in the important case of *Ripley* v. *Ætna Ins. Co.* 30 N. Y. 136, which is in accordance with the weight of authority, if the assured had been asked whether he agreed to have a watchman every night, he would probably have excepted Saturdays; but, being asked, generally, whether a watchman was employed at night, he said "Yes." There are other objections to construing similar words in the same paper as representations of the present or covenant for the future upon an arbitrary standard of the importance of the particular subject. In all these cases, on either side, there was no written statement upon the subject-matter of the supposed warranty. Here, then, was an oral statement that a watchman was at the mill "day and night," and there was an oral description of the force-pump. These statements were true at that time, and true at each renewal of the policy, and therefore it is of no consequence whether they are called warranties or representations.

I have seen no case which holds that an oral statement of a fact could be construed into a continuing warranty or promise when the contract is in writing. *Clark* v. *Manufacturers' Ins. Co.* 2 Woodb. & M. 472; 5 How. 235, merely decide that parol evidence might be introduced to identify the written application referred to in a policy. That covenants cannot be imported into or taken out of a written contract by parol, is an elementary rule, applicable to contracts for insurance as to others. See *Abbott* v. *Shawmut Mut. Fire Ins. Co.* 3 Allen, 213; *Schmidt* v. *Peoria Mut. Ins. Co.* 41 Ill. 295; *Higginson* v. *Dall*, 13 Mass. 96; *Kimball* v. *Ætna Ins. Co.* 9 Allen, 540. The judgment in the case last cited reviews the authorities, and decides that an actual promise, if oral, cannot be given in evidence to defeat a policy which has once attached. Here there is no contention that an oral promise was made, but only that the court ought to infer one from the oral statement of a fact.

In respect to increase of risk I understand the law to be

that if there is a single change, such as a new use of the building, or an alteration in them, the jury are to say whether, upon the whole, the risk is greater or less. If, however, there are two or more changes, unconnected with each other, and one has increased the risk, it is no answer to the plea of forfeiture to say that something else has diminished it. *Curry* v. *Com. Ins. Co.* 10 Pick. 535.

In that case numerous witnesses testified that an enlargement of the insured dwelling-house, and a contemporaneous removal of the uninsured barn to a greater distance from the house, did not increase the risk, and the verdict for the plaintiff was sustained. See, also, *Jones Mfg. Co.* v. *Mfrs.' Ins. Co.* 8 Cush. 82, and *Date* v. *Gove Dist. Mut. Co.* 15 U. C. (C. P.) 175, as to single and contemporaneous changes; and, as to others, *Heneker* v. *Brit. Am. Assn.* 13 U. C. (C. P.) 99, and *Lomas* v. *Brit. Am. Assn.* 22 U. C. (213) 310. Within this rule it was proper for the jury to inquire whether stopping the mill was, upon the whole, considering the decrease of risk from accidental fires, and the increase from the discharge of the watchman and want of power for the pump, such a change in the use or occupation of the premises as to increase the risk.

There is another question which has impressed me more forcibly during and since the argument of the motion than it did at the trial. The steam-chest of the pump was broken some weeks before the mill was stopped, and was not repaired. It is a fair question whether any one in authority at the plaintiff's works was informed of this fact; but it is clearly a matter "within the control of the assured," and, therefore, if the neglect to repair the pump was an increase of the risk within this covenant, that part of the case should have been left to the jury by itself, and not as part of the general change of use and occupation which took place afterwards.

I am of opinion, upon consideration of this condition, and construing it with the context, that it does not refer to mere negligence of the assured, however gross, or however it may increase the risk; but to some permanent change, purposely

undertaken, in the structure, use or occupation of the insured premises. For instance, if the assured neglected to lock his doors at night, the risk might be largely increased; but, though he had done this for a week together, it would not be such a change as is contemplated by this condition. The failure to repair this pump was a bit of negligence, great in degree, perhaps, and upon an important matter, but still a piece of negligence by the servants of the assured, or by themselves, in the conduct of their business, and the care of their property, against which they are insured.

I have examined many decisions upon this subject, and have not found one in which the point has been taken that a neglect of this sort was within the covenant. There are many in which a temporary use permitted things, from heedlessness or good nature, increasing the risk and causing the loss, have been held not to be within it, but in none of them was the negligence so long continued as in this case. *Dobson* v. *Sotheby*, M. & M. 86; *Shaw* v. *Robberds*, 6 A. & E. 75; *Gates* v. *Madison County Ins. Co.* 5 N. Y. 469; *Loud* v. *Citizens' Mut. Ins. Co.* 2 Gray. 221. In one a house was vacant for several weeks, and the court held that, if there was no intentional abandonment of the occupation of the house, but the insured was using reasonable diligence to obtain a tenant, there was no forfeiture. *Gamwell* v. *Merchants' Ins. Co.* 12 Cush. 167. That case differs from this, because here there was no evidence of reasonable diligence; but, upon general principles of the law of insurance, the ruling must have been the same, without that element, so long as the assured had not purposely given up the use of his house. Diligence does not come into question in this connection; its presence will not save a forfeiture if the risk is changed, nor will it if it is not.

The condition avoiding the policy, if the premises "become unoccupied" without the consent of the company, must likewise refer to something more than a temporary suspension of work in a mill. The works had been stopped for five days, and how soon it would have been renewed is uncertain. But I think they were not unoccupied, within the meaning of this

clause, while used for the storage and delivery of goods requiring daily visits by one or two persons. I am confirmed in this by the fact that, since the policy was issued, the defendant company has added a clause in this connection avoiding a policy if work in a factory is stopped.

The result is that the rulings are sustained, and there must be judgment on the verdict.

CRAMPTON *v.* JERKOWSKI.

(*Circuit Court, D. Vermont.* May 19, 1880.)

BANKRUPTCY—PARTNERSHIP—CONDITIONAL SALE.—F. and defendant entered into partnership, F. furnishing $1,500 in cash and defendant $4,500 in goods. Subsequently they dissolved, F. taking the stock and giving defendant notes for his interest, then two-thirds; defendant's share to remain as his property until the notes were paid, and all goods purchased in the meantime, in place of those sold, to be substituted to title of defendant. Subsequently, F. becoming embarrassed, defendant, to protect himself, bought the stock, paying something more than his debt, and, within two months thereafter, F. was declared a bankrupt. In an action against defendant, by F.'s assignee, *held*, that defendant was liable to such assignee for the value of one-third of the original stock on hand, one-third of all that had been purchased with proceeds of original stock, and all of the stock purchased by F. from his own resources, including goods bought on credit and not paid for.

In Equity.

W. L. Burnap and *J. C. Baker*, for orator.

Prout & Walker, for defendant.

WHEELER, D. J. This cause was heard at last term on bill, answer, replication and proofs. Martin P. Flack and the defendant entered into partnership on the first day of August, 1876, the terms of which were in writing, and were, among other things, that Flack should put in $1,500 capital, and the defendant ready-made clothing to the amount of $4,500. The answer alleges that the goods were to remain the property of the defendant until sold in the course of business, and the defendant has so testified. Flack denies this, and testifies that the written articles of partnership will show how it was.

These have been produced and put into the case, and they do not provide that the goods shall so remain the property of the defendant. On this evidence it is found that the goods put into or brought into the business became the property of the firm and belonged to the partners respectively in proportion to their respective interests.

They continued in partnership until February 8, 1877. Their partnership property then inventoried at $5,824.35. By agreement the defendant took out $800 in amount of the goods, and sold his interest in the residue to Flack for $500 in cash, and his notes of $500 each for the balance, to become due in six, twelve, eighteen and twenty-four months. Flack's $1,500 had remained in all the while. The defendant had put in goods and drawn out money in amounts not definitely stated, and it is difficult to determine how much he had in at that time. Upwards of $400 of the inventory represented accounts and fixtures which he did not buy. In view of the price he sold at, $3,000 must be a liberal allowance for his share of the remaining $4,500, and a little over. On the whole it is found that his interest in what Flack had of the firm was $3,000, and Flack's $1,500, so that he owned two-thirds and Flack one. The sale was a conditional one, such as the laws of the state recognized, and provided that the goods were to remain the property of the defendant until the notes should be paid, and that all goods purchased in place of those sold should be substituted for them in the title of the defendant.

Flack continued the business until into October, 1877, sold old goods, bought new, some for cash and some on credit, paid the defendant the note which fell due in that time, but did not pay his other creditors, and became badly insolvent. The defendant learned of his condition, and, to save himself, bought the stock of goods and fixtures then on hand at about $460 more than his debt, paid $400 in checks, and about $60 in money, delivered up the notes, and took the goods away. Within less than two months a petition in bankruptcy was filed against Flack, upon which he was adjudged a bankrupt, and the orator was appointed assignee of his

estate. This bill is brought to set aside the conveyance of the goods, or of Flack's interest in them, to the defendant. Upon the evidence and the circumstances shown it is quite clear that the sale and conveyance were made to give the defendant a preference over other creditors, and to prevent the property from coming to the assignee in bankruptcy, if there should be one, as there has been, and that the defendant had reasonable cause to believe, and did believe, and know that Flack was insolvent, and that the purpose of making the sale and conveyance was as has been stated. Upon these facts the transfer, so far as it operated as such upon property to which the defendant had not the right before, was, under the provisions of the bankrupt law, void as to the plaintiff.

Much has been said about the effect of a mortgage upon personal property which the mortgagee has, by the terms of the mortgage, a right to sell; and upon after-acquired property which the parties, by the terms of the mortgage, attempt to cover by it; but it does not seem to be necessary to consider such questions here. There has been no mortgage or attempt to mortgage any of this property. The rights of the defendant depend upon the title he retained; not upon any title he acquired by mortgage from Flack. He sold to Flack, reserving the title till payment. The question is as to the extent of that reservation. He reserved the title to the two-thirds which he sold; the other third was already Flack's, and the title to that was not affected, nor attempted to be affected. His only right to Flack's third of that property is what he undertook to get by the transaction which the law makes null as to the orator, so as to give him the right to the property or its value, so far as it was Flack's.

Upon this view there is no difficulty about the rights of the parties in respect to property on hand at the time Flack bought out the defendant. One-third of that property, or the value of one-third, belongs to the orator as assignee; the other two-thirds the defendant had a right to by virtue of his lien. The defendant took the whole away and disposed of it, and thereby has become liable to account to the orator for one-third of its value.

The more difficult questions arise in respect to the property acquired by Flack afterwards. Some of this property was probably paid for from the avails of the original property sold; some of it may have been paid for with other property of Flack; and some of it appears to have been bought on his credit, and not paid for at all. The rights of the parties are to be determined by the laws of Vermont, although the estate of the bankrupt is taken and distributed under the bankrupt law of the United States.

Paris v. *Vail*, 18 Vt. 277, shows what the laws of the state are upon most or all of these questions. That case was fully considered, and does not appear to have been doubted or questioned since. *Williams*, C. J., dissented to a part of the judgment, but on the ground that, as he thought, the relation of landlord and tenant gave the plaintiff some additional right to property added by the purchaser to that which had been conditionally sold. There is no such relation here. It was held that the plaintiff, who was lessor of a farm, stock, and farming tools, by a lease providing that the stock and farming tools, and all other stock and farming tools which might be added to or substituted for the same, should be and remain the property of the plaintiff as security for the payment of the rent, etc., could not hold stock and farming tools added by the tenant from his own resources, during the term and before payment, against the creditors of the tenant, and that he could hold the stock and tools substituted by the tenant for the original stock and tools. Here the provision in the agreement of conditional sale from the defendant to Flack was that the goods sold, and those purchased by Flack and substituted for them, should be held by the defendant for the payment of his debt. As to those purchased by Flack in substitution for the original goods, from the avails of them, the defendant is entitled to hold them to the same extent he could the original goods; that is, to the extent of two-thirds of their value. For the other third he is liable to account to the plaintiff. Those, if any, purchased by Flack distinctly from his own resources, including those not paid for from

any source, the plaintiff is entitled to an account for in whole.

This case is not like *Mitchell* v. *Winslow*, 6 Law Rep. 347, 2 Story, 630, cited by *Williams*, C. J., in his dissenting opinion in *Paris* v. *Vail*; nor like *Platt* v. *Stewart*, 13 Blatchf. 481, reversed in part on appeal; *Stewart* v. *Platt*, Supreme Court United States, October term, 1870, Chicago Legal News, February 28, 1880; for each arose under the laws of a state authorizing chattel mortgages—the former in Maine and the latter in New York; while in Vermont, at the time of this transaction, there was no statute authorizing a mortgage of chattels in any form, and no mode by which a lien upon them as against creditors could be created by act of the parties other than by pledge or by conditional sale reserving title. Neither is it like *Cramton* v. *Tarbell*, District Court United States, District Vermont, for in that case there was a loan of actual value, made in good faith, upon security taken in good faith on the occasion of making the loan, which is expressly saved by the bankrupt law. Act of June 22, 1874, § 11. Here the defendant undertakes to acquire Flack's interest by a transfer which the bankrupt law declares void.

The evidence does not show definitely the amounts of these classes of goods, nor their value, nor the value of the share to which the assignee is entitled. The case must, therefore, go to a master to have these amounts and values ascertained.

Let decree be entered for an account of the value of one-third of the original goods purchased by Flack of the defendant, and of those substituted therefor, and of the value of those purchased by Flack and paid for from his own resources, aside from the goods purchased of defendant, if any, and those purchased by Flack and not paid for, taken by the defendant, and for the payment of these amounts, when ascertained, to the orator, with costs.

In re UNITED STATES *vs.* CIGARS, etc.*

(*District Court, E. D. Pennsylvania.* May 25, 1880.)

FEES—RETENTION OF BY OFFICERS OF COURT IN REVENUE CASES—PRACTICE.—In revenue cases, when the government is successful, the district attorney, clerk and marshal may retain their fees out of the moneys collected as in other cases.

SAME—ACTS OF CONGRESS—CONSTRUCTION OF.—Sections 856 and 3216 of the Revised Statutes, providing that the fees for which the United States are liable shall be paid on the settlement of the officers' accounts, and that costs recovered by the government shall be paid to the collector of internal revenue, relate only to cases in which the government is unsuccessful, and to cases in which it has paid fees in the progress of the cause, and subsequently recovered them as costs.

SAME—CIRCUIT COURT.—Concurring opinion by circuit judge establishing same rule for circuit court.

SAME—PAYMENT INTO COURT—PRACTICE.—The practice of paying the entire amount recovered, including fees, into court, in such cases, approved.

This was a motion for an order to pay the local collector of internal revenue the whole fund recovered by the government in certain revenue cases, and paid into the registry of the court, including the fees, costs, charges and expenses of the officers of the court. The only question raised by the motion was whether the fees of the officers might be retained by them, or should be paid to the collector.

John K. Valentine, U. S. District Attorney, for the motion.

A. Sydney Biddle, contra.

BUTLER, D. J. This motion contemplates a change of practice, respecting the officers' fees in revenue cases. Heretofore, the fees, in these, as in other cases, have been retained by the officers when collected and received, and accounted for in their semi-annual returns. Now, it is claimed, that the amount should be paid over to the internal revenue department, through the collector, and the officers look to the treasury for its return.

That the practice heretofore pursued conformed to the law, as it existed prior to the act of June 30, 1864, re-enacted

*Prepared by Frank P. Pritchard, of the Philadelphia Bar.

July 13, 1866, (Rev. St. § 3216,) is not, I believe, open to doubt. The act of February 26, 1853, (Rev. St. §§ 823, 828, 839, 842,) prescribes what fees shall be allowed to the clerk, district attorney, and other officers; and sections 839, 842 and 844 show, with great distinctness, that these fees are to be retained by the officers, when received, until the limit fixed as the maximum of their compensation is exceeded. Each one of these sections 839, 842 and 844 recognizes this right to retain in plain terms, the last declaring "that every district attorney, clerk and marshal shall, at the time of making his half-yearly return to the attorney general, pay into the treasury * * * * any surplus of the fees and emoluments of his office, which said return shows to exist, over and above the compensation and allowances authorized by law to be *retained* by him."

Section 856 provides that "the fees of district attorneys, clerks and marshals, * * * in cases *where the United States are liable to pay the same*, shall be paid on settling their accounts at the treasury." And on this language, and that of the act of July 13, 1866, (Rev. St. 3216,) the argument in support of the motion is based. The "cases where the United States are liable to pay," (referred to in section 856,) are not, however, suits in which the fees are collected from its antagonists; but others, in which it is an unsuccessful party, and, also, where services are required (such as the act specifies) for which no fees are taxed to the defendant. Where the United States is successful, and the fees are recovered from the defendant, it is not liable to pay, and the case does not fall within this section. This construction is reasonable, and conforms to the language employed; while any other would bring the section into conflict, not only with the several sections before referred to, (which provide, as has been seen, for the officers' retention of their fees,) but also with the section immediately following it, (section 857,) which directs that "the fees and compensation of officers, and persons hereinbefore mentioned, *except* those which are directed to be paid out of the treasury, shall be recovered in like manner

as fees of the officers of the states, respectively, for like services are recovered."

The distinction in the mind of the draughtsman of the act, which, without this section, would have been plain, is thus put beyond doubt. The fees, other than those which are to be paid out of the treasury, are those which are taxed and collected in suits; and these are to be recovered as like fees are recovered by similar officers of the state. In Pennsylvania such fees are recovered by taxation and execution, if not voluntarily paid; and when recovered belong exclusively to the officer. The plaintiff in whose suit they are collected has no claim upon, nor responsibility respecting, them. *Beale* v. *The Commonwealth*, 7 Watts, 186. In this case Chief Justice Gibson says: "He who orders the service is also liable on an implied contract. Down to the receipt of them (the fees) by the sheriff he certainly is; but it cannot be doubted that payment to the agent of the creditor, by the debtor ultimately liable, discharges the collateral liability of the intermediate one. If the money be lost in the sheriff's hands it is lost to him whose property it was at the time; for a loss which would not have happened without some degree of negligence must be borne by him whose inattention occasioned it, and it is the business of the officer to see that the sheriff pay over his fees."

The act of July 13, 1866, which provides "that all judgments and moneys recovered or received for taxes, costs, forfeitures and penalties shall be paid to collectors as internal taxes are required to be paid," effects no change in the existing law, except to require the costs, *which belong to the government*, to be paid into a different department in internal revenue cases. These costs consist in expenditures made by it during the progress of suits, and taxed to and recovered from defendants on its account, and this, manifestly, was its only purpose. It does not require the officers' *fees* to be thus paid over, and no proper object is discoverable for such a requirement. The fees belong to the officers as the emoluments of their offices. Conceding that congress might require

the payment, and send the officers to another department to recover them back, such a purpose will not be attributed to the statute in the absence of plain terms to that effect.

This interpretation gives full force to the language of the statute, and, I have no doubt, to its purpose. The distinction between *costs* to which a successful party is entitled, and *fees* belonging to an officer, is well understood by the profession, and is judically stated by the court in *Messer* v. *Good*, 4 S. & R. 248, and again in *Beale* v. *The Commonwealth*, before cited. In the former case the court says: "*Costs* are an allowance to a *party* for expenses incurred in conducting his suit; *fees* are a compensation to an *officer* for services rendered in the progress of the cause." The act of 1866, manifestly, recognizes this distinction, and was not intended to affect the officers referred to, by taking possession of their fees, but simply to turn the money coming to the government, in the form of costs, from revenue cases, into another department, more appropriate for its reception.

The entire amount collected in the cases referred to, has been paid into court; and we regard this as a proper practice, as it affords all persons interested an opportunity of contesting the officers' claims.

The motion is therefore denied.

McKennan, C. J. The statutes referred to in the opinion of the district judge apply as well to the disposition of money collected or paid under proceedings in the circuit court as to money in the custody of the district court. Hence it was desired that the circuit judge should sit with the district judge at the argument of the motion.

The questions involved in it were argued with great fullness and ability, and the foregoing opinion is the result of our concurrent judgment. It is to be understood, therefore, as practically an adjudication by both courts, and as establishing the rule by which similar applications will be determined by the circuit court.

WHITEHOUSE, Assignee, *v.* THE CONTINENTAL FIRE INS. CO.*

SAME *v.* THE COM. FIRE INS. CO.

SAME *v.* THE MANHATTAN FIRE INS. CO.

(*Circuit Court, E. D. Pennsylvania.* May 18, 1880.)

REMOVAL OF CAUSES—TIME OF REMOVAL—ACT OF CONGRESS.—Under the act of March 3, 1875, it is not necessary that the cause should be removed from the state court at the first term at which it could be put at issue, but it may be removed at any time before the pleadings are completed, or at the first term following their completion.

SAME—REMOVAL FOR LOCAL INFLUENCE OR PREJUDICE.—The provisions of the act of 1867, (Rev. St. § 639,) for the removal of causes from the state courts, on the ground of local influence or prejudice, are not repealed by the act of 1875.

These were rules to remand causes to the state court.

The record showed that the above suits were commenced in the court of common pleas of Schuylkill county, Pennsylvania, on September 5, 1874. Defendants appeared by counsel, but no declaration was filed, or any further proceedings taken, until November 17, 1879, when defendants filed petitions for the removal of the causes to the United States circuit court. The petitions set forth that the matters in dispute in each case exceeded $500; that the controversy was between citizens of different states, the plaintiff being a citizen of Pennsylvania, and the defendants being corporations organized under the laws of New York, and having their principal offices in the city of New York; and that petitioners believed that, from prejudice and local influence, justice could not be obtained in the state court. The petitions were accompanied wtth the usual bonds to remove the record to the United States court, and the record was filed in the circuit court at the first term after the filing of the petitions.

Hon. J. B. Reilly, for plaintiff.

G. R. & S. H. Kaercher and *E. D. Smith*, for defendants.

BUTLER, D. J. The rules taken must be dismissed. The act of March 3, 1875, section 3, requires the petition for removal

*Prepared by Frank P. Pritchard, Esq., of the Philadelphia Bar.

to be filed "before or at the term at which such cause could be first tried." The causes here involved, were not at issue, nor had any step been taken to put them at issue, when the petition was filed. In that condition they could not be tried. The citation from "Buskin's Indiana Practice"—"*We understand* that Justice Davis, when sitting in circuit for the district of Indiana, held that the application for removal must be made at the first term at which the cause could be *put at issue*"—is too uncertain to be regarded as authority. Much more important are the cases of *Scott et al., Trustees*, v. *Clinton & Springfield R. Co.* 8 Chicago Legal News, 210, (6 Bissell, 529,) and *Michigan R. Co.* v. *Andes Insurance Co.* 9 Chicago Legal News, 34, in which it was held that, inasmuch as the cause cannot be tried, until the issues are made up, the application is in time if it come before the pleadings are completed, or the next term following their completion. In the valuable note to *Taylor* v. *Rockefellow*, Am. Law Reg. (N. S.) vol. 18, No. 5, p. 313, the same judgment is expressed by the intelligent author.

This construction is consistent with the spirit of the statute, as well as with its terms. The object in limiting the time for application is to guard against loss of opportunity for trial, from delay in making it. Where, as here, it is made before any step has been taken towards forming an issue, no such loss can result.

But these applications are within the terms of the act of 1867, providing for causes in which local influence or prejudice is likely to defeat the ends of justice, Rev. St. § 639; Dillon on "Removal of Causes," 22, 23, 25, as well as that of 1875; and they might, therefore, have been made at "any time before *trial or final hearing*." *Insurance Co.* v. *Dunn*, 19 Wall. 214; *Vannever* v. *Bryant*, 21 Wall. 41. There has been no express repeal of this provision of the statute of 1867, and there does not seem to be any by implication. Dillon on "Removal of Causes," 25; *Cook* v. *Ford et al.* 16 Am. Law Reg. (N. S.) 417; *Zinc Co.* v. *Trotter*, 17 Am. Law Reg. (N. S.) 376. Regarding it as in force, all question respecting the defendant's right to trial here is removed.

The other matters objected to are immaterial.

BURGESS *v.* SOUTHBRIDGE SAVINGS BANK and others.

(*Circuit Court, D. Massachusetts.* May 7, 1880.)

MORTGAGE — INTEREST ON DEBT AFTER DUE — INSURANCE PREMIUMS PAID BY MORTGAGEE—ALLOWANCES TO MORTGAGEE.

In Equity.

LOWELL, C. J. The Southbridge Savings Bank, holding a first mortgage upon the premises which are in controversy here, were made defendants, perhaps without necessity, but were made so, in this suit, and in several others, in which Thomas Burgess is plaintiff. The controversy appears to be between the plaintiff and Mrs. Tyler, holding a second mortgage, which the plaintiff says should be postponed to his, which is, in order of time, the third.

By consent of parties a decree was entered for a sale of the land by the savings bank, and for payment into court of the proceeds of sale, beyond what is due them on their mortgage. The account has been rendered, and two or three questions are raised upon certain charges made by the bank against the proceeds.

The debt bears 7 per cent. interest by the agreement of the parties, and the first question is whether, after a default, the mortgagees are to charge that rate or only 6 per cent. Even if I am not positively bound by the decisions in Massachusetts I ought to follow them in a case of this kind, unless they appear to me decidedly unsound. I understand those decisions to be that the rate of interest agreed between the parties for the forbearance of money is, in general, understood to mean that the rate shall so continue until payment, or until judgment, and therefore is the true rule of damages under the statute of Massachusetts, which fixes the rate of 6 per cent. only when the parties have failed to agree on some other. *Brannon* v. *Hursell*, 116 Mass. 63.

It is not worth while to examine into the niceties of the cases on this subject, because it is plain that both parties understood that this debt was to bear 7 per cent. interest. It

was payable on demand, with that rate agreed on, and if that should be held to mean that 7 per cent. should be paid until default, and 6 per cent. thereafter, it is meaningless, as there was a default the day after the mortgage was delivered. The parties have acted on this theory and settled accordingly. Besides, the defendants have been prevented from realizing their money wholly by the suits instituted by the plaintiff.

The premiums of insurance are properly chargeable against the fund. There was a covenant in the mortgage, in the most ample terms, authorizing the bank to insure at the expense of the mortgagees, and a condition for the repayment of the premiums. It is true that after the mortgagees had taken possession they insured on their own moneys, and a question might possibly have been raised upon the form of policy whether it came within the covenant. The evidence is that they intended to insure for all persons interested, and were advised by the agent of the underwriters that mortgagees in possession should insure in this way. Under these circumstances I do not think that they could have refused, in a court of equity, to account for the insurance money if they had recovered it, and therefore they should be allowed the premiums.

It is admitted that a small item for compound interest must be disallowed; that a return premium received since the account was made up must be credited. The only other question is upon counsel fees and expenses. The charge of the mortgagees for care of the premises is disallowed, because it seems that they agreed with the plaintiff to employ a man for this purpose, and did employ him, and his very reasonable charges are allowed.

The mortgage permits the bank to deduct all costs, charges and expenses of suits concerning the premises; and the evidence shows that they have been put to a great deal of charge, rather uselessly, perhaps, and have been obliged to spend money for costs and fees to defend their title. I allow on this account the sum of $450.

Making the changes in the account, in accordance with this opinion, the Southbridge Savings Bank stand charged

with a balance of $8,670.79. I understand the money has been invested by consent of the parties, and of course whatever interest is earned will be added to this balance.

UNITED STATES *v.* JACKSON.

(*Circuit Court, D. New Hampshire.* May 13, 1880.)

BANKRUPTCY—CONCEALMENT OF PROPERTY—INDICTMENT FOR.—An indictment under the bankrupt law for wilful and fraudulent concealment of his goods by the bankrupt alleged such concealment some months after the adjudication, "all then and there the property" of him, the said bankrupt. *Held*, that the failure to allege specifically that the property concealed was the property of the bankrupt, at the time of the adjudication in bankruptcy, was a formal defect.

INDICTMENT—DEFECTS IN.—A particular intent which, by the statute, makes an act a crime is matter of substance, but mistakes in expressing the substance of a crime, if the meaning can be understood, will be looked upon as formal defects.

Mr. O'Ray, U. S. Attorney, for the United States.

Mr. Clark, for respondent.

LOWELL, C. J. The Revised Statutes, in section 5132, punish a person "respecting whom proceedings in bankruptcy are commenced," whether by his own petition or that of his creditors, "who, with intent to defraud, wilfully and fraudulently conceals from his assignee, or omits from his inventory, any property or effects required by the title to be described therein." The indictment charges such an offence. It is demurred to upon the ground that there is no intelligible allegation that the goods and chattels said to have been concealed were the property of the defendant when the proceedings were begun. That the defendant was made a bankrupt in March, 1876, and that an assignee was chosen and qualified in April, are set forth in a mode not objected to. After stating these facts the indictment proceeds to say that Cornelius Coolidge, the assignee, was entitled to have and receive, for the benefit of the defendant's creditors, all the estate and effects assignable under the laws of the United States concerning bankruptcy;

yet that the said Noah Jackson, after the commencement of the proceedings in bankruptcy respecting him, to-wit, on the first day of November, 1876, at Hillsborough, in New Hampshire, did, with intent to defraud his creditors, etc., wilfully and fraudulently conceal from his assignee, and has continued to conceal from him, a large part of his property and effects required by law to be described in the inventory by law required to be filed, no part of which was exempt or belonged to the defendant after said proceedings were commenced, to-wit: "did unlawfully, etc., on said first day of November, conceal, etc., * * * [giving a full description of the horses, harness, etc., with values added, at the end of the description,] and all then and there of the property of him, the said Noah Jackson."

The objection is that the last line in quotation marks refers to the first of November, and alleges that the goods were then the property of the defendant, instead of saying that they were so at the moment of the commencement of the proceeding. If they were his in November, they should not have been given to the assignee, who was entitled only to what was the bankrupt's property in March.

As a criticism upon the allegations of time, I find the objection a sound one. Upon a careful examination of the indictment, which consists of one very long sentence, I understand it to allege that the defendant has concealed property which was of a kind required to be described in his inventory; that it was a great part of what should have come to the possession of the assignee, from which we are to infer that it belonged to the bankrupt on the third day of March, the day when the proceedings were begun. It is nowhere stated affirmatively that the bankrupt owned goods on that day. I think it probable that in using the words "then and there the property of said Noah Jackson," the pleader had in mind to affirm, without particular regard to the date, that these goods were Jackson's own property, and not those of a third person, or held by him in trust.

Is this defect fatal? Section 1025 of the Revised Statutes requires the courts not to hold an indictment insufficient

for any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant; that is, if the defect is one of form, and the indictment is not so defective in form as to be likely to prejudice the defendant, the defect may be disregarded, or perhaps amended.

It is somewhat difficult to say what is form, and what is substance, in an indictment. A nice critic might insist that form is substance in criminal pleading, but the statute is intended to have some operation, and I have been disposed to give it a liberal construction. I have held that a particular intent, which made an act a crime by the words of a statute, is part of the substance. On the other hand, mere mistakes, however serious, in expressing the substance of a crime, if the meaning can be understood, I look upon as formal.

By this rule I hold that the allegations of time in this indictment, one of which is repugnant to the other, amounts to a formal defect or imperfection; it being set out informally, but with no danger of mistake, that the defendant is accused of wilfully and fraudulently concealing from his assignee property which he should have given up to him for the use of the creditors.

Demurrer amended.

SHERMAN, Assignee, etc., *v.* SAVERY and others.

(*District Court, D. Iowa.* March, 1880.)

VENDOR AND VENDEE—VENDEE'S RIGHT TO POSSESSION OF LAND.—Where land is vacant, and a contract for its transfer is silent as to possession, and the vendee has fully performed on his part, and it only remains for the vendor to make the necessary conveyance, his rights are fixed, and there is an implied agreement or license that the vendee may at once take possession and have the use of the land.

SAME—LIABILITY OF VENDEE FOR TAXES.—A vendee in such case should pay his proportion of taxes thereafter assessed upon such land, and it is no defence against such obligation that the vendor refused to convey to him, but conveyed to another against whom a decree for specific performance has since been entered.

SAME—SAME—VOLUNTARY PAYMENT OF TAXES BY TRUSTEE.—Where lands which a vendee was entitled to have conveyed to him, were transferred by the vendor to another, who was subsequently held to be trustee for such vendee, and decreed to convey to him, *held*, that taxes paid by such trustee to protect the title subsequently conveyed to vendee was not a voluntary payment, and he was entitled to reimbursement therefor although the decree of the state court under which such conveyance was made ordered a conveyance "free from encumbrances executed or suffered."

NELSON, D. J. The present suit is brought by the complainant for a partition of real estate described in the bill of complaint. Cross-bills are filed by some of the defendants; one by Taylor, who claims contribution for taxes paid by him upon the entire property, most of it pending a suit to enforce the specific performance of a contract for the sale of an undivided one-half of the lands.

The only question in controversy arises upon the claim of Taylor as set out in his cross-bill. The facts are these: On May 16, 1863, the following contract was entered into between F. C. D. McKay, of Des Moines, and the county of Cerro Gordo, in the state of Iowa:

"Agreement made the sixteenth day of May, A. D. 1863, between the county of Cerro Gordo, state of Iowa, of the first part, and F. C. D. McDay, of Des Moines, in said state, of the second part, witnesseth: Whereas, the said county has expended large sums of money in attempting to acquire title

to her swamp lands, and to secure the claim of the county on the United States for such of her swamp lands as have been sold by the general government, or located with warrants, and has, so far, been unsuccessful; and, whereas, by the recent decisions and rulings of the commissioner of the general land office, the swamp-land interest and claim of said county is involved in great jeopardy and will require expenditures in costs, expenses and efforts, in order to secure it: Now, therefore, said county hereby agrees to put its swamp-land interest and claim into the hands of the party of the second part for prosecution, settlement and collection as fully as the same exist, whether for lands, scrip or cash. The county also agrees to furnish the records and papers in its possession to the party of the second part to aid said work.

"The county also agrees to nominate and appoint such agents as the party of the second part may desire to select or reselect said lands, if necessary, and to make the indemnity proofs, and also to nominate to the governor such persons as the party of the second part may request for special agent, under the thirteenth section of the act of the general assembly of the state of Iowa, entitled 'An act to authorize the governor and board of county supervisors to appoint agents in regard to swamp lands belonging to the state of Iowa, and to define their duties,' approved April 8, 1862; such agent to give the bail by law required, and to deliver the proceeds to the board of supervisors as required by said thirteenth section of said act.

"The party of the second part take said interest and claim for said purpose, and agree to prosecute the same thoroughly and with dispatch; to make such selections and proofs as may be necessary, so far as practicable; to retain such counsel and help as may be necessary to pass said claim at Washington; to close up and finish the business at the earliest practicable time; and to pay all the expenses of all such agencies and of doing said business at Washington and elsewhere, so that said county shall have nothing to pay, whatever, if nothing is obtained out of said interest or claim; and in case any lands, scrip or money, or all, are obtained, then, out of such proceeds, the county is to pay to the parties of

the second part the sum of $1,000, to cover such costs and expenses and efforts in full, and the remainder of all the proceeds of such business is to be equally divided between the parties hereto; the county to take and have one-half thereof, and to pay and deliver the other half thereof to the party of the second part; each sharing alike in such equal division as to land, scrip and money.

"By order of the board of supervisors.

[Stamp.]

"JARVIS J. ROGERS, Chairman.
"DAVID BUTTS,
"GABRIEL PENCE,
"EDGAR OSBORNE,
"E. D. HUNTLEY,
"Supervisors.

"Attest: F. C. D. MCKAY.
"H. B. GRAY, Clerk.
"By H. G. PARKER, Deputy.

"*State of Iowa, Cerro Gordo County—ss.:*

"I, B. F. Hartsorn, clerk of the board of supervisors in and for said county, do hereby certify the foregoing to be a full, true and correct copy of a contract entered into by and between the aforesaid county and F. C. D. McKay on the sixteenth day of May, 1863, as appears from the original now on file in my office.

"Witness my hand and the seal of said board this sixteenth day of June, 1866.

[L. S.] "B. F. HARTSHORN,
[Stamp.] "Clerk Board of Supervisors."

Under this contract McKay and his associate, after five years of toil and the expenditure of large sums of money, secured from the United States government, for said county, in cash, $7,257.62, and 30,053 78-100 acres of land. The cash was remitted by draft of the treasurer of the United States, payable to the order of the governor of Iowa, for the use of Cerro Gordo county.

The land was approved and patented to the state of Iowa by the United States, for the use of Cerro Gordo county, and on the thirteenth of March, 1868, was patented by the state to Cerro Gordo county, and as this patent recites, in detail, the history of the title, it is here set out in full:

"*State of Iowa: To all to whom these Presents shall come—Greeting:*

"Whereas, by the act of congress approved September 28, 1850, entitled 'An act to enable the state of Arkansas, and other states, to reclaim the swamp lands within their limits,' it is provided that all the '*swamp and overflowed lands*' made unfit thereby for cultivation, within the state of Iowa, which remained unsold at the passage of said act, shall be granted to said state; and, whereas, by an act of the general assembly of the state of Iowa, approved February 2, 1853, entitled 'An act to dispose of the swamp and overflowed lands within the state, and to pay the expenses of selecting and surveying the same,' and other acts amending or supplemental thereto, the said swamp and overflowed lands, and the indemnity therefor, were granted to the counties respectively in which the said swamp and overflowed lands may lie or be situated;

"And, whereas, by the first section of the act of congress, approved the second of March, 1855, 'for the relief of purchasers and locators of swamp and overflowed lands,' authority is conferred, on certain conditions, to purchasers or locators, who have made entries of the public lands claimed as swamp lands, either with cash or with land-warrants, or with scrip, prior to the issue of patents to the state, as provided by the second section of the act approved September 28, 1850;

"And, whereas, by the second section of the act aforesaid of the second of March, 1855, it is provided, among other things, that upon due proof being produced to the commissioner of the general land office, as therein mentioned, that the class of lands that had been located by warrants or scrip are swamp lands, within the meaning of said act of 1850, that said state shall be authorized to locate a quantity of like

amount upon any of the public lands subject to entry, at one dollar and a quarter per acre or less, and patents shall issue therefor, upon the terms and conditions enumerated in the act aforesaid of March 2, 1855, provided that the said decisions of the commissioner of the general land office shall be approved by the secretary of the interior;

"And, whereas, a special certificate, dated March 1, 1867, was issued by the commissioner of the general land office, authorizing the state of Iowa to locate the quantity of 30,057.54 acres as indemnity contemplated by the second section of the aforesaid act of the second of March, 1855, for swamp and overflowed lands in Cerro Gordo county, entered of the United States by location of military bounty land warrants, and the said certificate having been returned to the general land office, accompanied by a list showing the selections in satisfaction thereof of the lands hereinafter described, situated in the Sioux City land district;

"And, whereas, the said land hereinafter described has been approved and patented by the United States, in pursuance of the acts of congress aforesaid, to the state of Iowa, to-wit: [Here follows description of the land in controversy] according to the official plats of the survey of said lands:

"Now, therefore, know ye that the state of Iowa, in consideration of the premises, and in conformity with the act of the general assembly aforesaid, have given and granted, and by these presents do give and grant, unto the said county of Cerro Gordo, in fee-simple, to be disposed of according to the several acts of the general assembly relating thereto, the tracts of land above described.

"To have and to hold the same, together with all the rights, privileges, immunities and appurtenances thereunto belonging, unto the said county of Cerro Gordo, in fee-simple, and to its assigns forever.

"In testimony whereof, I, Samuel Merrill, governor of the state of Iowa, have caused these letters to be made patent, and the great seal of the state of Iowa to be hereunto affixed.

"Given under my hand at Des Moines, the thirteenth day of March, in the year of our Lord one thousand eight hun-

dred and sixty-eight, and of the state of Iowa the twenty-second.

"SAMUEL MERRILL.

"By the Governor.

"ED. WRIGHT,

"Secretary of State.

"I certify that the foregoing deed is recorded in vol. 1, page —. "C. C. CARPENTER,

"Register State Land Office."

At the June session, 1868, of the board of supervisors, Mr. Savery, who was associated with McKay, reported to them the success of McKay under the contract of sixteenth May, 1863, and demanded a settlement under said contract; but no settlement was effected, and within a few months afterwards the county of Cerro Gordo granted all of said lands to the McGregor & Sioux City Railway Company; before doing so, however, taking from said company a bond of indemnity in words as follows:

"*Know all men by these presents,* that the McGregor & Sioux City Railway Company does hereby covenant and agree to and with the county of Cerro Gordo, state of Iowa, in consideration of said county entering into a contract with said company to convey to said company certain lands, held and owned by said county as indemnity for swamp lands, to procure said company to construct a railway in said county; said McGregor & Sioux City Railway Company will, if said contract is ratified by and held for that purpose, and said lands are conveyed to said company, as specified in said contract, hold said county free, harmless and exempt from all costs, expenses and liabilities to the American Emigrant Company for any claim or pretended claim, right or demand said American Emigrant Company may have against said county for any part or parcel of said lands.

"Witness the signature of said company, hereto affixed, this August 21, 1868.

[Stamp.] "MCGREGOR & SIOUX CITY R. W. Co.,

"By JOHN LAWLER,

"Vice President and General Agent of said Company."

And afterwards, on the seventh of October, 1872, the said railway company conveyed said lands to Horace S. Taylor by deed in words and figures following:

"*Know all men by these presents*, that the McGregor & Missouri River Railroad Company, in consideration of the sum of sixty thousand one hundred and seven and 56-100 dollars, to be paid them in five years from date, with annual interest at 7 per cent per annum, payable on the first day of October in each year by Horace S. Taylor, of the city of New York, do hereby sell and convey unto the said Horace S. Taylor the following described lands situated in Woodbury, Sioux and Lyon counties, in the state of Iowa, viz.: All of the lands described in a deed dated fifth of October, 1868, made by the county of Cerro Gordo, Iowa, to the McGregor & Sioux City Railway Company, which company is now named the McGregor & Missouri River Railway Company, amounting to thirty thousand and fifty-three acres and 78-100 of an acre, which deed is recorded in book "F," pages 225 to 232, of the records of Woodbury county, Iowa, and in book "C," pages 519 to 526, of the records of Sioux City, Iowa, to which deed reference is here made; and they hereby covenant with said grantee that the title to said lands in the same are acquired by the grantors from the county of Cerro Gordo, Iowa, and that the title has in no way been encumbered by the grantors, except by certain contracts of sale, and to which this sale and conveyance is subject, namely:

"Contract for N. $\frac{1}{2}$, N. E. of section 5, township 99, range 45, to C. H. Moore.

"Contract for N. $\frac{1}{2}$ of section 4, in township 99, range 45, to S. Lockwood Bailey and certain others.

"Contract for all of section 8, in township 100, range 45, to S. Lockwood Bailey.

"Contract for S. E. $\frac{1}{4}$ of section 14, in township 98, range 46, to G. R. Badgerow; and such other contracts (if any) as may have been entered into by O. E. Palmer, agent, which are not yet reported to the company.

"And the grantors will warrant and defend the said lands to the said grantee, and to his heirs and assigns, forever, sub-

ject to certain contracts as aforesaid, against the claim or demand of all persons whatever claiming the same, by, through or under the grantors. The grantors reserve a vendor's lien for the purchase money above named, viz., sixty thousand one hundred and seven and 56-100 dollars.

"In witness whereof they have hereunto set their hand and seal this seventh day of October, A. D. 1872.

"McGregor & Missouri River Railway Company.

"By Russell Sage, President.

"Witness: John A. Hillery. [L. S.]

"J. M. Bush, Assistant Secretary."

On the fifth of February, 1870, B. F. Allen, who had become associated with F. C. D. McKay in the contract of May 16, 1863, brought a suit in equity, in the district court of Polk county, Iowa, against Cerro Gordo county, the railway company, and the governor of Iowa, to compel a specific performance of the McKay contract.

On the eighteenth of March, 1874, Horace S. Taylor appeared in said cause and asked to be made a party defendant, and filed the following pleading:

To the District Court aforesaid:

"Your petitioner, Horace S. Taylor, respectfully represents that he is the owner in fee in the real estate described in the plaintiff's petition in this cause, and to recover which plaintiff in this cause brought this action; that said land was conveyed to him by deed by the defendant, the McGregor & Sioux City Railway Company, now called the McGregor & Missouri River Railway Company, dated October 7, 1872, a copy of which deed is hereto annexed, marked Exhibit A, and made a part hereof. Your petitioner therefore asks that he be made a party defendant in this action, and be allowed to defend, and that he be substituted as defendant in the place and stead of the said McGregor & Missouri River Railway Company.

"Horace S. Taylor."

A trial was had and a decree ordered in accordance with the prayer of the plaintiff's bill, by the court below, on the —— day of ———, 1874.

The cause was taken to the supreme court of the state, and was tried there *de novo* on its merits, the decree of the district court affirmed, and a new and full and final decree entered in the supreme court on the twenty-second of April, 1875. This decree is set out in full, as an exhibit to complainant's bill in this cause, and we point only to the following extracts from the same, to-wit: "It is ordered and adjudged that the defendants, the county of Cerro Gordo and McGregor & Sioux City Railway Company, now the McGregor & Missouri River Railway Company, and the defendant Horace S. Taylor, are ordered and directed, within 20 days from this date, to execute deeds of release, with special warranty against conveyances or encumbrances, executed or suffered by them respectively, to the said B. F. Allen, for an undivided one-fourth of all the land hereinbefore described, and to J. C. Savery for an undivided one-eighth of all the lands, etc., with like covenants; and to Angeline J. McKay, for an undivided one-eighth, etc., with like covenants, and deposit the same with the clerk of this court, etc.

"And that in default of the delivery of such conveyances, duly executed, to the clerk of this court, within twenty days from the rendition of this decree, the clerk of this court is hereby appointed, and he is hereby directed, to execute such conveyance in the name of said several defendants, with like covenants in their name and behalf.

"And it is further ordered and adjudged that the said McGregor & Sioux City Railway Company, now the McGregor & Missouri River Railway Company, purchased the interest of said Cerro Gordo county in the lands in controversy, upon a covenant to save said county harmless and exempted from all costs and expenses by reason of the contract in controversy herein; and that the said county of Cerro Gordo have and recover of the said McGregor & Sioux City Railway Company, now the McGregor & Missouri River Railway Company, all costs in this suit adjudged against said county, and that may have been paid, or that shall be paid, in this cause by said county, or any fund to which it is entitled under this decree."

Under this decree, the railway company and Taylor having failed to execute the conveyances within the 20 days, the same were executed by the clerk of the supreme court, with the covenants authorized by the decree. These conveyances were executed September 14, 1875.

The defendant "Hervey" obtained his interest in the lands from Savery on June 19, 1875, and Stewart from Mrs. McKay on September 25, 1875, after the decree for a specific performance, and it is agreed by a stipulation on file that the present interest of parties is: Taylor, one-half ($\frac{1}{2}$;) Sherman, assignee, one-fourth ($\frac{1}{4}$;) Stewart, one-eighth ($\frac{1}{8}$;) Hervey, one-eighth ($\frac{1}{8}$.)

In considering the question presented it is necessary, first, to determine McKay's rights under the contract. It was clearly the intention that he should become a tenant in common to the extent of an undivided one-half of all the swamp lands he might secure to the county of Cerro Gordo, and his equitable interest was fixed on March 13, 1868, when the land was patented by the state of Iowa to the county. McKay having fully performed his part of the contract was entitled to a deed from the county for the undivided one-half ($\frac{1}{2}$) of the land, and had a right to the use of the property as a tenant in common.

The contract, after its fulfillment by him, impliedly gave a license to such possession as is secured to tenants in common. All that was necessary to be done by the county was to give a deed and thus complete the contract.

In equity, McKay is considered the owner of an undivided one-half of the lands at the time the county obtained the deed from the state. He was entitled from that time to one-half of any income derived from the property. He was interested in protecting the property from waste, and was entitled to all increase and gain on its value, and must share in all the disadvantages, expenses and outgoings. It is claimed that under this contract the right of exclusive possession to the entire lands remained in Cerro Gordo county and the railway company, and its grantee, Taylor, until a conveyance was made under the decree for a specific performance. I do not

so understand the equitable rule. I think the doctrine defining the rights and liabilities of a vendee under a contract of this character is settled as I have stated it.

The rule is thus given by *Earl*, J., (*Miller* v. *Ball*, 64 N. Y. 293:) "It may be stated, as a general rule, that in all cases where the contract is silent as to the possession, the land being vacant, and the vendee has paid the entire consideration, and fully performed on his part, and all that remains for the vendor to do is to give the deed, there must be an implied agreement or license that the vendee may at once take possession and have the use of the land."

If this doctrine is solid, then, although the county of Cerro Gordo granted all the lands to the McGregor & Sioux City Railway Company, and by the latter they were sold and conveyed to Taylor, with knowledge of all the facts, the equitable rights and liabilities of McKay and his successors in interest are not changed, and they should pay a proportion of the taxes which were a charge upon the land; at least, should reimburse Taylor, who held the lands in trust for them.

It is urged that the county of Cerro Gordo having wrongfully withheld the deed when demanded by McKay, and refused to recognize his rights under the contract, and the railway company and Taylor being equally at fault, they should keep down the taxes, and Taylor is not entitled to any favor in a court of equity. If I am right in the construction of this contract, and the equitable interest of the parties thereto was fixed when the condition was performed by McKay, then a refusal by the county to convey his interest, and a grant of the lands to the railway company and to Taylor, did not change his equitable rights. He was placed in no better or worse position, so far as the equities are concerned, by the act of the county. The railway company took the title subject to his equities, and Taylor, with knowledge of the facts, occupied the same position as trustee. If the contract had been completed by the county, and a deed given, McKay and his successors in interest would have been required to pay the taxes. Why should they occupy a better position now? At least, why should they not reimburse Taylor?

The counsel urge, in addition, as a reply to such interrogatory, the payment of taxes was voluntary. If so, then, under the well-established doctrine affirmed in the case of *Homestead Co.* v. *Valley Railroad*, 17 Wall. 153, 166, Taylor can have no relief. Was the payment of taxes voluntary? I think not. Taylor held the title to an undivided one-half of the lands in trust for McKay and his successors in interest. It was so decided in a suit for specific performance, and Taylor was ordered to make conveyances. He was required, while such trustee, to protect the title, and prevent a sale of the property and extinguishment of the interest he held in trust. He did so, and the payment of taxes was in fulfilment of his duty, and not voluntary. See *Duff* v. *Dorman*, 52 N. Y. 634.

The authorities cited by counsel are not in conflict with the views above expressed. Judge Wright, in one of the Iowa cases, decided that in contracts for the sale of land, silent as to payment of taxes, the party in actual possession of the land should keep down the taxes. It is stipulated the land here was vacant. In the English case of *Carrodus* v. *Sharp*, 20 Beav. 56, there was an agreement for the sale of a lease of a mill by the plaintiff. By the terms of the lease no assignment could be made until the assent of the lessor was obtained. The parties had some differences about the value of machinery, and the defendant refused to perform. The assent of the lessor was obtained, and a decree for specific performance being granted, and a reference as to title being had, it was decided that the date when the assent of the lessor was obtained fixed the time when defendant became a purchaser, and when he ought to take possession, and after that period he should pay the expenses and outgoings.

In this case McKay became a purchaser, and was entitled to his equitable interest when the county obtained a patent from the state, and the expenses and outgoings after that time must be paid by him and his successors.

Again, it is urged that the decree of the supreme court of Iowa, granting specific performance, settled all the equities, and a conveyance being ordered "free from encumbrances

executed or suffered," it was intended to relieve the case of all embarrassment on the question of taxes. I am not prepared to admit this, although the point raised is close. The laws of Iowa imposed the taxes. Taylor was not consulted, but was passive in the matter, and was required to pay the taxes in order to protect the title held in trust, and it is not believed this clause in the decree concluded their adjustment.

I have given this case such examination as the pressure of business will admit, and have arrived at the conclusion that Taylor is entitled to relief. An appeal to the circuit court, which is allowed, will afford ample opportunity for the correction of any error.

A decree for a partition is granted, and the amount of taxes paid by Taylor, and only that, after he became the purchaser from the railway company, is allowed him, to be paid by the parties according to their respective interests in the lands.

A reference is ordered to the clerk, and the proper decree in conformity with this opinion will be entered, and the costs of the litigation shared by all parties.

WHITING *v.* THE TOWN OF POTTER.

(*Circuit Court, N. D. New York.* May 20, 1880.)

MUNICIPAL BONDS—PETITION TO ISSUE TO INVEST IN RAILROAD STOCK—SUFFICIENCY OF—CHAPTER 907, LAWS N. Y. 1869, AS AMENDED BY CH. 925, LAWS 1871.—The verification of a petition, under chapter 907, Laws N. Y. 1869, as amended by chapter 925, Laws 1871, for the issuance of bonds by a municipal corporation to be invested in the stock or bonds of a railroad corporation, is a part of such petition, and if such petition and verification, taken together, state the necessary facts required by statute, the county court to whom it is addressed will have jurisdiction.

SAME—SAME—"TAX PAYERS."—Where a petition and verification in such case uses the words "tax payers" it will be deemed to include owners of non-resident lands taxed as such.

SAME—BONA FIDE HOLDER—ESTOPPEL.—Where a municipality had issued its bonds, under such statute, and invested them in railroad stock, which it retained, and had for a long time paid interest on such bonds, *held*, that it was estopped, as against a *bona fide* holder for value of interest coupons thereon, from questioning the validity of such bonds or coupons, but their conduct was a direct ratification of the acts of those who had issued them.

Alfred C. Coxe, for plaintiff.

H. L. Comstock, for defendant.

BLATCHFORD, C. J. This suit was tried before the court without a jury. It is brought to recover the amount payable by 218 coupons on bonds issued by the town of Potter, in Yates county, New York, a municipal corporation of the state of New York, in aid of the construction of the Geneva & Southwestern Railway Company. Of these coupons 109 fell due March 1, 1879, and 109 September 1, 1879. Of each set of 109, 90 belonged to bonds of $100 each, and were for $3.50, and 19 belonged to bonds of $1,000 each, and were for $35 each. The total amount of the 218 coupons is $1,960. The total amount of bonds issued by the town in aid of the railroad was $30,000. The commissioners who issued the bonds delivered them to the railroad company in payment of a subscription by the town for $30,000 of the capital stock of the company, and the town received a certificate for that amount of such stock, and has retained it ever since. The bonds were dated September 1, 1872, and were issued shortly after November 6, 1872, and were payable in 30 years from date, and had on them when issued coupons payable every six months from and including March 1, 1873, to and including September 1, 1902. The town paid the coupons which fell due before March 1, 1879. The plaintiff is a *bona fide* holder for value of the coupons sued on. The bonds are in this form:

"United States of America, State of New York. No. 3. $100. Town of Potter, county of Yates. The town of Potter, in the county of Yates and state of New York, acknowledges itself indebted to the bearer in the sum of one hundred dollars, which sum said town promises to pay to the holder hereof at the county treasurer's office of Yates county, in Penn Yan, N. Y., thirty years after the date hereof, and also interest at the rate of seven per cent. per annum thereon, payable semi-annually on the first days of March and September, in each year, until the said principal sum shall be paid, on the presentation of the annexed interest warrants at the county treasurer's office of Yates county, in Penn Yan, N. Y.

"This bond is one of like tenor, amounting in the whole to the sum of $30,000, and issued pursuant to an act of the legislature of the state of New York, passed May 18, 1869, entitled 'An act to amend an act entitled "An act to authorize the formation of railroad corporations, and to regulate the same," passed April 2, 1850,' so as to permit municipal corporations to aid in the construction of railroads, and the several acts amending the same.

"In testimony whereof the undersigned, duly appointed commissioners of said town of Potter, pursuant to sections 2 and 3 of the said act, have hereunto set their hands and seals the first day of September, in the year of our Lord 1872.

"MORRIS B. HYNN, [SEAL.]
"LYMAN LOOMIS, [SEAL.]
"JOHN SOUTHERLAND, [SEAL.]
"Commissioners.

"Registered in the county clerk's office of Yates county, this sixth day of November, 1872.

"Witness my hand and the official seal of said county.

[SEAL.] "H. A. HICKS,
Deputy Clerk."

Each coupon was in this form:

"The town of Potter will pay the bearer, at the county treasurer's office of Yates county, in Penn Yan, New York, three and fifty one-hundredths dollars, on the first day of March, 1879, for six months' interest on bond No. 3. Morris B. Flane, Lyman Loomis, John Southerland, Commissioners."

The first section of the act of May 18, 1869, (Laws of New York, 1869, *c.* 907,) as amended by the act of May 12, 1871, (Laws of New York, 1871, *c.* 925,) provides as follows:

"Section 1. Whenever a majority of the tax payers of any municipal corporation in this state, who are taxed or assessed for property, not including those taxed for dogs or highway tax only, upon the last preceding assessment roll or tax list of said corporation, and who are assessed or taxed, or represent a majority of the taxable property upon said last assess-

ment roll or tax list, shall make application to the county judge of the county in which such municipal corporation is situate, by petition verified by one of the petitioners, setting forth that they are such majority of tax payers, and are taxed or assessed for, or represent, such a majority of taxable property, and that they desire that such municipal corporation shall create and issue its bonds to an amount named in such petition, and invest the same, or the proceeds thereof, in the stock or bonds (as said petition may direct) of such railroad company in this state as may be named in said petition, it shall be the duty of said county judge to order that a notice shall be forthwith pubished, * * * * * * * * * directed to whom it may concern, setting forth that, on a day therein named, * * * he will proceed to take proof of the facts set forth in said petition as to the number of tax payers joining in said petition, and as to the amount of taxable property represented by them. * * * The words 'municipal corporation,' when used in this act, shall be construed to mean any city, town or incorporated village in this state, and the words 'tax payer' shall mean any incorporation or person assessed or taxed for property, either individually or as agent, trustee, guardian, executor or administrator, or who shall have been intended to have been thus taxed, and shall have paid, or are liable to pay, the tax as hereinbefore provided, or the owner of any non-resident lands taxed as such, not including those taxed for dogs or highway tax only. * *"

The second section of the act of 1869, as amended by the act of 1871, provides as follows:

"Sec. 2. It shall be the duty of the said judge, at the time and place named in the said notice, to proceed and take proof as to the said allegations in said petition, and if it shall appear satisfactorily to him that the said petitioners, or the said petitioners and such other tax payers of said municipal corporation as may then and there appear before him, and express a desire to join as petitioners in said petition, do represent a majority of the tax payers of said municipal corporation, as shown by the last preceding tax list or assessment roll, and do represent a majority of the taxable property

upon said list or roll, he shall so adjudge and determine, and cause the same to be entered of record in the office of the clerk of the county in which said municipal corporation is situated, and such judgment and the record thereof shall have the same force and effect as other judgments and records in courts of record in this state. * * * The judge shall file the petition as part of the judgment roll. * * *"

The third section of the act of 1869 provides as follows:

"Sec. 3. If the said judge shall adjudge and determine that such petitioners do represent a majority of such tax payers, as aforesaid, and a majority of such taxable property, as aforesaid, it shall be his duty forthwith to appoint and commission three persons * * * to be commissioners for the purposes hereinafter named. * * *"

The fourth section of the act of 1869, as amended by the act of April 4, 1871, (Laws of New York, 1871, *c.* 283,) provides that it shall be the duty of such commissioners to cause to be made and executed the bonds of such municipal corporation, signed and certified by them, bearing interest at the rate of 7 per cent. per annum, payable semi-annnually, and also bearing interest warrants corresponding in number and amounts with the several payments of interest to become due thereon.

The fifth section of the act of 1869 empowers and directs such commissioner to subscribe in the name of such municipal corporation to the stock of the company named in such petition, to an amount equal to the amount of bonds so created by them, and to pay for the same by exchanging the said bonds therefor at par.

The sixth section of the act of 1869 provides that the bonds of any muncipal corporation issued pursuant to its provisions shall be a charge upon the real and personal estate within the limits thereof, and that the principal and interest thereof, when due, shall be collected and paid in like manner as other debts, obligations and charges against the said municipal corporation.

The act of April 28, 1870, (Laws of New York, 1870, *c.* 507,) as amended by section 5 of the act of May 12, 1871, provides

that the supreme court, at general term, shall have power at any time, by the usual process of said court in like cases, on notice and for good cause shown, to prevent, by injunction, the issuing of the bonds.

Section 4 of the act of May 12, 1871, provides as follows: "Review of proceedings under the acts hereby amended," (that is 1869, *c.* 907, and 1870, *c.* 507,) "shall be by *certiorari*, and no *certiorari* shall be allowed unless said writ shall be allowed within 60 days after the last publication of the notice of the judge's final determination, as provided in section 2 of this act. * * * * * * On the return of the *certiorari* the court out of which the same issued shall proceed to consider the matter brought up thereby, and shall review all questions of law or of fact determined for or against either party by the county judge. And the said courts, or court of appeals, in appeals now pending, and in all future proceedings, may reverse, or affirm, or modify, in all questions of law or fact, his final determination, or may remand the whole matter back to said county judge to be again heard and determined by him. * * * Applications for *certiorari* shall be on notice. On review, persons taxed for dogs or highway tax only shall not be counted as tax payers, unless that claim was made before the county judge. * * *"

At the trial the plaintiff put in evidence the judgment roll of the judgment of the county judge of the county of Yates, recorded and entered in the book of judgments of that county on the ninth of October, 1871. There is, first, the petition, which was filed with the county judge on the fourth of August, 1871, and bears 246 signatures. It is in these words: "To the Honorable, the County Judge of the County of Yates: The undersigned respectfully represent that they are a majority of the tax payers of the town of Potter, in the county of Yates, whose names appear upon the last preceding tax list or assessment roll of said town as owning or representing a majority of the taxable property in the corporate limits of said town; and they further represent that they desire that said town of Potter shall create and issue its bonds to the

amount of $30,000, the same not exceeding 20 per cent. of the whole amount of taxable property shown by said tax list and assessment roll, and invest the said bonds in the stock of the Geneva & Southwestern Railway Company, a railroad corporation in the state of New York, and that for this purpose commissioners may be appointed and such proceedings may be had as are prescribed by an act to authorize the formation of railroad corporations and to regulate the same, passed April 2, 1850, and an act passed May 18, 1869, amendatory thereof, and acts amendatory of the same."

Then follows, appended to the petition, an affidavit made by Emmett C. Dwelle, sworn and subscribed before the county judge on the fourth of August, 1871, in these words:

"*State of New York, Yates County,—ss.:*

"Emmett C. Dwelle, being duly sworn, deposes and says that he resides in the town of Potter, in the county of Yates and state of New York, and is a tax payer in said town of Potter upon real and personal property therein taxed; that he is one of the petitioners named in and who signed the annexed petition; that he has read the same and knows the contents thereof, and that he believes the same to be true; that the petitioners whose names are signed to said petition are a majority of the tax payers of said town of Potter, Yates county, and state of New York, who are taxed or assessed for property therein, not including those taxed for dogs or highway tax only, whose names appear upon the last preceding assessment roll or tax list of said town of Potter, and who are assessed or taxed, or represent a majority of the taxable property upon said last assessment roll or tax list; that he knows the same by an actual inspection of said assessment roll or tax list, and by comparing the same with the said petition and the names thereto signed; that, from his own knowledge as to part of the signatures of said petitioners who have signed said petition as aforesaid, and upon information and belief as to the rest of said signatures, this deponent verily believes the same to be true and genuine; that, as appears by said petition, such petitioners desire that said town of Potter shall create and issue its

bonds to the amount named in said petition, to-wit, the sum of $30,000, and invest the same in the stock of the Geneva & Southwestern Railway Company, a railroad company existing in the said state of New York; that said sum of $30,000 does not exceed 20 per cent. of the whole amount of taxable property, as shown by said assessment roll or tax list."

To the petition and affidavit is appended the judgment of the county judge, in these words:

"In the matter of the application of certain tax payers of the town of Potter, for leave to create and issue the bonds of said town, and invest the same in the stock of the Geneva & Southwestern Railroad Company. Before William S. Briggs, Yates County Judge.

"Whereas, on the 4th day of August, 1871, an application was made to the county judge of the county of Yates, by certain tax payers of the town of Potter, in said county, purporting to be a majority of the tax payers of said town, whose names appear upon the last preceding tax list or assessment roll of said town as owning or representing a majority of the taxable property in the corporate limits of such town, by petition, verified by one of said petitioners, setting forth that they are a majority of the tax payers of the said town whose names appear upon the last preceding tax list, or assessment roll, of said town, as owning or representing a majority of the taxable property in the corporate limits of said town, and that they desire that said town of Potter shall create and issue its bonds to the amount of $30,000, the sum not exceeding 20 per cent. for the whole amount of taxable property, as shown by said tax list and assessment roll, and invest the said bonds in the stock in the Geneva & Southwestern Railway Company, a corporation in this state, and that for this purpose commissioners might be appointed, and all and singular such proceedings be had requisite for the purpose, pursuant to the statute in such cases made and provided, whereupon, said county judge, on said fourth day of August, 1871, pursuant to the statute, duly made an order that a notice should be forthwith published in the Penn Yan

Express, a newspaper printed and published at Penn Yan, in the town of Milo, in said county of Yates, directed 'to whom it may concern,'setting forth that on the twenty-fifth day of August, 1871, at 10 o'clock in the forenoon of that day, the said county judge would proceed to take proofs of the facts set forth in the said petition, as to the number of tax payers of said town joining in said petition, and as to the amount of taxable property represented by them, and such other matters as might be proper in the premises; and whereas, on the said twenty-fifth day of August, 1871, at 10 o'clock in the forenoon of that day, proof by affidavit having been duly made to the said county judge of the proclamation of said notice pursuant to such order as aforesaid, the parties interested in said matter and proceedings appeared before said county judge, at his office in Penn Yan, aforesaid—Hon. E. B. Potter and D. B. Prasser appearing as counsel for said petitioners, and in favor of said application, and no one appearing opposed to said application,—and on that day made proofs and allegations before me of the facts set forth in said petition, as to the number of tax payers of said town of Potter joining in such petition, and as to the amount of taxable property represented by them, as shown by the last preceding tax list or assessment roll of said town, and the whole amount of taxable property of said town, as shown by the said last preceding tax list or assessment roll, and of all other facts necessary to be taken into consideration relating thereto; and other tax payers of said town of Potter then and there appeared before said county judge, and expressed a desire to join as petitioners in said petition, and did so join as petitioners in said petition, and proof being taken as to the number of tax payers in said petition, and as to the amount of taxable property represented by them, as appearing upon the said tax list or assessment roll, and, after hearing the argument of the counsel aforesaid, it appearing satisfactorily to the said county judge that the said petitioners whose names appear upon the said tax list or assessment roll, and the other tax payers aforesaid of said town who did then and there on such proceedings appear before him, and express a

desire to join as petitioners in said petition as aforesaid, and did so join, and whose names also appear upon said tax list or assessment roll, do represent a majority of the tax payers of said town of Potter, as shown by the said last preceding tax list or assessment roll, the same being the tax list or assessment roll of the year 1870, and do represent a majority of the taxable property of the said town of Potter, as shown by said last preceding tax list or assessment roll, that the said amount of bonds named in such petition does not exceed 20 per cent. of the whole amount of taxable property, as shown by the said tax list or assessment roll, and it is hereby adjudged and determined by the said county judge, and the said county judge doth hereby adjudge and determine, in pursuance of the statutes in such case made and provided, that the said petitioners whose names appear upon said tax list or assessment roll, and the other tax payers, aforesaid, of said town who did then and there on such proceedings appear before him, and express a desire to join as petitioners in said petition as aforesaid, and did so join, and whose names also appear upon said tax list or assessment roll, do represent a majority of the tax payers of said town of Potter, as shown by said last preceding tax list or assessment roll, the same being the tax list or assessment roll of the year 1870, and do represent a majority of the taxable property of said town of Potter, as shown by said preceding tax list or assessment roll; and the said county judge hereby orders and directs that this judgment and determination be duly entered of record with the clerk of the county of Yates aforesaid, and the said county judge, in pursuance of the statute in such cases made and provided, doth hereby order, adjudge and decree that Morris B. Flinn, John Southerland, and Lyman Loomis, who are freeholders, residents and tax payers within the corporate limits of the said town of Potter, be and they are hereby appointed and commissioned by said county judge as commissioners for said town of Potter, for the purposes and uses provided for in chapter 907 of the Laws of the State of New York for the year 1869, and acts amendatory of the laws. In witness whereof, the said county

judge hath hereunto set his hand, this twenty-sixth day of September, 1871. William S. Briggs, Yates County Judge."

It is contended for the defendant that the petition to the county judge was not drawn in conformity with the statute, and, therefore, did not confer jurisdiction upon him to entertain the proceeding or to render any judgment therein; that the proceeding was commenced after the act of May 12, 1871, took effect; that the petition was drawn according to the act of 1869, as originally passed, and not according to that act as amended by the act of May 12, 1871; that the petition does not exclude persons taxed for dogs and highway tax only; that it does not include the owners of non-resident lands, taxed as such; that all that the petitioners assert in the petition is that they are a majority of the tax payers whose names appear upon the tax list or assessment roll; that such assertion included persons taxed for dogs and highway tax only, but does not include the owners of non-resident lands, taxed as such; that the petitioners do not assert that they are a majority of the tax payers "who are taxed or assessed for property, not including those taxed for dogs or highway tax only," as required by the act of May 12, 1871; that the petitioners might be a majority of the tax payers of the town, including those taxed for dogs, and they might own or represent a majority of the taxable property appearing on the tax list, and yet not be a majority of the tax payers who are assessed or taxed for property, not including those taxed for dogs or highway tax only; and that the language of the petition is not equivalent to the language of the statute.

In *The People* v. *Spencer*, 55 N. Y. 1, the court of appeals of New York held, under the act of 1869, as amended by the act of May 12, 1871, that where the petition to the county judge did not show that the railroad company, in aid of which the bonds were to be issued, was a railroad company "in this state," the county judge had no jurisdiction to entertain the proceeding. That point was taken before the county judge, but he overruled it, and made an adjudication directing the bonding of the town, and his judgment was affirmed by the general term of the supreme court, on *certiorari*. On appeal,

the court of appeals, on the ground above stated, reversed the judgments below. That was a direct proceeding, before any bonds had been issued, and, in the decision, the court of appeals said: "In this case the rights of third persons are not in question, and we can, without injustice to any one, affirm the conclusion we have reached, that the county judge did not acquire jurisdiction of the proceedings, on the ground of the omission to state in the petition that the company named therein was a corporation in this state."

In *The People* v. *Smith*, (55 N. Y., 135,) the court of appeals of New York held, under the same two statutes, that the petition, in order to give the county judge jurisdiction, must show that the petitioners are not only a majority of the tax payers of the municipal corporation to which it relates, but that they are a majority, "not including those taxed for dogs or highway tax only." In that case the county judge, on a petition which did not show that the petitioners were a majority, "not including those taxed for dogs or highway tax only," had refused to make an adjudication for the bonding of the town. The general term of the supreme court reviewed his order, and remanded the case for a rehearing before him, and the court of appeals reversed the judgment of the general term. "The court of appeals said the petition in this case did not show that the petitioners were a majority of the tax payers of the town of Gorham, excluding those taxed for dogs or highway tax only, and the county judge acquired no jurisdiction of the proceedings. His authority could only be revoked by the presentation of a petition in conformity with the statute, and he could not, on his own motion, dispense with the performance of a condition precedent to the exercise of the authority conferred by the act." The petition in that case contained no allusion to persons taxed for dogs or highway tax only, nor did the affidavit of verification, so far as appears. It was a direct proceeding before any bonds had been issued.

In *Wellsboro* v. *N. Y. & C. R. Co.* 76 N. Y. 182, the county judge, on a petition under the same two statutes, which made no reference to persons taxed for dogs or highway tax

only, had made an adjudication for the bonding of the town and appointed commissioners. Before the bonds were issued the town brought a suit against the commissioners and the railroad company to annul the adjudication of the county judge, and to restrain the issuing of the bonds. The special term and the general term of the supreme court gave judgment for the plaintiff. The court of appeals held that the petition to the county judge was defective, and conferred no jurisdiction on the county judge to entertain the application or to make an adjudication, because it averred merely that a majority of the taxable property of the town, not including taxes for dogs and highways, was represented by the petitioners, and did not aver that the petitioners were a majority of the tax payers, excluding those taxed for dogs or highways only, and that the petition might be true although the petitioners were less than a majority of the tax payers, excluding the classes of tax payers who were not qualified petitioners. There does not appear to have been anything in the affidavit of verification to obviate the defect pointed out. The court of appeals said: "We are not disposed to relax the stringency of the rules we have heretofore adopted, and, least of all, in a case like the one before us, where bonds have not been issued, and the question presented is whether the preliminary proceeding shall be consummated and a debt against the town created.

Assuming that this were a case of a direct proceeding to reverse or annul the adjudication of the county judge brought before the issuing of any bonds, and to be determined according to the rules laid down by the court of appeals of New York in the cases above cited, it must be held that the county judge acquired jurisdiction to entertain the proceeding and make adjudication.

The act of May 12, 1871, provides that the words "tax payer," when used in that act, shall include "the owner of any non-resident lands taxed as such," and shall not include "those taxed for dogs or highway tax only." The statute provides that the application is to be made "by petition, verified by one of the petitioners, setting forth that the petitioners are

such majority of tax payers," (that is, "a majority of the tax payers of the town who are taxed or assessed for property, not including those taxed for dogs or highway tax only, upon the last preceding assessment roll or tax list of the town, and who are assessed or taxed for, or represent, a majority of the taxable property upon said last assessment roll or tax list,") "and are taxed or assessed for, or represent, a majority of taxable property," (that is, "a majority of the taxable property upon said last assessment roll or tax list;") "and that they desire that such municipal corporation shall create and issue its bonds to an amount named in such petition, and invest the same, or the proceeds thereof, in the stock or bonds, as said petition may direct, of such railroad company in this state as may be named in said petition."

Although the petition proper, in this case, signed by the 246 petitioners, omits the clause as to dogs and highway tax, yet the petition and the verification to it, taken together, contain and set forth all the matters required by the strictest interpretation of the statute. It is sufficient, under the statute, if the verified petition sets forth the required matters. It is the petition so verified that is to set them forth. The verification is a part of the petition, and the petition includes the petition proper and the verification. The petition verified by one of the petitioners is to be regarded as verified by all of them. The verification is to be taken as made by all who signed the petition. The statute authorizes one to verify for all. "The application is to be made by a verified petition." The application, consisting of the verified petition,—that is, of the petition proper and the verification,—is to set forth so and so. In this case it does so, within the strictest rule laid down by the court of appeals of New York.

It was not necessary that the petition or verification should refer to the owners of non-resident lands taxed as such. The statute defines the words "tax payer" as including and meaning "the owner of any non-resident land taxed as such."

Therefore, when the petition and verification use the words "tax payer," they include thereby, necessarily, the owners of non-resident lands taxed as such.

The judgment of the county judge states as appearing satisfactorily to him everything which the statute says must appear satisfactorily to him, and adjudges and determines everything which the statute says he must adjudge and determine. The statute in this respect uses only the words "tax payers," and the judgment uses only the words "tax payers." What those words mean in the section of the statute which relates to the proofs and the judgment is defined by the statute itself. But, aside from the foregoing views, it must be held in this case that as against the plaintiff, as a *bona fide* holder, for value, of the coupons in suit, the town is estopped from questioning the invalidity, after it has accepted and retained the stock for which the bonds and coupons were issued, and has paid the interest on the bonds for so long a period of time. Such conduct was a direct ratification of the acts of those who issued the bonds. It was a ratification made with full knowledge on the part of the town of the defect now alleged to have existed. *Supervisors* v. *Schenck*, 5 Wallace, 772; *Pendleton Co.* v. *Amy*, 13 Wallace, 297; *Commissioners* v. *January*, 4 Otto, 202.

There must be a judgment for the plaintiff for $980, with interest, from March 1, 1879, and for $980, with interest, from September 1, 1879.

STEWART & Co. *v.* MERRITT.

(*Circuit Court, S. D. New York.* ——, 1880.)

IMPORTS—DUTIABLE VALUE—APPRAISAL, WHEN FINAL.—Sections 2930, 2931 and 3011, Rev. St. U. S., are to be construed together, and the decision of the proper officer after appeal and without fraud, as to the dutiable value of imports, is final and conclusive against the importer.

A case of considerable public importance was recently tried in the United States circuit court for the southern district of New York before Judge Shipman and a jury. It was brought by A. T. Stewart & Co. against E. A. Merritt, collector of the

port, to recover duties alleged to have been exacted from the plaintiff in excess of the lawful duties on certain importations of Alexandre's kid gloves.

The gloves were invoiced entered at a valuation of 42 francs per dozen, but the local appraiser raised the value for the purpose of assessing duty thereon to 52 francs per dozen, and thus the importers incurred a penalty of 20 per centum *ad valorem* upon the assessed value, the latter being 10 per centum over the invoice value.

The importers were dissatisfied with the action of the local appraiser, and expressed their dissatisfaction in writing to the collector, who thereupon, in compliance with the requirements of section 2930 of the United States Revised Statutes, appointed a merchant appraiser to act with one of the general appraisers upon a reappraisement of the gloves. The appraisers were unable to agree, and made separate reports to the collector, who adopted the report of the general appraiser, and determined the dutiable value of the gloves to be 49 francs per dozen, while the merchant appraiser had reported that the dutiable value was only 42 francs per dozen. The importers, having been required to pay duties at the rate of 50 per centum *ad valorem* on the value thus ascertained and determined by the collector, protested against the exaction, and appealed to the secretary of the treasury, and subsequently brought suit.

Upon the trial of the suit the plaintiffs sought to introduce testimony as to the fair foreign market value of the gloves, but the counsel for the defendant objected to such testimony, and maintained that an appraisement regularly made was, in the absence of fraud, conclusive against the importer upon the question of the foreign market value of the gloves.

After hearing full arguments on both sides, Judge Shipman rendered the following decision.

Alexander & Green and *Geo. H. E. Tremaine*, for plaintiffs.

A. B. Herrick, Ass't United States Att'y, for government.

THE COURT. On this point, as to the admissibility of this testimony in regard to the fair, actual market value of the articles in the principal markets of France, in the absence

of fraud upon the part of the collector and the officer of appraisal, it can hardly be doubted that prior to June 30, 1864, the system of legislation in regard to the effect of appraisals, and the judicial decisions upon the binding character of appraisals free from fraud, and made in conformity with the statute, were substantially uniform. The importer was bound by the appraisal, which was established in conformity with the statutes, after appeal, provided such appraisal was made by persons equipped with power and without fraud.

On June 30, 1864, (the then existing statute in regard to appraisals having been passed in 1851,) a tariff act was passed, of which the fourteenth and fifteenth sections related to the effect of a decision of the collector upon the rate and amount of duties, and the prerequisites necessary to be taken for a review of such decision either by the secretary of the treasury or by the courts. If no further legislation had taken place there might be room for argument that the decision of the collector, upon appraisal made after appeal, in accordance with the act of 1851, was not final in the sense that it could not be reviewed by the secretary or by the courts, for it might be argued that while the decision of the collector as to the rate of duties affected the classification only of articles, yet that his decision as to amount involved both classification and value; that the amount was the product of rate and value, and that, therefore, an appeal from his decision as to amount of duties necessarily implied an appeal from his decision as to value. But since that time the Revised Statutes have been enacted.

Section 2930 re-enacts substantially the act of 1851. Sections 2931 and 2932 contain substantially the fourteenth and fifteenth sections of the act of June 30, 1864. If the act of 1851, under the provisions of which a final appraisal had been regarded as a finality ever since its enactment, had been modified or repealed by the act of June 30, 1864, it seems as if the revisers and congress would have announced such modification in plain terms; but, on the contrary, the finality on an appraisal is left in substantially the phraseology of the act of 1851, while the decision of the collector is

declared to be reviewable upon the specific questions specifically stated. The reproduction of the act of 1851, in substantially its original language, seems to me to be controlling in respect to any supposed legislative repeal by implication. It is claimed that section 3011, being a re-enactment of the act of 1845 in regard to suits against collectors to recover money paid under protest, gives power to test the question of value; but section 3011 had existed from 1845 to 1864, and during this time the supreme court had repeatedly decided that a valid appraisal was final. The last decision on the subject was made by Judge Clifford in the first circuit, in 1863. If the act of 1845 had no effect upon the appraisal acts of 1842 and 1851, it is difficult for me to see how it has an enlarged effect, as section 3011, upon section 2930, which is the act of 1851.

Again, we have in the revision three sections—2930, 2931, and 3011. They must be construed together. The positive declaration of 2930 is that an appraisal made by the proper officer, after appeal, is final. It would be in my judgment a great stretch to construe this language to be modified by section 3011, especially as the supreme court has repeatedly given to this statute, upon this part of the tariff system, a construction in opposition to that which is now claimed by the plaintiffs.

The testimony is excluded.

HECOX and others v. THE CITIZENS' INS. CO. OF ST. LOUIS and another, U. S. Marshal.

(*Circuit Court, N. D. Illinois.* ——, 1880.)

SURETY—INSURANCE AGENT—APPLICATION OF MONEYS REMITTED—RESTRAINING ENFORCEMENT OF JUDGMENT.—An insurance agent, by requirement of the company for which he was acting, gave a bond for the faithful performance of his duties, and an accounting of moneys received. At the time of giving such bond he was delinquent to said company on account of past transactions. Such agent afterwards made remittances to the company, directing that they be applied upon past transactions. A judgment at law having been recovered against the sureties on the bond, a bill was filed by them to restrain its enforcement, claiming that the remittances made were from current business, after the bond was given, and should be applied upon such account. *Held*, that to entitle complainants to the relief prayed, it must appear that the moneys remitted were in fact from current business, and that the company had knowledge of that fact when it received and applied the money on account of former transactions, as directed, and proof not sufficiently showing this, the bill should be dismissed.

Mr. Kales, for complainants.

Mr. Whiton, for defendants.

DYER, D. J. On the sixth day of April, 1877, and for several years prior thereto, one Pottle was the agent at Chicago of the defendant insurance company, whose principal place of business was at St. Louis, in the state of Missouri. On the day mentioned, by requirement of the defendant company, Pottle executed a bond in the sum of $5,000, conditioned that as the agent of the insurance company, authorized to receive sums of money for premiums, payment of losses, salvages and collections, he would pay over such moneys correctly, and in every way faithfully perform his duties as agent, in compliance with the instructions of the company, through its proper officers. Complainants in the present bill, Hecox and Briggs, joined in the execution of this bond as sureties for Pottle.

In 1878 the insurance company sued complainants, impleaded with Pottle in this court upon said bond in a plea of debt, and recovered judgment against complainants for the sum of $5,000. At the time of the execution of this bond

Pottle was indebted to the insurance company, on account of past transactions for the company, in the sum of $5,223.80, and between the date of the execution of the bond and September 19, 1877, there became due to the company from Pottle, on account of business done by him between those periods, $4,114.70. From April 6, 1877, the date of the bond, to September 19th of the same year, Pottle remitted to the company $3,370, all of which was, by his direction, applied upon his indebtedness to the company which accrued prior to the execution of the bond. The purpose of the present bill is to obtain an injunction restraining proceedings for the collection of the judgment at law against complainants, for an accounting to ascertain what is justly due to the defendant company on account of the defalcations of Pottle, and to avoid the legal effect of the judgment recovered against complainants as Pottle's sureties on the bond.

The material allegations of the bill are that at the time of and prior to the making of the bond Pottle was informed by the company that if he would give a bond, with good sureties, he should be at liberty to deposit the moneys of the company in bank with his other moneys, to his own credit and in his own name; that all of Pottle's remittances, after the execution of the bond, should be applied upon his old accounts, on which he was in arrears to the insurance company, and that Pottle then understood from the company that if he would give such a bond, and apply his collections afterwards made to the payment of his former deficits, he would be allowed to go on as previously, and act as the agent of the company; that Pottle, at the time of making the bond, understood from the insurance company that by giving the same he would be allowed to continue in business as agent, and to deposit moneys collected for the company in bank with his own funds and in his own name, and would be required out of such account to make remittances and to allow the same to be applied on account of his prior defalcations, and that he acted upon this understanding with the company in remitting and directing the application of the moneys afterwards collected by him, supposing that in so

doing he was carrying out the understanding between himself and the insurance company.

It further alleged that complainants did not, until after the recovery of the judgment at law, become cognizant of the agreement and understanding between Pottle and the insurance company, nor of the mode in which business was transacted between them, but were advised by Pottle of the facts after the recovery of the judgment, and when execution was in the hands of the defendant marshal, and that they executed the bond in ignorance of the fact that Pottle was, at the time, a defaulter to the company.

The answer of the defendant company denies the material allegations of the bill, and it is unnecessary, for disposition of the case, to state in detail the denials and affirmative allegations contained in the answer.

The contention on the part of complainants is that for a long time previous to the execution of the bond Pottle had been in the habit of depositing moneys, which he received as agent of the insurance company, in bank in his own name, and to the credit of his individual account, thereby converting the same to his own use; that remittances to the company were made by his individual checks upon such account, and that while pursuing this course of dealing he became a defaulter; that being required to give the bond in question he was allowed by the company, thereafter, in pursuance of previous methods of business, to convert the moneys which he thereafter received to his own use, and then to apply those moneys in satisfaction of indebtedness which accrued before and existed at the time of the execution of the bond; that all this was permitted under an implied if not express understanding between the insurance company and Pottle; that the application of moneys received by him upon current business, transacted after the execution of the bond, to his previous defalcations, operated constructively, if not actually, as a fraud upon the sureties; that therefore they have an equitable right to satisfaction of the bond to the extent of the moneys remitted on account of the current business accruing after the execution of the bond. In other words, that, as

against the sureties, it was a breach of trust on the part of Pottle to put the moneys which he received from accruing business after the execution of the bond on deposit in his own name, and then to direct his remittances to be applied in satisfaction of his former indebtedness, and that the defendant company was cognizant of this course of dealing on Pottle's part, and adopted and ratified it.

The testimony in the case is not voluminous, and, in my opinion, fails to meet the point upon which the case must turn, and which it is essential to establish to give complainants the relief they ask. The bond was wholly prospective in its terms and operation. It was intended only to secure the payment by Pottle to the insurance company of such moneys as he should thereafter receive as agent for the company. Of this there can be no doubt. Neither can there be doubt that if there was a conspiracy or actual agreement between the company and Pottle, made or existing at the time the bond was executed, by virtue of which the bond should be obtained and the moneys thereafter received by Pottle as agent should be applied upon prior defalcations, and if such a conspiracy or agreement were carried out, and not discovered by complainants until after the trial of the action at law, complainants would be in position to ask the interposition of a court of equity for their relief. But the testimony fails to show such a state of case, and indeed, upon the argument, the learned counsel for complainants was not understood to insist that such conspiracy or actual agreement was proved.

The facts seem to be that, during his agency, and up to the time of giving the bond, Pottle deposited the moneys of the company, as fast as collected, in the bank where he kept his account, to his own credit, and that he made remittances by his personal check on his banker. He was, both before and after the execution of the bond, agent for other insurance companies, and all moneys received by him as such agent were, as it would appear, mingled in a common fund, and deposited and remitted in manner before indicated. After giving the bond he made collections, deposits and remit-

tances in the same way, and his remittances both before and subsequent to the execution of the bond were, by his direction, applied upon all such of his unpaid monthly accounts as were earliest due. To illustrate: Subsequent to the execution of the bond he from time to time directed, by letter, that remittances then sent in the form of check should be applied on a designated account, and his remittances were so applied, thus reducing the amount of his default existing at the time of the execution of the bond. It does not appear that complainants were induced to become Pottle's sureties by any act or upon any solicitation of the company. They signed the bond as friends of Pottle, at his request, and on his assurance that they should never suffer.

Now, while there is force in the view urged by counsel, that the appropriation of moneys which Pottle received upon current business and remitted, after the execution of the bond, to the satisfaction of old indebtedness, would necessarily operate to the injury of the sureties, I am of the opinion that complainants' right to the relief they now seek, even admitting that the facts would not constitute a defence to the action at law, depends upon the point of knowledge on the part of the insurance company, at the time it received such remittances, that they were of the moneys which Pottle received from current business accruing after the execution of the bond. This, I think, is the decisive and turning point in the case, and, in my judgment, upon this point the proofs are inadequate. The officers of the insurance company were resident at St. Louis. Their business transactions with Pottle were conducted wholly by correspondence, and this correspondence is in evidence. It is not proven that it was agreed between the company and Pottle that if he would procure a bond he might deposit in his own name the moneys which he should receive as agent. There is no proof that the insurance company knew that he thus dealt with their moneys except as such knowledge may be inferred from the fact that his remittances were in the form of his individual checks. The case is devoid of satisfactory evidence that the company knew that the remittances which they received after the exe-

cution of the bond were of the moneys received by him from their current business, or that the company was a party to any agreement or understanding that remittances should be made from such moneys to apply upon old indebtedness. The company seems to have received remittances in the ordinary course, with directions on the part of its debtor to apply them in a certain way, and they were so applied. Indeed, it cannot, upon the evidence, be found that the moneys which Pottle received from current business, after the execution of the bond, were the moneys remitted by him to the defendant company. For aught that appears, he may have used those moneys on his personal account and remitted other moneys received from other insurance companies, or from other sources, to the defendant company.

Pottle, in his testimony, says that he cannot testify that he was requested to remit as usual after giving the bond. He does say, however, that the reason he directed his remittances to be applied on the old account, instead of the current months for which collections were made, was because it was his understanding, at the time the bond was given, that he should remit on account of subsequent collections, as he had remitted before. But the proofs do not bring home to the insurance company such understanding, and he states that when the bond was mailed to the defendant company he had no talk with any of the company's officers as to the manner in which he should keep his bank account or the company's funds, and that he had never shown his account to the officers of the company. So far as any understanding in relation to deposits and remittances is concerned, it rests in inference, and seems to have been solely the understanding of Pottle, without evidence of participation therein by the insurance company.

It is true that in the letter which the secretary of the company wrote to Pottle, requesting the execution of the bond, reference is made to the then existing indebtedness of Pottle, and it is stated that it is the wish of the company to have security against any contingency, and it may have then been thought that the bond which Pottle was required to give would secure past as well as any future liability. But the

bond which was subsequently executed plainly informed the company that it was wholly prospective in its terms and legal effect. If enough were established by the testimony to show either an actual or constructive fraud upon the sureties in the application of payments, and that the company was knowingly a party to the transaction, there would be, as I conceive, difficulty in perceiving why such a state of facts would not be a defence maintainable in an action at law on the bond. However that may be, my conclusion is that in this suit in equity, to entitle complainants to relief against the judgment already recovered, it must appear that the moneys remitted by Pottle after the execution of the bond were, in fact, moneys which he received as agent from current business, and that the defendant company had knowledge, when it received such moneys and applied them in the manner directed by Pottle, that they were moneys which he received from business accruing after the execution of the bond, and, in this regard, the proofs do not meet the requirements of the case.

The bill must therefore be dismissed.

EVORY and others *v.* L. CANDEE & Co.

(*Circuit Court, D. Connecticut.* May 8, 1880.)

PATENT—IMPROVEMENT IN SHOES—GORE FLAP—INFRINGEMENT.

C. Wyllys Betts and *Benjamin F. Thurston*, for plaintiffs.
Charles F. Blake, for defendants.

SHIPMAN, D. J. This is a bill in equity to restrain the alleged infringement of letters patent granted to Evory & Heston, on November 6, 1866, for an improvement in shoes. The National Rubber Company is an exclusive licensee to use the patent in the manufacture of rubber boots and shoes. The invention consisted in a double extension gore flap upon each side of the shoe, the external fold of which flap is attached to and in front of the quarter, and the internal fold of which is attached to and in rear of the vamp. The gores are folded outside of the shoe proper, and forward over the instep, so that the ankle and the foot are enclosed by the shoe proper. The claim is as follows: "A shoe, when constructed with an expansion gore flap, C, D, the external fold, C, of which is attached to and in front of the quarter, B, and the internal fold, D, of which is attached to and in rear of the vamp, A; the said several parts and pieces being respectively constructed, and the whole arranged for use, substantially in the manner and for the purpose set forth."

The material point of difference between this shoe and the one shown in the English patent of Stephen Norris consists in the fact that the Norris gore folds within the shoe, while the gores of the plaintiffs' patent fold outside the shoe. If the gore of the English shoe is made of stiff leather, there is a stiff crease on each side of the shoe which hurts the foot. If the gore is made of thin and pliable leather, the folds are apt to wrinkle and to become easily displaced when the shoe is worn. The plaintiff's shoe avoids both difficulties. The novelty of the patented device is not denied. The Norris and the defendants' shoes are described in the opinion in the case of *Williams and The National Rubber Company* v. *L. Candee &*

Co., which has just been decided. In the defendants' shoe the foot is encased by the vamp and that part of the quarter which is behind the hinge of the fold at the ankle, and the jointed flaps, or the ear pieces, fold without the shoe proper.

It is claimed by the defendants that there is no infringement because their shoe is the Norris shoe. In the Norris shoe the sides of the quarter come forward and are buckled or fastened over the instep, covering the fold made in the gusset, while in the Evory & Heston the quarter comes only to the front line of the heel covering, and the fastening is made by uniting the two gussets folded outside of the shoe. In the defendants' shoe that part of the quarter which serves as a support and protection for the foot is the Evory & Heston quarter. That part of the quarter which is forward of the hinge, or the fold in the quarter, is folded with the vamp extension outside of the shoe proper. There is no substantial difference in the manner in which the extensions are folded in the respective shoes. The confusion, if there be any, consists in the fact that the Evory & Heston quarter is a narrow one, extending a little beyond the ankle joint, and the gores are hinged at the ankle seam. The defendants' quarter is a wide one, and the vamp extension and the front part of the quarter fold upon each other and swing forward outside of the shoe proper at about the same point at which the Evory & Heston gores are hinged.

In addition to the evidence derived from the manner of construction of the respective shoes, the defendants had taken a license in the year 1877 from Evory & Heston, and had displayed in their trade circular for that year pictures of the shoes which they then manufactured and which they are still manufacturing, and which they then represented to be made under the Evory & Heston patent. That was undoubtedly their opinion at that time, and I do not think that they were mistaken. Infringement is clearly proven.

Let there be a decree in the usual form for an injunction and an accounting.

DAY *v.* SCHWAB and another.

(Circuit Court, S. D. New York. May 8, 1880.)

PATENT—IMPROVEMENT IN SKIRT PROTECTORS—MOTION TO OPEN CASE TO ADMIT OTHER DEFENCES—INSUFFICIENT AFFIDAVIT.

In Equity.

Miles B. Andrus and *Edward N. Dickerson*, for complainant.

M. P. Stafford, for defendant.

WHEELER, D. J. This cause is substantially like that of *Day* v. *Combination Rubber Co.*, heard at the same term, except that it is founded upon letters patent No. 161,012, dated March 23, 1875, and issued to the plaintiff, assignee of Theodore D. Day, for an improvement in skirt protectors by placing a moulding of India rubber, having two ribs, upon the lower edge of skirt protectors, made of plain material, and stitching it there through the web between the ribs, in addition to the De Forest patent, and the defendants have moved to have the case opened to admit other defences.

The affidavit in support of the motion sets forth no particular facts constituting defences desired to be brought forward, and no reason why they have not been brought forward in the usual manner, if they exist, except that the case was not attended to either by the defendants or their solicitor. Such an affidavit is wholly insufficient for the purpose. There is nothing in the case to show that the patent is not valid for that addition to skirt protectors. The evidence shows that the defendants have sold, for use, skirt protectors of that particular form, as well as those having the band of the De Forest patent. Therefore, upon the case as made up and presented, there must be a decree that both patents are valid, that the defendants have infringed them, and for an injunction and an account accordingly.

Let a decree be entered for the plaintiff accordingly, with costs.

MERCHANTS' NATIONAL BANK OF LITTLE ROCK *v.* THE COUNTY OF PULASKI.

(*Circuit Court, E. D. Arkansas.* April, 1880.)

COUNTY BONDS—NEW BONDS IN LIEU OF OLD—FAILURE OF COUNTY TO CARRY OUT AGREEMENT—PROPER REMEDY.—Bonds were issued by a county, under an act of the legislature, making it obligatory on the county to levy an annual tax sufficient to pay the interest on the bonds as it accrued, and the principal at maturity. Afterwards, the county proposed to the holders of such bonds that if they would scale them 25 per cent., and take new bonds for the reduced sum, the county would annually levy and collect a sufficient tax to pay the interest on the new bonds as it accrued, and the principal at maturity, and that if it failed to do so the holders of the new bonds should be restored to all their rights under the old bonds. New bonds were issued under this agreement, but the county failed to pay the interest thereon, and by reason of the terms of the act under which they were issued could not levy a tax for that purpose. *Held*, an action at law could be maintained on the original bonds, and that a bill in equity, not seeking for any discovery, would not lie.

SURRENDER OF VALID EVIDENCE OF INDEBTEDNESS FOR ONE THAT IS INVALID—EFFECT.—Where a valid evidence of indebtedness issued by a county is surrendered by the holder to the county, and a new evidence of debt issued therefor, which is invalid, the legal rights of the creditor are not affected thereby

Demurrer to Bill.

Prior to the twenty-ninth of May, 1878, the complainant was the holder and owner of divers bonds of the defendant corporation, amounting in the aggregate, including interest, to the sum of about $43,000. These bonds were of two classes: *First*, bonds issued in pursuance of the provisions of the act of the general assembly of the state entitled "An act to authorize certain counties to fund their outstanding indebtedness," approved April 29, 1873; *second*, bonds issued under the provisions of an act of the general assembly of this state entitled "An act to authorize the several counties in the state to fund their outstanding indebtedness," approved March 6, 1875, and an act supplementary thereto.

By an act of the general assembly of Arkansas, approved March 6, 1877, (Acts 1877, p 21,) the several counties of

the state were authorized to fund their outstanding indebtedness.

Under the provisions of this act the complainant and defendant made an adjustment and compromise, whereby the complainant agreed, upon certain conditions, to remit 25 per cent. of its claim upon all of said bonds of both classes, and the defendant agreed to issue new bonds for the balance due after such remission; and also agreed that it would annually levy a tax of one-half of 1 per cent. per annum upon all the taxable property of said county, to pay interest and principal of such new bonds. It was further agreed that if such county should make default in the payment of any instalment of interest when due, or of the principal of said new bonds, for a period of 60 days, that the said county of Pulaski should forfeit the 25 per cent. remitted, and would pay the holder of such new bonds the full amount of the original indebtedness for which they had been issued, and that the acceptance of the new bonds was not to discharge or release said county from any portion of its original indebtedness, unless the interest on said new bonds and the principal thereof should be paid at maturity.

In pursuance of this agreement, new bonds were issued, containing on their face the following stipulation: "The person to whom this bond is issued having, at the request of said county and its authority, made a concession and reduction of 25 per centum of the principal and interest of the bonds presented for funding, the county of Pulaski hereby pledges and binds itself to pay the principal and interest of this bond, as the same becomes due and payable, and to annually levy a tax, payable only in the lawful money of the United States, and faithfully apply the same, when collected, to the principal and interest of this bond; and it is hereby stipulated that this bond is not to be a waiver by the holder thereof of any of the provisions of the act under which the surrendered bonds were issued, and that this bond preserves the obligation of the contract of each and all of said bonds as fully as if set forth herein."

The old bonds were delivered to defendant, and new bonds

issued to complainant for the amount of its original claim, less the 25 per cent. remitted.

Default for more than 60 days has been made in the payment of the interest on these new bonds, and the county court of Pulaski county has refused to levy the tax provided for in said agreement.

These are the principal facts as averred in the bill and amended bill, which, for our present purpose, are to be taken as true.

It is, however, further averred that the supreme court of the state of Arkansas has declared that the county of Pulaski has no power or authority to levy a special tax of any amount to pay interest upon the bonds issued under the aforesaid act of March 6, 1877, entitled "An act to authorize the counties in this state to fund their outstanding indebtedness," etc.; and that said court has determined that the obligation of the contract, and the taxing power, which were in force and effect at the time of the issue of the surrendered bonds, cannot be carried into the bonds issued under the last recited act.

Complainant now brings into court the new bonds and tenders them to defendant, and claiming its rights under the old bonds, and the agreement of compromise, prays a decree for $43,026.13, that being the amount of the indebtedness now claimed as due and unpaid on the old bonds and interest.

McCRARY, C. J. The demurrer raises the question whether the complainant has an adequate remedy at law? The new bonds, as already stated, were given in lieu of two classes of bonds previously held by the complainant. I will consider the demurrer as it relates to both classes.

1. As to the first class, to-wit, bonds issued under the act of April 29, 1873, the contention of the complainant is that by the construction placed by the supreme court of Arkansas upon the act of March 6, 1877, it is deprived of the right to sue at law and recover judgment upon its debt, and to enforce the payment of the same by levy and collection of the taxes which the county agreed to levy and collect for that purpose, to-wit, such taxes as were authorized by law when the original bonds were issued. The decision referred to is

in the case of *Brodie et al.* v. *McCabe, Collector*, (not yet reported,) which was a proceeding by tax payers to enjoin the levy and collection of taxes in excess of the maximum allowed by the Arkansas constitution of 1874.

Section 9 of article 16, of that constitution, provides as follows: "No county shall levy a tax to exceed one-half of 1 per cent. for all purposes; but may levy an additional one-half of 1 per cent. to pay indebtedness existing at the time of the ratification of this constitution."

Section 6 of the act of March 6, 1877, under which complainant's bonds were funded, and the new bonds now held by it were issued, provides that "it shall be the duty of the county courts issuing bonds under the provisions of this act to levy a special tax of sufficient amount to pay the principal and interest of said bonds as they shall become due, not to exceed the limit of taxation, together with all other taxes levied during that year, prescribed in the constitution of the state."

In commenting upon that clause of the act, the supreme court of Arkansas, in the case *supra*, observe that "those who took or might take these bonds evidently submitted to the constitutional limit of taxation under the present constitution;" and undoubtedly such is the fair presumption, unless the contrary is made to appear in any given case by the terms of the contract. It does not appear that any of the bonds issued under the act in question were before the court, and it certainly was not called upon to construe, and did not assume to pass upon, the written contracts under which the complainant claims. The most the court could have intended to assert is that where a creditor of the county funds has bonds under the act of 1877, without any stipulation preserving the obligation of the original contract, those obligations are waived and substituted by such as are consistent with the constitution of 1874. But it was clearly within the power of the parties to agree that the non-payment of the compromise bonds, or of the interest thereon, for a specified period, should annul the new bonds, and restore the parties to their rights before the agreement of compromise was entered into.

Such an agreement was not beyond the powers of the defendant corporation, as insisted by counsel for the defence. It would be an unwarranted enlargement of the doctrine of *ultra vires*, to hold that a municipal corporation owing an admitted, valid debt, and having the power to pay or compromise the same, may not bind itself by the terms of such a compromise agreement as that set out in the bill, and shown by the exhibits, in this case. What is that agreement? It is that the complainant shall remit 25 per cent. of its demand, and take new bonds for the balance, upon the condition that, if the new bonds are not met, interest and principal, as they mature, "their acceptance shall not discharge or release said county from any portion of its original indebtedness," and that the acceptance of the new bonds "is not to be a waiver by the holders thereof of any of the provisions of the act under which the surrendered bonds were issued." In other words, it was plainly a conditional settlement, to be void if not complied with by the county. By complying with it the county can save 25 per cent. of the amount of the original debt. By default, it clearly becomes liable to pay the whole amount of the original debt, and also to levy all such taxes as were authorized by law, at the time the original bonds were issued, to raise funds for their payment.

It is well settled that where bonds of a county or municipality are issued under authority of law and payable out of the proceeds of taxation, the law providing for such taxation enters into and becomes part of the contract, and cannot be subsequently repealed by the legislature or changed by constitutional amendment so as to deprive the bond holder of his remedy. At the time of the contract of compromise, therefore, the complainant had a perfect right to demand the levy for the payment of his bonds of whatever taxes were authorized by law for that purpose when such bonds were issued, even if the same should exceed the limit prescribed by the constitution of 1874. It is also well settled that a change in the form of the contract, or the substitution of one evidence of debt for another, does not ordinarily change the rights of parties.

The complainant's debt against the county remained the same debt notwithstanding the substitution of the new bonds for the old. It was, therefore, perfectly competent for the county to agree to the conditions to which I have adverted, and which are plainly stated in the writing set out with the bill. Whether, under the decision of the supreme court of the state, it is now within the power of the county court to levy and collect the taxes necessary to meet the interest on the compromise bonds, is immaterial. The contract in effect was that a failure on the part of the county, from any cause, to meet the interest or principal of said bonds, should render the compromise void, and leave the parties in the enjoyment of their rights under the original contract. A court of equity can never hold that the contract of compromise was effectual for the purpose of taking away the remedies existing under the original contracts, and not effectual for the purpose of securing the payment, in the manner provided, of the reduced amount represented by the new bonds.

From what it has been said it will be seen that in my judgment the complainant has an adequate remedy at law. If payment of the past-due interest on the compromise bonds shall be refused on demand, the complainant can declare in an action at law upon the original bonds. No discovery is necessary, for the bill shows that the complainant can describe the bonds and other evidences of debt with sufficient particularity to enable it to prove the sum due thereon, and it can aver that they are in the possession of the county, or have been by it lost or destroyed.

If, in such a suit, the county shall fail to produce said bonds upon being notified to do so, it will be competent for complainant to prove their contents by secondary evidence. The fact that the bonds surrendered to the county at the time of the compromise may appear to have been by it cancelled, will not defeat the complainant's right of action. Proof may be offered, and will be admissible, to prove that the cancellation was in pursuance of the contract of compromise and is of no force or effect.

As to the second class, to-wit, bonds issued under the act

of March, 1875, and the act supplementary thereto, these appear to have been issued in lieu of county scrip surrendered. Subsequently to their issue, the supreme court of Arkansas held that the said act of March, 1875, and the supplementary act, were void. Still, it is clear that complainant held a valid claim against the county, for, if the bonds were invalid, it was at liberty to seek its remedy upon the original debt represented by the surrendered scrip. It seems to be conceded by counsel on both sides that the bonds issued under the act of March, 1875, based, as they were, upon a valid, pre-existing debt, could lawfully be funded under the act of March 6, 1877. The point made by complainant's counsel is that the decision of the supreme court in *Brodie et al.* v. *McCabe, Collector,* does not permit the county to carry out the contract of compromise, as to these bonds, by carrying into them the obligations of the contracts upon which they are founded, and out of which they grew, to-wit, the county scrip aforesaid. In this I think the counsel is wrong. The original debt, for which these bonds were issued, was subject to the limitations as to taxation, for its payment, contained in the ninth section of article 16 of the constitution of 1874.

The supreme court has in that case decided that the bonds were issued subject to that limitation, and it has decided nothing more. The contract between the parties, referred to in the first part of this opinion, will, as respects this class of bonds, be carried out by a levy up to the limit of the constitution, for as to them the original contract provided no other or better remedy. It follows that the complainant's remedy as to these bonds is at law.

The demurrer to the bill and amended bill is sustained.

THE UNITED STATES *v.* AMBROSE and others.*

(*Circuit Court, S. D. Ohio.* May, 1880.)

CLERK OF U. S. COURT — BOND OF — DUTY TO ACCOUNT. — 1. The condition in a bond given by a clerk of a United States Court, that he would faithfully account for all moneys coming into his possession as such clerk, did not enlarge the obligation of the bond required by statute. The accounting for moneys in his hands as clerk was one of the duties for the faithful performance of which he was required by statute to give bond, and the specification of one of the details covered by the general obligation does not affect the validity of the bond he was required to execute.

SAME—SAME—DECLARATION IN ACTION FOR BREACH.—2. A declaration alleging as a breach of such bond a failure to make the proper returns and *pay over surplus funds* is good, although the breach alone consists in a failure to make the proper returns. The additional allegation of a failure to pay over may be treated as surplusage, or as indicating the measure of damages on a failure to make such returns.

This suit is on the official bond of the defendant Ambrose, as clerk of the United States circuit court, for failing to make return of all his fees and emoluments. The defendants answered that the attorney general required him to give the bond sued on containing a condition not required by statute, and that said bond having been thus extorted under color of office was void. The answer was in form the same as the plea in case of *U. S.* v. *Tingly*, 5 Pet. 115, upon which the defence relied. To this answer the district attorney demurred.

The statute (act of February 22, 1875, 18 St. at Large, 333) authorizes the attorney general to require a clerk to give bond conditioned that he will faithfully discharge the duties of his office. The bond in suit is conditioned that he will faithfully discharge the duties of his office, and in addition thereto that he will faithfully account, as required by law, for all moneys that may come into his hands.

Channing Richards, U. S. Dist. Atty., for plaintiff.

George Hoadly, *H. A. Morrill* and *George R. Sage*, for defendants.

SWAYNE, J. The statute which lies at the foundation of

*Prepared by Messrs. Florien Giauque and J. C. Harper, of Cincinnati, O.

this controversy requires the bond of the clerk to be conditioned "to faithfully discharge the duties of his office and seasonably record the decrees, judgments and determinations of the court." That is the entire ground covered by the statute.

The additions required to be made, and in fact made, to the bond in question, are, *in limine*, the first sentence of the condition, "that he shall, by himself and by his deputies, faithfully perform," etc., following the language of the statute; and then the last clause, which is not required in terms by the statute, is in these words: "And shall properly account for all moneys that may come into his possession, as required by law."

Now, as regards the first superadded matter which relates to the deputy clerk, the statute in force when the bond was given authorizes the court to require a bond to be given by the deputy clerk for the faithful performance of his duties, but that same section (No. 796 of the Revised Statutes, 149,) expressly declared that the security so taken for the fidelity of the deputy clerk, in the respect of his duties, should not in anywise affect the liability of the clerk himself; hence it seems to me too clear to admit of controversy that this phraseology as to deputy clerks, as was suggested in the argument, is entirely supererogatory. It is certainly surplusage, and therefore ineffectual for any purpose, especially as it regards affecting or destroying the validity of the bonds.

It was said in argument (and I was struck with it at the time as possibly suggesting a point very material to be considered, but I came, ultimately, to the above conclusion) that this comprehensive language might involve a guaranty for the clerk in respect to things that he could not be competent to do. But my own reflections suggest an answer to that view of the case, to-wit, that the language employs this phraseology, and the consequent intendment to be deduced by the court from that language is that no other duty on the part of the clerk was contemplated, or intended to be in any wise guarantied, except such duties as were lawful—such as were already required by the law.

I cannot, therefore, in any light in which I can view this feature of the case, entertain the slightest doubt as to the utter unavoidability of these words, especially as regards any effect to follow from them touching the validity of the bond.

If that be so, it was in nowise obligatory upon the government, in framing this declaration upon the bond, to put in any averment whatever touching the clerk, and the declaration contains nothing upon the subject.

Then, as regards the other terms of the bond, "that the clerk shall faithfully account for all moneys," etc., I am clear, upon reflection, under my view of the subject, that the entire liability covered by that language was covered by the more general terms which preceded, to-wit: "that the clerk should faithfully discharge the duties of his office," etc. Now, one of the first and most important of the duties of the clerk, undoubtedly, is to pay over moneys that may come into his hands, and which by law he is required to pay over.

Here is a particular specification of one of the details covered by that general proposition—clearly covered by it; and that particular specification, it seems to me, to use the language of several of the authorities upon the subject, is only expressing, in conformity with the law, more fully than in its terms it would be expressed, what the law prescribes; for what the law had prescribed in the same general terms the requirements of the bond fulfilled. They are no more comprehensive, they are no more onerous in any respect, as it seems to me, than if this specific requirement attached to it had not been contained in the bond at all.

I think, therefore, that there is no ground for the objection upon which the validity of the plea rests.

But it was very properly said that this demurrer to the plea, as do all demurrers under such circumstances, reaches back to the original pleading, *i. e.*, the declaration, and subjects it to scrutiny as if it had been demurred to, and raises the question as to whether the declaration itself is a valid and proper one.

The declaration charged that large amounts of money having come into the clerk's hands "on account of the fees and

emoluments of said office, he *did not properly account therefor in his emolument returns, as required by law, and did neglect and refuse to pay into the treasury the sum,*" etc. It is said by counsel for defendants that the clerk is not required to pay over surplus funds in his hands until the attorney general has designated the depository in which they shall be placed; and that, therefore, until such designation is made he is not required to pay over. This is undoubtedly the case. But until the coming in of the proper reports, showing a surplus, the attorney general has nothing upon which to act; the report is the basis upon which he makes the designation. The breach of the bond consists in the failure to make these reports; and so the declaration charges. But it goes on to allege a failure to pay over. This may be treated as surplusage, or as an allegation of the damage resulting from the failure to make the proper reports.

I therefore think the declaration sufficient. It clearly alleges the failure to make the proper returns as a breach of the bond, and, as I have said, what follows may be treated as surplusage or as an allegation of the damages incurred. Of course, if there was no balance to turn over, the damages for failure to make returns would be merely nominal. If there were funds coming to the government their amount would be the measure of damages for a failure to make such returns as would have enabled the attorney general to make the proper designation.

But I would suggest to the district attorney that it might be well to amend the declaration so as to alone allege the failure to make the proper returns as the breach, and to refer to the amount which was in the clerk's hands and should have been turned over, only as showing the extent to which the government has been damnified by the failure to make returns.

I therefore sustain the demurrer to the answer.

Demurrer sustained.

THE UNITED STATES *vs.* AMBROSE.*

(*Circuit Court, S. D. Ohio.* May, 1880.)

UNITED STATES DISTRICT JUDGE—POWER TO ADMINISTER OATHS.—1. A judge of a district court of the United States has the power to administer oaths in matters arising in his court, or coming before him as a judicial officer of the United States. Such power is incident to his judicial office.

SAME—OATH OF CLERK TO ACCOUNTS WITH GOVERNMENT.—2. The administration by such judge to a clerk of a United States court of the oaths required to be made to his accounts with, and returns to, the government, is such a matter, and is within his power to administer oaths.

CLERK'S ACCOUNTS—OATH TO—PERJURY.—3. Whether the sworn statements required to be made by a clerk of a United States court, in his accounts with, and returns to, the government, are "*declarations*" or "*certificates*," within section 5392 of the United States Revised Statutes punishing perjury, *quære.*

Demurrer to the Indictment.

The defendant was indicted for perjury, under section 5392 of the United States Revised Statutes, in swearing to his accounts against the government as clerk of the United States courts for the southern district of Ohio, and his emolument returns to the attorney general, before the United States district judge for that district. The first count charged the defendant with making oath to a false "written *declaration* by him subscribed," in swearing to his account against the government for the six months preceding January 1, 1879; the second count the same, in swearing to his emolument return to the attorney general for the six months preceding January 1, 1879; the third count the same, in swearing to his emolument return for the six months preceding July 1, 1878. The fourth count charged him with making oath to a false "written *certificate* by him subscribed," in swearing to his account for the six months preceding January 1, 1879.

Channing Richards, U. S. Dist. Atty., for plaintiff.

George Hoadly and *Edgar M. Johnson*, for defendant.

SWAYNE, J. Two objections are taken to the indictment

* Prepared by Messrs. F. Giauque and J. C. Harper, of Cincinnati, O.

—*First*, that it does not appear that the district judge who administered the oath, in connection with which the perjury is alleged to have been committed, had authority to swear the defendant.

I was a little troubled by that objection at the outset, the rule being so strict in the criminal law as to the elements of the crime, and particularly as to the authority of the officer administering the oath, the breach of which is alleged in the indictment. Upon full reflection, and the examination of such authorities as have been brought to my attention, I am perfectly satisfied that the judge had the power to administer the oath. The oath is incident to his judicial office. I do not mean that he could go into the street and administer oaths to everybody, and for all purposes and under all circumstances; but this was a matter of his own court—this was a matter touching the government of the United States, in which he is serving as a judge, and under which he is a judicial officer. Such oaths, according to my recollection, and, indeed, my knowledge, have been administered for the last 30 or 40 years, and I never knew an objection taken before in a case like this.

I think, upon the whole, the *United States* v. *Bailey*, 9 Peters, 238, which was referred to by Mr. District Attorney Richards, may be considered as conclusive upon the subject. At any rate, my judgment is that this exception is not well taken.

The other objection is that the indictment sets out that the defendant had failed to make returns as required by law, and that in swearing to these returns he swore, as charged in some of the counts of the indictment, to a *certificate* which was false—which he knew to be false; and it is charged in other counts of the indictment that in swearing to his returns he had sworn to a *declaration*, knowing that in so swearing he swore falsely.

Now, in the argument, it is shown, with great clearness, that there are a large number of instances defined by the laws of the United States in which declarations, specifically named as such, are required to be sworn to; and so there are

a very large number of instances in which certificates of various kinds are specifically required to be sworn to.

There is no provision in any act of congress, so far as I know, or so far as revealed from the elaborate discussion before the court, in which a return by the clerk, such as the law required in the case, touching emolument returns, is specifically made the subject of an indictment for perjury.

Now it may be said that in a broad, general sense the clerk's statement of his account, and swearing to it, is a declaration that it was true; and so it may be said that the oath was a certificate. But I am by no means clear, though that is one legal view of the subject. I think that such a view of the subject is hardly warranted by the principles of law touching the crime of perjury. They are of great strictness, and very wisely made so.

This case being one of great importance to the defendant, and not without importance to the government, I have concluded upon the whole—my brother, the circuit judge, (Baxter,) agreeing—that, as to the questions arising touching this aspect of the case, we will divide and certify the case up to the supreme court.

In re TOWNSEND.

(*District Court, D. Delaware.* ——, 1880.)

BANKRUPTCY—DISCHARGE—SECTIONS 9 AND 21, ACT OF CONGRESS, JUNE 22, 1874, CONSTRUED.—Constructions given to sections 9 and 21 of the act of congress of June 22, 1874. This act effects a total repeal of the provisions in section 5112, in the Revised Statutes of 1874 and 1878, which proviso is in these words: "But this provision shall not apply to those debts from which the bankrupt seeks a discharge which were contracted prior to the first day of January, eighteen hundred and sixty-nine."

SAME—SAME—ABSENCE OF ASSETS—CREDITORS CONSENTING TO DISCHARGE.—As the law now stands, only those creditors who have proven their claims can have them counted in the formation of the complete liability of the bankrupt to which the new law of one-third in value and one-fourth in number is applicable; but all creditors, no matter when their debts were contracted, can give or withhold assent to discharge of bankrupt, if he has not the requisite amount of assets, *i. e.*, one-third in value, and one-fourth in number of the creditors who have proved their claims.

SAME—SAME—BOOKS OF BANKRUPT—OBSCURITIES IN.—Books are required of the bankrupt which are reasonably explanatory of the business conducted, and kept obviously with the intent of affording information as to that business. It is no reason to refuse a discharge to a bankrupt because there are obscurities which need explanation, when those obscurities are explained, and there is no evidence of fraud or deceit in the entries.

SAME—SAME—AMENDMENT OF SCHEDULES.—When there is no reason to withhold a discharge on the ground of fraud against the bankrupt laws, the court will order formal amendments made to the schedules which were omitted by the bankrupt through ignorance and mistake, and the case continued, in order that such proper returns may be made; and, upon compliance with the orders of the court, an application for discharge may be made at some future time.

In Bankruptcy.

BRADFORD, D. J. Application for discharge of the bankrupt. The question which meets us at the threshold of the case is, the bankrupt having no assets, has he produced the written assent, filed in this court, of a sufficient number and value of his creditors to entitle him to his discharge, notwithstanding the absence of all assets?

Amount of claims as *admitted by the bankrupt* against him, as per *schedules* filed, -	$71,584.30
Amount of claims or debts proven before the register, - - - - -	43,984.12
Debts increased by proof of larger amounts than set forth in bankrupt's schedule, as assumed in the argument on both sides, - -	8,281.39

—which, added to the aggregate scheduled debts of $71,584.30, $8,281.39—$79,865.69—being the total liability as principal debtor of the bankrupt, without regard to the time the debts were contracted.

One-third in value, $79,865.69, - -	$26,621.89
The amount of the claims of the creditors, who have assented to the bankrupt's discharge, $24,667.60, which, deducted from $26,621.89, leaves a deficiency of $1,954.29, - -	$26,621.89
	24,667.60
	$ 1,954.29

Prior to June, 1874, 50 per cent. of proven claims was necessary for the discharge of the bankrupt without the assent of his creditors, and if the bankrupt had no assets, or not the required amount, he must have had a majority in number and in value of his creditors who had proven their claims.

The law as it then stood was in these words: "Section 5112. In all proceedings in bankruptcy commenced after the first day of January, 1869, no discharge shall be granted to a debtor whose assets shall not be equal to 50 per centum of the claims proved against his estate upon which he shall be liable as the principal debtor, unless the assent, in writing, of a majority in number and value of his creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims, is filed in the case, at or before the time of the hearing of the application for discharge; but this provision shall not apply to those debts from which the bankrupt seeks a discharge which were contracted prior to the first day of January, 1869."

Section 9 of the act of June 22, 1874, (18 U. S. Statutes,

part 3, p. 180,) has the following provision, viz.: "And in case of voluntary bankruptcy no discharge shall be granted to a debtor whose assets shall not be equal to 30 per centum of the claims proven against his estate, upon which he shall be liable as principal debtor, without the assent of at least one-fourth of his creditors in number and one-third in value; and the provision in section thirty-three in said act of March the second, eighteen hundred and sixty-seven, requiring 50 per centum of such assets, is hereby repealed."

In section 21 of the same last-cited act (18 U. S. Statutes, part 3, p. 186) is found this provision, viz.: "That all acts and parts of acts inconsistent with the provisions of this act be and the name are hereby repealed."

There has been a difference of opinion in the United States courts as to the full effect of this latter law of June 22, 1874, on the law as laid down in both of the U. S. Revised Statutes of 1874 and 1878; some of the judges holding that it effected a full repeal of the law, and let in all creditors, without regard to the time of contracting their debts, to add their claims to the aggregate liability of the bankrupt, and thus create the necessity for him to produce a greater amount of assets than he would otherwise be required to do to obtain his discharge, and also let them in with subsequent creditors to give their assent to the discharge of the bankrupt in case there were no assets, or less than the required amount.

Other judges hold that the act of June 22, 1874, parts of which are above recited, only repealed that part of the former law which required 50 per cent. of assets, in the bankrupt, of the proven debts against him, and a majority in value and number of the creditors who had proven their claims, and substituted in lieu thereof the 30 per cent. of assets, and, in default of that, the one-fourth in number and one-third in value of creditors whose assent was necessary to justify a discharge, without the requisite amount of assets, and that the latter clause in the two Revised Codes, viz.: "but this provision shall not apply to those debts from which the bankrupt seeks a discharge, which were contracted prior to the first

day of January, eighteen hundred and sixty-nine," remained unaffected by the later act of June 22, 1874.

Of course, in this latter view of the case, all the creditors whose claims were contracted prior to January 1, 1869, were altogether powerless to oppose the discharge of the bankrupt, either by adding their claims to the aggregate of his liabilities, and thus require a greater percentage of assets, or by refusing their assent to his discharge.

In re Gifford, 16 National Bank. Register, September 26, 1876, Justice Withey, district judge of the western district for Michigan, sustains the former proposition, and says: "As the law now stands, we hold that in the *absence of consent by creditors in voluntary cases, no matter when commenced, or when debts were contracted, the assets* must pay thirty per cent., not fifty per cent., or there can be no discharge; whereas, in compulsory cases, the bankrupt, if otherwise entitled thereto, is entitled to a discharge, irrespective of the assent of creditors or the amount of assets." He cites the opinion of Judge Lowell as confirming his own, in *In re Griffiths*, 1 Central Law Journal, 506; and, also, that of Mr. Justice Miller, of the United States supreme court, reported in 1 Central Law Journal, (*In re King*,) 501.

Judge Drummond, of the United States circuit court, Indiana, *In re Wheeler & Riggs*, 19 B. R. 259, in a lengthy opinion, has supported this view of the case, and concludes by saying: "But, when we look at the whole scope of the amendment of 1874, and apply the language of the ninth section to the case now before the court, it seems to me that it was the intention of congress to declare by that section that in any case of bankruptcy, when there were no assets equal to thirty per cent., if the bankrupt secured the assent of one-fourth of his creditors in number, and one-third in value, as there stated, that he was entitled to a discharge, irrespective of the time when the debts were incurred; and, therefore, I hold, contrary to the opinion of the district court, that the ninth section of the act of June 22, 1874, necessarily repealed the proviso to the 5112th section of the Revised Statutes, and

that in this case, on the facts as conceded, the bankrupts are entitled to their discharge."

Judge Blatchford has, *In re Sheldon*, expressed an opinion on this subject, but it was *obiter dictum*, as the proceedings were all commenced before the twenty-second of June, 1874, and consequently were not governed by that law. Judge Gresham, U. S. district judge for Indiana, has taken the same view of the case as Judge Blatchford.

On the weight of the authorities (as far as I can inform myself) I shall follow Judge Drummond's opinion, and conclude that the act of June 22, 1874, altogether repealed the provisional clause of 5112 in both of the Revised Statutes, and that, as a necessary result, if there had (in this case) been any assets to entitle the bankrupt to a discharge, there must have been 30 per cent. of the claims proven against his estate upon which he is liable as a principal debtor, without regard to the time they originated; and if, as in the present case, there are no assets, then it is requisite to have the assent of one-third in value and one-fourth in number of his creditors to assent to his discharge, no matter when the claims of these creditors arose. By this repeal the creditors whose debts were contracted before the first day of January, 1869, whether they have proven their claims or not, are "entitled" to the same *status*, as to giving or withholding their assent to a discharge of the bankrupt, as all the other creditors.

As the law now stands, *after the repeal of the provision aforesaid*, the bankrupt has to have 30 per cent. of the *proven claims only*, and, therefore, creditors who have not proven their claims cannot add them to swell the aggregate of the bankrupt's liability, but they are, in general terms, without any words of restriction as contained in the repealing act, let in to give or withhold their assent to the bankrupt's discharge where there are no, or not sufficient, assets. The exact words, showing no restriction in the repealing act, are as follows: "Without the assent of at least one-fourth of his creditors in number, and one-third in value." Thus it will be seen that upon this construction of the law the bankrupt has not the requisite amount in value of creditors assenting to his dis-

charge to entitle him to it, the deficiency being, as before shown, $1,954.29.

A strong effort has been made by certain creditors to prevent the discharge of the bankrupt. Elaborate specifications have been filed, each one of which has been denied or answered, The grounds for opposing the discharge, without reciting in detail the specifications and answers, are substantially as follows:

First. That the bankrupt has "wilfully sworn falsely" in his affidavit annexed to his original petition and Schedule A thereto, in that he omitted to set forth certain debts of the Wilmington Rolling Mill Company, amounting to $37,500, which he had assumed, and many other debts to the creditors unknown.

As to this specification the court takes leave to say that it considers there is no evidence whatever, in all the transactions brought to its notice, of any wilful false swearing within the meaning of the provisions of the bankrupt act; that the evidence conclusively shows that the indebtedness named in this specification was that of the Wilmington Rolling Mill Company, not that of the bankrupt; as it was proven in the case, and not successfully refuted by the creditors, that the ultimate liability for the payment of this $37,500 depended on the successful prosecution of the rolling mill business, which, for this consideration, had been transferred from the company to the bankrupt.

The last clause of the first specification, in these words, viz., "and many other debts to the creditors unknown," is faulty by reason of its generality and want of precision.

Second. Specification charges wilful false swearing, in that he did not embody in his Schedule B all his assets and property. On an examination of the evidence, this court thinks the bankrupt should have returned articles of property which he omitted, but under such circumstances as to negative any idea of wilful false swearing or fraud on the provisions of the bankrupt act. He should have returned his household goods, though it was very natural that a former exemption of the same property under execution by the sheriff,

as his wife's property, should have induced the mistaken belief that they belonged to her. This was a mistake on his part, for the law had not been so altered in favor of married women as to secure these household goods to her, although purchased for her by a relative. So he should have produced whatever choses in action he held, however worthless, at the time he considered them. He should have returned in this Schedule B any real estate standing in his name, no matter to what extent it may have been covered with judgments against him. He should have returned his gold watch, wearing apparel, etc., etc., and have relied on the exemption under the United States and state laws, which are liberal in their provisions. I shall then order the bankrupt's schedules, in reference to the matters above stated, to be amended so as to comply with the law.

Third. False swearing by the bankrupt that "he had no books, deeds or papers relating to his business at the time of filing his petition. There may be more stringent requirements made of some bankrupts than of others in the matter of books to be kept by them."

Considering the wide range of capacity of those entering into and failing in business who are entitled to the benefits of the bankrupt law, it must needs be that there are many very honest men who are not professional book-keepers themselves and have no means to employ them; but as it is an essential feature of the bankrupt law that a free discharge must depend upon a free discovery of assets and delivery of the same to the assignee, books of accounts, *i. e.*, written evidence of all the credits and liabilities of the business engaged in, must be kept, and the production of some books of account of this nature must be made, to enable the bankrupt to obtain a discharge. The degree of accuracy and particularity required will depend, in a great degree, on the circumstances of each case. Books which show an honest attempt to throw such light on his business transactions as will make them reasonably plain of themselves, or capable of being made plain by explanation, are sufficient, within the meaning and intention of the bankrupt law.

Now, the books produced in this hearing by the bankrupt have been at the service of the creditors of the Wilmington Rolling Mill Company, or his individual creditors, since the time of his filing his petition in bankruptcy; and in this connection it may be well to give a short statement of the bankrupt's relations with the company. Finding the business not a remunerative one, they entered into articles of agreement with the bankrupt, the contents of which articles of agreement, proven by parol, (they having been lost,) established these facts: The rolling mill company were, by certain trustees named in the articles of agreement, to deed the whole real and personal estate of the company, fixtures and appurtenances, to the bankrupt, on consideration that he would assume one-half of the indebtedness thereof. In pursuance of this agreement he gave to the trustees of the company his judgment bond for the payment of $37,500, which was duly entered against him; and thereupon he was placed in the possession of the real and personal estate, fixtures, etc., etc., with the distinct understanding and agreement between himself and the trustees of the creditors of the company that if he succeeded in his business, to the extent of paying off the indebtedness of $37,500 entered against him, he was to be entitled to all the profits over and above that sum he could make, and be absolute owner of the real and personal estate conveyed to him; and also that if, after his best efforts to succeed, he should fail in the business undertaken, he should turn over to the company, and the company should accept, all the real estate and personal estate they had sold and possessed him of, and should then satisfy the judgment entered against him.

In point of fact, the creditors took out execution on this judgment, and levied on and sold all the real and personal property they had before transferred to the bankrupt. It is evident to the court that the bankrupt in good faith facilitated the redelivery of all the property put into his hands by the company.

So much as bearing on the question of books: The company had, of course, a set of books kept in the usual manner, and

with ordinary accuracy and particularity. Mr. Townsend, succeeding to the business, took up and continued the same books. His final interest in the concern was a contingent one, and, as it proved in the end, the trustees of the company were ultimately interested in their contents.

If we were disposed to be technical we might suggest the query whether these books, in any proper sense, can be called the bankrupt's books; but we waive that question. The books were, with all other property, credits, etc., turned over to the trustees of the creditors, and, upon a full and searching examination of the bankrupt, in open court, he has cleared up whatever might need explanation.

On this point the court is fully satisfied that the formal objection of not keeping proper books of account has failed.

Specification 4. The substance of this specification is the wilful concealment of property. On an examination of the evidence submitted, the court does not think this specification is sustained.

Specification 5. The court does not think that there has been such fraud and negligence in not delivering his property to his assignee, as charged in this specification, as to prevent his discharge, if that deficiency is corrected by obeying the orders of the court to amend his schedule in that behalf, and he is otherwise qualified.

Specification 6. Property wilfully omitted. This specification is answered by the order of this court requiring of the bankrupt to amend his schedules in that behalf. Under this specification we observe that there was no such wilful omission as should deprive the bankrupt of a discharge, if otherwise entitled to it.

Specification 7. Proper books of account not kept. This specification is already disposed of by the remarks heretofore made.

Specification 8. Is indefinite, uncertain, and faulty in all respects. It does not specify properties or moneys concealed, times, places, or any circumstances, such as demand an answer.

Specification 9. This specification has already been considered.

Specification 10. Alleging that the assent of Williams, one of the creditors of the bankrupt, was of no avail, as he was at the time *non compos mentis*, was withdrawn.

The bankrupt cannot receive his discharge now. The application will, therefore, be indefinitely continued, to allow him to obtain the requisite number in amount and value of his creditors, and to conform to the order of the court now made that he shall amend his schedules, referring to his ownership and possession of property, as above indicated, and in order that he may claim the exemption allowed him under the state and United States laws.

The court considers him entitled to a discharge on his compliance with the matters of form made necessary by the acts of congress, and shall so order when they are complied with.

ONDERDONK *v.* FANNING.

(Circuit Court, E. D. New York. May 17, 1880.)

EQUITY—PRACTICE—MOTION TO ATTACH FOR CONTEMPT OF INJUNCTION. A patent for a lemon-squeezing machine was sold to O. by F., the inventor, who thereafter still made and sold machines a little different. A suit for infringement being brought, and a temporary injunction granted against F., he devised an improvement on O.'s machine, and obtained a patent for it. A motion to attach F. for contempt of the injunction being made, *held*, that the question between two patents, raised by this second invention, could not be brought up by this motion, although the device was made after the injunction was issued, and the issuing a patent for it forbids the calling it a mere colorable device to avoid the patent of O., without a hearing had and decision made upon that question.

Foster, Wentworth & Foster, for plaintiff.

E. H. Brown, for defendant.

BENEDICT, D. J. This is a motion for an attachment against the defendant to punish an alleged contempt in making and selling a certain form of lemon-squeezers, the making

or selling of which was forbidden by a temporary injunction of this court. The injunction referred to described with particularity and detail the machine to which it was intended to apply. It is not pretended that the defendant has, since the issue of the injunction, made or sold any machine precisely similar to the machine described in the injunction. On the contrary, it is conceded that the machine complained of differs from the machine described in the injunction in this, that the movable bed upon which the lemon rests while being pressed is not perforated, and its surface is formed into grooves, so arranged, in connection with what is termed a concentrator, as to permit the juice of the lemon to pass to and around the edge of the bed, instead of through the perforations in the bed.

But it is contended that this alteration is merely a colorable device intended to evade the injunction. The plaintiff's patent is for a combination of old elements, one of which is a perforated bed. The machine complained of contains no perforated bed. The present motion cannot, therefore, be decided in favor of the plaintiff without determining the question whether the non-perforated, corrugated bed in the machine complained of performs the same function as the non-corrugated, perforated bed in the plaintiff's combination. The moving papers show this question to be presented by the motion, and it is one not passed on when the temporary injunction was granted. Furthermore, it is made to appear by the defendant that a patent has been issued to him for the machine now complained of. Under such circumstances the defendant must be upheld in his contention that the question raised by the new machine cannot be presented by a motion for an attachment for contempt. It is true, that at the time of doing the act complained of the defendant had not obtained his patent, but the subsequent action of the patent office in granting the new patent affords ground for the defendant to insist that the alteration made in the bed was not so plainly colorable as to entitle the plaintiff to an attachment against him for contempt.

The motion is, accordingly, denied.

OLENDORF and another *v.* ECKLER.

(*Circuit Court, N. D. New York.* May 24, 1880.)

PATENT—PRIOR USE.

H. Striyes, for plaintiffs.

L. I. Burnett, for defendant.

BLATCHFORD, C. J. The testimony satisfactorily establishes that the invention claimed in the plaintiffs' patent was known to and used by Lewis Perkins before it was made by the plaintiffs. The bill must, therefore, be dismissed, with costs.

DAY *v.* COMBINATION RUBBER CO. and another.

(*Circuit Court, S. D. New York.* May 6, 1880.)

JUDGMENTS—BINDING EFFECT OF.—Judgments and decrees are conclusive evidence of facts only as between parties and privies.

PATENT—IMPROVEMENT IN SKIRT PROTECTORS—CONSTRUCTION OF.—There being no evidence in this case impeaching the *prima facie* effect of the patent involved, being one for improvement in skirt protectors, it is construed with reference to prior existing devices to ascertain its scope.

In Equity.

Miles B. Andrus and *Edward N. Dickerson*, for complainant.

M. P. Stafford, for defendants.

WHEELER, D. J. This bill is brought for relief against an alleged infringement of letters patent No. 61,172, dated January 15, 1867, to Thomas B. De Forest, for an improvement in binding for skirts, and now owned by plaintiff.

The defences set up in the answer are that the defendant, the rubber company, is operating under a patent, No. 155,134, dated September 20, 1874, to Helen Marie MacDonald, for an improvement in dress protectors, and that they do not infringe the plaintiff's patent.

While the application of MacDonald was pending an interference was declared between her and one Chase, in the

decision upon which Mr. Commissioner Leggett expressed an opinion that her invention dated back to 1861. *MacDonald* v. *Chase*, 6 Off. Gaz. 359.

Afterwards she brought a bill in the circuit court for the district of Massachusetts for an infringement of her patent, and in that case it was found, upon the evidence, by *Shepley* J., that she was the first inventor of the skirt protector described in her patent. The case was afterwards opened for the introduction of the De Forest patent, and, upon the case as presented with that patent in evidence, *Lowell*, J., found that her invention was made in 1861, before the patent of De Forest.

In the subsequent cases of *MacDonald* v. *Shepard*, in the district of Massachusetts, and *MacDonald* v. *Sidenberg*, in this district, on motions for preliminary injunctions, the decisions in the former case were followed by *Lowell*, J., there, and *Blatchford*, J. here, and temporary injunctions ordered. None of the evidence on which those findings were based in any of those cases has been reproduced in this case, nor have the defendants even set up any prior knowledge or invention, or use, in their answers to defeat the patent of De Forest.

On the hearing they have produced copies of the opinions filed in those cases, and argued that those decisions conclusively settle that MacDonald's invention was prior to De Forest's. None of the parties to this suit were parties to any of those; neither is it shown that any of these parties are privies to those, and it is elementary that judgments and decrees, in order to be conclusive evidence of facts, or evidence at all in other proceedings, must be between the same parties, or privies to them. These decisions and opinions are authorities for all similar cases, but not estoppels in any, except such as may arise between those very parties, or others claiming under them. This case stands upon its own evidence, which shows nothing prior to the plaintiff's patent, except that Miss MacDonald was asked by the defendants, expressly disclaiming any intention of proving prior knowledge of De Forest's invention, when she commenced experimenting in water-proof skirt protectors, and answered in 1861; and,

further, that she made skirt protectors of water-proof material and attached them to the skirt, so as to extend below the lower edge as a protection to the lower part of the skirt and braid, and wore them in that year. There is nothing to impeach the *prima facie* effect of the patent itself, and it must be treated as valid, and be construed in the light of this testimony of Miss MacDonald as to prior existing devices, which is not contradicted, for the purpose of ascertaining how much it will cover, and whether what the defendants have done will come within its scope.

The patent is for, among other things, a band of India rubber or other flexible material, placed upon and attached to the outer surface at the lower edge of what is called the binding to the inside of the skirts of ladies' dresses at the bottom, to protect the dress at the edge, and it is mentioned that the binding itself may be coated with India rubber, thinly, and rendered water-proof. It is said that the binding proper of a dress is wrought in with the facing, and becomes a part of the dress itself, all of which is protected by a skirt protector proper; and that the invention is confined to bindings, and has nothing to do with skirt protectors. But the whole description in the patent is to be looked at, as well as the name given to the subject of the invention, in order, according to the settled rule for the construction of all writings, to give effect to every part, and ascertain from the whole what is meant. The drawings are referred to as showing ing the different forms of his constructions enlarged. Some of the witnesses for the defence have treated that part as meaning that the whole binding is represented as enlarged, and therefrom have concluded that the binding would be very narrow, and only apply to the extreme edge of the skirt; but it is not so understood here. The new parts are represented enlarged, and what is called the binding improved upon is represented in various widths, and being a mere sheet of material could be of any desired width. The form carrying the band of rubber could not be used as ordinary proper binding is, for the band would be put out of place for the purpose it was for by such use. It could be used as an extra binding to

protect the edge of the skirt according to its design. This band upon an inside strip of material, which might be itself made water-proof, to protect the edge of the skirt, is what was patented, by whatever name it was or might have been called. In the MacDonald patent her device was, in one place, called a skirt facing or protector, which shows that the names of those parts of a dress were not used at all times with exact discrimination. Her protector would, in some sense, be a sort of extra facing. She afterwards disclaimed facings as a part of her patent, which might affect the patent and might not, but it would not affect the use of the language employed to express her ideas. Her testimony is understood as meaning that the skirt protectors she wore before De Forest's patent were similar to those she afterwards patented. These were made of plain water-proof fabric, gathered into plaits or fluting. Judges Blatchford and Lowell are understood to have held that the plaiting and fluting are merely modes of finish, and that the real thing she invented was the plain water-proof strip, finished in either of those modes, or any other desired for the purpose of a skirt protector. Such strips were in existence when De Forest took his patent; he recognized them in his patent, and his patent was for an improvement upon them, and similar things. His patent, as this case has been presented, is valid for that improvement, consisting of such a band placed upon and fastened to the lower edge of such strips of material on the inside of the skirts of dresses at the bottom, for additional protection.

The evidence shows that the defendant the Combination Rubber Company, of which the defendant Greacen is president, has made and sold for use strips of water-proof material with exactly this improvement. Some of the bands have very shallow creases across them, which some of the witnesses call fluting, as if they were like the fluting of Miss MacDonald's protectors and patent, and made such bands different from those of De Forest. This distinction is without foundation. The fluting of her patent has an office to perform in giving a hang to the skirt, and must be made by gathering the material into open folds, as flutings of such sort are usually

made, and is more than such configuration as these creases make, which has no effect except upon the appearance of the material before or when not in use. The defendants infringe by the use of these bands, as well as by the use of the plain ones.

Let a decree be entered establishing the validity of the patent, and the infringement of the defendants, and for an injunction, and an account accordingly, with costs.

PERFECTION WINDOW CLEANER CO. *v.* BOSLEY.

(*Circuit Court, N. D. Illinois.* ———, 1880.)

PATENT—DEVICE PATENTABLE.—A device which is merely the result of mechanical skill is not patentable.

SAME—SAME—RUBBER WINDOW CLEANERS.—A device for cleaning windows, consisting of a handle or holder, with an elastic or rubber strip attached to one edge, with a tubular rubber bearing or support therefor, embodies nothing but mechanical skill and is not patentable.

Munday & Evarts, for complainant.

Mr. Paine and *Mr. Bonney*, for defendant.

DYER, D. J. This is a bill to restrain the infringement, by the defendant, of letters patent granted to William C. Gayton, dated April 9, 1878, and re-issued September 3, 1878, for an improvement in window cleaners. The important question in the case relates to the patentability of the alleged invention. It is alleged that the defendant infringes all of the first four claims as they are stated in the re-issued patent. Those claims are described as follows: *First*, an improved window cleaner, consisting of a handle or holder, an elastic rubbing strip attached by one edge to said holder, and a bearing or support for said strip near its outer edge, said parts being combined substantially as described; *second*, the holder having its back extended and lying underneath the projecting strip, jointly with the bearing or support located thereon and the rubbing strip, substantially as described; *third*, the combination with the holder of the elastic rubbing strip and a

yielding bearing or cushion, substantially as and for the purpose set forth; *fourth*, in combination with the elastic strip B, attached to a suitable holder or bearing or cushion C, of India rubber, made tubular in form, substantially as described and for the purpose set forth.

The alleged invention then consists, as described in the specifications and claims in the patent, and as appears from the specimen which has been put in evidence, of a handle or holder, in a groove, upon or near the upper edge of which is inserted a strip of rubber, attached by the lower edge to the holder within the groove, and a bearing or support for and lying behind the strip, made also of rubber, and tubular in form, the parts being so adjusted that the edge of the rubber strip, as it is used, comes in contact with the glass; this rubbing strip being placed at such an angle as will cause such contact to be effected in the practical use of the implement. I do not understand that the proposed invention embraces any particular form or style of handle, or frame, with which the rubbing strip is connected. The essence of the alleged invention is the attachment of the rubbing strip to the holder at such an angle as will, in its use, bring the edge of the rubber in contact with the glass, and in the elastic or yielding support against which the rubber rests. This is apparent from the specifications, which state that the "invention relates to a device for drying and cleaning window-panes, mirrors, and like smooth surfaces, after they have been washed in the usual manner, and it consists, *first*, in employing, upon a suitable holder, an elastic strip, attached at one edge to the holder, and thence projecting forward and outward, and sustained or stayed by means of a bearing or support beneath it—that is to say, as between it and the holder, at or near its opposite edge; *secondly*, in having the support of a yielding character; whereby uniformity of contact between the rubber strip and the glass is insured; *thirdly*, in making the bearing tubular in form and of India rubber, whereby it best answers the purpose for which it is designed; *fourthly*, in combining with the rubber strip and holder two thick rubber plates, fastened one to each end of the holder behind the rubber strip, to form a

backing for the same and adapt it to enter the corners of the sash."

Now, the question is does the construction of this device involve invention within the meaning of the patent law? That it may and does produce a useful result is undoubtedly true, but does its construction involve anything more than mechanical skill? In the case of *Reckendorfer* v. *Faber*, 2 Otto, 347, it was settled by the supreme court that the granting of letters patent and the decision of the commissioner on the question of invention, its utility and importance, is not conclusive; that his decision in the allowance and issue of a patent creates a *prima facie* right only, and upon all the questions involved therein the validity of the patent is subject to an examination by the courts.

The erasive and cleaning qualities of rubber have been long known. Its use in cleaning window-glass is but a new use of an old and well-known article. Long used for erasing pencil marks upon paper, there is nothing new or in the nature of discovery in the application or use of this article in cleaning window-glass. The idea of the patentee in putting rubber to such a use may be, and undoubtedly was, an excellent one; but the question is, is his device in its construction, and with reference to its own use in connection with an old and well-known material, of such character as to entitle him, under his patent, to protection as an inventor?

As was said by the supreme court in *Reckendorfer* v. *Faber*, *supra*, "this device is for the performance of a mechanical operation to produce mechanical results, and is a mechanical instrument as much as a brush, a pen, a stamp, a knife, a rule, or a screw. Whether it is styled a manufacture, a tool, or a machine, it is an instrument intended to produce a useful mechanical result, * * * Does it embody any new device or any combination of new devices producing a new result?"

The combination consists only in the adjustment of the rubbing strip, and the supporting tubular cushion, in such manner as will bring the edge of the strip in contact with the glass. Now, "the law requires more than a mere juxta-

position of parts, or of the external arrangement of things, to give patentability." *Hailes* v. *Van Wormer*, 20 Wall, 353. "Mechanical skill is one thing; invention is a different thing. Perfection of workmanship, however much it may increase the convenience, extend the use, or diminish expense, is not patentable." *Reckendorfer* v. *Faber*, *supra*.

The distinction between mechanical skill and inventive genius is well understood. In my judgment, the device in question, in its construction, involved only mechanical skill. It is the case of the new use of an old and well-known article, so adjusted to an ordinary handle or holder as to make it capable of such new use; the adjustment of parts being purely mechanical, and only requiring the exercise of mechanical ingenuity.

There was exhibited to the court, as showing the state of the art when the letters patent in question were granted, an instrument previously used in cleaning the decks of ships, which consists of a broad strip of rubber firmly inserted in a wooden holder, connected with which is a handle, and which in its cleaning operation performs the service and is somewhat in the form of an ordinary mop. It thus appears that rubber so arranged and adjusted, had been previously used for cleaning purposes, and although this implement, because of its size and general form, would not be adapted to the particular use of cleaning windows, I cannot but think that the construction of complainant's device was but the carrying forward, or new, or more extended application of a thought original with others, and not such an invention as will sustain a patent. Furthermore, in 1873, what is known as the Morrison patent was issued, which was a patent for a scouring utensil, provided with scouring surfaces consisting of India rubber, and, although the form of this utensil as set forth in the drawings accompanying the letters patent is essentially different from complainant's device, it being a solid piece of rubber attached to a handle in the form of a hair-brush, it is apparent that the idea of using India rubber for scouring and cleaning purposes was not new with the patentee in the Gayton patent, and if the Morrison patent be valid I deem it a

serious question whether it does not anticipate complainant's. However that may be, I am of the opinion that complainant's device is but the result of the exercise of mechanical skill; that it is wanting in such characteristics as entitle it to be regarded as a new and original invention, within the meaning of the patent law, and hence that it does not possess the essential element of patentability.

A decree will be entered dismissing the bill

MIRCOVICH and others *v.* THE BRITISH BARK STAR OF SCOTIA, etc.

(*District Court, S. D. New York.* May 13, 1880.)

ADMIRALTY—COLLISION—FAILURE OF VESSEL TO KEEP GOOD LOOKOUT AND AVOID A VESSEL ENTITLED TO HOLD HER COURSE.—Evidence considered, and the collision complained of in this case *held* to have been caused by the failure of defendant to keep a proper lookout, and in not keeping out of the way of the libellant's vessel, entitled to hold her course.

F. R. Coudert, L. Ullo and *E. L. Owen,* for libellants.

C. E. Souther and *E. P. Wheeler,* for claimants.

CHOATE, D. J. This is a suit to recover damages caused by a collision between the Austrian bark Sansego and the British bark Star of Scotia. The collision happened off the Jersey coast, about 60 miles south-east of Absecom Light, on the morning of the ninth of March, 1880, at about half past 2 o'clock. The Sansego was on a voyage from Marseilles to Boston, with a valuable cargo, consisting of 2,000 bales of wool and 200 barrels of sulphur. She was sunk by the collision, and this suit is for the value of vessel, freight and cargo, and the personal effects of the master and crew, the damages claimed being $145,000. The Star of Scotia was on a voyage from Calcutta to New York. She was an iron vessel, originally ship-rigged.

The wind was about north-east. Both vessels were close hauled when they came in sight of each other, the Sansego on

the starboard tack. She was a vessel of 560 tons. The Star of Scotia was on the port tack. She was a much larger vessel; her tonnage is not given, but her length was about 220 feet from stem to stern. The night was overcast, with no moon or stars, but vessels' lights could be distinctly seen. The wind was a five to six-knot breeze. The Sansego was making about six knots. The Star of Scotia a little less.

The libel alleges that the lookout on the Sansego reported a light on the lee bow; that the mate went forward to see this light, and made the same to be a green light of a sailing vessel that was at the time crossing the bows of the Sansego; that this green light crossed to the weather side and then disappeared, and, although a good lookout was kept, no light was seen; that a short time afterwards the loom of a vessel appeared on the weather side, showing no light, and before it could be ascertained what course she was on she struck the Sansego on the starboard side, near the main rigging, and sunk her in less than an hour after the collision; that the Sansego kept her course close hauled from the moment she first sighted the green light until the collision; that the collision was wholly owing to the fault of the Star of Scotia in having no competent lookout, no regulation side lights burning, as required by law, and in that she did not keep out of the way of the Sansego, as she was bound by law to do.

The answer avers that the Star of Scotia was sailing close hauled on the port tack, and was headed S. E. $\frac{1}{2}$ S.; that the wind at the time was blowing from the N. E., or N. E. by E.; that the Star of Scotia had proper side lights brightly burning; that the officer of the deck saw a red light, which afterwards proved to be the red light of the Sansego, about a point and a half on the starboard bow; that as the wind was on the port side of the Star of Scotia and on the starboard side of the other vessel, it was the duty of the Star of Scotia to keep out of the way, and the duty of the Sansego to keep her course, and thereupon, in order to fulfil that duty, the officer of the deck ported his helm; that the Star of Scotia answered her helm, and the red light soon became visible on the port bow; and if the Sansego had kept her course there would have been no

collision; but that the Sansego thereupon changed her course and showed her green light to the Star of Scotia; that the Star of Scotia was kept under the port helm until the red light was well on the port bow, when the helm was steadied; that the red light of the Star of Scotia was in full sight of the Sansego, and could have been seen from her if a proper lookout had been kept; that the Sansego did not keep her course, and did not keep a proper lookout, and did not observe the movements of the Star of Scotia with proper vigilance, but again changed her course and showed her green light to the Star of Scotia; that at that time she was so near the Star of Scotia that the loom of her sails could be seen from the deck of the Star of Scotia; that the Star of Scotia at once put her helm hard a-port, but the two vessels were so near each other that it was too late, after the Sansego had again changed her course, to avoid the collision; that the collision was caused by the negligence of the Sansego in not keeping a good lookout, and in not keeping her course.

Under the rules of navigation the Sansego was bound to keep her course, and the Star of Scotia was bound to keep out of her way. The Star of Scotia recognized this duty, and made certain movements to perform it, which she claims were ineffectual, by reason of the Sansego's changing her course, by going off before the wind. The principal question of fact, then, is whether the Sansego kept on her course, close hauled by the wind, till the collision. If she did, then the Star of Scotia is responsible for the collision, since she did not keep out of the way, and it is not claimed that she could not have done so if the Sansego kept her course.

The testimony of those on the Sansego is clear and explicit that she kept her course. It was the mate's watch. His testimony is that he was standing on the poop deck, and the lookout forward, on the forecastle, reported a green light a little to leeward. He could not see it from where he stood, and he went forward, with his glass, to look at it. When he got on the forecastle he saw it, without the glasses, right ahead; that he looked with his glasses and saw the light, but

could not see the vessel's sails; that it was right ahead, coming towards them and going to starboard; that it got about a point or a point and a half on his starboard bow; that he went back to the poop deck, and, leaning there on the weather rail, he saw the green light; that when it got about a point and a half on his starboard bow it disappeared, and he could see no light; that when it disappeared he called to the carpenter, and asked him if he saw the light; that the carpenter was looking to windward and told him that he could not see anything; that he felt uneasy at the disappearance of the light, and continued to watch to see whether that or any other light would appear; that after the light disappeared he spoke to the man at the wheel and told him to keep the sails full; that he had noticed the sails shaking, the topgallant sails and royal; that after a short time, looking still to windward, he saw a shadow and then the loom of a vessel, and then, all at once, the other vessel was on top of them. He testified that the Sansego was heading N. W. by N. ½ N.; that they had been heading so since 8 o'clock the night before; that the wind had been the same all the time. The lookout testified that he saw the light a little to leeward; that he reported it as a green light right ahead; that the mate came forward and looked at it, and then returned aft; that the light passed to windward and then disappeared; that he saw no light in place of it; that he looked for a light, expecting to see it again, or some other light; that he looked to windward and to leeward and saw nothing; that the next thing he saw was a vessel coming upon them; that the vessel was close hauled by the wind, braced sharp up; that the light disappeared a short time after the mate went aft; that the vessel was kept by the wind all the time; that the sails were not changed; that they were kept full, lifting from time to time—when the sails lifted she would pay off a little. The man at the wheel testified that he had been on deck from 12 o'clock, and took the wheel at 2 o'clock; that the vessel was heading N. W. by N., by the wind on the starboard tack; that he heard the lookout report a green light ahead, a little to leeward; that he could not see it then; that as soon as it was reported the mate took

the glasses and went forward, and then came aft again; that he saw the green light when it passed to windward; that when he saw it the mate was on the poop deck; that the mate was looking at the light to windward when he saw it; that it bore N. by W. ½ W. by the compass; that he continued to see the green light a short time, and next he saw it no more; that the vessel kept always the same heading; that he saw nothing else till he saw the loom of something coming upon them, but no light was to be seen; that, after the light disappeared, he saw the mate using the glass to see if he could see anything; that he heard him asking the carpenter if he could distinguish anything of that vessel or light; that he did nothing with his wheel after the green light was reported, up to the moment of the collision, except steering by the wind; that he was heading all the time by the wind, and seeing that the sails were full; that he kept looking at the compass and the sails; that when the other vessel struck them he was heading N. W. by N.; that he left the wheel when the vessels struck, and got up on the other vessel. He also testified that the mate spoke to him; told him that the light was clear of them, and told him to keep the sails full, so that they would not be luffing or shaking; that the green light disappeared all of a sudden. The man who had been at the wheel up to 2 o'clock testified that, till that time, the vessel was sailing close hauled—as close to the wind as he could get—heading N. W. by N., seven points from the wind; that when he was relieved he went forward and stood by the foremast; that the man on the lookout reported a green light ahead, a little on the lee side; that he saw it—that it was a little on the lee side; that the officer of the deck went forward and then went aft; that after the mate had gone aft the lookout called him to the forecastle to see the light; he went forward, and saw it a little on the lee side; that he went back to his place, and shortly after the lookout called to him again that a ship was running on top of them; that he ran forward and saw the vessel, but saw no light. The carpenter testified that he heard the lookout report a green light ahead, a little to leeward; that he saw it himself, a little to leeward, as he stood on the lee side, by

the main backstay; that the light passed to windward, and he crossed over to the windward side and saw it to windward; that when he saw it from the leeward side he saw it straight ahead; that he saw it there by the time the mate got forward; that when the light had crossed over to the weather side it disappeared; that when the mate came aft he asked this witness if he saw the light, and he answered that he did not see it any more; that there was no change in the vessel's sails up to the time of the collision.

It is claimed, however, on behalf of the Star of Scotia, that the case thus made by the Sansego is overborne by the weight of evidence tending to show that the Sansego did change her course, by starboarding and going off the wind; that is, by sheering more to the westward or leeward, after the two vessels came in sight of each other. Four classes of proof are relied upon by the claimants as showing this: (1) What was seen from the Star of Scotia of the movements of the Sansego; (2) what was done on the Star of Scotia in respect to her own movements; (3) the angle at which the vessels came together, and their heading at that time; and, (4,) as bearing on the third point, the position and nature of the injuries done to the Star of Scotia.

The testimony as to what was done on the Star of Scotia, and what was seen of the movements of the Sansego, by those on her deck, is briefly as follows:

It was the second officer's watch. There were eight men and boys, all told, in his watch, six of whom were examined —the second mate, the wheelsman, the lookout, and one seaman, and two apprentices who were on watch standing by about amidships.

The second mate testified that they were close hauled by the wind, heading by compass S. E. $\frac{1}{2}$ S. The wheelsman says S. E., with a possible variation of a quarter of a point to the south. The wheelsman thought she would lie up to within seven points of the wind.

The second mate thought not quite so close with that wind, which he says was not steady. The bark, being an iron vessel, there was a variation of the compass, which, however,

the second mate was not informed of, having, as he said, left that to the captain and chief officer. The deviation of their compass at S. E., as given by the captain, was one point westerly, making the actual heading, while on the wind, S. E. by E. to S. E. ¾ E., according to the wheelsman; S. E. ½ E. according to the second mate. Assuming the wind to be N. E., as it is testified on both sides, the course of the Star of Scotia may be taken to have been at S. E. ¾ E., without much possibility of error.

It is clear, from the testimony of both the wheelsman and the second mate, that their heading, as given in the answer, S. E. ½ S., is the heading by compass, and not the actual heading; and, as she could not lie closer than seven points to the wind, that the wind must have been nearer to N. E. than N. E. by E. The wind is stated in the answer in the alternative, N. E. *or* N. E. by E. The second mate then testified that he first saw a red light on his starboard bow; that it bore about S. S. E., or a point and a-half on his starboard bow. He evidently is speaking of its bearing by compass, as S. S. E. is a point and a-half from S. E. ½ S., which was their compass heading as he gives it. If the compass bearing of the light was S. S. E., its real bearing was, according to the captain, S. E. by S. ¼ S., the variation at this point being ¾ of a point westerly. The second mate took the red light to be the port light of a vessel sailing by the wind on the starboard tack, and he says that he immediately gave the order to the man at the wheel to port, and that he helped him heave the wheel over. The wheelsman testifies that the order was hard a-port; and on cross-examination the mate appears to admit that this was so. The difference, perhaps, is of very little importance. At this time no light had been reported by the lookout.

The mate's testimony, then, is that, as soon as he had helped the man at the wheel heave the wheel over, he hailed the lookout and asked him if he saw that light on the starboard bow, to which the lookout replied that he did. At this instant, according to the testimony of the mate, and just as the ship began to pay off, the red light changed to green.

The lookout testified that the first light he saw was a green light on the starboard bow, about a point on the starboard bow; that he saw it just at the moment the mate hailed him. Upon the red light changing to green the mate gave no new order to the wheelsman, and the ship continued to pay off under the port or hard a-port wheel, and while this was being done the green light passed across the bow, from starboard to port. While there is considerable confusion in the testimony as to how much the green light broadened on the port bow, there is no doubt that it passed over to the port bow with the porting of the vessel. Then, with the paying off of the vessel to starboard, the green light again changed to red. Thus far there is a substantial agreement of the witnesses on the Star of Scotia. The mate does not expressly say that the green light crossed to the port side, but he says the green changed to red, and that the second time the red appeared it was on the port bow. The lookout saw it first on the starboard bow, and he testifies that the red light of the same vessel appeared on the port bow, about two points, as they were paying off to starboard. The man at the wheel did not notice anything till he got his wheel over. After that he saw the red light on the port bow. The seaman amidships took no notice till a little while after, hearing the mate hail the lookout. Then he looked and saw the green light nearly ahead on the port bow. He followed it till it changed to red. One of the apprentices testified that he first saw the green light on the starboard bow; it was crossing over to the other side. He saw it again on the port bow, and after that he saw the red light on the port bow. The other apprentice was in the house eating when he heard the mate hail the lookout. He put his head out and saw a green light on the starboard bow; then he went back into the house, and did not look out again till the alarm was made that immediately preceded the collision.

It is urged, on the part of the libellants, that the testimony of the second mate that he first saw a *red* light on his starboard bow before seeing the green light, is discredited by the circumstance that no other person on the Star of Scotia saw

it. It is insisted that this seeing of the red light was an afterthought; that it was devised for the purpose of justifying the maneuver of porting the wheel. But there is nothing inconsistent with the testimony of the second mate, that he saw this red light first, and then almost immediately after saw the green light, just about when and where he did, in the case testified to by those on the Sansego. On the contrary, his testimony on these points singularly harmonizes with and confirms that of libellants' witnesses as to their own course, and what they first saw of the Star of Scotia's light. They say they were heading N. W. by N., and saw a green light nearly ahead, a little on their port bow; that while they kept their course the green light crossed over to their starboard bow, and after broadening some on the starboard bow, about a point and a-half, so that it became plainly visible to the wheelsman, who of course could not see it till it was off the bow, it suddenly disappeared. Therefore, when the mate of the Star of Scotia says he saw a red light, which changed suddenly to green, his vessel being on a course S. E. $\frac{3}{4}$ E., the light at that time bearing S. E. by S. $\frac{1}{4}$ S., this showed that he was just crossing the bow of the Sansego from port to starboard, and his observation of the bearing of the light at this moment does not vary a quarter of a point from the heading which those on the Sansego swear to as the course of their vessel, N. W. by N. This testimony clearly shows that the Star of Scotia thus crossed the bows of the Sansego from port to starboard very soon after the lights of each vessel came in sight from the other, and before the lookout or any one but the mate of the Star of Scotia had discovered the light of the Sansego.

The answer charges that this first change from red light to green, as seen on the Star of Scotia, was caused by a change of course on the part of the Sansego. The answer clearly charges two changes of course against the Sansego: first, at the time of this change from red to green; and, secondly, again after the Star of Scotia had, by falling off before the wind on a port helm, brought the red light of the Sansego on her port bow, and almost immediately before the collision happened.

It was evident, however, that the reconciliation of the testimony does not call for this alleged first change of course. There is nothing in the evidence, on the part of the Star of Scotia, to require it. On the contrary, if at that instant, just after the vessels came in sight of each other, and while the Star of Scotia was going to windward, the Sansego had changed her course to leeward to any appreciable extent, the Star of Scotia would not, so readily and quickly as she appears to have done, have crossed her bow again and brought her red light again in sight on her own port side. Moreover, the bearing of the light of the Sansego, as seen from the Star of Scotia just before this change from red to green, is so near to what it should be, if the Sansego was then heading as those on her say she was, when the green light of the Star of Scotia crossed her bow, that such crossing of the bow of the Sansego accounts by the Star of Scotia perfectly for the change of lights observed from the Star of Scotia.

This reasoning, from admitted or clearly proved facts, was so obvious that on the trial the allegations of this first change of course was abandoned in argument, and the charge of change of course was confined to that secondly alleged in the answer.

There is an entire agreement, also, as to the maneuver executed by the Star of Scotia after she thus first crossed the Sansego's bow from port to starboard. What those on the Sansego saw was the green light passing over to their starboard bow, and then, while it was on their starboard bow, it disappeared and they saw no light. This entirely agrees, so far as the green light is concerned, with the story told by those on the Star of Scotia. They say, in effect, that though their wheel was put a-port, the green light of the Sansego, which appeared first on their starboard bow, passed across their bow, and at some distance on their port bow it disappeared, and the red light appeared in its place. So long as they continued to see the green light on their starboard bow they were showing, of course, their green light to the Sansego over its starboard bow, and that their green light must have disappeared, and their red light, if visible at all, must have

been seen over the starboard bow of the Sansego, is evident, because they say that they continued to see the green light on their port bow as they swung to port. The moment the green light crossed their own bow, their own green light must have disappeared to those looking at it from the Sansego; and this happened before the light of the Sansego changed from green to red, and consequently while their green light was still on the starboard bow of the Sansego.

The navigation, then, of the Star of Scotia, in pursuance of her admitted duty to keep out of the way of the Sansego, was this: Seeing her red light from a point and a-half to two points on the starbord bow, she ported her helm, intending to pass to leeward of her, leaving her to keep her course to windward.

The wheel being put to port, but before the vessel had had time to fall off, or, at most, but very little, the red light changed to green, still bearing about the same distance on the starboard bow. This indicated with great certainty that she was already crossing the bow of the other vessel from port to starboard, and also informed the officer in command of the Star of Scotia that the other vessel was heading about N. W. by N., and was probably a vessel sailing by the wind on the starboard tack.

On getting this new information, by seeing the green light, two courses were open to the officer of the Star of Scotia. One was to reverse his order, bring his vessel again up to the wind, and keep on the windward side of the other vessel, passing her starboard to starboard. To do this required only a change of wheel, as he had made no change in his sails. They remained as before, with the yards braced sharp up as they were while she was by the wind.

The other course was to keep the wheel a-port and sweep round under a port wheel till he should cross the bow of the other vessel a second time and pass to leeward of her, or port side to port side. The officer of the deck adopted this second course. The mate testifies that when he first saw the red light he took it to be a vessel close hauled on the starboard tack, and obviously porting was then a proper move-

ment. As the learned counsel for the claimants well suggests, he could not, on seeing the red light, know how close to the wind she was lying; and if it happened that she was a fore-and-aft schooner, which could lie within four and a-half points of the wind, as it well might be, it would be hazardous to attempt to cross her bows.

The only certain mode of avoiding her, if she was sailing so close to the wind, and bound, as she was, to keep her course, was to port. But when, immediately upon heaving his wheel up, he discovered the green light, and thereby ascertained that he had already crossed her bows, and that if close hauled she was seven points from the wind, and if not close hauled she was going off to leeward upon a N. W. by N. course, the situation was altered, and he was bound to act upon the more exact information thus acquired. The bearing of the light showed him that the courses of the two vessels diverged about two points, and that he had already passed the point at which their courses intersected. It seems to me, therefore, that in this new situation the obvious course of safety was to let his vessel come immediately up to the wind again, and keep his original course by the wind. It is objected to his doing so that it would have shown to the other vessel that his course was vacillating and confused; that it would have misled and confused the other vessel as to his intended movement. The argument is, I think, unsound. He was still showing his green light to the other vessel, and had just begun to pay off to port. The testimony shows clearly that for quite an appreciable length of time afterwards he had not paid off sufficiently to show his red light, and there was ample time to heave the wheel down, and bring his vessel back to the wind, without showing his red light. This would have been more especially easy, as no change had been made in the sails on porting. The mate admitted in his testimony that if he had not seen the red light, and had first seen the green light, when the lookout answered his hail, which was the instant that he observed that the red had changed to green, he would not have ported, but would have kept on his course. The situation was not sub-

stantially altered because the wheel had been hove up, the vessel not yet having paid off. The danger of continuing under the port wheel was that it involved the necessity of crossing the bow of the other vessel again, and her distance was a matter of great uncertainty.

The mate himself testifies that he could not judge of her distance when he first saw the light; she might have been a mile and a-half or three-quarters. He could not say that she was more than a mile off. Of course, in the night-time, with nothing but the appearance of the light to determine distance, that element in the problem is very uncertain. And the movement resolved upon by the mate required a considerable space for its safe execution. His vessel must come around and cross the bows of the other at a safe distance from her. Meanwhile both vessels would be covering the space between them at a combined speed, as the wind was of about a mile in five minutes.

The mate, though questioned on the subject, was wholly unable to say in what time his vessel would fall off four points, which is the amount it is claimed she did fall off before he judged that he was clear of the other vessel and gave the order to steady. Nor could he say at what distance his vessel would run in falling off four points under a hard a-port wheel. While, however, the movement attempted must be held to have been an error, yet it is claimed that it was successfully accomplished; that the Star of Scotia came around under her hard-aport wheel till she crossed the bow of the Sansego, and brought the red light of the Sansego at a safe distance on her port bow, and then, the two vessels being clear of each other, the Star of Scotia steadied, and the collision happened from the Sansego changing her course to leeward, and running across the bows of the Star of Scotia. If this is true, the earlier mistake did not cause the collision. It is, I think, fully established by the evidence that the Star of Scotia did bring the red light of the Sansego on her port bow. It was positively sworn to by so many witnesses on the Star of Scotia, as being seen on the port bow after the green light disappeared, that this point may be considered

established, as well as that the red light thus seen remained in sight on the port bow until it changed to the green light, close under the bow of the Star of Scotia, and immediately before the collision. But as against the positive testimony of those on the Sansego, that they kept their course close hauled by the wind till the collision, the questions are whether the red light was brought, by the porting of the Star of Scotia, so far on her port side that the vessels could safely pass each other, and whether, from the time the Star of Scotia steadied on her course with the red light so on her port bow, she kept that course, or, as the libellant's claim, gradually came up again to the wind, diminishing the distance which she had gained to leeward of the Sansego, and approaching her upon a line dangerously close to her course. It is evident that it is not enough merely to bring the red light on the port bow in order to pass in safety a vessel which is passing on the windward side close hauled. Every vessel close hauled on the wind will yaw more or less. She is kept by the wind by the constant but slight movement of the wheel as she tends to fall off or to come up.

The experts in this case estimate half a point each way, as the ordinary variation from her course by the wind, which must be generally expected from this cause. Then, also, the actual course of every vessel sailing by the wind is likely to be a little to the leeward of the apparent course as indicated by her lights, varying with circumstances, the weight of her cargo, her trim and sails.

In judging, therefore, of the case presented by the Star of Scotia, it is necessary to take these points into consideration. If a vessel thus passing another has not made due allowance for these things, and has not given a safe margin to allow for the possible leeway of the approaching vessel, and for her possible yawing while doing all she can to keep by the wind, she is liable to be surprised, as the Star of Scotia was, by the unexpected disappearance of the red light, and the appearance of the green light of the approaching vessel under her bows when it is too late to avoid a collision. On this question, how far on the port bow of the Star of Scotia the red

light of the Sansego was brought, and, as the two vessels approached, how it continued to bear,—in other words, how far to leeward of the course of the Sansego the Star of Scotia put herself, when, as she claims, she steadied, and how far to leeward she kept before the vessels were apparantly in immediate danger of collision,—is, I think, left in great uncertainty on the testimony of those on the Star of Scotia. And on this point, unfortunately, those on the Sansego can give but little assistance, because they did not see the red light of the Star of Scotia, and saw nothing, after the green light disappeared some distance off on their starboard bow, till the loom of the vessel was seen rapidly coming upon them on their starboard bow. The cause of the red light of the Star of Scotia not being seen will be hereafter considered. The second mate of the Star of Scotia, who was the officer responsible for the navigation, testifies that, when the red light appeared, it bore about two and a-half to three points on his port bow. He testified, also, several times, with great positiveness, that it ranged with or a little abaft the port fore rigging, as he stood on the weather or port side of the wheel.

This would be less than half a point. It is clear that if the latter statement be true the light was not brought well or safely on the port bow. Having brought the light on his port bow, so far as in his judgment made it safe to steady the wheel, and having given the order to steady, it was then his duty to watch the light as the two vessels approached. If his calculation was right, and he was safely to leeward, the red light, provided the other vessel kept her course, would have constantly broadened on the bow; yet his testimony as to the movement of the light after it was first seen is very confused. He does not testify that it broadened at all on his bow. On the contrary, he always puts it as ranging with the fore rigging, and he puts it there when it suddenly changed to green, and the other vessel was found under his bow. Yet, if it did not broaden, he should have noticed it, and should not have been taken by surprise, as he was, by its sudden change to green.

The lookout testified that the ship was paying off when he

saw the red light; that it was about two points on their port bow when he noticed that they stopped going off and appeared to be steadier; that he could not tell how long it was before the green light appeared again, but not very long; that when it came in sight the green light was crossing their bow; that the red disappeared and the green appeared, and then the collision. Being asked if the red light changed its bearing while he was watching it, he answered: "Our ship was steadied after we saw it. It did not change its bearing for a minute or so—a good three minutes. It must have changed its bearing to produce the collision."

One of the apprentices, who was about amidships, testified that he first saw the red light on the port side; that it bore nearly ahead; that he saw it about five minutes. The seaman, who was standing by amidships, saw the green light on the port side for a very short time. He watched it till it changed to red. He says he waited a minute, during which he saw the red, and then he saw both lights together. He could then see the loom of a vessel, and he ran aft to help the man at the wheel. When he first saw the green light it was well forward; he could give no idea of the distance, but it seemed to be pretty close.

He gives no testimony as to how the red light bore or its movement after it was seen.

The wheelsman testified that after putting his wheel hard up he noticed a red light; that it was just on the port bow. When asked if it broadened any on the port bow, he said: "Of course. We were keeping away. We kept away till we brought this light well on the port bow. We brought it a couple of points on the port bow. Then I got orders from the second officer to steady my wheel. I did so." He also testified that she had swung off altogether three points; that the next thing he saw was a green light about two points on the port bow.

On cross-examination he said that he saw the light when he was to steady his wheel, and that it ranged between the mizzen rigging and the mizzen topmast backstay.

From where he stood this would have been about two

points and a-half on their port bow. Again, he says he saw it as soon as he brought it on the port bow. If this was so, he must have seen it considerable forward of the mizzen rigging. He swears that he kept the wheel steady after he got the order till the green light appeared again. Then he had an order hard a-port, and the wheel was put hard a-port before the vessels came together. He says the green light ranged between the main and fore rigging. He also says, on cross-examination, that the vessel fell off in all four points.

He says he observed how much she fell off by the compass, but still he leaves it uncertain whether it was three points or four points.

And, if he noticed what it was by the compass at the time, it is clear that when he was examined he did not remember how she was heading by the compass at the time he steadied. He also testified that she fell off under the hard a-port wheel the second time—that is, after the green light was seen and before the vessels struck—two or three points, he thought, but he did not observe it by the compass. The second mate testified that he steadied at S. $\frac{1}{2}$ E. This, being by compass, must be corrected by the variation, which makes the true heading at that time, if his statement is correct, according to the master's testimony, S. $\frac{1}{4}$ E. If this were so, they had changed from their original course of S. E. $\frac{3}{4}$ E. four and a-half points when they steadied. He also says that they were just paying off at the time of the collision, and he noticed the heading at the time of the collision, and it was S. $\frac{1}{2}$ E.; that is, exactly what he had observed it to be when they steadied. It is difficult, if not impossible, to reconcile the testimony of the second mate and the wheelsman, or the different statements of either, made at different parts of their examination, with themselves on these material points.

If it be true, as testified to by the wheelsman, and apparently agreed to by the mate, that she fell off on the second porting of the wheel, then either the ship was not kept steady, as the wheelsman testifies, but was allowed through his inattention to come up again towards the wind, or else one of the second mate's observations of the compass was erroneous

If one, which one was it? If the wheelsman is right that she fell off at first three points only, then the mate's observation of the compass the first time was wrong, or he does not remember it aright.

It is suggested that, as the yards and sails were not changed, she would tend to come up in the wind upon the wheel being steadied. Several experts have been examined upon this point, the result of whose testimony seems to be that with the sail she was carrying, and at three to four points off from the wind, an attentive wheelsman would have no difficulty in keeping her head steady, with her yards still braced sharp up as they were. It is, however, consistent with some parts of the claimant's evidence, especially that of the mate and wheelsman, above referred to, and the testimony generally as to where the red light was seen after the wheel was steadied, that the wheelsman, through inattention, allowed her to come up some part of the distance she had fallen off when he steadied. Taking the evidence of the mate, as a whole, I am far from being satisfied that he kept that careful observation of the light, after he brought it on his port bow, which the situation and his responsibility required. He was not able to give such an intelligible account of its bearing and movements, down to the time the green light appeared again, as he should, and could have done, if he had been observant and alert.

The testimony on the part of the claimants as to what was seen and done on the Star of Scotia has not that certainty which is sufficient to control and overweigh the positive evidence that the Sansego kept her course by the wind. I think that the evidence, on the part of the claimants, at least, leaves it doubtful whether the Star of Scotia kept off to leeward of the course of the Sansego sufficiently far to pass her safely on the port hand; or whether, after having ported till the officer of the watch judged it safe to steady the wheel, the vessel was kept steady on her new course; or whether the other vessel was attentively kept in view and watched, as was necessary to prevent a collision. The second mate's ignorance concerning the deflection of his own compass was itself

negligence imperiling the safety of both vessels. It tended to render his judgment erroneous or uncertain both as to the course of the Sansego and the navigation of his own vessel. It affected the accuracy of his observation in respect to how close to the wind the Scotia was sailing when her red light changed to green, and also in respect to how far his own vessel had fallen off under her port wheel; the two principal points which controlled or should have controlled his movements to avoid a collision. It is impossible to say that this ignorance on the part of the officer in command of the Star of Scotia was not the cause of the collision. I have not overlooked the argument for the Star of Scotia, that what the mate of the Sansego said to the wheelsman after the green light disappeared, which was that he should keep the sails full, was, or may have been understood to be, an order to keep off. I do not think it could have been so understood by any seaman. It was no more than a caution to keep her full and by the wind. The claimants rely on the evidence as to the angle at which the vessels struck, as shown by diagrams made by the various witnesses. They all, with the exception of the second mate of the Star of Scotia, make the blow of the stem of the Star of Scotia on the Sansego starboard quarter an oblique blow, angling towards her stern. They vary considerably in the angles they make. Such diagrams are of very little value. When two vessels are coming together thus, with the instant expectation of a collision, the minds of the witnesses are not fixed on the precise angle they make; and, especially in the night-time, their observation on such a point is liable to great uncertainty.

The second mate of the Star of Scotia makes the angle of the collision about 45 degrees, ranging forward on the starboard quarter of the Sansego, instead of aft, as all the others make it. This extraordinary error itself throws great doubt on the accuracy of his observation on other points, especially upon his testimony in respect to the heading of his own vessel. The angle may well have been sharper than any of the witnesses make it. Moreover, as it is uncertain on the evidence how much the Star of Scotia fell off the second time,

no certain conclusion can be drawn from the angle at which they came together as to how she or the Sansego was heading just before she saw the green light and ported. The claimants have laid great stress on the testimony of a ship-builder and surveyor of vessels who had examined the injuries done to the bow of the Star of Scotia, and who testified that, in his opinion, those injuries were made by a blow nearly square on; that a certain hole made in the plates on the port bow, between two and three feet above the water, could only have been made by the channels of the Sansego, and that to make this hole the Star of Scotia must have struck the blow at an angle of at least 45 degrees. It impaired very much the fact of this testimony when it was shown, as it was, that the Sansego had no channels. The evidence is purely speculative, and, I think, entitled to very little weight. With both vessels moving forward rapidly, and rising and falling more or less with the sea, such speculations must be often at fault; nor does any experience acquired in ship-yards, or in the observation in port of injured vessels, suffice to render any man's judgment on such a point trustworthy, or entitled to control other proofs which are reasonably certain in their results. The question whether or not the Star of Scotia had a port light which could be seen from the Sansego is not itself a decisive question, if it be found that the Sansego kept her course. It has been made important, however, as the determination of that question one way or the other affects somewhat the weight to which the testimony of those on the Sansego is entitled. They swear positively that the green light, when about a point and a-half to windward, disappeared, and they could see no other light. It is suggested by the learned counsel for the claimants that they did not see it because they did not look in the right place; that they looked to windward, in the direction where the green light disappeared, whereas they should have looked to leeward, to which side the Star of Scotia had passed. But this theory does not meet the case. As is shown by the testimony of those on the Star of Scotia, as above referred to, the moment her green light disappeared her red light ought to have been seen in

the same place off the starboard bow of the Sansego, and to have moved from there across the bow of the Sansego. These men were watching the green light. It disappeared. This was a noticeable, a striking circumstance. Their attention was especially attracted by it. They spoke to each other about it. They expected to see another light. They looked for it in the proper place and saw nothing. It does not seem to be a matter about which they can be mistaken. If there was a good bright light there, brought within range of their vision when the port side of the Star of Scotia was turned towards their starboard bow, as was shown by those on the Star of Scotia, it seems impossible that they should not have seen it. This is very different from the ordinary case of a mere failure to observe a light that might have been seen. It is very strong evidence, if the witnesses are credible, that the light was too dim to be seen, at any rate, at and soon after the green light disappeared. And there is some evidence on the part of the Star of Scotia that the port light was not burning as it should have done that night. At half past 11 it was found necessary to take it down and trim it. One of the apprentices testified that he trimmed it then by knocking off whatever of crust there was on the wick; that it was then replaced. There is also evidence that it was burning brightly at 12 o'clock. The lookout who went on duty at 2 o'clock testified with great confidence that both side lights were burning brightly all the time after he went as lookout up to the collision; that he could not help seeing them as he walked to and fro on the forecastle deck. Another witness, however, testified that to see them from the deck it was necessary to lean over the rail. They were set at the break of the forecastle, about at the height of the forecastle deck, outside of everything. One of the apprentices, however, testified that, soon after the Sansego sunk, he took down the port light and trimmed it again. This he did without orders, and it was not his watch. He says that it was an extra precaution to make it burn more brightly. He testifies that it was burning well, and that the glass was clean. The sail-maker testified that after the collision the side lights were taken down; that

the green light was put up again in the mizzen rigging, because, as the vessels hung together, it was in danger of being carried away where it was; that he saw and passed to another man the port light, which was afterwards put back in its place; that it was burning well, but had a scum around the glass. There is some evidence that one of the men was seen cleaning the glass of a light after the collision, but it is not satisfactorily identified as the red side light, while it is true that those who saw and handled this port light deny substantially that it was dim, or the glass obscured. I think the fact that it was found necessary twice that night, once before and once after the collision, to trim it, throws considerable doubt on its condition; and that, on all the evidence, the red light was not seen by those on the Sansego, for the reason that when the green light disappeared the red light was not bright enough to be seen at the distance at which the two vessels were then apart.

The conclusion, therefore, upon the whole case, is that the Sansego was not in fault; that she kept her course close hauled on the wind; that the Star of Scotia was in fault in not keeping a good lookout, and in not keeping out of the way of the Sansego, as she was bound to do.

Decree for libellants, with costs, and a reference to compute their damages.

TODD *v.* THE BARK TULCHEN.

(*District Court, E. D. Pennsylvania.* May 24, 1880.)

ADMIRALTY — JURISDICTION — LIBEL IN REM BY WORKMAN INJURED WHILE REPAIRING VESSEL—NEGLIGENCE.—While a vessel was at a wharf its master contracted with a firm of carpenters to work upon it and this firm employed a journeyman. While the journeyman was at work the master without his knowledge or consent took the vessel away from the wharf and proceeded towards another landing but on the way owing to the master's negligence the vessel was capsized and the journeyman was injured. *Held* that the latter might proceed in admiralty by an action *in rem* against the vessel.

Gerrity v. *The Kate Cann*, 2 FED. REP. 241, followed.

SAME—PRACTICE—RELEASE OF VESSEL UPON STIPULATION WITHOUT FORMAL CLAIM — NEGLECT TO NAME OWNERS — LIABILITY OF STIPULATORS—SUFFICIENCY OF ANSWERS—AUTHORITY OF CONSIGNEE OR AGENT.—After the vessel was attached one C without filing any formal claim entered stipulation on behalf of the owners and received the vessel but the owners were not named in the stipulation. Afterwards C filed an answer by which it appeared that he was merely a consignee. Afterwards one J filed an answer alleging that before the attachment he had as agent for one D received a bill of sale of the vessel and that he adopted C's answer. Upon exceptions to these answers *held* that under a rule providing that an answer must be made by the party or by an attorney in fact specially instructed, these answers were insufficient. *Held, further*, that the stipulators could not take advantage of the neglect to file a formal claim or to name the owners in the bond and that a decree *pro confesso* could be entered against them.

In Admiralty.

Exceptions to answers and motion for decree *pro confesso*. This was a libel by James H. Todd against the bark Tulchen *in rem* filed September 26, 1879, setting forth that while the vessel was lying at a wharf on the Delaware river at Philadelphia her master employed a firm of ship carpenters to line the vessel for grain who in turn employed libellant as a journeyman to assist in the work. That while libellant was on board the vessel engaged in the work the master without libellant's knowledge or consent took the vessel away from the wharf and proceeded down the Delaware river intending to go to Girard Point on the Schuylkill river. That owning to the negligence of the master the vessel, on the

way, capsized and libellant was thrown against the side of the vessel and sustained permanent injuries. The libel was allowed provisionally on October 1, 1879, after argument.

On November 4, 1879, libellant gave stipulation for costs and process of attachment went out returnable November 21, 1879, under which the vessel was attached November 6, 1879.

On November 15, 1879, William M. Thackara one of the firm of Workman & Co. entered stipulation in the sum of $1,500 with George Crump as his surety and the vessel was restored to him. The stipulation recited that the owners of the vessel by William N. Thackara were the claimaints and was conditioned that the "owners or the claimants" should abide the orders of the court.

On the return day of the original writ Thackara made his answer in which he said: (1) That his firm were consignees of the vessel; (2) that the court had no jurisdiction; (3) that the facts in the libel were not truly stated; and (4) that the vessel was sold on the day of attachment but before it was served, to Lawrence Johnson of this city as agents for foreign parties.

On November 28, 1879, libellant excepted to this answer because neither Thackara nor Workman & Co. were entitled to make answer.

On December 4, 1879, an answer was filed by Lawrence Johnson & Co. alleging—(1) that they on October 6, 1879, before the attachment, received, as agents for Dickinson, Ackroid & Co. of London, England, a bill of sale of the vessel; and (2) that they had read the answer of Thackara and adopted it.

On January 17, 1880, libellant excepts to this answer because—(1) it did not appear that Lawrence Johnson & Co. had any right to appear and defend; (2) because the owners of the vessel had not taken defence; (3)that the answer was insufficient and irrelevant.

On February 6, 1880, libellant moved for a decree *pro confesso*, and the case was heard upon this motion and the exceptions to answers.

George P. Rich, for libellant.

H. G. Ward and *Henry Flanders, contra.*

BUTLER, D. J. Taking the libellant's case as stated by himself, as we must, is he entitled to the remedy invoked?

Of the jurisdiction of the court I entertain no doubt whatever. The right to proceed *in rem* is not so clear. A careful examination of the subject in the light of the authorities, has however, satisfied me that the libellant is entitled to this remedy. He was lawfully on the vessel, at the instance of the master, and for her benefit. It is unimportant that the contract to repair was not directly with him; he was there in pursuance of it. It was therefore his right to have the vessel so kept and managed as to render him secure from unnecessary danger while on board.

Whether he be regarded as a passenger after the vessel moved —(and I incline decidedly to the opinion that he may be; because, taken on a voyage, as he was without consent, it would seem quite reasonable to hold the vessel to an implied contract to treat him as a passenger)—or simply as a workman, engaged in repairing the vessel in the river I believe him to be entitled to proceed by attachment. If the movement of the vessel under the circumstances stated in the libel was justifiable, the duty to exercise proper care, to avoid accident in transferring her to another landing is plain. That such care was not exercised, and that the injury resulted from this cause, the libel sufficiently avers. For this injury,—whether the libellant be regarded as a passenger while the vessel was in motion or simply an ordinary workman engaged in making repairs, I believe, as before stated, the *vessel* is liable. I will not enlarge on the subject; for had I the inclination, I have not now, the time. It is sufficient to say that in my judgment the decided weight of recent authority supports the conclusion stated. The opinion of Judge Benedict in *Gerrity* v. *The Kate Cann*, decided in April last, and published in the FEDERAL REPORTER of the eighteenth inst., (vol. 2, No. 2, p. 241,) very fully covers the case in hand; and presents an examination of the interesting question involved and the authorities, so able, and satisfactory that it would be unprof-

itable to add anything to what is there said. The cases of *The Marcic* 1 Sprague 23, and *The New World*, 16 Howard 469, may also be read, with interest in this connection.

To determine whether the record (which is very peculiar) is in condition for a decree *pro confesso*, required a careful inspection of it, and an examination of the rules. In this I availed myself of the very valuable assistance of Henry R. Edmunds Esquire, who as *amicus curiæ*, made the full and satisfactory report which I file herewith, and adopt as the court's expression of judgment on this subject.

I do not think the sureties can take advantage of the irregularities in the proceeding. *U. S.* v. *Four Pieces of Cloth*, 1 Paine, 435; *The Alligator*, 1 Gallison R. 149; *U. S.* v. *The Schooner Little Charles*, 1 Brockenbury, 380; *Dexter* v. *Munroe*, 2 Sprague, 39. There is nothing inequitable in holding them to the terms of their obligation; and justice to the libellant requires that it shall be done.

The court has repeatedly suggested the desirableness of having the owners come in, the irregularities in the proceeding thus removed, and the case put to trial on its merits. I do not therefore see occasion for further delay; and the decree asked for will be now entered.

The following is the report of Henry R. Edmunds referred to in the foregoing opinion (after reciting the facts already stated.) By the provision of the eleventh rule of the supreme court (in admiralty) "where any ship shall be arrested, the same may, upon the application of the claimant, be delivered to him * * * upon his giving stipulation with sureties." And by the twenty-sixth rule "the party claiming the property shall verify his claim on oath, stating that the claimant by whom or on whose behalf the claim is made is the true and *bona fide* owner and that no other person is the owner thereof"—"and where the claim is put in by the agent or consignee, he shall also make oath that he is duly authorized thereto by the owner."

The record does not show that this claim was ever made "*pro forma*," by any one, but I am satisfied that it was *in fact*, and *in effect* made by Thackara. On fifteenth November,

1879, *he asked* for the surrender of the vessel to him for her owners and gave stipulation in which it is recited that the owners of said bark by William N. Thackara are the claimants and that the "owners or the claimants" would well and truly abide all the orders of the court, otherwise he the said Thackara and his surety acknowledged themselves to be jointly and severally indebted unto the libellant in the sum of $1,500 to be levied of their goods and chattels, lands and tenements.

Thus far, therefore I am satisfied that although the record may not be "*pro forma*," as prescribed by the rules, yet it is in effect sufficient to estop Thackara or his owners from taking advantage of the irregularity, especially after the delivery of the vessel to them. The duty to make the "*pro forma*" claim was *theirs*, they cannot *now*, after having received the vessel, take advantage of their own neglect to defeat the libellant.

They perhaps should not have been permitted to enter stipulation without first making the usual claim, but they *were* so permitted. The right to insist upon this claim was waived *for their benefit*. It could not have been otherwise. Can they now say that their *stipulation* should be avoided because of this waiver? I think no court would assist *them* under such circumstances.

The proceedings therefore being in effect regular up to this stage, what next do the rules prescribe. By the nineteenth admiralty rule (of this district) *an answer* must be put in before the return day. Answer was made *on* return day (November 21st.) Thackara answers, he says, his firm are the consignees of the vessel and this is the only title under which he claims a right to answer. Under the third admiralty rule (of this district) the answer must be made by the party, (when within the district) otherwise by an *attorney in fact, specially instructed*. Surely therefore his answer amounts to nothing. It cannot be said that it is within the line of the duty of a mere consignee of a vessel, to make answer and defend an action, unless specially authorized or instructed, especially when he does not even disclose his principals. The

duty of a consignee of a vessel is simply to make her collections and disbursements and obtain business for her. What is to prevent the owners of the vessel from repudiating the action of Thackara. Cannot they come in and say that he had no authority to answer and they are not bound by his answer. He does not even allege that he has any such authority or that any one has so instructed him. I am satisfied that his answer is not therefore sufficient and the exceptions to this answer should be sustained.

December 4, 1879, Lawrence Johnson & Co. filed their answer—which is also excepted to. There are many objections to this answer. In the first place it comes too late, and upon protest the court could and under the circumstances of this case probably would, impose terms, before permitting it to be filed at all. I am inclined to think that the present exceptions must be taken as in effect such a protest.

In the second place Lawrence Johnson & Co., do not pretend that they are authorized or instructed to make answer, they do not even say that they are the general agents or attorneys for the owners, they simply allege that on the sixth day of October, 1879, they received a bill of sale for the vessel for English parties and for that purpose they are agents.

Besides, this answer is insufficient. It would be loose pleading, such as the rules do not permit and the court ought not to allow an answer to stand, which merely states that the respondent has read what some other person has said in the cause and is willing to adopt it. The twenty-seventh rule promulgated by the supreme court provides "that the answer shall be full and explicit and distinct to each separate article and separate allegation of the libel, in the same order as numbered in the libel." It follows therefore that this answer is bad and the exceptions thereto should be sustained.

This would leave the record clear for a decree *pro confesso* under the rules, provided the court shall be of opinion. (1) that the jurisdiction can be sustained (for by the terms of the allowance indorsed on the libel the court must pass upon the sufficiency of the libel, now even if it were not bound to take

judicial notice of a question of jurisdiction not suggested by the record;) (2) that such a decree is properly entered against the stipulators and claimant, and (3) that the owners of the bark should not have further time to *place themselves on the record.* [NOTE. And if they should do this they could, in view of the delay, be put under such terms as would clear away all questions in reference to the record, to-wit, file on oath a proper claim and give stipulation.]

The question of jurisdiction, I leave.

By the authority of the twenty-ninth and thirtieth rules (supreme court, in admiralty) there can be very little question as to the second point. They must be interpreted to mean that the libellant is entitled to a decree against the owners, claimants and stipulators of and for the vessel; and the stipulators having agreed by their bond that they would answer for the default of the owners, they must be held now to their bond.

The fact that the owners are not specially named in the bond ought not to avail the stipulators. The true owners were known to them only and they knew when they signed the bond and received the vessel, that the owners were not joined in the bond. I am aware that there are decisions and one quite recently, *Johnson* v. *Township of Kimball,* 39 Mich. ——, which say that a bond not signed by the principal is uncollectible against the sureties, but these are cases where it was intended and expected that the principal should join. In the present case the sureties gave the bond knowing that the principal would not sign, and it was so taken to oblige them.

MOODY *v.* FIVE HUNDRED THOUSAND LATHS, part of the cargo of the schooner Olive.

(*District Court, E. D. New York.* May 5, 1880.)

CHARTER-PARTY—DEMURRAGE—ALL POSSIBLE DISPATCH.—A vessel was loaded with laths, in New Brunswick, for New York, under a charter specifying that she was to be loaded "with all possible dispatch." She was compelled to await her turn for cargo, and was thereby detained five days, and was also detained by tide, and also at the place of discharge. Suit being brought for the demurrage, *held*, that demurrage could be allowed only for the detention in loading, upon the evidence.

A provision of charter-party for loading "with all possible dispatch" construed.

The case of *The Mary E. Taber* approved and followed.

A. J. Heath, for libellant.

Wm. W. Goodrich, contra.

BENEDICT, D. J. This action is brought upon a charter-party of the schooner Olive, to recover demurrage for the detention of the schooner while awaiting her turn at the place of loading; also, for detention after she loaded, caused by low tide, and also for detention at the place of discharge.

The charter was made in St. John. It provides that the vessel shall proceed to Point Wolf, N. B., and there load from the charterers a full cargo of laths, and, being so loaded, shall proceed therewith to New York and deliver the same. It also provides for a lien upon the cargo for freight and demurrage, and concludes as follows: "Cargo to be delivered within reach of the vessel's tackles, with all possible dispatch, at Point Wolf, and to be taken delivery of in like manner." This special provision, which is in writing, must, of course, control the general provisions of the printed blank. The contrary has not been contended. By this provision the charterers assumed an obligation to designate an unencumbered berth for the loading and discharge of the cargo, (*Davis* v. *Wallace*, 3 Clifford, 133; *Thatcher* v. *Boston Gas-Light Co.* 2 Lowell, 362,) and to furnish cargo at the place of loading as fast as it might be possible for the vessel to receive it.

Sleeper v. *Ping*, 8 Rep. 257. Any other construction of the phrase "all possible dispatch" would attach a different meaning to the word *dispatch* from that given to it by the adjudged cases already referred to, and render inoperative a provision inserted in writing, and manifestly intended to be controlling. The obligation created by this special agreement in regard to loading is not affected by any usage at Point Wolf in regard to awaiting a turn. *Keen* v. *Audenried*, 5 Ben. 535; *Sleeper* v. *Ping*, 8 Rep. 357. Accordingly, it must be held that the designation by the charterers of a wharf then occupied by a vessel there being loaded by them, whereby the Olive was detained some days before she could come to the berth so designated, was a violation of the agreement, and entitles the vessel to be compensated therefor.

In regard to the detention at Point Wolf after the cargo was on board, and which arose from the circumstance that the vessel was tide-bound, no liability can attach therefor to the cargo, the evidence showing that diligence on the part of the vessel after she began to load, in taking on board the cargo and in moving from the wharf, would have prevented her being nipped.

In regard to the detention in New York, it must be held in this case, as in a former one, (*The Mary E. Taber*, 1 Ben. 105,) apparently approved in *Thatcher* v. *The Boston Gas-Light Co.* (2 Lowell, 363,) that it was no violation of the agreement on the part of the consignee to name more than one place of discharge for such a cargo as this. The contract, while it calls for an unencumbered berth, does not limit the discharge to a single such berth, where the custom is to deliver cargo of this description at several places. Therefore, while I think the custom was pushed to its extreme limit in the designation of three such places of discharge as Jersey City, Wallabout creek and Gowann's canal, I cannot say, upon the evidence, that the custom was exceeded. The master having accepted the designation made by the consignee, and having proceeded to those places in compliance with that designation, without objection made at the time, cannot now claim demurrage for the time

occupied in reaching those places. The objection made when the vessel had arrived in Gowann's canal, after having been to Jersey City, and the libellant was too late to permit the consignee to change the place of discharge, affords no support to the claim now made. *Davis* v. *Wallace*, 3 Clifford, 133.

In regard to the alleged delay in receiving the cargo as fast as it could have been landed at those places of discharge, the evidence fails to satisfy me that any detention arose from such a cause. The claim of the libellant must, therefore, be limited to the detention at Point Wolf, caused by the failure to designate an unencumbered berth. The evidence shows this to have been five days, and that $20 per day is fair demurrage.

Decree for libellant for $100, with interest at 6 per cent., and costs.

FIRST NATIONAL BANK OF LACON *v.* BENSLEY and others.

(*Circuit Court N. D. Illinois.* ——, 1880.)

DRAFT — AGREEMENT TO ACCEPT — CONDITIONS — MUST BE COMPLIED WITH.—Where an agreement was to pay the draft of J. B. & Bro., with bills of lading attached, *held*, that to make the promissor liable thereon there must be a literal compliance with the conditions, and the presentation of a draft drawn by A. D. B. & Bro., or one unaccompanied by bills of lading, was not sufficient compliance, although the names J. B. & Bro. and A. D. B. & Bro., were used by the same firm interchangeably, and the property represented by the bills of lading to be attached came into the possession of the promissor.

CONDITIONAL CONTRACT—ACTION TO ENFORCE—BURDEN OF PROOF.—In an action to enforce a special and conditional contract, the burden is on the plaintiff of showing an actual compliance with the conditions imposed.

DRAFT — AGREEMENT TO ACCEPT — WHEN MUST BE PRESENTED. — Where no time is specified within which a draft agreed to be accepted shall be presented, it must be presented within a reasonable time.

SAME—UNREASONABLE DELAY IN PRESENTATION.—Delay of more than a year in the proper presentation of a draft agreed to be accepted, is unreasonable.

Mr. Bacon, for plaintiff.
Needham & Miller, for defendants.

DYER, D. J. This is an action upon a special coutract. The facts in the case are these: Immediately prior to October 11, 1877, J. Buckingham & Brother, a firm doing business at Lacon, in this state, arranged with the defendants, who were engaged in the business of receiving and dealing in live stock in this city, that the defendants should pay a draft which Buckingham & Brother should draw on account of certain shipments of live stock, with bills of lading attached; and pursuant to the arrangement thus made the defendants, on October 11, 1877, sent to the cashier of the plaintiff bank a telegraphic dispatch in the following words: "We will pay J. Buckingham & Brother's draft, bill of lading attached, for three cars of cattle and one of hogs." [Signed] BENSLEY, WAGNER & BENSLEY. On receipt of this telegram the plaintiff bank paid to J. Buckingham & Bro. $4,232.35, being the value of the three car loads of cattle and one of hogs. At the same time the bank received from Buckingham & Bro. a draft dated October 12, 1877, upon the defendants, for the sum named, which draft was signed "*A. D.* Buckingham & Bro."

There is no doubt, upon the testimony, that these moneys were thus advanced by the bank upon the faith of the dispatch received from defendants; and it is shown that the funds thus obtained from the bank were used by Buckingham & Bro. in the purchase of the stock. On the eleventh of October two car loads of stock were shipped to Chicago upon the Chicago & Alton Railroad from La Rose, and on October 12th two other car loads of cattle were shipped from Lacon. The stock shipped from La Rose was forwarded under bill of lading running to one Samuel McCully, and was consigned to McCully at Chicago, the circumstances of this shipment being that at the same time McCully was shipping a car load of stock on his own account, and as John Buckingham, the member of the firm of Buckingham & Bro. who gave active attention to the business, was unable to attend personally to the shipment of the stock, it was arranged that McCully should load and take care of the stock shipped from La Rose for Buckingham & Bro.; and by arrangement between Mc-

Cully and the station agent at La Rose, in the absence and at the time without the knowledge of Buckingham, the stock was consigned to McCully and the bill of lading made as before stated, but with the understanding that, on its arrival in Chicago, McCully should turn the stock over to Buckingham, or to his commission agent.

The stock shipped by Buckingham & Bro. from Lacon, October 12th, was forwarded under bill of lading running to A. D. Buckingham & Bro., and was consigned to them at Chicago. The cashier of the plaintiff bank testifies that when the draft was drawn, and the money advanced on account of it to Buckingham & Bro., bills of lading were attached to the draft and were sent with the draft to the Union Stock Yards National Bank of Chicago. As there do not appear in evidence any other bills of lading than those described, the conclusion is that the bills of lading which were attached to the draft when it was forwarded, if any, were those which have been mentioned. The car loads of stock covered by both bills of lading duly arrived in Chicago, and came to the hands of the defendants, who sold the same.

It appears, further, that as the draft which Buckingham & Bro. had drawn on the defendants was signed *A. D.* Buckingham & Bro., and as the telegraphic dispatch from defendants to the plaintiff bank stated that they would pay the draft of *J.* Buckingham & Bro., it was feared that the defendants would not honor the draft, and so, three days later, Buckingham & Bro. delivered to the plaintiff bank a second draft, for a like amount with the first, upon the defendants, which was signed J. Buckingham & Bro. The proceeds realized by the defendants upon the sale of the four car loads of stock amounted to $3,891.25, and this amount, less defendants' charges, was paid to the bank, and appears to be indorsed on the draft secondly drawn.

It appears that the firm of Buckingham & Bro., in the transaction of their business, used the firm name of J. Buckingham & Bro. and A. D. Buckingham & Bro. interchangeably; and concerning the La Rose shipment it appears also that, as McCully desired to use the railroad pass which Buck-

ingham & Bro. had, it was deemed necessary that the stock shipped from that point should be shipped in the name of McCully. Concerning the receipt by the defendants of the stock consigned to McCully, McCully testifies that on his arrival in Chicago he explained to one of the defendants the circumstances under which the stock was shipped in his name, and gave to the defendant with whom he had the conversation an order to sell the stock on account of J. Buckingham & Bro., telling him at the same time that he (McCully) had no interest in the stock. The witness Buckingham has also testified that he telegraphed the defendants to receive the stock shipped in the name of McCully, and that this was done in the evening of the eleventh or on the morning of the twelfth of October. There is no doubt that the entire four car-loads of stock came, in the manner stated, to the possession of the defendants.

The defendant Wagner, in his testimony touching the sales of the four car loads of stock, and the account of sales which the defendants rendered, says that the defendants did not authorize the indorsing of the amount which they paid to the bank upon the draft which Buckingham & Bro. had drawn upon them, but that the accounting and payment were made according to the ordinary course between commission men and the owner of the property, and not to apply upon the draft. On presentation of the draft of October 12th, such presentation being made on the 13th, payment was refused; and the same result followed the presentation of the second draft of October 15th. It has been stated that the testimony of the cashier of the plaintiff bank is that at the time the first draft was drawn and the money advanced to Buckingham & Bro. the bills of lading were attached to the draft. From the testimony of the defendant Wagner it appears—and his statement on the subject is positive—that when the draft was presented for payment no bills of lading were attached. And it appears, further, that, in order to obviate difficulties supposed to arise from previous presentations of the drafts to the defendant in connection with the bills of lading, the plaintiff bank, on the seventeenth day of December, 1878, more than

a year after the original transaction, caused a draft dated October 15th to be again presented to the defendants for payment, with the two bills of lading, which have been previously described, attached thereto.

There resulted from the sale of the stock a loss which was the difference between the amount of the draft and the amount realized for the stock. This difference the defendants were called upon to pay. Payment was refused, and this action was brought. It will be noticed that this action is not brought to recover from the defendants the value of the stock which they received and sold, nor the proceeds of the sales. The action proceeds upon the contract originally made between the parties, which was special in its character; and it is insisted by the plaintiff, upon the foregoing facts in the case, that the defendants are liable upon the draft which Buckingham & Bro. drew upon them and delivered to the bank.

The case, so far as legal principles are involved, lies within very narrow compass. The agreement of the defendants, as expressed in their telegram to the bank, was not simply an agreement to pay Buckingham & Bro.'s draft. It was an agreement on their part to pay J. Buckingham & Bro.'s draft with bill of lading attached, and, therefore, their promise was conditional. Its nature, in this regard, was communicated to the bank. All parties were advised that compliance with the terms named by the defendants was essential if the drawers and the bank would have the draft honored on presentation; and it is the fair meaning of the language used in the dispatch that bills of lading should accompany the draft upon its presentation for payment. It was necessary, in order to hold the defendants upon their special promise, that the draft should be drawn as they directed—that is, in the name of J. Buckingham & Bro.—and that proper bills of lading should accompany the draft. The presumption is that the condition thus prescribed by the defendants was imposed for their protection, and that they would pay the draft only in case bills of lading accompanied it; and the court cannot construe their agreement otherwise without de-

priving them of the benefit of the condition upon which they agreed to pay the draft. The value of a bill of lading as a security is well understood. That value lies in the fact that the property upon which advances are made is in the possession of a carrier under an agreement on its part to deliver the property to the consignee named, and that, on presentation of the bill of lading by the consignee or his assigns, the property upon its arrival will be delivered to him. Various advantages, not necessary to mention, may accrue to the consignee of the property who holds a bill of lading for the same; and it must be presumed, from the language of the dispatch which the defendants sent to the bank, that they desired to secure to themselves such advantages.

It is, I think, enough to say that, to entitle the plaintiff to recover, it must stand upon the letter of the contract which it seeks to enforce, and must therefore show full compliance on its part with the terms of the contract, in order to enforce it against the defendants. It was said, upon the argument, that there was a substantial compliance on the part of the bank, and the ground thus taken by counsel struck me with a good deal of force. The difficulty, however, is that, as the defendants stated the precise terms upon which they would pay the draft, substantial compliance only results when there has been a literal compliance with such terms. It is one of those cases where parties have stated a condition upon which they will do a certain thing, and it therefore becomes essential that the precise condition named be performed, in order to hold the party to liability upon his specific agreement. I do not refer to authorities upon the question, because the elucidation of the point seems free from difficulty. It is quite plain that the terms of the agreement, under which the defendants promised to pay the draft, were not complied with.

Upon the testimony I think it must be determined that bills of lading did not accompany the draft when it was first presented for payment, and, moreover, the bills of lading upon their face, the one running to McCully and the other to A. D. Buckingham & Bro., did not meet the requirements

of the contract. There was a substantial deviation from the terms upon which the defendants stated that they would pay the draft, and which, I think, relieved them from liability upon the draft; and their acceptance of the stock under the circumstances which have been stated, and the account of sales which they rendered, and payment of the proceeds realized from such sales, did not, in my judgment, establish such liability. Their payment was not made on account of the draft. Nothing in the case shows that they have at any time, since they first refused payment of the draft, recognized it as a binding obligation upon them. Nor do I think that the subsequent presentation of the draft, with these bills of lading attached, more than a year after the transaction, can avail the plaintiff. No time was specified by the defendants when the draft should be presented for payment. The law, therefore, implies that it was to be presented within a reasonable time, and it cannot be held that presentation in December, 1878, was seasonable, so as to avail the plaintiff in the prosecution of this action.

It was suggested on the argument that the defendants suffered no loss for want of bills of lading; that the property in question came to their hands, and that they were enabled to deal with it as effectively, as if there had been literal compliance with the contract under which the defendants agreed to pay the draft; but this does not answer the objection that, as this is an action to enforce a special and conditional contract against the defendants, there is devolved upon the plaintiff the necessity of showing an actual compliance on its part with the terms or conditions of that contract.

It follows from these views that judgment must be rendered in favor of the defendants.

KIDDER *v.* FEATTEAU.

(*Circuit Court, D. Nebraska.* May, 1880.)

REMOVAL OF CAUSE—DELAY IN FILING RECORD—REMANDING.—The only necessary consequence of failure to file the record of a case removed from a state court, under the act of March 3, 1875, by the first day of the next term after the application for removal, or within 20 days after such application, is to create a liability on the bond. Unnecessary delay, amounting to laches, in filing such record, prejudicing the other party, may be ground for remanding the case; but the party is not entitled for such cause, as matter of right, to have it remanded. Delay in filing record in this cause *held* not sufficient ground for remanding cause to state court.

Brown & Campbell, for plaintiff.

C. A. Baldwin, for defendant.

MCCRARY, C. J. This is a motion to remand the case to the state court, from whence it was removed, on the ground that the transcript was not filed in this court by the first day of the next session after the application for the removal, nor within 20 days from the time of such application.

The third section of the act of March 3, 1875, (18 St. 470,) provides that the party filing a petition in a state court for the removal of a cause to the circuit court of the United States, "shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of the then next session, a copy of the record in such suit, and for paying all costs that may be awarded in said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto," etc. The seventh section of the same act provides "that, in all causes removable under this act, if the term of the circuit court to which the same is removable, then next to be holden, shall commence within 20 days after the filing of the petition and bond in the state court for its removal, then he, or they, who apply to remove the same, shall have 20 days from such application to file said copy of record in said circuit court, and enter appearance therein; and, if done within said 20 days, such filing and appearance shall be taken to satisfy the said bond in the behalf."

It is admitted that the copy of the record in this case was not filed within the time specified in these provisions of the statute, and in the bond executed in pursuance thereof. It seems, however, to be well settled that the only *necessary* consequence of this delay is a liability of the obligors on the bond. If there is such unnecessary delay in filing the transcript as amounts to unexcused laches, whereby the other party is prejudiced, the federal court may, for this reason, remand the case. The defendant, in this case, cannot demand, as a matter of right, that the case be remanded. It is for the court to say whether, under all the circumstances, there has been inexcusable laches. Dillon on Removal of Causes, 74, note 125.

In this case it appear that the petition for removal and the bond were filed in the state court on the eighteenth day of December, 1879, and that the transcript was filed here on the thirty-first of January, 1880. The intervening time was, therefore, 43 days.

It does not appear, however, that the defendant has been prejudiced by the delay. The suit is brought to enforce the collection of certain promissory notes of the defendant, and to foreclose a mortgage given by him to secure the same. In the absence of any showing to the contrary, I must presume that the defendant in such a case is not damaged by a postponement of the day of trial, and while a long neglect to bring the record into this court, if unexplained, would not be excused, I do not see in the facts of this case any sufficient reason to remand the cause, and this motion is accordingly overruled.

DAVIS *v.* JAMES and others.

(*Circuit Court, N. D. Illinois.* ———, 1880.)

FEDERAL COURT—JURISDICTION—STATE STATUTE DIRECTING THAT ACTION SHALL BE IN STATE COURT.—The fact that a state statute may provide that all actions of a particular character arising within its limits shall be brought in a certain state court, will not affect the jurisdiction of federal courts in such actions, otherwise competent.

SAME—SAME—SAME.—A state statute provided that guardians might be licensed to mortgage the estate of their wards, but that foreclosure of such mortgages should only be made by petition to certain state courts. *Held*, that mortgagee was not thereby precluded from bringing action for the foreclosure of such mortgage in the federal courts, the citizenship of parties and amount involved being sufficient to confer jurisdiction.

DYER, D. J. This is a bill to foreclose two trust deeds, and the case has been heard upon a plea to the jurisdiction of the court. It appears from the bill and pleas that on application to the county court of this county by the defendant James, as guardian of the minor heirs of Robert D. McFarlane, deceased, he was duly authorized by that court to borrow the sum of $50,000, in all, for the purpose of erecting buildings on the premises in question; and, to secure such loans, was further authorized to execute mortgages or trust deeds upon the premises; and pursuant to such order the guardian borrowed $40,000 from complainant in 1873, and $10,000 in 1874. And in his capacity as guardian the defendant James executed to complainant his promissory notes for the sums so borrowed, together with trust deeds on the real estate, to secure the payment of such notes. The pleas allege that these trust deeds were executed solely under the authority of the state statnte, and the order of the county court acting in pursuance of such statute, and that the complainant, when he made the loans, had knowledge of such fact, and of the provision of the statute under which a guardian of minors may be empowered to execute trust deeds or mortgages. The point raised by the pleas is that these trust deeds can only be foreclosed in the county court which authorized this execution. The statute provides that the

guardian may, by leave of the county court, mortgage the real estate of his ward for a term of years, not exceeding the minority of the ward, or in fee, and that before any mortgage shall be made the guardian shall petition the county court for an order authorizing such mortgage to be made, in which petition shall be set out the condition of the estate, and the facts and circumstances on which the petition is founded, and a description of the premises sought to be mortgaged. The statute then further provides that foreclosures of mortgages authorized by this act shall only be made by petition to the county court of the county where letters of guardianship were granted, or, in case of non-resident minors, in the county in which the premises, or some part thereof, are situated, in which proceedings the guardian and ward shall be made defendants.

The argument of the learned counsel for defendants, in support of the pleas, is that the state has supreme authority to legislate upon all matters of transmission and alienation of real property; that this power has been exercised by the passage of this statute; that the alienation of the premises in question by mortage or trust deed is only authorized by this statute; that all the provisions of the statute, including that which relates to the enforcement of remedy by foreclosure, were passed for the protection of the interests of minors, and became a part of the contract between the guardian and the person who made the loan and took the security; that the complainant, as the mortgagee or holder of the trust deed, was bound by the state statute, and that the federal court is also bound to follow the statute in determining questions relating to the enforcement of complainant's remedy upon his mortgages.

No question is involved as to the citizenship of the parties. The plaintiff is a citizen of Massachusetts, and the defendants reside in this state. The debt secured by the trust deeds is due. If remedy were to be sought in the state courts in the form of foreclosure, it may be admitted that complainant would be obliged to prosecute his foreclosure in the

county court where letters of guardianship were granted to the mortgagor.

At the time these trust deeds were executed the judiciary act of the United States declared that circuits courts of the United States should have jurisdiction where the matter in dispute, exclusive of costs, should exceed the sum of $500, provided the citizenship of the parties should be such as to warrant it, and I regard it a satisfactory answer to the position that the provisions of the state statute, including those relating to remedies, became part of the contract between the parties; that the statute of the United States which gave to complainant the right to prosecute his remedy in this court was also, with even higher potency, a part of the contract.

Decisions of the supreme court bearing upon the question seem clearly to determine that even in a case where the right of action is originally derivable wholly from the state statute, which also designates the court in which such remedy may be enforced, state legislation cannot limit a party's right to enforce his remedy in the court thus designated by the statute, provided the citizenship of the parties is such as would otherwise authorize the prosecution of such remedy in the federal court.

In the case of *Railway Co.* v. *Whiton*, 13 Wall. 285, there was a statute which declared a liability by a person or corporation to an action for damages when death ensues from a wrongful act, neglect or default of such person or corporation, and which statute contained a proviso that such action should be brought, for a death caused within the state, in some court established by the constitution and laws of the same. Here, although the right of action existed only in virtue of the statute, and only in cases where the death was caused within the state, the supreme court held that the proviso requiring action to be brought in the court of the state did not prevent a non-resident plaintiff from removing the action to a federal court and maintaining it there. The court said: "In all cases where a general right is thus conferred it can be enforced in any federal court

within the state having jurisdiction of the parties. It cannot be withdrawn from the cognizance of such federal court by any provision of state legislation that it shall only be enforced in a state court. The statutes of nearly every state provide for the institution of numerous suits for partition, foreclosure, and the recovery of real property in particular courts and in the counties where the land is situated, yet it has never been pretended that limitations of this character could affect, in any respect, the jurisdiction of the federal court over such suits, where the citizenship of one of the parties was otherwise sufficient."

In this state there was formerly, and is perhaps at present, a statute declaring in substance that all actions against any county may be commenced and prosecuted in the circuit court of the county against which the action is brought, and the question arose whether a citizen of another state could prosecute a suit in this court against the supervisors of Mercer county upon certain bonds issued by them on behalf of the county. A motion to dismiss the case for want of jurisdiction having been overruled in this court, and the case being removed to the supreme court, it was held by that court that there was no doubt of the constitutional right of the party to bring suit in the circuit court of the United States upon the obligations of the county of Mercer, notwithstanding the statute before referred to. *Cowles* v. *Mercer County*, 7 Wall. 118. And in the case of *Ex parte Biddle*, 2 Mason, 472, which was a proceeding by partition existing only by virtue of the laws of Massachusetts, the court said: "Parties entitled to sue in the courts of the United States are, in general, entitled to pursue in such courts all remedies for the vindication of their rights which the local laws of the state authorize to be pursued in its own courts."

Again, in the case of *Warren* v. *The Wisconsin Valley R. Co.* 6 Bissell, 425, it was said, in the opinion of the court, that "it was the intention of congress, under the power conferred by the constitution, to give to suitors having a right to sue in the federal courts remedies co-extensive with such rights. These remedies cannot be abridged or controlled by state legisla-

tion, by exempting the person or corporation in such state from suit. A citizen of another state, in this respect, possesses a right not pertaining to one of the same state."

Upon the argument, counsel earnestly pressed upon the consideration of the court a distinction between these cases and the case at bar, the distinction consisting in the fact that in the present case the subject-matter involved is real estate; the point being urged that, as the state must be held to have controlling authority in regulating the transmission and alienation of real property situated within the state, the federal courts are limited in their right to exercise jurisdiction in proceedings which contemplate the ultimate transfer of title of such character of property. But I am unable to perceive solid foundation for such distinction. The question is one involving the right to pursue a remedy. The statute of the United States, at the time of the execution of these trust deeds, declared that the circuit court of the United States should have cognizance concurrent with the courts of the several states of all suits of a civil nature, at common law or in equity, with a proviso as to the citizenship of the parties. No state legislation could take away the right thus granted by congress under the constitution of the United States. And if, in the case where a right of action, whether it pertain to persons or property, exists only in virtue of, and is solely derivable from, a statute of a state, that statute also declaring that the remedy to enforce such right shall be brought in a court of the state,—if, I say, in such a case the remedy may be enforced in a court of the United States, as has been distinctly held, I am unable to perceive why, in a case like that in hand, the remedy may not also be pursued in the federal court, notwithstanding the state statute. That statute, in my opinion, can only be construed as limiting the right of the party to pursue his remedy in a particular form, where such remedy is sought to be enforced in the courts of the state.

The pleas will be overruled.

PETTIT *v.* THE TOWN OF HOPE.

(*Circuit Court, N. D. New York.* May 20, 1880.)

COUPONS—PAYABLE TO BEARER—ASSIGNEE OF CAUSE OF ACTION.—The holder of a coupon payable to bearer is not an assignee of a cause of action within section 1, act March 3, 1875, (18 U. S. St. at Large 470.)

DEMURRER—FACTS RELIED UPON IN SUPPORT OF, NOT PLEADED.—Questions raised in argument as the ground of demurrer ought not to be disposed of on a demurrer to a complaint failing to make averment of facts in the cause which it is claimed vitiate the proceeding. They can only be disposed of when developed on the trial.

Parkhurst & Baker, for plaintiff.

J. M. Carroll, for defendant.

BLATCHFORD, C. J. This suit being on coupons, it must be held, according to the decision in *Cooper* v. *Town of Thompson*, (13 Blatchford, C. C. R. 434,) that the holder of a coupon, payable to bearer, is not an assignee of the cause of action, within section 1 of the act of March 3, 1875, (18 U. S. St. at Large, 470.)

Although the adjudication of the county judge is alleged to have been made on November 1, 1872, yet the complaint avers that the application to the county judge was made after the passage of the act of 1869, and before the issuing of the bonds. The complaint does not show that the application was made after the amendatory act of May 12, 1871, was passed. It may have been made before that. If made before that, the application seems to conform to the act of 1869. The questions raised in argument, as the demurrer by the defendant, ought not to be disposed of on a demurrer to a complaint which fails to make the averment of what is claimed by the defendant to vitiate the proceeding. Those questions can properly be considered only when all the facts are brought out on a trial.

The demurrer is overruled, with leave to the defendant to answer the complaint in 20 days on payment of costs.

In re WONG YUNG QUY, on *habeas corpus.*

(*Circuit Court, D. California.* May 24, 1880.)

CONSTITUTION—DISINTERMENT OF CHINESE.—The statute of California making it an offence to disinter or remove from the place of burial the remains of any deceased person without a permit, for which a fee of $10 must be paid, does not violate subdivision 3 of section 2, article 1, of the constitution of the United States, providing that "congress shall have power to regulate commerce with foreign nations."

SAME.—Nor does it violate subdivision 2 of section 10, article 1, providing that "no state shall, without the consent of congress, lay any impost or duties on * * * exports."

SAME.—Nor is it in conflict with the fourteenth amendment, which prohibits any state from denying to "any person within its jurisdiction the equal protection of the laws."

SAME.—TREATY WITH CHINA.—Nor does it violate the fourth article of the treaty with China, called the Burlingame treaty, which provides that "Chinese subjects in the United States shall enjoy entire liberty of conscience, and shall be exempt from all disability or persecution on account of their religious faith or worship." 16 Stat. 740.

SAME.—The act is a sanitary measure within the police powers of the state, and as such is valid.

A CORPSE IS NOT PROPERTY, and the remains of human beings carried out of the state for burial in a foreign country are not exports, within the meaning of the clause of the national constitution prohibiting the laying of imposts or duties by the state upon exports.

Geo. E. Bates and *J. M. Rothchild*, for petitioner.

Crittenden Thornton, for respondent.

SAWYER, C. J. On April 1, 1878, the legislature of California passed an act entitled "An act to protect public health from infection, caused by exhumation and removal of the remains of deceased persons," sections 1, 2, 3, 4, and 6 of which are as follows:

"Section 1. It shall be unlawful to disinter or exhume from a grave, vault, or other burial place, the body or remains of any deceased person, unless the person or persons so doing shall first obtain from the board of health, health officer, mayor, or other head of the municipal government of the city, town, or city and county where the same are deposited, a permit for said purpose. Nor shall such body or

remains disinterred, exhumed, or taken from any grave, vault, or other place of burial or deposit, be removed or transported in or through the streets or highways of any city, town, or city and county, unless the person or persons removing or transporting such body or remains shall first obtain from the board of health or health officer, (if such board or officer there be,) and from the mayor or other head of the municipal government of the city or town, or city and county, a permit in writing so to remove or transport such body or remains in and through such streets and highways.

"Sec. 2. Permits to disinter or exhume the bodies or remains of deceased persons, as in the last section, may be granted, provided the person applying therefor shall produce a certificate from the coroner, the physician who attended such deceased person, or other physician in good standing cognizant of the facts, which certificate shall state the cause of death or disease of which the person died, and also the age and sex of such deceased; and provided, further, that the body or remains of deceased shall be enclosed in a metallic case or coffin, sealed in such manner as to prevent, as far as practicable, any noxious or offensive odor or effluvia escaping therefrom, and that such case or coffin contains the body or remains of but one person, except where infant children of the same parent or parents, or parent and children are contained in such case or coffin. And the permit shall contain the above conditions, and the words, 'Permit to remove and transport the body of ——, age ——, sex ——;' and the name, age, and sex shall be written therein. The officer of the municipal government of the city or town, or city and county, granting such permit, shall require to be paid for each permit the sum of $10, to be kept as a separate fund by the treasurer, and which shall be used in defraying expenses of and in respect to such permits, and for the inspection of the metallic cases, coffins, and enclosing boxes herein required; and an account of such moneys shall be embraced in the accounts and statements of the treasurer having the custody thereof.

"Sec. 3. Any person or persons who shall disinter, exhume, or remove, or cause to be disinterred, exhumed, or removed

from a grave, vault, or other receptacle or burial place, the body or remains of a deceased person, without a permit therefor, shall be guilty of a misdemeanor, and be punished by fine not less than $50 nor more than $500, or by imprisonment in the county jail for not less than thirty days nor more than six months, or by both such fine and imprisonment. Nor shall it be lawful to receive such body, bones, or remains, on any vehicle, car, barge, boat, ship, steamship, steamboat, or vessel, for transportation in or from this state, unless the permit to transport the same is first received and is retained in evidence by the owner, driver, agent, superintendent, or master of the vehicle, car, or vessel.

"Sec. 4. Any person or persons who shall move or transport, or cause to be moved or transported, on or through the streets or highways of any city or town, or city and county, of this state, the body or remains of a deceased person which shall have been disinterred or exhumed, without a permit as described in section 2 of this act, shall be guilty of a misdemeanor, and be punishable as provided in section 3 of this act.

"Sec. 6. Nothing in this act contained shall be taken to apply to the removal of the remains of deceased persons from one place of interment to another cemetery or place of interment within the same county; provided, that no permit shall be issued for the disinterment or removal of any body, unless such body has been buried for two years." Stat. 1877–8, 1050.

The petitioner, Wong Yung Quy, is, and Wong Wai Toon was, in his life-time, a subject of the emperor of China, of the Mongolian race, residing in the United States. Wong Wai Toon died in January, 1876, and was buried in Laurel Hill Cemetery, a public cemetery of the city and county of San Francisco. In October, 1879, petitioner, a relative of the deceased, having complied with all the provisions of said act, except the payment of $10 required by said act to be paid for an exhumation and removal permit, demanded from the proper authorities permission to remove the remains of said

Wong Wai Toon from said cemetery, and ship them to China. Refusal having been made on the ground of the non-payment of said fee of $10 required to be paid by said act, the petitioner proceeded to disinter and remove said remains without a permit, and was arrested in the act, tried and convicted for the offence created by said statute in the court having jurisdiction, and sentenced to pay a fine of $50, or, in default of such payment, to imprisonment in the city and county jail for a period of twenty-five days. Failing to pay the fine, and being imprisoned in pursuance of the judgment, he obtained a writ of *habeas corpus;* and he now asks to be discharged on the ground that the provision of said act, requiring the payment of said fee for a permit, violates the treaty with China, known as the Burlingame treaty, and the constitution of the United States, and is therefore void. All the other provisions of the act having been complied with, the only question is as to the power of the legislature to require the petitioner to take out a permit at a cost of $10 as a condition of disinterment and removal of the remains of his relative from their place of burial.

The first point made is that the act, in the requirement in question, violates subdivision 3 of § 8, art. 1, of the national constitution, which provides that "congress shall have power to regulate commerce with foreign nations." We are unable to perceive any violation of this provision of the constitution, under the broadest construction claimed by petitioner for the term "commerce," even if it includes the transportation of the remains of aliens to their own country for final sepulture. There is no reference to aliens or to any extra-territorial act of any kind anywhere in the statute, except in the last clause of section 3, which is a wholly independent and different provision from that under consideration, creating an additional offence, and might be wholly omitted without affecting the remainder of the act. It is not necessary now to consider the question of the validity of that provision. The act deals with matters wholly within the state—within its territory—with the remains of parties who have lived and died within its jurisdiction, and which have been buried and which still

remain buried in its soil; and professedly and apparently for sanitary purposes. The statute knows nothing of the objects or motives of the exhumation, except as provided in section 6, that the act shall not apply to removals from one place of interment to another in the same county. This exception is doubtless made for those common cases wherein no vault or burial place has been provided for the deceased during life, and the remains are temporarily deposited in a public receiving vault, or the vault or grounds of some friend, till the surviving friends can provide for a place of final sepulture. These removals are ordinarily from one place of burial to another in the same or an adjacent cemetery, where there are several cemeteries lying near each other, as in San Francisco, and therefore not so fully within the reason upon which the act is founded. The statute deals with the local inter-territorial fact of burial and exhumation, without regard, in other respects than that stated, to motive or intention, race or nation, citizenship or alienage, future domestic or foreign sepulture.

The matter of the burial and exhumation of the dead, with a view to sanitary objects, has in all times and among all civilized nations been regarded as a proper subject of local regulation. It is founded upon the law of self-protection. The fact that in many or even most instances the object of disinterment is to send the remains abroad, cannot affect the question. The local sanitary considerations must be the same, whatever the purpose of exhumation and transportation through the streets of a city. The fact that the Chinese exhume and transport to their own country the remains of all or nearly all their dead, (amounting to more than ninety per cent. of all such removals,) while other aliens and citizens comparatively but rarely perform these acts, only shows that this generality of practice requires more rigid regulations and more careful scrutiny, in order to guard against infections and other sanitary inconveniences, that would otherwise be required. In *Secor's Case, Pratt,* J., says: "A proper respect for the memory of the dead, a regard for the tender sensibilities of the living, *and a due preservation of the public health,*

require that the corpses *should not be disinterred or transported from place to place*, except under extreme circumstances of exigency." 18 Alb. Law Jour. 488; 31 Legal Int. 268. The exposure of unburied human remains, or neglect to inter the same by the person on whom the duty is cast, is a misdemeanor at common law. See *Rex* v. *Stewart*, 12 Ad. & E. 773; *Chapple* v. *Cooper*, 13 Mes. & Wels. 252; *Ambrose* v. *Kerrison*, 10 Com. B. 776; *Jenkins* v. *Tucker*, 1 H. Black. 394; Willes, 536. And this is doubtless so, in part, at least, upon sanitary considerations generally recognized among enlightened nations.

We see nothing in the language of the act, in the surrounding circumstances, or in the nature of the subject-matter upon which the statute operates, to justify us in holding that the object of the legislature was to impose burdens on the commerce or intercourse between this country and China, rather than to provide wholesome sanitary regulations for the protection of our people. The statute is general, and operates wholly upon matters within the territoral jurisdiction of the state, and without discrimination as to remains to be removed to any considerable distance, whether within or without the state, and is within the principle of the case *In re Rudolph*, recently decided in the United States circuit court for Nevada, upon drummers' licenses. 10 Cent. Law Jour. 224; 2 FED. REP. 65. The exhumation and removal of the dead is not a matter of public indifference, harmless in itself, like the style of wearing the hair, as in the *Queue Case*; but it affects the public health, and its regulation is, like the regulation of slaughter-houses and other noxious pursuits, strictly within the police powers of the state. See *Ex parte Shrader*, 33 Cal. 286; *Slaughter-House Cases*, 16 Wall. 36.

In *Gibbons* vs. *Ogden*, 9 Wheat. 203, Mr. Chief Justice Marshall says: "But the inspection laws are said to be regulations of commerce, and are certainly recognized in the constitution as being passed in the exercise of a power remaining with the states. * * * The object of inspection laws is to improve the quality of articles produced by the

labor of a country; to fit them for exportation; or it may be for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to a general government, all of which can be most advantageously exercised by the states themselves. *Inspection laws, quarantine laws, health laws of every description,* as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass."

If, then, as claimed, the transportation of the remains of deceased persons to China is a part of foreign commerce, these supervising and inspection laws "act upon the subject before it becomes an article of foreign commerce," and while the remains are being "prepared for that purpose." They simply provide that the preparations of the remains for foreign transportation, while still within the state and under its jurisdiction, shall be made in *such a manner* as not to be detrimental to the public health.

The principles relating to sanitary laws recognized in *City of New York* v. *Miln,* 11 Pet. 102; *Thorpe* v. *R. & B. R. Co.* 27 Vt. 140; *The Passenger Cases,* 7 How. 283; *Railroad Co.* v. *Huson,* 95 U. S. 471, and numerous other cases, are broad enough to cover the provisions in question. In these respects this case differs materially from the *Queue Case,* reported in 5 Sawyer, 553, and is more like the case arising under the cubic air statute, which we held to be constiutional. It being within the constitutional power to regulate the disinterment and removal of the dead, and to provide officers to scrutinize and supervise the operation in order to secure a conformity to the laws, we see no reason why a fee cannot be charged to and collected from those who desire to exercise the privilege, to defray the expenses of the inspection and supervision. The fee is charged under the law, not for the transportation or for the privilege of carrying the remains out of the country, but to pay the expenses of super-

vising their disinterment and due preparation for passing through the territory of the state, and through the streets of populous cities, either to other parts of the state or elsewhere, without endangering the health of the people.

For similar reasons the provision in question does not violate subdivision 2 of section 10, article 1, of the constitution, which provides that "no state shall, without the consent of congress, levy any imposts or duties on imports or exports, *except what is absolutely necessary for its inspection laws.*" The case also seems to be within the terms of this exception. Besides, the remains of deceased persons are not "exports" within the meaning of the term as used in the constitution. The term refers only to those things which are property. There is no property in any just sense in the dead body of a human being. 18 Alb. L. Jour. 487; 17 Alb. L. Jour. 258; *Pierce* v. *Pro. of Swan Point Cemetery*, 14 Am. Rep. 667; 10 R. I. 227, and cases cited. There is no impost or duty on exports in any proper sense, or in the sense of the constitution. This provision of the constitution was intended to prevent discrimination in matters of trade.

There is no violation of the fourteenth amendment to the national constitution. There is no discrimination against or in favor of any class of residents. It operates upon aliens of all nationalities and upon all citizens alike. It applies to all cases of remains to be removed beyond the boundaries of the county, whether to foreign countries, to other states, or to other parts of this state. And there are no restrictions upon disinterments and removals of Chinese dead to other places within the same county for burial not applicable to citizens and all other aliens. It may be that the large number of Chinese removals suggested the necessity for stringent supervision; but we see no reason to suppose that the act was not intended to operate upon all within its terms; and the testimony shows—if it is admissible to look at the testimony—that it is, in fact, enforced against all alike. But, whether enforced or not, the subject-matter, as we have seen, is a proper one for regulation; and if the act is not enforced upon all alike, there is a gross neglect of duty on the part of

those appointed for this purpose under the law. If the provisions of the act affect a larger number of Chinese than of any other class, it is not on account of any discriminations made by the law, but only because under their customs there is a much large number of disinterments and removals by them than by any others. *In re Rudolph, supra,* and cases cited.

There is nothing in the provision in question in conflict with article 4 of the Burlingame treaty, which provides that "Chinese subjects of the United States shall enjoy entire liberty of conscience, and shall be free from all disabilities or persecutions on account of their religious faith or worship." Conceding that the religious sentiment of the Chinese requires that they shall remove the remains of their deceased friends to China for final burial, there is nothing in the provision forbidding or unduly obstructing the performance of that rite or religious duty, and nothing that does not equally apply to other aliens and citizens. It is only provided that, in the performance of that duty, proper precautions shall be taken not to endanger the health of the people among whom they have elected to live, and have died and once been buried. The fee established is only to liquidate the portion of expense of supervision and inspection imposed upon the public resulting from their custom; and, like the other expenses of disinterment and removal, which the surviving friends voluntarily incur, is necessarily incident to their peculiar practice. The customs of Chinese in this respect renders the supervision necessary and proper; and we can perceive no impropriety in charging them with the expense incident to it. The amount of $10 may seem large, but it is charged alike to all, and is not so large as to justify us in holding that it was manifestly intended to obstruct the performance of the duty; and we do not understand that the amount is regarded as objectionable if the charge is otherwise legal. Besides, it may well be questioned whether the treaty-making power would extend to the protection of practices, under the guise of religious sentiment, deleterious to the public health or morals, or to a subject-matter within the acknowledged police

power of the state. See *Reynolds* v. *United States*, 98 U. S. R. 145, with respect to religious belief as affected by the first amendment to the national constitution. But, under the view we take, it is unnecessary to consider the question now.

We are satisfied that the provisions of the act in question do not violate any provision of the national constitution or of the treaty with China, and that there is no ground for discharging the prisoner by this court.

Let the writ be discharged, and the prisoner remanded to the custody of the officer from whom he was taken.

WASHBURN *v.* THE MIAMI VALLEY INS. CO. and others.*

(*Circuit Court, S. D. Ohio.* ———, 1880.)

INSURANCE—CONDITIONS IN POLICY—EXPLOSION.—Where a policy of insurance against loss by fire contains a condition that the insurance company shall not be liable for any loss or damage occasioned by explosion of any kind, unless fire ensues, and then for the loss and damage by fire only, and a fire originates in the insured premises which produces an explosion by which that property is destroyed, such destruction is a loss by fire within the meaning of the policy.

SAME—SAME—SAME.—An exception in a policy of fire insurance that the "company will not be liable for loss or damage occasioned by the explosion of a steam boiler, gunpowder, *or any other explosive substance*, except only such loss as shall result from fire that may ensue therefrom; nor shall the company be liable for any loss by such fire, unless privilege shall have been given in the policy to keep such articles," etc. *Held*, that this exception must be viewed in the light of the surrounding circumstances, and that, from the nature of the business of the plaintiff, the parties must have contemplated the presence in the structure insured of the explosive substance known as flour dust, and that, therefore, its presence was not within the terms of such exception.

SAME—EXPLOSIVE SUBSTANCES—INCIDENT TO BUSINESS CARRIED ON. Explosions produced incidentally from the manufacturing which the parties contemplate would be carried on in the building insured, and which are an inseparable or necessary result of the process of manufacture, are not within such exceptions.

These actions were founded upon policies of insurance against fire issued by the defendants to the plaintiff upon

*Prepared by Messrs. Florien Giauque and J. C. Harper, of Cincinnati, Ohio.

Washburn Mill A, Minneapolis, Minn. The defence was that the loss was occasioned by an explosion, and, therefore, fell within the exceptions given at length in the following opinion. A jury was waived, and the cases submitted to the court upon the proofs:

The evidence established the fact that a destructive fire had commenced and had been burning some minutes, when it communicated with an explosive material in the mill, known as flour dust, causing an explosion which destroyed and consumed the entire premises.

Sage & Hinkle, for plaintiff.

Wm. M. Ramsey and *Thomas McDougall*, for defendants.

SWAYNE, A. J. The policy issued by the Miami Valley Insurance Company contains the following clauses, upon the first of which this controversy is understood to turn, so far as that company is concerned: "Provided, etc., that this company shall not be liable for loss, etc., by lightning, or explosion of any kind, including steam boilers, unless fire ensues, and then for the loss or damage by fire only." And the second clause to which I wish to refer is as follows: "Gunpowder, saltpeter, phosphorus, petroleum, naphtha, benzine, benzole, or benzine varnish, are positively prohibited from being deposited, stored, or kept in any building insured or containing property insured by this policy, unless by special consent, in writing, indorsed on this policy, naming each article separately; otherwise the insurance shall be void."

The policy issued by the Fidelity Fire Insurance Company contains the same clauses. They are as follows: "Or if the assured shall keep gunpowder, fire-works, nitro-glycerine, phosphorus, saltpeter, nitrate of soda, petroleum, naphtha, gasoline, benzine, benzole, or benzine varnish; to keep or use camphene, spirit gas, or any burning fluid or chemical oils, without written permission in this policy, then, and in every such case, this policy is void."

Then follows the clause upon which, as respects this company, the controversy turns. The exception is in these words: "The company shall not be liable, etc., for any loss caused by the explosion of gunpowder, or any explosive substance, nor

explosion of any kind, unless fire ensues, and then for the loss or damage by fire only," etc.

The language of the policy issued by the Union Company, touching these exceptions, is as follows: "This company will not be liable for the loss or damage occasioned by the explosion of a steam-boiler, gunpowder, or any other explosive substance, except only such loss as shall result from fire that may ensue therefrom; nor shall the company be liable for any loss by such fire, unless privilege shall have been given in the policy to keep such articles," etc.

That makes the case very peculiar as to the Union Company. Giving a literal view to the language of the second clause, which I have just read, the policy was void at the outset, and never had any validity, because there was in the mill from the first an explosive substance, to-wit, flour dust, and there was no permit given in the policy to keep such substance.

Now, according to the theory contended for by the defence, the company never in legal effect insured the property which is named in the policy, and was known to have connected with it necessarily more or less of this explosive substance, and yet the company took the money of the assured, when it knew, or ought to have known, that according to the terms of its policy it had no validity whatever. Now, I cannot suppose that that was the intention of this company. The policy must be construed, like all other instruments in writing, in the light of surrounding circumstances; and I am willing to construe this particular "explosive substance" as not within the terms or meaning of the particular language of the policies upon that subject. I shall construe it, as if the language was the same, or substantially the same, as that upon the subject in the other policies. But I do not see, if the microscopic eye of a special demurrer were applied, why the gentleman for the defence might not as well contend that this policy had no validity, as that it had no validity so far as the effect of the explosion is concerned in the results that followed. But, as I do not take that view of the subject, I shall not apply that principle. Now, certain remarks are to

be made in the light of the clauses which have thus been read, construing the last one reasonably, in the light of the circumstances surrounding the parties when the contract was entered into, and which are material to be borne in mind.

It will be observed that the companies are protected, with respect to explosives, by making it fatal to the policies to keep them; the policies become void if such explosives are kept. Perhaps, right here, I might remark that that word "kept" must have a particular signification in this connection, and that it does not apply where explosives of a known fixed character, known to be such, were accidentally present in the structure insured; but it does apply where they were kept there knowingly, in violation of the terms which the policy contains with reference to them. That must have been the understanding or intention of the parties in reference to the peculiar substance flour dust, which is highly explosive, but which, as I have remarked, was necessarily present, and from which arose the genesis of the explosion out of which this controversy has arisen. The company had taken care to secure itself against the perils of explosion—*First*, by a comprehensive stipulation in the policy; *secondly*, the exceptions referred to are named only in connection with *fires which they have produced*. That is in the clause on which the controversy turns. And, by the way, the second clause I have read is the only clause to which counsel have referred. Nothing was said about the other provisions which I have read.

I repeat, explosives are named only in connection with fires which they have produced. There is nothing said about them in connection with fires which have produced them. The policies on that subject are wholly silent. Is not this somewhat remarkable, if the construction contended for by the companies be correct? In that case would not the language of the context have naturally been that the company will not be liable for explosions, and will not be liable for fires which produce them, or fires which they have produced? The first may define the liability of the company, and the sentence I have just read is certainly important. Would not

the policies have read "that they will not be liable for explosions caused by fires, or for fires caused by explosion?" I repeat, and it is a feature of great significance in the case, as it seems to me, that where explosions are produced by fires —accidental fires—the policy is wholly silent. Now, I am free to remark that it seems to me that this could hardly have been so if the intention of the parties had been as is contended for by the counsel for the defendants.

But, further, if it be suggested that this would leave the exception without any legal effect, I would say that there are several obvious answers. First, these clauses are frequently prepared by non-legal men, who do not know the legal effect of the language which they employ in such instruments, and I will add that these instruments go into the hands of individuals who know nothing of the legal effect of these special clauses which they contain. Again, if prepared by a legal hand, the writer may not have known, probably did not accurately know, the state of the law touching the subject to which the exception, and the exception within the exception, here in question, relate. Again, there is nothing which in terms, and this is substantially what I have said already, withdraws the exception here in question from the clause of insurance, as it would be if the construction contended for by the plaintiff's counsel be sustained. There is nothing disclosed which tends to withdraw the subject of these exceptions (nothing in terms, there may be by implication) of the clause here in question from the general language and operation of the clause employed. They refer to fires which the explosion shall produce, and are wholly silent as to the fires which produce such explosions.

Again, insurance policies, like all other written contracts, are to be reasonably construed; yet, as with respect to all other written contracts, insurance policies are to be construed most strongly against the party making them, which, in this case, is the insurance company.

I deem it proper to advert for a moment to the case in 7 Wallace, (*Ins. Co.* v. *Tweed*, 7 Wall. 44,) which I did not fully understand at the argument. The exception was somewhat

similar, and the fire happened in that case from an explosion, producing a fire at a distant point from the site of the insured property. A wind prevailed at the time, and swept the fire a considerable distance, and the property insured, and covered by the policy, was destroyed by fire. The company was sued, and it defended on the ground that the case was covered by the exception, which was that the company should not be liable for a fire produced by an explosion. That policy was at the opposite pole from the one here under consideration, and the assured was defeated. He recovered nothing. No doubt he thought that very unreasonable, as it seems to me most persons would regard it. He intended, no doubt, to have his property protected by that policy, and supposed it was protected. The supreme court of the United States held from principle that it was not.

It is very possible that the conditions of this clause (which were frequently brought to my attention, for I had a great deal to do with this head of the law, practically) had produced a good deal of dissatisfaction, and hence this clause was changed. If that policy had been the same in this particular as those under discussion here, then, irrespective of the question of explosion, the party would have been entitled to recover; but, the policy being different, the result was different. A change was made, probably having its origin in that case and others like it—a change was made to meet that difficulty, and hence it is, perhaps, we have these policies phrased as they are before us.

Now, to recur again to the proposition to which I adverted at the outset, to-wit, that there is nothing here which in terms withdraws the protection against fire, although that fire should involve an explosion. It seems to me that there would have been language to that effect, if such had been the intention of the parties. The intention of the statute constitutes the law; the intention of the law-makers constitutes the law; the language may be within the letter of the statute and not within its meaning, and the language may be within its meaning and not within its letter. That is a familiar proposition. If we can ascertain the intention and meaning of the

parties here, that constitutes the contract which it is the object of the court to carry out. Now, there is another remark, perhaps rather hypercritical, but proper in this connection to be made, and that is, according to the technical formality of the law of insurance this explosion cannot be recognized. It was a part of that fire—just as much a part of the fire, and admitted to be as such, covered by the insurance, as if there had not been an explosion, by the general language, "insurance against fire." If the exception had not been made, it would have been considered (which was conceded at the argument) a part of the fire, and the policy would have been held, for the purpose of this view of the case, just as effectual, as it regards the effects of the explosion produced by the fire, as the policy is now effectual with respect to fires produced by an explosion, upon which the language of the policy is express. Now, I think, under the circumstances of this case, that that view of the subject is entitled to very considerable consideration.

But there is another matter to be considered which has very great weight in the case. I am free to confess that, viewing this policy in its own light, I might doubt very much more than I do; but this subject has been litigated very fully before a very able and learned judge, a great lover of the authorities, and perhaps as much influenced by them as any judge to be found. I refer to the district judge of Michigan. *Washburn* v. *Union Fire Ins. Co.* U. S. Cir. Court, E. D. Mich., *Brown*, J., (see Detroit Post & Tribune of Nov. 8, 1879.) It seems he had no hesitation in coming to the conclusion that the insurers were liable under policies drawn like this, and for the purposes of this action identical with these in the cases before me. The same question was in several cases before the learned circuit judge of the Pennsylvania circuit, (*Washburn* v. *Artisans' Ins. Co.*; *Same* v. *Penn. Ins. Co.* U. S. Cir. Court, W. D. Penn. 9 Pittsburgh Legal Journal, (N. S.) 55,) and, without the slightest doubt or hesitation, he ruled in the same way in a case involving the same question. And they were afterwards before the district judge of this district, (*Washburn* v. *Farmers' Ins. Co.* U. S. Cir. Court, S.

D. Ohio, 2 FED. REP. 304; *Washburn* v. *Western Ins. Co.* U. S. Cir. Court, S. D. Ohio, October term, 1879, *Swing*, J.,) and he ruled in the same way.

Now, I must say that, under these circumstances, upon a mere doubt, and technical criticism and objection, of the importance of those which have been urged upon my attention, I am not quite bold enough to overrule these adjudications. In my judgment, they decide the question before me. I do not mean that the views of these gentlemen are in anywise conclusive—not at all; or that the same result would follow if a like adjudication had been made by one of my peers and brethren, or any number of them. But there is, doubtless, a moral binding force in the very indications to which I have adverted, which gives them a sufficient amount of gravity in my judgment, and rightfully gives it to them, to turn the scale of this case in favor of the plaintiff, and judgment will be rendered accordingly.

Judgment for plaintiff for amount of policies and interest.

METCALF, Assignee, *v.* OFFICER & PUSEY.

(*Circuit Court, D. Iowa.* ———, 1880.)

DORMANT PARTNER—EVIDENCE—GENERAL REPUTATION—While evidence of general reputation may not be admissable to *prove* a partnership, still it may be competent upon the issue as to whether a *member* of a firm is a dormant partner.

SAME—OSTENSIBLE PARTNER—NAME NOT IN FIRM STYLE.—A partner is not to be deemed dormant because his name does not appear in the firm style; nor is it necessary to constitute one a dormant partner that his membership be universally unknown. It is sufficent if he is not an ostensible partner.

BANKRUPTCY—FRAUDULENT PREFERENCE.—To constitute, a payment made, a fraudulent preference, under the bankrupt law, it is necessary to be shown that the person to whom payment was made had reasonable cause to believe the debtor insolvent, and knew that a fraud upon the bankrupt law was intended.

SAME—SAME—SUFFICIENCY OF EVIDENCE.—Evidence in this case held sufficient to sustain the verdict that a payment made was a fraudulent preference under the bankrupt law.

Motion for new trial.

C. C. Cole, for motion.

Mr. Cummings, *contra*.

NELSON, D. J. 1. The first issue for the jury to determine —"Is Mrs. M. E. Mead a secret or dormant partner of the firm of A. Bernard & Co.?"—was fairly and properly submitted. I have reviewed the charge to the jury, and the testimony upon that issue, and find no error. While it is true that general reputation is not admissible, in aid of other testimony, to *prove* a partnership, yet, when the issue is of the character presented here, and the inquiry is whether a *member* of a partnership is a dormant partner, such general evidence is admissible.

The definition of a dormant partner sanctions such proof. He is one whose name and transactions are unknown to the world, at least to such extent that he cannot be regarded an ostensible partner. It is a question of fact for the jury to determine, although the style of the partnership indicated to the world that more than one might be members of the copartnership; and the same class of testimony which would justify a jury in deciding whether a plaintiff knew a defendant was a partner, is competent and admissible to determine whether a partner is dormant.

The evidence of general knowledge in the community was introduced for the purpose of showing the relation of Mrs. M. E. Mead to the partnership; that instead of being an active and ostensible partner she was a dormant and secret one.

The counsel for the defendants urge that, the style of the firm being A. Bernard & Co., Mrs. M. E. Mead could not in law be a dormant parter. This is the substance of the claim, although with this qualification: "In a partnership between two persons only, under the style of A. Bernard & Co., one of them cannot, in law, be a dormant partner." I agree with counsel that the legal presumption is that both members of a partnership, composed of two persons under such style, are to be deemed ostensible partners; yet the right to

prove that under such style one of the members is a dormant partner is not concluded where more than two persons may compose the firm, and when more than two had been adjudged bankrupts as members of the firm.

The authorities only go to the extent that because a partner's name does not appear in the firm style he is not, on that account, to be deemed a dormant partner, and, therefore, under the style "& Co.," all the actual partners are regarded in law, members sustaining the same relation to the copartnership as if their names were expressed, and are not dormant partners. But it is not necessary that a member of a partnership should be universally unknown to constitute him a dormant partner. If he is not an ostensible partner it is sufficient. See *Goddard* v. *Pratt*, 16 Pick. 429; 2 Harris & Gill, 172; 20 Vt. 110, and authorities cited; 30 N. Y. 374–80; 5 Gill, J. 383.

2. The next and last issue for the jury—"Was the payment to the defendants a fraudulent preference under the bankrupt law?"

It is urged that the verdict is against the evidence upon this issue. It was necessary for the plaintiff to prove, *inter alia*, that the defendants had reasonable cause to believe that the firm of A. Bernard & Co. was insolvent, and also that the defendants knew that a fraud on the bankrupt act was intended by the payment made to them. These are independent facts, and both must concur to sustain the verdict; and if the evidence does not show that the defendants had knowledge of an intended fraud upon the bankrupt law, as well as reasonable cause to believe the insolvency of A. Bernard & Co. at the time of payment, a new trial should be granted.

The defendant Pusey was consulted by A. Bernard with reference to the sale of his stock situated in the store at Council Bluffs, or in Nebraska. He knew the firm was embarrassed, and a portion of its indebtedness was overdue. It cannot be said there was not sufficient evidence to induce a reasonable belief that the firm was insolvent. The facts and

circumstances were sufficient to create not merely a suspicion, but belief of insolvency.

Did the defendants know a fraud upon the bankrupt law was intended? They certainly had reasonable cause to believe that by this payment other creditors would be deprived of an equal distribution in the assets of the firm. Pusey testified, "he was of the impression that some one would suffer;" that is, the circumstances and facts within his knowledge produced the effect upon his mind that by this payment to himself and Officer other creditors would suffer.

The amendment to the bankrupt act substituting "knowledge" in the place of "reasonable cause to believe," in this section, was undoubtedly intended to uphold payments which might be fraudulent before the amendment, and since the amendment such facts and circumstances must exist as would induce not merely belief, but knowledge, that a fraud on the act was intended. The principal circumstance to prove this was that Pusey knew there were other creditors who would be deprived of their right to an equal distribution of the proceeds of the bankrupt's estate. The evidence on this point is not doubtful. Pusey admitted it. 15 B. R. 168; 16 B. R. 93; 17 B. R. 163; 16 B. R. 275.

Motion for new trial denied.

IN THE MATTER OF VAN BUREN and another.

(*District Court, S. D. New York.* May 14, 1880.)

BANKRUPTCY—APPLICATION FOR DISCHARGE—OBJECTIONS TO—CREDITORS CONSENTING INSUFFICIENT IN VALUE—INTEREST ON CLAIM—PROOF OF DEBT—REJECTION OF—FAILURE TO KEEP PROPER BOOKS—JUDGMENT BY DEFAULT—EFFECT OF—SECONDARY EVIDENCE.

W. W. Badger and *C. M. Da Costa*, for opposing creditor.

N. Burt, for bankrupts.

CHOATE, D. J. Upon a hearing in this case on the certificate of the register of proceedings, under the petition by the

bankrupts for their discharge, one of the questions being whether one-third in amount of the creditors who have proved their debts had assented to the discharge, it appeared from the proofs of debt returned that interest on some of the claims had been improperly included to a date subsequent to the filing of the original petition, and in one proof on a judgment costs subsequently accrued had also been included. For these reasons it was referred to the clerk to compute the proper amount of the proofs, excluding such interest and costs. And now the case has been heard on his report and on the register's certificate. It appears by the report of the clerk that, excluding the claim of one Partridge, which is disputed, the creditors who assent are less than one-third in value of the creditors proving.

It is objected, on the part of the bankrupt, that on some of the claims proved no interest has been allowed, not even down to the date of the filing of the petition, and that the addition of such interest might affect the result. But in those cases there is no interest claimed in their proofs of debt by the creditors, and, of course, their debts cannot be taken for the purpose of this computation to be any greater than stated in the proofs filed. The object of the reference was to exclude interest obviously not a part of the debt provable, and not to ascertain the amount of the bankrupts' debts without regard to the proofs made. The one-third required by the act is one-third of the debts proved. It is also objected that in the claim of Verplanck, receiver, which is a claim on a judgment recovered since the commencement of these proceedings, upon a cause of action theretofore existing, interest on an account has been allowed from the date of the last item of the account, without any statement in the proofs of the date, or average date, when said account became due. The proof, as now stated by the clerk, includes only interest allowed in the judgment as due up to the commencement of the bankruptcy proceedings. That interest was claimed in the complaint, and has been found due. It seems not to be a case where, under General Order No. 34, the claimants' deposition should

state when the account became due. The proof was on the judgment. Nor is the claim properly to be considered one based on an open account.

The suit was brought to recover damages for a fraud, the amount of the damages being, indeed, measured by the unpaid balance of an account. Objection is also made to another proof of debt on a judgment recovered by one Christie, and proved by Verplanck, as assignee thereof, on the ground that the proof is not accompanied by the deposition of the assignor in its support. It appears by the transcript of the docket, annexed to and made part of the deposition of proof, that the judgment was recovered in October, 1876. These proceedings in bankruptcy were commenced August 31, 1878. This proof of debt was filed October 25, 1878. It avers that the bankrupts were indebted to the claimant, at the commencement of these proceedings, as assignee of said judgment. No objection has been taken to the form of the proof till this hearing. It is obviously now too late to urge the objection, if it were valid. And General Order No. 34 only requires such deposition of the assignor in case of an assignment after the filing of the petition in bankruptcy. The question of the bankrupt's discharge, therefore, so far as this point of the assent of their creditors is concerned, turns on the allowance or disallowance of the claim of Partridge. His proof of debt, sworn to on the nineteenth of April, 1879, was received by the register, but not filed or allowed because objections were made thereto by other creditors. And proceedings for the re-examination of the claim have gone on at the same time with the proceedings for the bankrupt's discharge, and the register has, with the consent of all parties, certified the testimony in relation to this claim to the court, and both matters have been submitted together; it being conceded that if the claim of Partridge is sustained the bankrupt is to have the benefit of his assent to the discharge, which has been filed, and which, with the other assents, will make up the requisite one-third in value, and one-fourth in number.

The proof of debt offered by Partridge states that the bankrupts, Lorenzo Van Buren and Squire Van Buren, are indebted to him in the sum of $15,000, being for a bond and mortgage given on property at Fishkill Landing, Dutchess county, New York. It states that "said bond and mortgage were executed and delivered to me on the eighteenth day of June, 1874;" "that the property upon which said mortgage was a lien has been sold under the foreclosure of a prior mortgage, and was sold for the exact amount of the first mortgage, interest and costs." It states that no security is held for the payment thereof. The deposition does not state the consideration of the bond, nor is any copy of bond or mortgage annexed to it. One of the objections taken to the claim is that the debt, if it did exist at all, is a secured debt, and that prior to the hearing before the register an order had been entered in the foreclosure suit, referred to in the proof, setting aside the sale and directing a resale.

Such an order was shown to have been entered May 15, 1879, after the date of the proof of debt. To meet this objection it was proved that in July, 1879, Partridge executed to the assignee in bankruptcy a release and surrender of the premises covered by the mortgage. It is insisted that the order of May 15th restored Partridge to the position of a secured creditor, and the subsequent release could not relate back and make his proof for an unsecured claim, sworn to in April, valid. This objection seems to me to be extremely technical. If the creditor believed, when he swore to his proof in April, that his mortgage had been extinguished, and for that reason omitted at the time to make a surrender of the security, the court would, I think, on his subsequent surrender of his security, after he found that it had not been extinguished, permit him to file an amended proof, if necessary, to avoid so technical an objection, and to enable him to participate in the proceedings as an unsecured creditor, especially if, as is claimed in this case, his security was nominal only.

There are, however, other objections to this claim much more serious. Upon the hearing a copy of the alleged mort-

gage of June 18, 1874, was produced; and it appears by that copy, as well as by the release above referred to, that, instead of being a mortgage to secure a bond of these bankrupts, it is a mortgage by the bankrupt Lorenzo Van Buren alone to secure his individual bond. It does not purport to be, therefore, a joint or partnership debt, but the individual debt of Lorenzo Van Buren. Moreover, no evidence whatever was offered to support the claim, except the deposition for proof of the debt itself, which is obviously untrue, and the recital of the giving of the bond contained in the mortgage. No proof of debt has been made or offered against Lorenzo Van Buren. Partridge, the claimant, was not called as a witness. He was represented in these proceedings by the bankrupt's attorney. Lorenzo Van Buren was not called as a witness. Squire Van Buren was examined. He professed to have no knowledge of this debt; and, from his testimony, I think a strong probability arises that Partridge has other mortgage security for the claim, if there be any valid claim, intended to be described in the proof of debt. On these grounds it must be held that Partridge's proof of debt against the bankrupts must be rejected.

The other objections to the discharge may be briefly noticed. Those objections now insisted on are the failure to keep proper books and the making of false entries in their books with intent to defraud a creditor. The charge is that, having made a contract with one Christie for the manufacture and sale of brick on joint account, under which they would become indebted to him for one-half the proceeds of sales from time to time, they falsified their books by understating the receipts, and rendered false accounts to him, and, when sued for an accounting under the contract, they, by means of their false books and by perjury in support of them, procured the judgment which was taken against them to be for a much less sum than the amount really due, leaving the difference still unpaid, for which fraud they were afterwards sued. And the judgments which constitute the claim of the objecting creditor, Verplanck, who was receiver of the estate of Christie, are

based on these transactions. The opposing creditor, however, has not offered evidence in this proceeding of the alleged false entries in the books. He has offered the judgment roll in said suit for fraud, which involves, as he claims, a conclusive determination of this fact of false entries. He has also offered secondary evidence of what was proved upon the trial in said action. To all this evidence the bankrupts have objected.

Christie first recovered a judgment after a trial on the merits, establishing the fraud, and on the trial evidence of the false entries in the books was given as part of the plaintiff's proofs, although the complaint did not allege the false entries in the books, but false accounts rendered and other fraudulent practices. This judgment was, however, set aside and a new trial was ordered, and when the cause came on for trial again the bankrupts suffered default, and judgment was taken against them on their default. The first judgment having been set aside concludes nobody. It is clear, also, as matter of law, that, even if the complaint had alleged the false entries in the books, the judgment recovered by default would not be evidence of the truth of the allegations in the complaint in another proceeding, on another cause of action, as this proceeding for a discharge must be considered. "A judgment by default only admits *for the purpose of the action* the legality of the demand or claim in suit; it does not make the allegations of the declaration or complaint evidence in an action upon a different claim." *Cromwell* v. *County of Sac*, 94 U. S. 356.

Still less is the judgment conclusive evidence collaterally of facts, of which evidence was offered in the course of the trial, in support of the allegations of the declaration or complaint. The secondary evidence of the entries in the books, as put in proof on the trial, was also clearly incompetent, and cannot be considered as any proof of the specification of false entries in the bankrupt's books, or of his keeping improper books. The papers make it highly probable that these specifications, or one of them, could be proved, but the opposing creditors have chosen to rely on modes of proof which are

wholly inadmissible. The same rules of evidence obtain upon this proceeding as upon any other trial.

For the reason that the record shows that there are no assets, and does not show an assent by the requisite proportion of creditors who have proved their debts, the discharge is refused.

WILLIAMS *v.* BARKER and another.

(Circuit Court, S. D. New York. May 28, 1880.)

PATENT—IMPROVEMENTS IN FORM OF A PATENTED MACHINE—MACHINE DIFFERENT IN FORM, BUT PRODUCING THE SAME RESULTS.

In Equity.

Chas. F. Blake, for complainant.

J. B. Fitch, for defendant.

WHEELER, D. J. This suit is brought upon letters patent re-issued to the plaintiff June 4, 1872, the original of which was dated November 26, 1861, for an improvement in machines for applying flock to felt rubber goods. The defence is that the patent cannot stand broad enough to cover the defendant's machine.

The defendants have put in evidence two English patents: one granted to William Green and Joseph Pickett, October 21, 1854, and sealed April 21, 1855, for improvements in treating or ornamenting textile materials or fabrics; the other granted to Stanislas Tranquillo Modeste Sorel, June 23, 1855, and sealed November 16, 1855, for a machine for applying adhesive matters on stuffs. The latter only need be noticed here. In a machine there described the fabric to be treated was passed from a cylinder on which it was wound over another cylinder, where the adhesive material was distributed upon it; thence over a stretcher above the line of the top of the distributing cylinder, and not far from it, designated in the patent and drawings by the letter J; thence under a flock

sifter, called, in the patent, a cullender, shaken by machinery; thence over beaters, striking it on the under side, to set the flock in the adhesive material; thence under a brush to sweep its upper surface, and onward in the machine to receiving cylinders. The stretcher supported the fabric between the distributing cylinder and the support beyond the beaters, and would steady it over the cylinder when struck by the beaters.

The plaintiff's machine takes the fabric from a cylinder, on which it is wound, over a gumming table, rising about 25 degrees, where the adhesive material is distributed; thence over a roller above the line of the table and near to it; thence under a flock sifter and over beaters, striking it on the under side to set the flock; thence under a brush to sweep the upper surface, and over another supporting roller, and onward to receiving rollers. The roller near the gumming table supports the fabric between the gumming table and the roller beyond the beaters, and steadies it when receiving the blows of the beaters. The distributing table, distributing devices, steadying roller, flock sifter, beaters, brush and carrying rollers of the plaintiff are each different in form from the distributing cylinders, distributing devices, stretcher, cullender, beaters, brush and support beyond, of Sorel, yet each performs the same part in the operation of the machine. While, but for the machine of Sorel, so far as this case shows, the plaintiff would be entitled to a patent covering all similar machines doing the same thing in substantially the same way, still, in view of that machine, he is entitled to hold only the improvement in form of the different parts. *Railway Co.* v. *Sayles*, 97 U. S. 554.

The defendants' machine has the same things except the brush, but nearly all different in form from the plaintiff's. Their guming table is level; instead of a steadying roller like the plaintiff's, it has a stretcher like Sorel's, but nearer to the beaters than either; a different flock sifter and different beaters.

The fourth claim of the plaintiff's patent is for the use of

what is here called the steadying roller, and there the cloth tension roller, in combination with the carrying roller, as arranged to steady the cloth; and the sixth is for the combination of the flock sifter with the beaters. These are the only claims in question. The bar of the defendants is not the equivalent of the improvement of the plaintiff's cloth tension roller upon Sorel's stretcher; and the use of it in the combination mentioned, which is not itself new, is not an infringement. The same is true of the flock sifter of the sixth claim. As the patent and these claims must be construed to be upheld, the defendants are not shown to infringe either claim. Let a decree be entered adjudging that the defendants do not infringe, and that the bill be dismissed, with costs.

WILSEY *v.* THE SHIP CELESTIAL EMPIRE and the TUG-BOAT SETH LOW.

(*District Court, E. D. New York.* May 26, 1880.

ADMIRALTY—NEGLIGENCE.—A ship coming up to a pier in the harbor of New York, in tow of a tug, was necessarily allowed to strike the side of a schooner, lying at the pier, in swinging into her berth. The touching was foreseen by those on the schooner, as well as on the ship, and fenders were put out. The schooner's rail was broken in and her side badly damaged, and the owner libelled both the ship and her tug. *Held*, that the tug was not liable, but the ship was liable for negligence, in placing her fender improperly, for the damage to the broken rail.

Benedict, Taft & Benedict, for libellant.

S. M. Parsons and *Beebe, Wilcox & Hobbs*, for defendants.

BENEDICT, D. J. There was no fault on the part of the tug Seth Low, and the libel must be dismissed as against that vessel, and with costs.

It was negligence on the part of the ship, when coming along-side the schooner, to permit a heavy fender to hang so that it caught upon the rail and not upon the hull of the

schooner. I do not find that it was negligence on the part of the ship to come along-side the schooner with the force she did, and I am satisfied that coming as she did would have done no damage to a sound vessel, if the ship's fender had been arranged so as to take the schooner's side properly. But here lies the fault on the part of the ship. One of her heavy fenders was so hung that the whole weight of the ship was brought upon the rail of the schooner, instead of upon the schooner's side, and damage necessarily resulted. For the damage caused to the schooner by the pressure of the fender at the place where the rail was broken, I hold the ship to be liable.

Let a reference be had to ascertain the amount of that damage.

TOLMAN *v.* LEATHERS.

(*Circuit Court, D. Iowa.* May, 1880.)

HOMESTEAD — MARRIED WOMAN — CONTRACT FOR MORTGAGE BEFORE MARRIAGE.—A contract for the loan of money upon mortgage security will not defeat the wife's right of homestead, under the statute of Iowa, upon the subsequent marriage of the mortgagor before the execution of the mortgage.

In Equity.

Brown & Campbell, for plaintiff.

Harvey & Lehman, for defendant.

MILLER, A. J. Leathers, an unmarried man, residing on and owning a quarter section of land (160 acres) in Iowa, made application to Tolman, a citizen of Massachusetts, to borrow of him the sum of $1,500, on the security of a mortgage on said land. The application was made on the tenth day of September, A. D. 1875, and accepted by Tolman, in writing, on the 18th of the same month. Tolman prepared a mortgage and note to be executed by Leathers, and a draft for the money *to be delivered* to said Leathers, as the bill alleges, *upon the due execution of the note and mortgage.*

The bill further alleges that on the thirteenth day of October Leathers duly executed and delivered said notes and mortgage, and acknowledged the latter, and received the draft for the money.

Default being made on the conditions of the mortgage, Tolman foreclosed it by suit in court against Leathers alone, and bought in the land under the decree. After this he learned that Leathers had married pending the negotiations for the loan—that is, after his acceptance of Leathers' proposition, and before the notes, mortgage and draft were delivered, and before the mortgage was executed and acknowledged. Tolman had no knowledge of the marriage when he parted with the money, and the wife had no notice of the agreement for the loan and mortgage at the time of the marriage. She asserts a right of homestead in the 40 acres on which the dwelling-house stands, and the present bill is brought for the pur-

pose of foreclosing that right, or compelling her to redeem by payment of the mortgage. The case is presented to the court on demurrer to the bill, which sets out the facts in full.

The statute of Iowa, as construed by the courts of the state, are very positive in asserting the doctrine that all conveyances affecting the homestead, made during coverture, are of no validity against the wife unless she joins in them. And as Leathers was residing on the land at the time of the marriage, there can be no doubt that the wife's right of homestead attached to it at that instant, subject, only, to any paramount right then existing. Her right was a vested right the moment the marriage was consummated, and the marriage is undoubtedly a good consideration, sufficient to support it.

Counsel for plaintiff argues, however, with much force that the transaction between plaintiff and Leathers was so far a completed transaction before the marriage took place that it created an equitable mortgage in favor of the former, which is paramount to the right acquired by the wife.

It is quite clear that unless the transaction concerning the loan had reached a stage in which plaintiff had acquired a vested right in the land before the marriage took place, the right of the wife must prevail. It is probably true, also, that if such right in plaintiff had vested, his liens should prevail. What would constitute a vested right in the nature of an equitable mortgage may not be so easy to define; but I think I cannot be mistaken in saying that unless plaintiff had acquired such a right against Leathers, at or before the date of the marriage, that he could, as the transaction then stood, enforce specifically his right to have the legal mortgage executed by Leathers, or a decree for a specific lien according to the terms of their agreement, he did not have such a vested right as will defeat the homestead claim of the wife.

Let us inquire how this was. At the date of the marriage Leathers had agreed to borrow the money and give the mortgage and notes, and Tolman had agreed to loan the money when this was done. No notes and mortgages had been passed, and were not signed. The draft for the money had

been drawn but not delivered. Suppose, as things then stood, instead of the marriage, either Leathers or Tolman had refused to proceed further. If Tolman had written to his agent to return the draft, and refused to loan the money, could Leathers have had a specific performance of the contract by tendering the notes and mortgage? Specific performance here would be a decree that Tolman loan the money and accept the security. I imagine no such case of specific performance can be found.

The reason is obvious. It is a case for damages at law. Mr. Leathers could borrow the money of some one else, and recover for the trouble and expense, and difference in rate of interest, which would be full compensation for Tolman's violation of the contract to lend. It is still clearer that, if Leathers had declined to go further, Tolman could not in a court of equity compel Leathers to accept the money and execute the mortgages. If the case had gone so far that Leathers had received the money, it might be otherwise; but with his own money in his pocket I do not see how the court could compel Leathers to take it, and then compel him to make the mortgage.

The reason is the same as in the other case. Mr. Tolman could use his money otherwise, and recover from Leathers the injury suffered in losing one contract and taking the other.

It seems to me that in neither is the contract, as it then stood, one on which a court would decree a specific performance, and if so, there could be no vested right at the time in the land in Mr. Tolman. The homestead right, under the Iowa statutes, only extends to 40 acres out of the 160; that is, the quarter section of that quarter section on which the dwelling stands.

The bill makes an attempt to set up rights in plaintiff under a mortgage for $800, to another person, which was paid off by the money loaned by Tolman to Leathers. The facts on which the claim of Tolman to be subrogated to the rights of that mortgage depends are very imperfectly stated, and as I am of opinion that a case may exist in which, after applying the value of the 120 acres, not part of the homestead,

to be ascertained by a new sale or otherwise, to the extinction of the mortgage which was paramount to the wife's right of homestead, the homestead might be subjected to the remainder, if any, of that $800 and interest, the demurrer to the present bill is sustained with leave to amend in regard to this right of subrogation.

McCrary, C. J., concurs.

THE FARMERS' LOAN & TRUST COMPANY *vs.* CENTRAL RAILROAD OF IOWA and others.

(*Circuit Court, D. Iowa.* May, 1880.)

JURISDICTION—MASTER IN CHANCERY.—Consent will not authorize a master in chancery to act as a referee at law.

The original suit was a bill in equity to foreclose a mortgage upon the Central Railroad of Iowa. In the course of the proceedings a receiver was appointed to operate the road, and while the road was in his hands one A. McKay was injured, as is claimed, by the negligence of the receiver's agents, engaged in running a train of freight cars. Subsequently, there was a decree for the sale of the road, saving, however, the rights of all persons who had claims against the receiver or the railroad company accruing while the receiver was in charge. The receiver has been discharged, but, in virtue of certain orders and decrees heretofore made in the case, the court is authorized to enforce as against the road and the present owner all such claims.

In January, 1879, McKay petitioned the court for leave to sue the receiver, and the matter was referred to the master to inquire into the facts and report upon the question whether leave to sue should be granted.

After this reference the parties stipulated that said master should hear and determine the whole case, and find the facts, the right to sue being admitted, and that his report should stand as the verdict of the jury. In pursuance of

said stipulation the master took testimony, and, after hearing argument, reported in favor of the right of said McKay to recover the sum of $2,217. Upon this report McKay, by his counsel, moves for judgment.

Mr. Lacy, for petitioner.

Mr. Boardman, for defendant.

McCRARY, C. J. There being no longer any fund in court to be administered, and the receiver having been discharged, the court hold that all actions prosecuted by permission of the court against the railroad company, for damages resulting from personal injuries, must be regarded as common-law actions, in which either party is entitled to trial by jury, unless the same be waived. The chancery powers of the court can be invoked only after judgment, and for the purpose of enforcing the judgment, as provided by the orders and decrees heretofore made. No reference of such a case can be made without consent to a master, except for the purpose of reporting the facts, in order that the court may determine whether permission to sue shall be given; but by consent of parties leave to sue may be given, and a jury may be waived, and the case sent to a referee to find and report upon the issues both of law and of fact.

The report of the master in the case of *McKay* must be considered as relating to the question of the right to sue, as it was not competent for the parties, by stipulation, to confer upon the master jurisdiction to hear and determine the merits. The order referring the case to the master was an order out of chancery. Its sole purpose was to advise the court of the facts necessary to be understood before determining the application of petitioner for leave to sue the receiver. It was not competent for the parties, by agreement, to constitute the master a referee at law, or to confer upon him the powers of such a referee. There has been, up to this moment, no action at law in this court between the petitioner and the receiver, or the petitioner and the railroad company. The court itself could not, without violating its well-settled rules, intermingle its equity and common-law jurisdiction by trying a common-law action on the chancery side of the court.

Much less can the parties themselves do this without the order of the court.

We sent out an order in chancery to a master of this court, and it is now claimed that, in response to this order, a report may be brought in by a referee at law in relation to a common-law action, upon which we may render judgment at law. Not so. The proceedings of the master, in so far as he acted as referee, were unauthorized; as much so as if they had been had before any other person. His report will be considered only so far as it presents matter for the consideration of a chancellor, and is responsive to the order of appointment. Being so considered, it shows clearly that petitioner should be permitted to prosecute his claim by suit at law against the railroad company, and such permission is granted. The parties being before the court, the issues may be joined without delay, and the cause will be submitted to a jury at the present term, unless a jury be waived.

LOVE, D. J., concurs

WALLACE *v.* GERMAN-AMERICAN INSURANCE COMPANY.

(*Circuit Court, D. Iowa.* May, 1880.)

INSURANCE, FIRE—CONDITIONS IN POLICY CONSTRUED—PLEADING.

Demurrer to amended replication.

MCCRARY, C. J., (*orally.*) This is an action upon a policy of insurance issued by the defendant, to insure the plaintiff against loss by fire upon a certain building, therein described.

The policy contains numerous conditions, among which is one (numbered 9) from which I quote, as follows: "In case differences shall arise touching any loss or damage, after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award in writing shall be binding on the parties as to amount of such loss or damage, but shall not decide the liability of the company under this policy."

The eleventh condition provides as follows: "It is furthermore hereby provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided."

The amended replication avers that defendant, prior to the commencement of this action, refused to submit to an impartial arbitration any differences touching the loss or damage sustained by plaintiff for which this action is brought. To this amended replication defendant demurs, for the reasons—*First*, that it is not shown that any demand in writing was ever made by plaintiff for the arbitration required by the conditions of the policy of insurance; *secondly*, because the defendant was not required by the terms of said policy to make its election to submit matters of difference to arbitration until after a demand therefor had been made in writing by plaintiff.

It will be seen that the policy of insurance sued on provides for an arbitration to determine the amount of loss in case differences arise touching the same after proof thereof, and "upon the written request of the other party." In a subsequent condition it is further provided that no suit shall be sustainable until after an award shall have been obtained in the manner above provided. The two provisions of the policy must be construed together, and thus construed we hold them to mean that the defence that plaintiff has failed or refused to arbitrate cannot be made in a case where neither party has made a written request for such arbitration. Neither party is bound to request an arbitration. The most that can be claimed is that either party is bound to arbitrate upon the written request of the other; but whether a refusal to arbitrate would, in any case, defeat the right of action, is a question not now decided. Certain it is that, where neither party has made a written request for arbitration, the clauses of the policy referring to that subject cannot be pleaded or relied upon as a defence.

The eleventh condition of the policy, which provides that

no action to recover loss shall be sustainable "until after an award shall have been obtained fixing the amount of such claim in the manner above provided," must be held to apply only to a case where the written request for arbitration has been made, as provided for in the preceding ninth condition.

The pleadings in this case would indicate that counsel on both sides are proceeding upon the theory that the defence of a failure to arbitrate may be set up without a showing that there was a written request made in pursuance of the policy for such arbitration. In this they are clearly in error. The question of arbitration cannot figure at all in the case until a written request is alleged. Nor does it make any difference that one or the other party may have refused to arbitrate upon a verbal request to do so, or may have refused to make the request in writing.

The demurrer to the amended replication is sustained.

DARLAND *v.* GREENWOOD.

(*Circuit Court, D. Iowa.* May 1880.)

PLEADING—CONTRACT CONTAINING MUTUAL CONDITIONS.—In an action for the breach of a contract containing mutual conditions, performance or readiness to perform must be averred by the plaintiff.

Demurrer to petition.

J. E. Owens, for plaintiff.

Starr, Harrison & Danforth, for defendant.

MCCRARY, C. J., (*orally.*) This is a suit brought to recover damages for the breach of a contract. The plaintiff avers in his petition a contract between himself and defendant as follows: Plaintiff held against defendant five promissory notes for $500 each, and was also the owner of 80 acres of land in the state of Illinois. Defendant owned a house and two lots in the town of Marble Rock, Iowa, in which house he owned and kept a stock of merchandise.

It was agreed between plaintiff and defendant that defend-

ant should sell and convey to plaintiff said house and lots, and the merchandise aforesaid, and that the plaintiff should pay for the same as follows: *First*, to deliver up and cancel said five promissory notes; *second*, to deed to defendant said 80 acres of land, and free the same from encumbrance; *third*, to pay him $850 in cash; *fourth*, to assume the liabilities against said store, amounting to some $800 or $900.

After averring these facts, the petition alleges that "defendant has failed and refused to carry out his bargain with the plaintiff, and complete said bargain so entered into on said July 11, 1879, although requested to do so.

To this petition the defendant demurs, on the ground that the same does not show that the plaintiff has performed, or offered to perform, the said contract on his part. The covenants in the contract, as set out in the petition, are mutual covenants, and go to the whole consideration on both sides. They are mutual conditions, and neither party can recover against the other for their breach, except upon averring performance, or readiness to perform, on his own part. The defendant agreed to convey to plaintiff a house and lot, and the merchandise mentioned in the petition, and the plaintiff agreed in consideration thereof, and at the time of such conveyance, to make the payments named.

In such a case I am clear that the plaintiff cannot maintain an action without showing performance on his part or an offer to perform. 2 Parsons on Contracts, 532, note *r*.

The demurrer to petition is sustained.

CUMMINS, Assignee, etc., *v.* LODS and others.

(*Circuit Court, D. Iowa.* May, 1880.)

CONTRACT — FRAUD — RATIFICATION. — Inexcusable delay will operate as a ratification of a fraudulent contract.

A. B. Cummins, for complainant.
Brown & Dudley, for respondents.

McCRARY, C. J., *(orally.)* This is a bill in equity filed by complainant, as assignee of the firm of Thornburg & Van Leuven, bankrupts, to set aside the conveyance of a certain tract of land, and cancel a contract, on the ground of fraud. The parties who are represented by the plaintiff, as assignee, bought from the respondents an 80-acre tract of land without seeing it, and upon the faith of certain representations made by respondents. It is alleged that these representations were false and fraudulent, and the prayer is for a decree to set aside the contract and restore the parties to their original rights.

Upon the question of fact involved in the case, as to whether the representations made by respondents concerning the quality and character of the land were intentionally false and fraudulent, there is a serious conflict in the testimony, and upon some of the most material points it would seem to be almost evenly balanced.

It is, however, in my judgment, not necessary to decide that question, since the case may well be disposed of upon a question of law which arises upon the record. The claim of the plaintiff here is that the contract should be rescinded, and set aside, on account of fraud. By the terms of the contract the said bankrupts were to transfer to respondents a certain stock of hardware, and respondents were to convey to the bankrupts an 80-acre tract of land in Tama county, Iowa. The contract was executed. The transfer of the stock of hardware was made. A deed to the real estate was executed, acknowledged and delivered.

It is a well-settled rule of law that where the right to rescind a contract springs from discovered fraud, the party defrauded must rescind as soon as circumstances permit; or, in other words, at once, on discovery of the fraud. He is not bound to rescind, and any delay, especially if it be injurious to the other party, amounts to a waiver of his right. "The mere lapse of time," says Mr. Parsons, "if it be considerable, goes far to establish a waiver of this right, and if it be connected with an obvious ability on the part of the defrauded person to discover the fraud at a much earlier

period, by the exercise of ordinary care and intelligence, it would be almost conclusive." 2 Parsons on Contracts, 781, 782, and cases cited.

The contract alleged in this case to have been fraudulent was executed on the thirteenth day of August, 1878. It is admitted in testimony that the parties purchasing, (the firm of Thornburg & Van Leuven,) now represented by the assignee, were fully advised of the condition of the land in about eight or ten days after the date of the contract, which would be as early as the twenty-first or twenty-third of August, 1878. They complained to one of the respondents, and said to him that the land was not as represented, and that it must be made right. This, however, did not amount to a rescission of the contract. It is not necessary to determine precisely what is required to constitute a rescission, but the least that can be said is that it was the duty of the bankrupts in this case, upon the discovery of the fraud, to notify the grantor that they had elected to rescind, demand a return of the stock of hardware which had been delivered to the grantor, and tender a reconveyance to him of the 80 acres of land.

Whether it was necessary to institute legal proceedings, upon the refusal of respondents to recognize such rescission, it is not neccessary to decide. It is enough to say that the evidence here does not show any rescission. In less than a week after the said Thornburg & Van Leuven were advised of the alleged fraud they went into bankruptcy, and on the fifth day of October, 1878, the present complainant was elected their assignee. He must be presumed to have inquired into their affairs and to have ascertained the facts immediately upon his appointment, or within a reasonable time thereafter, especially as no allegation is found in his petition that he did not discover the fraud until a later period. He did not, however, institute this proceeding until the third day of April, 1879, about six months from the time of his appointment.

I am clearly of the opinion that the evidence shows such delay as amounted to a ratification of the contract. On that ground, without deciding the question of fact, I find for the defendant, and there is decree accordingly.

THE UNITED STATES *v.* PATTY and others.

(*District Court, E. D. Wisconsin.* ——, 1880.)

INDICTMENT — DUPLICITY — CIRCULARS CONCERNING LOTTERIES — REV. ST. § 3894.—An indictment is not bad for duplicity which charges that on a certain day a certain number of circulars concerning a certain lottery were deposited at the post-office to be sent by mail.

SAME—SAME—SAME—SAME.—An indictment is bad for duplicity which charges that on a certain day, and on each secular day between that day and another day named, and on each secular day between that time and another subsequent time mentioned there were deposited in the post-office a certain number of circulars concerning a certain lottery for the purpose of being sent by mail.

SAME—SAME—SURPLUSAGE.—Where two distinct offences are each set out in adequate terms, an indictment is bad for duplicity, and neither allegation can be rejected as surplusage.

G. W. Hazelton, for United States.

L. S. Dixon, for defendants.

DYER, D. J., (*orally.*) This is an indictment under section 3894, Revised Statutes, which provides that "no letter or circular concerning illegal lotteries, so-called gift concerts, or other similar enterprises offering prizes, or concerning schemes devised and intended to deceive and defraud the public, for the purpose of obtaining money under false pretences, shall be carried in the mail. Any person who shall knowingly deposit or send anything to be conveyed by mail, in violation of this section, shall be punishable" as the statute prescribes.

The indictment contains three counts. The first count sets out at length the organization of a lottery scheme, by which the defendants undertook to dispose of a hotel at Fond du Lac, known as the Patty House, and charges that on the first day of November, 1879, and on each and every secular day in said month of November, and on each and every secular day between the thirtieth day of said month of November and the tenth day of February, in the year 1880, the defendants did knowingly, wrongfully and unlawfully deposit in the post-office of the United States, at the city of Fond du Lac, and did send to the said post-office, to be conveyed by mail,

within the meaning of section 3894 of the Revised Statutes, a large number, to-wit, 500, printed circulars concerning said lottery, on each of said days, duly addressed and postpaid, directed to divers persons within and beyond the limits of this district; which circulars each and all were sent and conveyed by and through the mail.

The second count charges that on the twentieth day of January, 1880, the defendants deposited in the post-office at Fond du Lac 100 printed circulars concerning said lottery, addressed to persons unknown to the grand jurors, and that they were deposited to be sent and were sent by mail. The third count is similar to the second, except that it charges the deposit in the post-office at Fond du Lac, on the first day of December, 1879, for the purpose of conveyance through the mail, of 500 circulars concerning said lottery. A motion is made to quash this indictment for duplicity, it being claimed that the first count charges 45,000 distinct, independent offences; the second count 100; and the third count, 500. Upon the argument stress was laid by counsel for the defendants upon the language of this section, which is that "no *letter* or *circular* concerning illegal lotteries * * * shall be carried in the mail. * * * Any person who shall knowingly deposit or send *anything* to be conveyed by mail in violation of this section shall be punishable," etc. And it was insisted that the deposit in the post-office of a single circular to be carried in the mail constituted an offence. This position was controverted by the attorney for the United States, who urged that, under a proper construction of this statute, an indictment could hardly be maintained that charged the deposit or sending by mail of a single letter or circular relating to a lottery, and that in that view it was deemed necessary to set out in the indictment the scheme in which the defendants were engaged, and by means of which they were seeking to dispose of certain property, and that each count of the indictment ought to be regarded as stating a single act, and therefore a single offence.

It is true that the second and third counts do not specifically allege that on the tenth day of January, 1880, 100 of

these circulars were, *at one time and as one act*, deposited in the post-office; nor does the third count in express terms allege the deposit, at one time and as one act, of 500 of these circulars; but I think the allegations of each of these counts may be fairly construed to charge the commission of a single offence. To hold otherwise would involve a construction too restricted and technical; and I think there can be no doubt, although it might be, under this statute, an offence to deposit a single letter or circular concerning a lottery in the post-office to be carried by mail, that if a number of deposits are charged as made at or about the same time, so that they consist of a single act, or of successive stages in a single transaction, then we may properly say that one offence has been committed, and that an indictment so charging is not obnoxious to the objection of duplicity. And as these counts charge that on a certain day the defendants deposited in the post-office a certain number of circulars concerning this lottery, to be sent by mail, we may fairly say that there was intended to be and is charged the commission of but one offence in each count.

An interesting question, as may be readily seen, might arise upon the trial, provided, for example, the proof should show that at different times during the day named these circulars, in different quantities, were deposited in the post-office, and it might be that the prosecutor would be required to elect upon which of the transactions he proposed to ask conviction; but without anticipating any such questions I think these counts ought now to be considered as charging single offences.

As to the view that should be taken of the first count I had little doubt at the argument. It is to be observed of this count that it does not charge that on a certain day, and on divers days between that day and the presentment of the bill, a quantity of letters and circulars concerning a lottery were deposited in the post-office to be conveyed by mail, but it charges that on a certain day specifically named, and on each secular day between that day and another day named, and on each secular day between that time and another sub-

sequent time mentioned, thus particularizing each of the days on which the deposits were made, 500 circulars concerning this lottery were so deposited; and it seems quite impossible to say that here is an allegation of but one offence, but that this count must be regarded as charging distinct and independent offences, committed on different and distinct days, for each of which offences the defendants might be prosecuted.

In reply, however, the attorney for the United States has urged that this count does properly charge the commission of at least one offence; that the other allegations may be treated as surplusage; and that if the count be open to the charge of duplicity the objection may be obviated by holding that the count aptly charges one offence, and that the other allegations may be disregarded. The difficulty with the position thus urged is that, if the objection to this count can be thus obviated, I do not see why in every case where an indictment is bad for duplicity the defect may not be avoided by the selection of one of the offences charged, and then holding the other allegations charging distinct offences to be merely superfluous. I do not think the difficulty can be thus avoided. The true distinction between matter which makes an indictment bad for duplicity, and that which may be treated as mere surplusage, is stated by Mr. Bishop in his first volume on Criminal Procedure, section 440: "If an indictment describes one offence, and then adds such words only as *are in part* sufficient to describe another, it is not therefore double; to be so, it must set out each of the two offences in adequate terms. The principle is that the allegation which is mere surplusage, and therefore void, does no harm. The like case has already been mentioned where an offence *not in its nature continuing* is charged to have been committed on more days than one; if *only one of the days is adequately alleged* the rest is surplusage and the indictment good."

Again, at section 388 of same volume, the author says: "It is to be observed that we are not now speaking of continuing offences, properly laid under a *continuando*. * * * * Though the offence is in its nature committed on a single day,

and not continuing, if the indictment charges that the defendant did the criminal act on a day which it mentions, and, in general terms, on divers other days, without specifying the others, the latter clause, being in itself *an insufficient allegation of* time, may be rejected as surplusage. Thus, where the averment was that the defendants, to use the words of the report, on 'such a day, *et diversis aliis diebus et vicibus tam antea quam postea*, keep a common gaming house,' this was held to be a good allegation of keeping the house on the one day mentioned. True, in this particular case, more days might have been laid, but the time is so uncertain as to all but one day that only forty shillings are recoverable. Where an indictment sets out that the defendant sold liquors, without license, on a day which it mentioned, and at divers times between this day and the finding of the bill, it is sufficient, because *the inadequate allegations of other days may be rejected as surplusage*. But, where a count in an indictment alleged that the defendant committed the crime on the twentieth day of September, in a year specified, and on divers other days and times between that day and the ninth day of December, in a subsequent year specified, it was held to be insufficient. Here there were at least two distinct days adequately set out, and, whatever might be said of the rest, certainly the allegations of neither of these could be rejected as surplusage."

Here we have a test upon this question. And, certainly, it cannot be said that the offence which is charged in the indictment under consideration is in its nature continuing. The offence is one which may be committed to-day and as distinctly committed to-morrow, and the act of to-morrow may have no connection with that of to-day; and as this count does not merely describe one offence, and by inadequate allegation state in part another, so that the latter allegation may be treated as surplusage, but does charge in adequate terms distinct offences committed on distinct days, I must, within the principles stated, hold this count bad for duplicity.

The motion to quash as to the second and third counts will be overruled, and as to the first will be sustained.

THE UNITED STATES v. LEONARD.

Circuit Court, S. D. New York. May 25, 1880.)

INDICTMENT—MURDER—MANSLAUGHTER.—REV. ST. §§ 5339, 5341, 1035.

William P. Fiero, Asst. Dist. Atty., for the United States.

John A. Goodlett, for defendant.

BLATCHFORD, C. J. Section 5339 of the Revised Statutes of the United States provides that "every person who commits murder * * * upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin or bay, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, or who, upon any such waters, maliciously strikes, stabs, wounds, poisons, or shoots at, any other person, of which striking, stabbing, wounding poisoning or shooting such other person dies, either on land or at sea, within or without the United States, shall suffer death."

Section 5341 provides that "every person who, within any of the places or upon any of the waters described in section 5339, unlawfully and wilfully, but without malice, strikes, stabs, wounds, or shoots at or otherwise injures another, of which striking, stabbing, wounding, shooting, or other injury such other person dies, either on land or at sea, within or without the United States, is guilty of the crime of manslaughter."

Section 1035 provides that "in all criminal causes the defendant may be found guilty of any offence, the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offence so charged; provided, that such attempt be itself a separate offence."

The indictment in this case alleges that the defendant, "upon the high seas, within the admiralty and maritime jurisdiction of the said United States, and out of the jurisdiction of any particular state, and within the jurisdiction of this court—that is to say, in and on board of a certain American

vessel, being a bark named Archer, belonging in whole or in part to a citizen or citizens of the United States, whose name or names are to the jurors aforesaid unknown, the said bark then and there being afloat upon the high seas aforesaid, and within the jurisdiction of this court—with force and arms in and upon one Anton Klourtouski, in the peace of God and of the said United States, then and there being, piratically, feloniously, wilfully, maliciously, and of his malice aforethought, did make an assault and stab, the said Daniel Leonard, with a certain sheath knife, having a blade five and one-half inches long, and one and one-eighth inches in width, which said sheath knife he, the said Daniel Leonard, in his right hand then and there had and held, him, the said Anton Klourtouski, in and upon the right side of the abdomen of him, the said Anton Klourtouski, a little above the groin of him, the said Anton Klourtouski, piratically, feloniously, wilfully, maliciously, and of his malice aforethought, did strike, stab and and wound, then and there giving him, the said Anton Klourtouski, with the sheath knife aforesaid, in and upon the right side of the abdomen of him, the said Anton Klourtouski, a little above the groin of him, the said Anton Klourtouski, one grievous and mortal wound, he, the said Anton Klourtouski, from * * * until * * * did languish, and, languishing, did live, and on the said * * * in and on board the said bark Archer, at sea and upon the high seas aforesaid, without the said United States, of the said grievous and mortal wound died; and so the jurors aforesaid, upon their oath aforesaid, do say that the said Daniel Leonard, him, the said Anton Klourtouski, in manner, and form and by the means aforesaid, piratically, feloniously, wilfully, maliciously, and of his malice aforethought, did kill, slay and murder, against the peace of the United States, and their dignity, and against the form of the statute of the said United States in such case made and provided."

On being tried on this indictment the verdict of the jury was that the defendant was guilty of manslaughter.

The defendant now moves in arrest of judgment, on the ground—(1) That the defendant was not indicted for man-

slaughter, and was really found not guilty of murder; and (2) that a verdict of manslaughter was not warranted by section 1035 of the Revised Statutes, because the commission of that offence was not necessarily included in the offence charged in the indictment. We think these positions untenable. The allegations in the indictment, leaving out the allegations as to malice, constituted the offence of manslaughter. The unlawfulness and wilfulness of the acts alleged are charged, and also that they were done with malice. The acts charged, when proved to have been done wilfully and with malice, constituted murder within section 5339. The same acts, when proved to have been done unlawfully and wilfully, but without malice, constituted manslaughter, within section 5341. The commission of such offence of manslaughter was necessarily included in the offence charged in the indictment, because the absence of malice, the other ingredients charged being proved, made the case one of manslaughter, when, with the malice added, it would have been murder.

The motion is denied.

BENEDICT, D. J., and CHOATE, D. J., concur.

ALLEMAN, Assignee, etc., *v.* KNEEDLER.*

(*Circuit Court, E. D. Pennsylvania.* April 28, 1880.)

BANKRUPTCY—FRAUDULENT CONVEYANCE—GRANTEE TAKING TITLE FOR ACCOMMODATION OF THIRD PERSON—ABSENCE OF FRAUDULENT INTENT.—Where the grantee in a conveyance made by an insolvent debtor in fraud of the bankrupt act takes the title merely at the request of and in trust for a third person, and derives no profit from the transaction, he is not liable to the assignee in bankruptcy for the value of the land unless he not only knew of the insolvency, but also shared the bankrupt's intent to defeat the bankrupt act.

Bill in equity by the assignee in bankruptcy of John Ramsey against Walter S. Kneedler to recover the value of property alleged to have been fraudulently conveyed by the

*Prepared by Frank P. Prichard, Esq., of the Philadelphia Bar.

bankrupt to respondent, and subsequently sold by the latter. An answer was filed denying the fraud, and the case was referred to an examiner to take testimony.

The testimony on behalf of complainants was to the effect that in August, 1875, Ramsey became insolvent; that his personal property was sold at that time at sheriff's sale, under an execution against him, and that the respondent attended the sale; that on September 1, 1875, Ramsey conveyed to respondent for the nominal consideration of $1,500 a lot of ground and building worth $4,000 above a ground rent which was upon it; that on October 6, 1875, a petition in bankruptcy was filed against Ramsey, under which he was adjudicated a bankrupt; that afterwards, upon a demand being made by the assignee for a reconveyance of the real estate, respondent had said that Ramsey had come to him and wanted him to take a deed for the property, because if he did not take it his (Ramsey's) creditors would get it, and that he (Ramsey) preferred that respondent should have it; that respondent had also admitted that he paid no consideration for the property.

The testimony on behalf of respondent was to the effect that about September, 1875, Ramsey requested Solomon A. Kneedler, the father of respondent, to purchase the property, and that the latter agreed to purchase it for $1,500; that Solomon A. Kneedler then applied to respondent to allow title to be taken in the latter's name, and respondent consenting, a deed was executed to him, but that he paid no consideration and took the title merely in trust for his father; that Solomon A. Kneedler then employed a conveyancer to make searches, when it was discovered that there were arrearages of ground rent, taxes, etc., against the property amounting to more than $1,500.; that Ramsey then agreed that Solomon A. Kneedler should have the property for the arrearages; that subsequently and more than a year before the filing of this bill, respondent, at Solomon A. Kneedler's request, and to enable the latter to rebuild, conveyed the property, without consideration, to one Newcomer, in five lots, and received from Newcomer five mortgages, one on each

lot; that he subsequently, at his father's request and for his father's benefit, assigned or satisfied all of these mortgages except one, which was given to him by his father in exchange for building material. Respondent denied any knowledge of Ramsey's insolvency, or that he had said that Ramsey desired him to take the property because otherwise the creditors would get it. He alleged that he had received no profit from the transaction, but had merely allowed his name to be used for his father's accommodation.

Isaac S. Sharp, for complainant.

Francis E. Brewster, for respondent.

McKENNAN, C. J. The complainant is the assignee in bankruptcy of John Ramsey, and now seeks to recover from the respondent the value of certain real estate conveyed to him by the bankrupt in alleged fraud of the bankrupt law.

The respondent was not a creditor of the bankrupt, but took a conveyance from him of the real estate described in the bill as a mere intermediary, at the instance of Solomon A. Kneedler, his father, who purchased it from Ramsey, and by whose direction the respondent conveyed it to one Newcomer more than a year before the filing of this bill. It is apparent that he derived no direct benefit from the transaction, if there was any profit to any of the parties to it, and that he can be held liable only upon clear proof of his complicity with the bankrupt in the fraud charged in the bill. The elements of this fraud are—*First*, the insolvency of the bankrupt at the date of the conveyance; *second*, reasonable cause to know this fact by the respondent; and, *third*, an intent by the bankrupt and the respondent to defeat the operation of the bankrupt law, by preventing the property conveyed from being appropriated to the benefit of the bankrupt's creditors, or to hinder, delay and defeat them.

Of the insolvency of the bankrupt at the date of the conveyance there is no doubt. Whether the respondent actually knew it may fairly be doubted, but that he had knowledge of facts from which the bankrupt's condition ought to have been inferred, may be assumed as proved. That he shared the bankrupt's intent to defeat the operation of the bankrupt law,

is more than a questionable resultant from all the proofs in the case. We have examined them carefully since the argument, and our estimate of their import is that they fall short of establishing an illegal intent on the part of the respondent in taking a conveyance from the bankrupt.

We do not deem an analysis of the proofs necessary. It is enough to say that they are insufficient to make out a fact essential to the complainant's right to a decree, and his bill must be dismissed, with costs.

SMITH and others *v.* MORGANSTERN and another.

(*Circuit Court, W. D. Pennsylvania.* June 7, 1880.)

BANKRUPTCY—COMPOSITION—BANKRUPT ACT, § 29.—The amended sections of the bankrupt act, relating to composition, are within the purview of section 29 of the bankrupt act.

Bill of review in bankruptcy.

Malcom Hay, for complainants.

Sol. Schoyer, Jr., for bankrupts.

MCKENNAN, C. J. This bill brings up for review an order of the district court dismissing objections filed by the complainants to the discharge in bankruptcy of the respondents. The motion to dismiss the objections is in the nature of a demurrer, assigning as the only reason for it their insufficiency in law to prevent the discharge, and so it was dealt with by the court below. The objections set up a pecuniary arrangement with certain of the bankrupts' creditors, as the consideration of their assent to a proposition of composition, and their approval of a resolution to that effect. The composition failed for want of the assent of the required number of creditors, and so the bankruptcy proceeding went on in regular course.

To enforce a distribution of a bankrupt debtor's property among his creditors, upon a basis of equality, and to relieve him from further liability for his debts, are the fundamental

objects of the bankrupt law; and it provides two methods of effectuating these objects. In one, the assets are administered and ratably distributed by an assignee, selected by the creditors, and the bankrupt is discharged only by the special order of the court; in the other, the bankrupt and his creditors deal directly with each other, by compounding the debts at a fixed rate, which composition, when approved by the court and carried into effect, operates as a discharge of the bankrupt, without any formal order by the court. But as alternative and equally available means of accomplishing the same general results, they are constituent parts of the system of bankruptcy, and are alike within the scope and designation of bankruptcy proceedings.

The contested exception is founded upon the twenty-ninth section of the bankrupt act, which enacts that "if the bankrupt, or any person in his behalf, has procured the assent of any creditor at any stage of the proceedings, by any pecuniary consideration or obligation, his discharge shall not be granted."

It alleges in substance that the bankrupts influenced the action of certain of their creditors by a pecuniary consideration, at that stage of the proceedings, when they made a proposition of composition. It is thus clearly within the terms of the section. Why, then, is it not sufficient in point of law to prevent the discharge of the bankrupts? Two arguments are urged against this conclusion:

1. That the original bankrupt act contained no provision for composition, and that, therefore, the twenty-ninth section of the act is inapplicable to any act of the bankrupts touching a composition. While the several sections of the bankrupt law, as it now stands, were enacted at different times, that can make no difference in its construction as a whole. The sections of the act relating to composition were engrafted upon it as amendments, and hence are to be taken as parts of it, with like effect as if they had been incorporated with it in its original enactment. If, then, the terms are sufficiently general to embrace an act done to obtain a benefit provided by the amendments, the statute cannot be treated as inap-

plicable merely because it and the amendments were not concurrently enacted. This is the result of well-settled principles of construction.

2. That a discharge by operation of an executed composition, and by a special order of the court, is the result of distinct proceedings, under different systems of bankruptcy, and that, therefore, the act alleged in the exception is no bar to an order discharging the bankrupt.

It is scarcely necessary to repeat what has been already said, that the bankrupt law does not provide "distinct systems" for the discharge of a bankrupt, but only alternative methods of attaining that result, in the same bankruptcy proceeding. The present case exemplifies this. If the composition had been adopted, the objects of the act having been effectuated, the bankruptcy proceedings would have ended at that "stage;" as it failed, they have gone on regularly, without renewal or interruption, to their present "stage."

It is said, however, that anything done at any time, in composition proceedings, cannot be called "any stage in the proceedings resulting in a decree for a discharge," and hence that improper influence exerted to effect a composition cannot constitute the ground of an objection to a discharge by the court.

The error is in assuming that the collective relation between the bankrupt and a creditor must have reference to some matter or thing required to be done as conducive to the bankrupt's discharge by the court. But this limitation of the effect of the twenty-ninth section of the act does not accord with its terms or its reason. It is broad enough to cover every act of the bankrupt, of the defined character, touching any of the bankruptcy proceedings from their beginning, and it is intended to induce good faith on his part throughout their entire course. The benefits of the law are for those only who pursue them fairly, according to its spirit and intent.

But, even in the narrow sense ascribed to the words of the section, the conclusion from it is unwarranted. A "composition proceeding" *is* "a stage in the proceedings resulting in

a decree for a discharge." It intercepts the progress of such proceedings, and supersedes the judicial scrutiny which any creditor may promote touching any of the matters specified as grounds of objections to a discharge. It is a decisive "stage" of the proceedings; and if the effort thus to arrest them is made with the collusive aid of creditors, why is not the improper influence as much within the meaning of the law as if it had been employed to advance them? There is no warrant in the words or reason of the law for such distinction.

I am, therefore, of opinion that the matters alleged in the objection to the discharge of the bankrupts are referable to a "stage in the bankruptcy proceedings" within the meaning of the twenty-ninth section of the bankrupt act, and that said objection was erroneously dismissed; and it is now ordered that the order of the district court dismissing said objection be reversed, and that the same be reinstated, to the end that the facts specified therein may be inquired into and determined according to law.

THE LOCOMOTIVE SAFETY TRUCK COMPANY *v.* THE PENNSYLVANIA RAILROAD COMPANY.*

(*Circuit Court, E. D. Pennsylvania.* June 8, 1880.

PATENT—INFRINGEMENT—PROFITS—WHEN NOT RECOVERABLE—MEASURE OF DAMAGES WHEN NO PROFITS ARE SHOWN.—When a patentee cannot show an absolute advantage in the use of his patent over results which could be reached by other processes in common and unrestricted use, he cannot recover anything from an infringer as profits, although he may exact such damages as will compensate him for the injury caused by the infringement.

SAME—METHOD OF ASCERTAINING PROFITS—COMPARISON OF ADVANTAGES. In determining whether profits have been realized by the infringer the comparison of advantages should be made, not between the patentee's invention and the process previously used by the infringer, but between the patentee's invention and such other known process then in unrestricted use as would best accomplish the same result.

*Reported by Frank P. Prichard, Esq., of the Philadelphia Bar.

SAME—STATE OF THE ART.—In such case the state of the art when the invention was made is always to be considered.

SAME—PROFITS INCAPABLE OF MEASUREMENT.—Although an infringer may be answerable in damages, he is not to be held liable for profits, unless there is some satisfactory evidence from which the value of the advantage derived from the use of the invention can be measured.

SAME—COMBINATION OF LOCOMOTIVE WITH SWING-TRUCK.—The use of a combination of a swing-truck with a locomotive having flanges on all its driving-wheels, not shown to have any advantage over the use of a locomotive with plain forward driving-wheels and a rigid truck.

DAMAGES—STANDARD OF—ROYALTIES.—Where a patentee had a fixed royalty for the use of his patent, *held*, that this was a proper standard by which to measure his damages from an infringement.

SAME—INTEREST ON ROYALTIES.—In such case, in estimating the damages, interest should be added to the royalties from the time of infringement to the date of the decree.

Exceptions to the report of a master appointed to state an account of the profits realized by defendants by reason of an infringement of complainants' patent, and also to assess the damages caused by such infringement.

The master (Robert N. Willson, Esq.) reported that complainants' patent was for a combination of a swing-truck with a locomotive; that the evidence showed that prior to using such invention defendants had used locomotives having a rigid truck and flanged driving-wheels; that the advantages derived from the use of complainants' invention could have been obtained by the use of a locomotive having a rigid truck and having no flanges on its forward driving-wheels, and that this latter form of locomotive was then in common and unrestricted use. He also reported that in estimating profits the comparison of advantages should be made between complainants' invention and an engine having a rigid truck and forward driving-wheels without flanges; that complainants had scarcely attempted to meet such a comparison, but relied, apparently, upon a comparison with a locomotive having all its driving-wheels flanged, and that upon the evidence he was unable to find that defendants had realized any profits. He also reported that complainants had a fixed royalty of $100 per engine for the use of their invention, and adopting this as a measure of damages, and adding interest, he assessed the damages at $89,644. Both parties filed exceptions.

S. S. Hollingsworth and *Charles F. Blake*, for complainants.
Chapman Biddle, for respondents.

STRONG, J. After a careful examination of the evidence submitted to the master, including both the testimony and the exhibits, I have come to the conclusion that none of the exceptions filed to his report, by the complainants or by the defendants, ought to be sustained. The report is an intelligent and discriminating deduction from the evidence, and the conclusions which the master has reached are strongly fortified by his reasoning. I can add little to what he has said beyond an expression of my concurrence.

In the endeavor to ascertain the profits, if any, which the defendants derived from the use of the patented invention, both parties agreed during the argument that the rule stated in *Mowry* v. *Whitney*, 14 Wall. 620, and repeated in subsequent cases, is to be followed. That rule is that the measure of profits, as distinguished from damages, for which an infringer is responsible, is the aggregate of gains or savings which he has made from the use of the patented invention, above what he could have made, in doing the same work, from the use of any other device or process existing at the time, capable of accomplishing the same purpose, or attaining the same result, and free, or open, to public use.

This rule is founded upon the soundest reason. It is only that which was previously not known—or, in other words, it is only the addition to human knowledge and convenience which a patentee has made—that he can be said to own. The patent laws give him an exclusive right to that addition, and to the advantages resulting from it, and to nothing more. Undoubtedly, it may be a benefit to the community to have two modes of doing certain work, instead of one, both equally economical and convenient, accomplishing the same result, and each still patentable; but, as was well remarked by the master: "Unless a patentee can show such an absolute advantage in the use of his patent over results which could be reached by other processes in common and unrestricted use, there has been nothing really gained, no advance made by his invention. In such a case, though he may maintain a

monopoly over his patented machine, process or combination, and exact such damages as he may be able to show he has suffered from an infringer, he cannot claim any portion of what has been realized as profits in any sense owing or due to him, for the reason that the infringer could just as well have obtained such product, or result, without his aid, or the benefit of his work or ideas."

The rule stated in *Mowry* v. *Whitney* was applied by the master to the facts as they appeared in the case. But he found, after comparison of the patented invention with other devices in use before the invention was made, and ever since in use,—devices open to the public, and free to be used by anybody,—that the defendants had received no gains, profits or advantages by reason of their infringement of the complainants' letters patent, and that no such gains, profits or advantages had accrued to them by reason thereof. In this finding I concur. The evidence certainly established that a locomotive with plain forward driving-wheels,—that is, with its forward driving-wheels without flanges,—and with a rigid truck, is in all respects quite as convenient and economical as is a locomotive with such a truck as the patent describes. There is no gain, profit or advantage in the use of one over the use of the other. The former was in common use when the complainants' patent was granted. It was free to be used by the defendants. But the complainants argue that because it was not employed by the defendants when they began to use the combination of the swinging truck with a locomotive, the comparison of advantages should be made with an engine having flanged forward driving-wheels and a rigid truck.

I do not assent to this view. The combination protected by the patent is not that of a swinging truck, with a particular kind of engine, such as one having flanged forward driving-wheels. It is a combination of such a truck with any locomotive for railroad uses. It is the advantage of such a combination to which the patentee is entitled. Certainly, if the defendants had never used any locomotive when they began to employ the complainants' invention, they would,

according to the rule in *Mowry* v. *Whitney*, be liable only for the advantage they had in that use over what they would have had in case they had used a combination of an engine with forward driving-wheels without flanges, and with a rigid truck. I cannot see that what they had in use in 1866 has any bearing upon their liability to account for profits made in 1867 or 1868, when they resorted to the complainants' invention. If a man, making boards by hewing them from logs by an adze, changes his mode of manufacture to the unlicensed use of a patent rotating saw, it would be a strange doctrine to hold that he is responsible for all the increased advantages of one mode of manufacture over the other. Neither *Mowry* v. *Whitney*, nor any other decision with which I am acquainted, justifies any such accounting. Mowry was held liable to account only for the advantage his use of Whitney's process gave him over other known modes of making car wheels, equally valuable and salable in the market, though it did not appear those other modes had ever been used by the infringer. In accounting for profits, as such, for which an infringer is liable, the state of the art when the invention was made is always to be considered.

But were it conceded that the defendants in this case did secure some advantage from the use of the complainants' patented device, instead of other devices they were at liberty to use, (which I am unable to perceive,) I think there is not sufficient in the evidence to enable me to make any reliable estimate of the value of that advantage. The defendants are not to be held liable for profits in any amonnt unless there is some satisfactory evidence that profits to that amount were made, though they may be answerable in damages for their invasion of the complainants' right. Some witnesses, it is true, have given estimates of the saving of wear by the use of the swinging truck. But an examination of their testimony convinces me that their estimates are mere guesses, without any reliable basis. There are no facts in evidence to justify them. Besides, the comparisons upon which they rest their conjectures are inadmissible in view of what I have said. They rest upon the supposed wear of tires or flanges under different conditions

from those existing when plain forward drivers are used. In regard to the alleged additional safety attendant upon the use of the swing trucks, there is the same difficulty. I am not convinced that there is any increased safety in running locomotives with it. But if there is, there is no meter by which the value of that advantage, as a profit, can be measured, and during the argument the complainants disavowed any claim for profits on that account.

The case, therefore, is one for damages only. The evidence shows to my satisfaction that the complainants had a fixed royalty of $100 for each locomotive to which the invention was applied. The master adopted that as a proper standard for estimating the damages. In this I think he was justified by the case of *Birdsall* v. *Coolidge*, 3 Otto, 64. That, it is true, was an action at law. But there is no conceivable reason why the damages sustained by a patentee from the infringement of his patent are not the same whether he proceeds at law or in equity. Applying this standard, and adding interest to the royalties, the master has reported the damages to be $89,644, the invention having been used by the defendants in 614 engines. That sum will certainly cover all the damages the complainants have sustained, and all possible profits the defendants have made, if they made any.

A doubt arose in my mind at first whether interest should have been added by the master to the aggregate of the royalties, but further reflection has removed the doubt. As I have noticed, the royalties were allowed as the measure of damages. It is doubtless the general rule that interest prior to the final decree is not to be allowed upon profits or damages, because, until the decree, they are unliquidated. *Mowry* v. *Whitney*, 14 Wall. 653. But the rule is not without exceptions. We said in that case: "We will not say that, in no possible case, can interest be allowed." The present seems to be one not within the reason of the rule, and therefore proper for an exception. The damages cannot be said to have been unliquidated from the first. The amount of the royalty was fixed when the defendants began to use the inven-

tion. To that amount complainants were entitled at that time, and interest, therefore, is only compensation for the delay of payment of a liquidated sum. Besides, no exception has been specifically filed to the allowance of interest by the master.

This is all I need say of the case. All the exceptions filed to the master's report are overruled, and his report is confirmed. Let a final decree, accordingly, be prepared.

WILLIAMS and another *v.* L. CANDEE & Co.

(*Circuit Court, D. Connecticut.* May 8, 1880.)

PATENT — IMPROVEMENT IN OVERSHOES — WATER-PROOF FLAPS — INFRINGEMENT.

Benjamin F. Thurston, for plaintiffs.

Charles F. Blake, for defendants.

SHIPMAN, C. J. This is a bill in equity based upon the alleged infringement of letters patent No. 131,201, dated September 10, 1872, for an improvement in overshoes, and, also, of letters patent No. 166,669, dated August 10, 1875, for an improvement in rubber boots. Each patent was granted to Isaac F. Williams, one of the plaintiffs. The other plaintiff is the exclusive licensee under each patent.

Number 131,201 was designed to be an improvement upon the well-known rubber and cloth gaiter overshoe, called the "Arctic," and which was fastened by a buckle over the instep. The shape of the shoe was that of the brogan. The Arctic was not perfectly water-tight, for, when worn in deep snow, water would find its way between the vamp and the quarter. The improvement upon the Arctic shoe consisted in overlapping the vamp and the quarter beneath the rubber foxing, and extending the vamp and quarter so as to form bellows-like, water-excluding flaps, folded on each side of the instep, and buckled together over the instep. I do not consider the place of overlapping to be a part of the invention. The

overlapping was underneath the foxing, almost as a matter of course, but the invention would be the same if the foxing did not exist.

The patentee says, in his specifications: "My invention relates to that class of cloth and rubber gaiters which are provided with flaps and buckles, and it consists in a peculiar construction of certain double water-proofed jointed flaps, so arranged that the flap tongue passing over the instep will draw equally upon the sides of the quarter when buckled to the foot, and render the gaiter water-proof at all points adjacent to the flap." The description which is contained in the patent consists mainly of a reference to the drawings.

The claim is as follows: "As a new article of manufacture, a cloth and rubber gaiter overshoe, having a double water-proof flap, composed of extensions of the vamp and quarter, folded on each side of the instep, and provided with a buckle and flap tongue, which are arranged to draw equally on each side of the quarter across the instep, substantially as described."

Before the date of this invention, an English patent, dated January 23, 1856, had been granted to Stephen Norris for an improvement in leather shoes. His improvement consisted in the insertion of a gore or gusset between the vamp and quarter, which folded upon itself inside the shoe, and excluded water to a certain extent. The shoe was not perfectly water-proof, because the truncated apex of the gore at the point of union of vamp quarter and gore did not form a folded or an overlapping joint with vamp or quarter. The union of the three pieces of leather was made by sewing, and there was no turning of the water by a fold of the leather so as to exclude the admission of moisture to the foot. The great effort upon the part of the defendant was to limit the Williams patent, in view of the Norris invention, to the exact cut of vamp and quarter, and of their extension into a flap tongue, which is shown in the drawings. The defendant construes the patent to be for an overshoe having the peculiarly constructed water-proof jointed flaps, shown in the drawings, composed of extensions of both vamp and quarter,

folding on the instep, and having a buckle and the flap tongue extensions which draw as described.

It is true that Williams turns out not to have been the pioneer in water-excluding shoes by means of jointed flaps, as he supposed himself to have been. But he was the pioneer in his department, that of making an Arctic shoe, or a shoe of the class provided with flaps and buckles, water-proof by means of overlapping, jointed flaps. And the patent is not to be limited to the precise shape of the "cut" of each part of the extension which is shown in the drawings, but it covers, also, such other forms of cut which are substantially like the pattern shown and described, and which accomplish the same result. Another person cannot properly get the advantage of Williams' overlapping vamp and quarter by merely varying the cut of vamp or quarter, or the form or shape of overlapping joint, or the shape of the tongue. The patent is by no means for any peculiar shape of fastening device.

The defendant has made and sold a "snow-excluder," which has double-jointed flaps folded on each side of the instep, made water-proof by an overlapping of the vamp and quarter beneath the foxing, and provided with a buckle and tongue attached to one of the flaps, which are arranged to draw in the manner specified in the patent, but it is claimed that these shoes are not an infringement, because—*First*, the "cut" of the quarter is just like that of the quarter of the defendant's old-fashioned Arctic, and, therefore, there is no extension of the quarter, and no flap tongue; *second*, the cut of the vamp extension is substantially like that of the Norris gore, and not like that of the Williams extension, which is admitted to have been a patentable novelty. The shoe is, therefore, a union of the Arctic quarter and the Norris gore. The defendant's shoe has the general external appearance of the Arctic, and its quarter has the cut which the defendant used upon its Arctic shoes. It is, therefore, true that its quarter has no extension. This is, however, a verbal criticism. The water-proof jointed flap, uniting the overlapped vamp and quarter, and folded on each side of the instep, is the same flap in each shoe. The defendant's quarter is a wide one, and extends

well in front of the ankle, and its front edge is at right angles with the upper line of the foxing, so that at the instep the quarter is a broad piece of cloth, and the fastening is effected by a strap inserted in a slit in the quarter. In the plaintiff's shoe that part of the quarter which joins the foxing comes less further forward of the ankle than in the defendant's shoe. The part of the quarter which is extended over the instep is, therefore, narrowed, and becomes a flap tongue provided on one side of the shoe with a buckle, by which the shoe is fastened.

Another result of the different shapes of the quarter is that in the plaintiff's shoe the bellows flap can be turned back smoothly upon the outside of the shoe. The fold of the flap, and the front and lower edge of the quarter, are at the same point. In the defendant's shoe, in consequence of the width of the quarter, the flap is not turned smoothly backward, and dirt or sand cannot easily be brushed out of the fold. These two differences do not constitute any material or substantial difference in construction or operation.

The second alleged point of difference is the one which is relied upon to relieve the defendant from the charge of infringement. The gist of the Williams invention consisted in such a cut of vamp and quarter that the two overlapped or folded upon each other, and thereby the leak hole, at the junction of the Norris gore with vamp and quarter, was obviated. In the defendant's shoe the vamp and quarter overlap each other beneath the foxing. The cut of vamp and quarter, where the union is made, is a different cut from that of the Williams shoe. It is the cut of the Norris gore modified so that the vamp and the quarter shall overlap and make a tight joint. It avoids the defect of the Norris shoe by a form of cut not exactly like the Williams, but made upon the same principle and not materially different in shape. There is, in fact, no relief from the charge of infringement, unless the Williams patent is narrowly limited to its peculiar pattern of vamp and quarter.

The Williams patent of 1875 is thus described in the specification: "My invention relates to that class of boots which

are made of an outer and inner textile fabric, connected together by a layer of rubber. The main object of my invention is to furnish a rubber boot which fits well around the ankle, which may be easily put on and taken off, and which is neat and attractive in appearance; and my invention mainly consists in a boot composed of an inner upper, fitted to the last, slitted upward from near the sole, and long enough to allow this inner upper, after vulcanization of the rubber, to be removed readily from the last, (or, what is in substance the same thing, to allow it to be readily put on or taken off the foot,) and of an outer upper which is cut so large that it does not require to be slit in order that it may be removed from the last or put on and taken off the foot. My improved boot consists, in fact, of an inner and an outer upper, and a suitable sole, the inner upper being made to fit the last, and, therefore, requiring to be slit open from near the sole upward, while the outer upper is made much larger than the inner upper, and requires the surplus stock to be overlapped and fastened in order to fit the boot closely to the ankle and leg."

The patentee further says: "The novelty of the main feature of my invention does not lie, of course, in the patterns used, nor in the use of a folding gore piece, as it is obvious that the patterns may be largely varied, and the folding gore piece is well known. My inner upper must, however, be so cut as to permit it to be laid upon and conformed to the last or foot; and the outer upper must be cut as much larger than the inner upper as will provide for the overlapping of the front and rear sections thereof, and thereby guarding or covering the slit in the inner upper, and allowing the boot to be readily removed from the last, or be readily put on and taken off of the foot of the wearer, and at the same time admitting of the unison of the outer edges of said overlapping portions of the front and rear outer upper in forming the water-excluding bellows flap. The parts of the outer upper which are not attached to the inner upper are caused to fit snugly by securing them by means of the leg and ankle straps shown, or other suitable devices." One main difficulty to be avoided was that the shoe of 1872 could not be fitted

smoothly upon the last by reason of the flap pieces, and it was also desirable to line the flaps or ear pieces with a lighter material than that used for the shoe proper, so that they could be folded smoothly around the ankle. Novelty and patentability are not denied. I do not understand that any substantial defence is attempted to be made to the charge of infringement of the first claim.

Let there be a decree for an injunction and an accounting.

THE PECK, STOW & WILCOX CO. *v.* LINDSAY, STERRITT & CO.

(*Circuit Court, W. D. Pennsylvania.* ——, 1880.)

PATENT—PRIVIES TO INTERFERENCE—IMPROVEMENT IN COFFEE & SPICE MILLS.

In Equity.

ACHESON, D. J. This is a motion for an injunction on re-issued letters patent No. 8,866, dated August 19, 1879, granted to the complainant, assignee of Amos Shepard, for an improvement in coffee and spice mills.

The defendants are hardware merchants at Pittsburgh, Pennsylvania, and sell coffee mills manufactured by Landers, Frary & Clark, which mills, it is alleged, infringe the first claim of said patent.

It clearly appears, both from the affidavits in the case and by an inspection of the Landers, Frary & Clark mill, that it embodies the first claim of the said re-issued patent. This claim is in these words: "In a box mill a metal hopper and flange, said flange projecting laterally at or near the top of the hopper, so as to form the cover of and means of attachment to the wooden box, in combination with a hinged hopper cover and grinding mechanism, substantially as and for the purpose set forth."

The invention relates particularly to that style of box mills which have the bulk of the hopper located below the box top. The metallic hopper is made with a wide flange projecting

laterally from it, at or near the top, so as to form the cover of the box, and is provided with the means of attachment to the wooden box. On this metallic top the machinery of the mill is set up complete, and the same is then united to the box.

The specification thus states the purpose and advantages of the invention: "By making the combined box top and hopper of the form and as described, the entire grinding mechanism, together with the box top and hopper cover, can be set up, fitted and finished wholly independent of the wooden box, whereby the box is not soiled in setting up; neither is any extra labor or caution necessary in order to prevent soiling the wooden top, as the metal box top, hopper, cover and grinding mechanism, which constitute the mill proper, can be put together, fitted and finished in one room by one set of hands, and then attached to the box proper in another and cleaner room by another set of hands. Thus it will be seen that both the box and the grinding mechanism, with the box top, sunk hopper, and cover attached, may be properly finished before securing the latter parts of the box, so that merely securing the box top to the box produces a neatly finished box mill, with sunken hopper and cover complete, without any subsequent operation, which mill is stronger and more durable than prior ones of the same class, and at the same time it can be produced at a reduced cost."

The affidavits in the case fully support the foregoing statements and establish the utility of the invention. It appears that on November 30, 1877, R. L. Webb filed his application in the patent office for letters patent for an improvement in coffee mills, to be issued to his assignees, Landers, Frary & Clark, the defendants' vendors. In this application the following claim was made: "In a box mill, the hopper constructed with a laterally projecting flange to form the top of the mill, and with lugs on the under side as a means for securing the hopper and its flange, of the said flange, to the box, substantially as described."

This application of Webb was put in interference with the original application of Amos Shepard, the issue made

by the patent office being as follows: "The subject-matter involved in the interference is, in a box coffee mill, the hopper constructed with a lateral projecting flange to form the top of the mill, and having fastening devices for securing the same to the box."

The parties respectively filed the preliminary statements required by rule No. 53 of the patent office, and on May 15, 1878, the interference was decided in favor of Shepard. This decision was acquiesced in by Webb, who on May 24, 1878, disclaimed the invention and subsequently took out his patent on another claim.

The complainant's counsel contend that the defendants, who are the vendees of Landers, Frary & Clark, are privies to the interference and bound by the adjudication, and cites in support of this position the decision of Judge Nixon, in *Hanford* v. *Westcott*, 16 O. G. 1181. To this proposition I assent so far as the question of priority of invention is concerned. But the decision does not preclude the defendants from contesting the right of the complainant to injunction, upon the ground of defence now set up, viz.: That the Shepard invention was completely anticipated by the "French mill," and, therefore, that the reissued letters patent disclose no novelty, and are void for want of patentable invention. Let us, then, consider this defence.

The "French mill" consists of a box, with a top made of wood, upon the under side of which a wooden block is glued, so as to extend down into the box when the top is placed on the box. Through the center of the top and block there is a funnel-shaped opening, which forms the hopper. To the bottom of the wooden hopper the grinding shell is attached by means of screws. The top of the mill is nailed and glued to the sides of the box.

The defendants contend that the only substantial difference between the complainant's mill and the "French mill" is a difference of material, and that all the advantages are found in the latter mill which are described in the complainant's re-issued patent. But such was not the position of Landers, Frary & Clark, and their assignor, R. L. Webb, when the

latter made application for letters patent, out of which the above-mentioned interference grew. In the Webb application occurred the following statements:

"These mills have usually been made with a wood box and top, with the hopper and runner made of metal and secured to the top. The securing device is necessarily screws or bolts, and these, after a little use, are liable to became loose, and require constant resetting or repairs. The object of this invention is, principally, to overcome this difficulty, and it consists in constructing the top of a box mill of cast metal, and in one and the same piece with the hopper.

"By this construction of the top the usual securing devices between the top and the hopper are avoided, and the cost of producing the hopper and top in one piece is less than constructing the hopper separately and attaching it to the wood top.

"Again, this construction allows the completion of the whole grinding apparatus independent of the box or wood portion, as the whole grinding apparatus is practically made a part of the top, and, that completed, it only remains to secure that single part of the wood box; and accomplished as it is, in this case, by transverse screws or rivets, the strain upon them in grinding is very much less than on the usual vertical securing devices."

It is not pretended that at the time this application was made Webb and his assignees, Landers, Frary & Clark, were not perfectly familiar with the "French mill."

The advantages set forth in such detail and with such force, in the above-quoted statements from the Webb application, are shown all to exist in the Shepard invention, the priority of which, over Webb, has been finally adjudicated. Now, while the decision in favor of Shepard in the interference proceeding may not be conclusive against the defendants upon the questions of anticipation and patentable novelty now raised, yet, under the circumstances, great weight, I think, should be given to the action of the patent office in granting letters patent to the complainant. The *prima facie* case thereby established in favor of the complainant ought not to

be overthrown at the instance of Webb, or those in privity with him, without clear evidence that the patent is void for the reasons now assigned. Such evidence I do not find in the case. On the contrary, after an examination of the "French mill," and a careful consideration of the affidavits, I have reached the conclusion that the Shepard invention was not anticipated by the "French mill," or otherwise, and that his improvement is both new and useful.

I am of opinion that the complainant is entitled to the injunction moved for. Let a decree be drawn accordingly.

STROBRIDGE *v.* LINDSAY, STERRITT & Co.

(*Circuit Court, W. D. Pennsylvania.* ———, 1880.)

PATENT—IMPROVEMENT IN COFFEE MILLS.

In Equity.

ACHESON, D. J. The bill in this case is founded upon letters patent, re-issue No. 7,583, dated March 27, 1877, granted to the complainant, Turner Strobridge, for an improvement in coffee-mills.

The defendants are dealers in hardware at Pittsburgh, Pennsylvania, and bring into the complainant's market, and sell, a coffee-mill made by Landers, Frary & Clark, of New Britain, Connecticut, which mill the complainant alleges is an infringement of the first claim of his re-issued patent. This clause is in these words: "A coffee or similar mill having a detachable hopper and grinding shell, formed in a single piece and suspended within the box by the upper part of the hopper, or a flange thereon, substantially as and for the purpose specified."

The defences insisted on, at the argument of the case, may be reduced to two heads, viz.: *First*, that the mills manufactured by Landers, Frary & Clark, and sold by the defendants, do not infringe the complainant's said claim; *second*, that the patent is void for want of patentable invention.

The box of the Landers, Frary & Clark mill, sold by the defendants, is without the usual wooden top. "But the hopper" (to quote the language of the defendant's expert witness, John E. Earle,) "is cast with a flange projecting from the upper edge, sufficient to cover and form the top of the box; and it is that extension of the hopper, in defendant's mill, which forms the top of the box." In no other respect, it seems to me, does the Landers, Frary & Clark mill differ from the Strobridge mill, (an exhibit of this record,) so far, at least, as concerns the first claim of the patent.

The defendants insist that the phrase "detachable hopper and grinding shell" means a hopper and shell separate and detachable from the *top* of the box, and that the claim is for a coffee-mill in which the "hopper and grinding shell formed in a single piece" can be readily detached from the top of the box in which it is suspended; and therefore, it is argued, the mill sold by the defendants does not contain the combination set forth in the first claim of the patent, and there is no infringement of the complainant's rights. But I am unable to adopt this view. I do not think the word "detachable," as used in this claim, necessarily implies that the hopper must possess the capacity of being detached from the top of the box. The object contemplated seems rather to be to have a hopper easily detachable from the box. By the terms of the claim the hopper and grinding shell formed in a single piece are "suspended within the box by the upper part of the hopper or a flange thereon." As respects the width of the flange there is no express limitation in the specification. In the mill sold by the defendants the hopper is cast with a flange, which projects from its upper edge sufficiently to cover and form the top of the box. This, undoubtedly, is an improvement upon the Strobridge mill, as the same is shown by his drawing, and of which Exhibit "Strobridge" of this record is a specimen. The flange of the Landers, Frary & Clark mill not only sustains the hopper and grinding shell within the box, but performs the additional function of serving as a cover of the box. But this improvement does not justify the defendants in appropriating to their use the complainant's

invention, which his patent secures to him. *Westinghouse* v. *The Gardner & Ransom Air Brake Co.* 9 O. G. 538; *Howe* v. *Morton*, 1 Fisher, 587.

But the defendant alleges that, in view of what was well known prior to the date of the original Strobridge patent, what was done by him did not constitute such invention as entitled him to a patent, and that his re-issue was therefore void.

It is not denied that prior to the date of the Strobridge invention there existed and were well known in the art, coffee-mills in which the hopper and grinding shell were formed in one and the same piece. This, however, is not claimed as new or patentable, but the claim is limited to a hopper and grinding shell so constructed. If the Strobridge invention was anticipated at all, it was by what is known in this case as the "French mill," which was imported into this country as early as 1863, and sold to a very limited extent.

This mill is thus described by the defendant's expert witness, John E. Earle: "I find in the Exhibit French Mill an article known as a box mill, and consisting of a box, with a top made of wood, upon the under side of which a block is glued, so as to extend down into the box when the top is placed on the box. Through the center of the top and block a funnel-shaped opening is made, so that this opening through the top and block forms a hopper, being flush with the upper surface of the top of the box. The top and block being glued together, makes them practically one piece. To the bottom of the hopper and concentric with it the grinding shell is attached."

After a careful inspection of the "Exhibit French Mill" and "Exhibit Strobridge," I have reached the conclusion that they differ in important particulars, and that the French mill does not embody the invention covered by the first claim of the conplainant's patent. The French mill, indeed, has a sunken or suspended hopper, but here, it seems to me, its likeness to the complainant's invention ceases. The hopper and grinding shell of the French mill are not in one piece. The steel grinding shell is attached to the bottom of the wooden hopper

by means of screws. The sunken part of the wooden hopper is glued to the under side of the cover or top of the mill, and the top is nailed and glued to the sides of the box.

Neither in the "French mill" nor in any other mill shown to be in existence prior to the Strobridge invention, is there to be found the combination described in the first claim of the complainant's re-issued patent, viz.: a coffee-mill having a detachable hopper and grinding shell formed in a single piece, and suspended in the box by the upper part of the hopper, or a flange thereon."

Some of the devices entering into this combination, when taken separately and in detail, are old; but this cannot be successfully urged against the validity of the patent. *Bates* v. *Coe*, 8 Otto, 31; *Williams* v. *The Rome, W. & O. R. Co.* 15 O. G. 653.

The defendants, however, strenuously insist that in view of the state of the art, especially as shown by Exhibit Elevated Hopper Mill, and Exhibit French Mill, the former having the hopper and grinding shell in one piece, and the latter showing a sunken hopper, it did not require invention to make the structural changes recited in the first claim of the Strobridge re-issued patent; but to this I cannot give my assent. To me it seems that the complainant has produced a new and useful mill, differing substantially from any which preceded it, and evincing the exercise of the inventive faculty.

A change in the form of a machine or instrument, though slight, if it works a successful result, not before accomplished in a similar way in the art to which it is applied, or in any other, is patentable. *Isaacs* v. *Abrams*, 14 O. G. 861. And the validity of a patent is not determinable by the degree of novelty or invention displayed. *The Miller & Peters Mfg. Co.* v. *Du Brul*, 12 O. G. 351. Utility, within the meaning of the patent law, is authoritatively declared to exist "if the combination is new and the machine is capable of being beneficially used for the purpose for which it was designed." *Seymour* v. *Osborne*, 11 Wall. 549.

Applying these principles to the complainant's re-issued patent, why should it not be sustained? His combination is

new, and, as a result, we have a superior mill, characterized by simplicity of construction and the facility with which its several parts may be set up; and, when finished, compact, convenient and durable.

The merits of the invention were quickly perceived by the public. The box mills in the general market prior to the introduction of the Strobridge mill had the hopper above the top of the box. Immediately upon the appearance of the complainant's mill it met with great popular favor and obtained a ready sale. It was accepted and adopted by the trade and went into general use. The Charles Parker Company, of Meriden, Connecticut, and the Peck, Stow & Wilcox Company, of Southington, Connecticut, soon took licenses from the complainant, and these companies—both large manufacturers of coffee-mills—respectively make under the patent the mills known in this case as "Exhibit Charles Parker Mill" and "Exhibit Peck, Stow & Wilcox."

Nelson H. Camp, agent for the Charles Parker Company, testifies: "Shortly after we commenced selling these mills [Charles Parker mill] in the market we received notice that we were infringing the said Strobridge patent, and, upon investigation, concluded it was so, and took out a license to manufacture under the patent which they granted us under a royalty; and from that day to the present we have manufactured them very largely. The sale of these mills has been very large as compared with all other mills we manufacture."

Webster L. Walkley testifies: "I have sold some mills, similar to 'Exhibit Strobridge,' manufactured by the Charles Parker Co., and more manufactured by the Peck, Stow & Wilcox Co. * * * From the first introduction of these mills they met with unparalleled success, and the trade who had been purchasing the raised hopper mills, about the corresponding size and price, to a very large degree substituted in their place these sunken hopper mills. So that I should say that the sale of the ordinary raised hopper mill, as sold previous to the introduction of these mills, must have fallen off, in the aggregate, about one-half."

The letters patent themselves *prima facie* establish that the

complainant's improvement is a patentable invention; and strongly confirmatory of this view is the evidence showing the favorable acceptance by the public of the improvement, and its recognition and adoption by the trade as something new and meritorious.

Upon the whole case I am of opinion that the complainant is entitled to a decree.

Let a decree be drawn in his favor.

SHARP *v.* TIFFT.

(*Circuit Court, S. D. New York.* May 8, 1880.)

PATENT—NEW PARTS IN PATENTED COMBINATION—INFRINGEMENT.—It is an infringement to use in combination any of the new parts of a patented combination.

In Equity.

A. O. Briesen, for complainant.

B. F. Lee, for defendant.

WHEELER, D. J. This suit is brought upon letters patent No. 50,938, issued to Thomas J. Kelly for an improvement in burners for gas stoves, dated November 14, 1865, and re-issued to the plaintiff No. 6,833, dated January 4, 1876.

The defences set up and relied upon are that the re-issue is for an invention different from that described in the original; that, if not, Kelly was not the first inventor of all the material parts of the invention patented; and that the defendant does not infringe.

In burning illuminating gas for heat it is desirable to mix oxygen with it to obtain a better and more economical effect; and this is done in a handy way by drawing common air containing it into the burner with the gas, and combining them as they pass out to the flame. This was done long before Kelly's invention by bringing the gas into a tube at the lower end open there for admitting air also, and having a diaphragm above, perforated like a sieve, through which both would pass

upward and become mixed and go to the flame. In some of them the mixture burnt upon the diaphragm; in others there were caps over the upper ends of the tubes larger than the tubes, and forming a chamber above the diaphragm, in the sides of which were holes for the mixture to pass out through, and it was burned in jets as it escaped through the holes. The chamber was generally larger than the tube below, and made separate from it, and both were put together so as to hold the diaphragm in place. In all these the caps were held by the sides of the chamber through which the mixture must pass, and which could not be perforated to give an unbroken sheet of the mixture to the flame without weakening them too much for such support. Kelly appears to have invented a burner head consisting of two circular horizontal plates, one above the other, with flanges approaching each other around the edges, leaving a continuous aperture, and having a vertical diaphragm extending around between them a short distance inside of the flanges, forming an annular chamber between the diaphragm and flanges, all held together by a bolt and nut in the center of the plates, with an aperture leading from the feeding tube below through the lower plate, each side of a bar left across for the bolt, so as to pass the air and gas upward through the tube and lower plate into the space between the plates, thence laterally in all directions through the diaphragm into the chamber outside of it, and thence in an unbroken sheet horizontally through the aperture between the flanges to the flame, thus supplying a continuous flame all around the edge of the upper plate and effecting thorough combustion of the gas.

In the specifications of his patent he described the whole of this arrangement; set forth the nature of his invention as consisting in forming a chamber in the burner between the perforated diaphragm and the external opening, and in the employment of a vertical diaphragm in combination with an annular opening around the same; and the claim was the combination of a vertically arranged diaphragm with the external annular opening, as therein shown. The specifications of the re-issue are not materially different from those of

the original, but the claim is very much enlarged. It is expanded into two. The first is the combination of the outlet, the perforated diaphragm, and the chambers intermediate between the diaphragm and outlet, substantially as described. The second is substantially the same as the claim of the original patent. Had there been no burners for gas stoves before, or none with a perforated diaphragm, chamber between that and the outlet, and outlet beyond, he would have been entitled to hold this whole arrangement free from invasion; but as there were burners having all these elements, arranged in the same order, although of different form and capacity, he was entitled only to his particular form of devices which were really different from those which had been in use or known before, and the combination of those devices with each other or with others, so as to produce a new result, or an old result in a new way. *Railway Co.* v. *Sayles*, 97 U. S. 554. He had a new form of diaphragm, a new form of chamber between it and the outlet, and a new form of outlet to the flame. He was entitled to these forms, and to his combination of them, but not to the forms of others, or to their combinations. Since this suit was brought he has filed a disclaimer to every burner described in the first claim except those constructed of the two plates, bolted together by the bolt, and holding a perforated diaphragm between them.

If the patent should be construed broadly enough to cover all forms of diaphragms, mixing chambers and outlets, separately or in combination, it could not be sustained at all without something to cut it down to the particular devices and arrangement of Kelly. The bolt is no part of the combination of either claim. It is used in the construction of this particular form of burner, and the reference to it in the disclaimer is merely discriptive of that form, without taking away or adding anything. So of the plates holding a perforated diaphragm between them. In this construction they hold a vertical diaphragm between them. If the patent will cover any other form of diaphragm held between them, the disclaimer does not disown the other form; if it does not, the disclaimer will leave this particular form. So, in either case,

the disclaimer leaves the whole where it was before, and the re-issue is to be looked at as if no disclaimer had been filed.

As there is nothing described in the re-issue that was not described in the original patent, either as to devices or nature of the invention, it cannot be said that the invention in one is different from that in the other, although the claims attempting to cover the invention are so different. The re-issue is, therefore, as valid as the original would have been if it had been the same as the re-issue. Construed in the light of the things which existed before, it will cover the new form of devices invented by Kelly, and their arrangement, and those only: the two plates with flanges, the continuous aperture between the flanges, the vertical diaphragm, and the annular chamber between the diaphragm and flanges. The patent seems to be good for these.

The defendant uses two plates bolted together as Kelly's are; the lower one without any upturned flange, the upper one with projections downward around the edge for distance pieces, between which and the lower plate the diaphragm is held. This is not the combination of either claim of the plaintiff's patent. The vertical diaphragm, and the annular chamber, are wanting. Still the defendant has appropriated a part of Kelly's invention. He has taken the two circular plates held together by a bolt at the center, made projections on the upper in place of the flange, with spaces, so as to permit an outward flow of gas that will unite into a continuous sheet of flame on the outside and against the edge of the upper plate, accomplishing the same result as Kelly. The changes in the form of the plates are circumstantial and not material—made necessary by the change in location of the diaphragm, and not on account of any new function or mode of operation given them.

Generally, where a patent is for a combination of known parts, materials or elements, it is not infringed by the use of any number of the parts, materials or elements, less than the whole; for the patent in every such case is for that identical combination and nothing else, and a combination of any less number of parts is a different thing. *Prouty* v. *Ruggles*,

16 Pet. 336. But where some of the parts of the combination are new, and those parts are taken and used in the same manner, but with different things from the rest of the combination patented, a part of the patented invention is taken although the whole is not, and it is an infringement to that extent. *Sellers* v. *Dickinson*, 6 Eng. Law & Eq. 544; *Union Sugar Refinery* v. *Matthieson*, 2 Fisher, 601. Here the horizontal plates bolted together in the center, with a diaphragm between them, were altogether new for this purpose. They formed a suitable chamber for the mixed gas and air, after they had passed the diaphragm, and an external outlet useful in form and location. The defendant has appropriated these new parts to the same use by connecting them with the horizontal diaphragm and other devices, to accomplish the same result as Kelly's combination, although the other devices are different from Kelly's. This is an infringement to that extent. *Johnson* v. *Root*; Curtis on Pat. § 332, note; *Newton* v. *Grand Junc. R. W.* 6 Eng. Law & Eq. 557.

It is said that fastening horizontal plates together in the center by a bolt and nut, as these are, was old and well known before Kelly's invention, which is doubtless true; but it was not a known method of forming a head for a burner to a gas stove to make use of such plates. The object was not to fasten the plates together. It was to make a chamber for the inflammable mixture, after it had passed the diaphragm, and to provide a suitable outlet for it to the flame, so as to burn all around the top of the burner. These plates, fastened in that way, Kelly discovered, would furnish the required chamber, and an outlet for an unbroken sheet of the inflammable material, which was most desirable for the purpose. He patented that discovery in all its parts, and is entitled to the protection of it which the law affords.

As the plaintiff filed his disclaimer after suit brought, he would not ordinarily be entitled to any costs in the suit. Rev. St. U. S. § 4922. But in this case the disclaimer was not necessary to sustain the patent to the extent it is held valid, was inoperative, in the view taken of it, upon the patent, and has had no effect in maintaining the suit. Under

these circumstances it does not come within the provisions of the statute denying costs, and no reason is apparent why costs should not be allowed as if nothing had been done about a disclaimer.

Let a decree be entered for an injunction and an account, accordingly, with costs.

WILLIAMS *v.* THE ROME, WATERTOWN & OGDENSBURGH R. Co.

(*Circuit Court, N. D. New York.* May 21, 1880.)

PATENT—INFRINGEMENT—COMPUTATION OF PROFITS.

Edmund Wetmore, for plaintiff.

West & Bond, for defendant.

BLATCHFORD, C. J. In this case it was held (15 Blatchf. C. C. R. 201,) that the plaintiff's patent was valid, and that the defendant had infringed it. The patent is for an "improvement in locomotive lamps." The object of the invention, as stated in the specification, is "to permit coal oil or kerosene to be used in lamps for locomotive head-lights with success, and to obtain full advantage of its great light-producing capacity." The patent contains 11 claims. Each claim is a claim to a combination of certain instrumentalities or members. There are eight of such members. The specification states that the patentee does not claim to be the original inventor of any one of such individual members, but that, although they had been used before his invention, such use was in combinations substantially different from those devised by him.

The defendant had used three forms of head-lights, one of which infringed five of the claims, one four of the claims, and one all of the claims. The court found that the plaintiff's lamp was the first one which successfully burned kerosene oil in a locomotive head-light; and that his lamp had superseded those previously in use, and was used on nearly all the railroads in the United States. An account of profits and an

ascertainment of damages was ordered to be made by a master.

The master reports that the defendant, from December 19, 1865, to April 29, 1879, used continuously six lamps like the plaintiff's lamp; that, from and including the year 1875 to April 29, 1879, it used five additional lamps, which were adjudged by the court to infringe, and which burned kerosene oil by reason of their infringing, on portions of the plaintiff's lamp; that during the time from December 19, 1865, to April 29, 1879, when the plaintiff's patent expired, the lamp patented by him was the only one which could practically and successfully burn kerosene oil, except such lamps as infringed said patent in whole or in part; that the lamp made and sold by John Carton, for burning kerosene oil, was not the lamp described in his original or re-issued patent in evidence on the final hearing, but was an infringement on the lamp patented by the plaintiff; that, prior to the plaintiff's invention, the only oils which were or could be practically and successfully used in locomotive head-light lamps were lard, whale, sperm and kindred oils; that the plaintiff's locomotive lamp was the first one which successfully burned kerosene oil; that since his said invention kerosene oil has been exclusively used by railroad companies in their locomotive head-lights; and that the defendant, by the use of the lamps adjudged to infringe the plaintiff's patent, was enabled to and did burn kerosene oil instead of the other and higher-priced oils above mentioned, which result was secured only by the use of the plaintiff's invention.

The report then states the average market price of lard oil per gallon by the barrel for each year from and including 1866 to and including 1878, lard oil being the cheapest of the oils used in locomotive head-light burners except the plaintiff's, and those which infringed it; and also states the average market price of kerosene oil per gallon by the barrel for each of the same years. It also states that the 11 lamps were used by the defendant 20 nights in each month during said period of infringement, for four hours each night, kerosene oil being burned in them during the whole time;

that the defendant saved, by using such infringing lamp, 2 16-100 gallons of whale or lard oil during each year, being a total saving of oil of 205 1-10 gallons, by comparing the quantity of kerosene oil which each infringing lamp burned in each year with the quantity of whale or lard oil which the smallest size of lamp burning it would consume in each year when used the same number of hours; and that the total value of such saving and advantage was $224.95. It also states that the defendant denied the further benefit, saving and advantage of using the cheaper kerosene oil, the value of such saving being the difference between the market price of the kerosene oil used and the market price of an equal amount of the higher-priced oils which it would have been compelled to use but for its infringement; that such saving amounted to $3,320.91 for all the 11 lamps for the time they were so used; that the total value of the savings derived by the defendant from the use of the plaintiff's invention was $3,320.91; that all railroad companies use head-light burners on their engines; that the plaintiff possessed the facilities to manufacture all the burners required by railroad companies in the United States, and could have furnished the defendant with any number of burners required by it had the defendant desired; that the plaintiff's lamp was, during all the time of the infringement, the only one adapted to the burning of kerosene oil for head-light purposes, except infringing lamps; that the plaintiff's established price for his head-light burner was $15 each, and the cost of each was $2; and that the plaintiff was damaged by reason of said infringement by the defendant to the extent of $13 for each of the 11 infringing lamps which the defendant purchased from other parties, being in all $143.

The defendant excepts to the report on the ground that the plaintiff has failed to show what profits the defendant made by the use of the patented improvements; that the master ought not to have allowed the saving of the $224.95, or considered that matter; that he ought not to have allowed the saving of the $3,320.91, or considered that matter; that the finding that from December 19, 1865, to April 29, 1879,

the plaintiff's lamp, as patented, was the only one which could successfully burn kerosene oil, except infringing lamps, is not supported by the evidence; that the finding as to the Carton lamp is not supported by the evidence; that the finding of the damage of $143 is contrary to the evidence; that no gains, profits or advantages should have been found; that only nominal damages should have been found; and that, although some of the burners used by the defendant contained only a portion of the patented improvements, the master has reported the same amount as to those lamps as to those which contained all the patented features.

In argument, it is contended for the defendant that the plaintiff is not entitled to recover as profits the saving made by the defendant in burning kerosene oil in the infringing head-lights, but is entitled to recover only a proper license fee for each head-light. This view is based on the proposition that the plaintiff exercised his monopoly, not by using his patented inventions to burn kerosene oil in them, but by making and selling head-lights. There would be force in this suggestion if the suit were one at law, for damages only. But this suit is a suit in equity for an account of profits, savings or advantages by the use of the patented inventions. The statute, (section 4921 Rev. St.,) taken from the act of July 8, 1870, (16 U. S. St. at large 206, § 55,) expressly gives to the plaintiff, on a recovery in a suit in equity for an infringement, "the profits" to be accounted for by the defendant, in addition to the damages which the plaintiff has sustained by the infringement. It is the infringement, and the suit in equity and the decree therein, which give the right to the profits, and no court has any right to turn those profits into the license fee which would have been the remuneration to the plaintiff if there had been no suit in equity and no decree. The defendant made its election when it infringed and subjected itself to a suit in equity, and the plaintiff is entitled to the result of the choice he made of suing in equity and not at law. The plaintiff made his inventions for the purpose of enabling any one using them to successfully burn kerosene oil in lamps for locomotive head-lights, and to obtain

the full advantage of its great light-producing capacity. The defendant used them for that purpose and with that result, and must pay the profit or savings made thereby.

The master appears to have computed the profits or savings accurately and on proper principles. The defendant might, it is true, have burned in the head-lights other oils than kerosene oil, for they were capable of burning other oils. But, in such case, the defendant would not have made the saving it did. The claims embrace the combinations claimed when in use to burn kerosense oil. It does not follow, however, that they have no further scope as to manufacture or use.

It is objected by the defendant that the master found the same rate of profit in respect to the use of the infringing head-lights which contained less than the 11 inventions claimed in the patent, that he did in respect to the infringing head-lights which contained every one of the said 11 inventions. The answer to this objection is that, as the defendant burned kerosene oil in every one of the infringing burners, it necessarily used enough, in each case of the patented combinations claimed, to enable it to burn the kerosene oil, which it could not have done with success or satisfaction if it had not used the fewest number of such combinations which it did use. The head-lights which did not contain all the combinations were, necessarily, inferior in results, though sufficiently successful and satisfactory, to those which contained all the combinations, and the defendant derived therefrom the same rate of advantage in saving which it derived from the head-light which contained all the combinations, though not deriving equal advantages in other respects. But these last advantages are immaterial in ascertaining the saving.

The sixth and seventh exceptions are withdrawn by the defendant. The first, second, third, fourth, fifth, ninth, tenth, and twelfth exceptions are disallowed. On such disallowance the plaintiff consents to waive any recovery for damages. This makes it unnecessary to consider the eighth and eleventh exceptions. Let a decree be entered for the plaintiff for $3,545.86, as gains, in profits and advantages, with costs.

SPILL *v.* THE CELLULOID MANUFACTURING COMPANY.

(*Circuit Court, S. D. New York.* May 25, 1880.)

PATENT—IMPROVEMENT IN DISSOLVING XYLOIDINE FOR USE IN THE ARTS.

Horace M. Ruggles and *Edward M. Felt*, for plaintiff.

William D. Shipman, Henry Baldwin, Jr., and *E. Luther Hamilton*, for defendant.

BLATCHFORD, C. J. This suit, on the proofs, involves two patents granted to the plaintiff. One is No. 97,454, granted November 30, 1869, for an "improvement in dissolving xyloidine for use in the arts." The specification states that the "invention relates to the preparation and use of certain solvents of xyloidine, and which differ from the ordinary known solvents of xyloidine, in that these menstrua which are employed are not, necessarily, in themselves, solvents of xyloidine, but become so by the addition of the bodies, compounds or substances herein referred to." It also states that the invention consists in the employment of eight different solvents. Only the second solvent is alleged to have been used by the defendant. It is thus described in the specification: "Camphor or camphor oil, or mixture of the same, in conjunction with alcohol or spirits of wine, the same to be employed in about equal proportions." The claim is in these words: "The preparation and use of solvents of xyloidine, such as have been before described, so as to render xyloidine more easy of conversion into compounds containing xyloidine, which are suitable for applications in the arts and for industrial purposes." The defendant has infringed this claim by using camphor, in conjunction with alcohol, as a solvent of xyloidine. The defendant mixes ground and dried xyloidine with pulverized dry camphor, and then immerses the mixture in alcohol until the xyloidine is dissolved. It is dissolved by the joint action of the camphor and the alcohol. Neither alone is a solvent of xyloidine. It is immaterial, so far as the invention and the claim of the patent are concerned, whether the camphor and the alcohol are mixed so as to dis-

solve the camphor in the alcohol and then the xyloidine is put into the solution, or whether either the alcohol or the camphor is first mixed with the xyloidine and then the third substance is added. The bringing of the three together, causing the xyloidine to be dissolved or softened, so as to be more easy of conversion or working into compounds or articles containing xyloidine, is the invention. Making use of the solvent power of camphor and alcohol, when in the presence of each other and of the xyloidine, is the essence of the invention. The use of the camphor and the alcohol in about equal proportions is not of the essence of the invention. They are stated by the patentee to be useful in these proportions. But the evidence shows that the real invention was the discovery of the fact that camphor and alcohol, when united, would be a solvent of xyloidine.

The novelty of the invention of this solvent is attacked, but without success. The evidence is voluminous, and has been carefully considered, with the result that the defendant has failed to show want of novelty. The prior patents adduced and examined are the English patent to Cutting, No. 1,638, of 1854; and the English patents to Parks, No. 2,359, of 1855, No. 2,675, of 1864, No. 1,313, of 1865, No. 1,695, of 1867, and No. 1,614, of 1868. Park's pamphlet of 1867, and Gamielin's Hand-book of Chemistry, of 1860, have also been considered, as well as the English patent to the plaintiff, No. 2,666, of 1867. No other anticipation than the above seems to be considered by the defendant's expert, and he does not allude to the pamphlet. Another defence relied on is that one Parks communicated to the plaintiff, in England, the knowledge that alcohol and camphor united were a solvent of xyloidine, and that the plaintiff never made the invention himself. On the whole evidence, the defendant has failed to establish this defence.

The other patent involved is No. 101,175, granted to the plaintiff March 22, 1870, for an "improvement in the manufacture of xyloidine and its compounds." There are five claims in the patent. The second alone is alleged to have been infringed. The specification says: "The second part

of my invention relates to the bleaching of xyloidine, and is as follows: When it is desired to bleach or whiten the xyloidine, I bleach it directly after the removal of the acids, and before removing it from the vat. This I do by any of the well-known means, preferring a solution of chlorine, or a solution of chloride of lime or soda, which I add to the xyloidine, making use of alternate stirrings and rests, for a sufficient time, until the xyloidine is whitened. The solution is again drained off, and the xyloidine is repeatedly washed with water, in order to remove any excess of bleaching agents or any residue from such agents, when it will be found to be ready to be submitted to pressure in order to free the same from water, and may then be opened out, so as to prepare it for drying, dissolving, or other purposes." The second claim is in these words: "The process of bleaching xyloidine in the manner herein specified." That portion of the specification which precedes the statement of the second part of the invention relates to the treatment of vegetable fibre or lignine with acids, to convert it into xyloidine and render it soluble in suitable solvents. The fibre is intimately mixed with the acids by appropriate means, then the acids are strained and pressed from the fibre, which is now xyloidine, and it is subjected to a washing and stirring with water until it is nearly or quite free from acids, and the water is then drained off. The washing is done in a washing vat. The bleaching, as before stated, is done "directly after the removal of the acids," and before the xyloidine is removed from the vat. The evidence shows that the real invention of the plaintiff, in this regard, was to bleach xyloidine by ordinary bleaching agents, directly after the converting acids had been washed out of it, and before anything had been mixed with it which might interfere with the action of the bleaching agents. This is, fairly, the sense of the specification. Whether the bleaching is done in the washing vat or not, or in a solution of the ordinary bleaching agent, or by such agent not in a solution, are immaterial matters. The essential discovery was, that an ordinary and well-known bleaching agent, of the character of chlorine, or chloride of lime or chloride of soda, if applied

to xyloidine, when it had become such and had been freed from the converting acids, and while it remained in that state, would act upon it to bleach it. The defendant treats paper with acids to make xyloidine, then washes out the acids, then grinds it, and, while it is being ground, applies bleaching powders to it. The evidence is satisfactory that one of such bleaching powders is permanganate of potash, and that it was a well-known and ordinary bleaching agent at the time of the plaintiff's invention. Therefore infringement is established.

It is contended for the defendant that the claim in regard to bleaching does not claim a patentable invention, because it is merely the use to bleach xyloidine of what had been before used to bleach fibrous material not converted into xyloidine. The true view is well expressed by Professor Seeley, the plaintiff's expert. The defendant's expert, Mr. Edward S. Renwick, had cited four English patents, those to Martin, No. 7, of 1864, to Reeves, No. 2,797, of 1860, to Collyer, No. 550, of 1859, and to Reeves, No. 3,293, of 1866, as describing the treatment of vegetable fibre with a solution of chloride of lime or of soda, substantially as the plaintiff's patent describes xyloidine as being treated with a solution of chloride of lime or of soda. Professor Seeley says: "The patents referred to by Mr. Renwick cover inventions relating to bleaching, by means of ordinary bleaching agencies, the ordinary fibrous substances which are used for clothing, paper stock, etc. I do not find in them anything which has more bearing upon the novelty of Spill's invention than what might be included in the matter which Spill regards and defines as old and well known. Previous to Spill's time, the ordinary bleaching materials and methods were only applied to a peculiar class of substances, namely, those substances of fibrous character which were useful only by reason of that fibrous character. Spill's invention brings the utility of bleaching upon a new kind of material, and brings it where it was very desirable, but where it was supposed to be impracticable. It is true that pyroxyline" (xyloidine) "has a fibrous structure, but this fibrous structure is not any essential or

useful property in it. In fact, in this art, pyroxyline does not become useful until the fibrous structure is destroyed. Pyroxyline is not useful for any of the purposes to which the materials formerly bleached were applied. Pyroxyline is very different, in chemical character and composition, from the old bleachable materials. If pyroxyline had not the fibrous structure, probably the question of invention in this case would not have arisen, for then it would have appeared plainly that the case would have been very similar to that of (suppose) bleaching charcoal by ordinary bleaching agents. In the absence of experiment, the bleaching of a substance like pyroxyline would seem impracticable, almost incredible. The theory of ordinary bleaching is, that the coloring matter of goods to be bleached is of a complicated and unstable character, and is destroyed by the powerful chemical action of the bleaching agents, chlorine, oxygen, etc. Inasmuch as pyroxyline, in its manufacture, has been exposed to the action of some of the most powerful chemical agents which are known, it is unreasonable to suppose that any of the unstable coloring matter could be left in it. The bleaching of pyroxyline has often been proposed and attempted; it was especially desirable in this art; but it is my opinion that a chemist would exhaust all other theories before he would think of ordinary bleaching agents for the purpose. The subject had come up in my mind several times before Spill's invention, and I was unwilling to credit the efficacy of his plans until they were actually demonstrated to me. I know of very few inventions where so novel and useful results have been obtained by such simple and unlooked-for methods." There is no evidence to countervail this view.

The defendant has introduced evidence for the purpose of establishing that the invention claimed by the plaintiff in regard to bleaching xyloidine was previously known to Parkes, and was communicated by him to the plaintiff, and was not in fact invented by the plaintiff. The burden of showing this is on the defendant, and, on the whole evidence, it has not succeeded in doing so.

The defendant claims to have shown that other inventions

claimed in the two patents were not new, so as to affect the question of costs. But the attempt cannot be held to have been successful.

There must be the usual decree for the plaintiff, for an account and an injunction, as to the claims above held to have been infringed, with costs.

THE BRIG E. A. BARNARD.*

(*Circuit Court, E. D. Pennsylvania.* June 4, 1880.)

ADMIRALTY—HOME PORT—RESIDENCE OF OWNER—FOREIGN REGISTRY. The port in which the owner of a vessel resides is her home port, although she has a foreign registry and sails under a foreign flag.

Per BUTLER, J. As against one who had been misled by such representations, the owner would not be allowed to assert the contrary.

PRIORITY OF MARITIME OVER STATUTORY LIENS.—Maritime liens for supplies furnished to a vessel in a foreign port have priority over liens given by state statutes for repairs subsequently furnished in her home port.

DISTRIBUTION AMONG MARITIME LIEN CLAIMANTS—ORDER OF PAYMENT. *Semble* maritime liens of the same class or rank, upon a vessel, should (as a general rule) be paid out of the proceeds of the sale in the inverse order of their creation, without distinction between creditors of the same class, who are concurrently engaged in fitting the vessel for an intended voyage, and without respect to the dates of attachment.

The Pathfinder, 4 Weekly Notes, 528, not followed.

MARITIME LIENS—SERVICES OF WATCHMAN AND SHIP KEEPER.—The services of a watchman and ship keeper, rendered while the vessel is in port, do not create a maritime lien.

SAME—SERVICES OF STEVEDORE.—The services of a stevedore in loading a vessel in her home port do not create such lien.

SAME—AGREEMENT HYPOTHECATING VESSEL—WHEN NOT A BOTTOMRY BOND—ADVANCES TO VESSEL IN HOME PORT.—While a ship was in her home port her master, who was also her owner, borrowed money from parties abroad, and gave them a written agreement, providing that for such money they should have, "besides the responsibility of the owners, a lien on the ship and freight;" that the same were hypothecated to them, and that he would make them a remittance of the freight from Oporto, (the vessel's destination.) *Held*, that this instrument was not a bottomry bond.

Held, further, that the vessel being in her home port, the fact that the money was advanced to relieve her necessities do not give the advancers a lien as against other attaching creditors.

*Reported by Frank P. Prichard, Esq., of the Philadelphia Bar.

In Admiralty.

Exceptions to report of commissioner appointed to report as to the distribution of the proceeds of the sale of a vessel under admiralty process. The brig E. A. Barnard was registered at St. Andrews, New Brunswick, and sailed under the British flag, but was owned by her master, S. P. Willeby, who resided at Philadelphia. In the spring of 1879, upon the return of the vessel from a voyage to the Mediterranean, she had extensive repairs made to her at Philadelphia. In May, 1879, while she was still at Philadelphia, and loading for Oporto, a libel was filed against her by Thurlow & Sons, for supplies furnished in New York in July, 1878. Before any decree was obtained various libels of intervention were filed, as follows:

By Merchant & Co., and by various other parties, claiming liens for repairs furnished at Philadelphia, in the spring of 1879.

By Robert M. Wilson for wages as watchman and ship keeper at Philadelphia.

By Grace & Linderman for services as stevedores in loading the vessel, at Philadelphia.

By Baring Bros. & Co. for money advanced to the master under the following circumstances: Stetson & Co., the agents for the vessel at Philadelphia, had from time to time made disbursements on account of the vessel, many of which were for wages, and other objects that were maritime liens. Baring Bros. & Co. subsequently authorized the master to draw upon them for £430, for the vessel's disbursements at Philadelphia. The master drew for this sum in favor of Stetson & Co., who applied the money to their account for the previous advances. Accompanying the draft was the following instrument:

"PHILADELPHIA, May 16, 1879.

"*Messrs. Baring Brothers & Co., London.*

"GENTLEMEN: The British brig E. A. Barnard, under my command, will sail May 24th for Oporto, having on board a cargo of corn in bags. Freight amounting to £650. To

provide necessary funds to pay ship's disbursements here, for which ship and owners are liable, I have valued upon you this day for £430, at sixty days' sight, in favor of D. S. Stetson & Co., which please accept, for amount of which draft please insure the freight, loss payable to you, debiting premium, as well as amount of draft and your commissions, to account of said ship and owners; it being understood that for all such amounts you have, besides the responsibility of the owners, a lien on the ship and freight, and the same are hypothecated to you accordingly, with power to you to collect freight if you choose. I shall make you a remittance from Oporto of the whole amount of my freight, less expenses, to be placed to the credit of my ship-owners as soon as I realize from my freight. The recourse to owners, and lien on ship and freight, given as above to Baring Bros. & Co., after acceptance, are to operate in favor of the holder of the bill before acceptance.

"Respectfully, your obedient servant, S. P. WILLEBY.

"P. S. My vessel is owned as follows: S. P. Willeby."

The vessel was sold under a decree of the court, and the distribution of the proceeds referred to a commissioner, (Morton P. Henry, Esq.,) who reported that as between the lien for supplies furnished in New York in 1878, and the liens for repairs in Philadelphia in 1879, the latter should have priority, under the principle established by the authorities that the last service advanced for the vessel's necessities takes precedence, and that liens of the same class should therefore be paid in the inverse order of the dates of their creation, except as to claims of material men, who concurrently gave credit to the vessel in fitting her for a voyage, and who were, therefore, entitled to distribution *pro rata*. As between the various lien claimants for repairs made at Philadelphia in 1879, he reported that in accordance with the above principle they would be entitled to share *pro rata*, but that he felt himself bound by the decision in *The Pathfinder*, 4 Weekly Notes, 528, to award them priority in the order of the dates at which their respective libels were filed. The

commissioner refused to allow the claims of Robert M. Wilson and Grace & Linderman, on the ground that their services gave them no maritime lien.

With regard to the claim of Baring Bros. & Co., he reported that the instrument given to them was not a bottomry bond; that their advances, under the circumstances, gave them no maritime lien, and that by the application of their money to the previous advances made by Stetson & Co. they acquired no lien by subrogation as against the other attaching creditors.

To this report exceptions were filed by Thurlow & Sons, Merchant & Co., Wilson, Grace & Linderman, and Baring Bros. & Co.

Edward F. Pugh and *James B. Roney*, for Thurlow & Sons.

Henry G. Ward and *Henry Flanders*, for Merchant & Co.

Edward F. Pugh, for Robert M. Wilson.

John A. Toomey, for Grace & Linderman.

Henry R. Edmunds, for Baring Bros. & Co.

BUTLER, D. J. The exception filed by Grace & Linderman, stevedores, must be dismissed. I agree with the learned commissioner that such services do not create a lien. This view is, I believe, consistent with the uniform practice in this district, and with all the American cases, except that of *The George T. Kemp*, 2 Lowell, 477, in which the vessel was held to be *foreign*, and the decision put on that ground. As is said in *The A. R. Dunlap*, 1 Lowell, 350, the reason given for holding that such contracts are not maritime is not satisfactory, because the contracts of material men are not more so. But liens are allowed in such cases because the materials and supplies enable the vessel to make her voyage. The other reason assigned—that the cargo is a collateral matter, and not a part of the vessel's necessary equipment—is more to the purpose, though not entirely satisfactory, either, because the vessel cannot be used to advantage without a cargo. But, says Judge Lowell in this case: "It is important to adhere to the decisions, and I shall follow them in this respect, though I doubt their application to a foreign vessel." Subsequently, in *The George T. Kemp*, the same distinguished judge, as has

been seen, held the vessel there involved to be foreign, and, therefore, allowed the stevedore's claim.

While the circumstances of that case are very similar to those of the one before us, I cannot accept the conclusion that the vessel should be treated as foreign. She, clearly, is not. Her owner resides here, and here, therefore, is her home. That she has a foreign registry, and sails under a foreign flag, does not seem to be important. As against one who has been misled by such representations, the owner would not be allowed to assert the contrary. But here there has been no misleading. The residence of the owner in Philadelphia was well understood, and that the home of the vessel was therefore here, all persons dealing with him were bound to know. For necessary services and supplies furnished in foreign ports liens are allowed, on the presumption that credit is given the *vessel*, inasmuch as the owner, personally, has none there. When at home the presumption is reversed, and the credit treated as given to the owner personally. What difference can it make, therefore, that the owner registers his vessel abroad and sails under foreign colors? These facts do not affect the presumption on which alone the question of lien depends. But, aside from the reasonableness of this view, the point has been so decided in this court after full consideration. In *McCorker* v. *The Brig Thomas Walker*, the owners, residing in Philadelphia, had their vessel registered abroad, and sailed under foreign colors, to avoid danger from rebel cruisers during the late war, and a lien was claimed for services rendered here on the ground that she was *foreign*. The claim was disallowed by the district court, and, on appeal, by the circuit court also; Judge Grier filing a written opinion, in which, while expressing sympathy with the plaintiffs, he held that the foreign registration, and the use of a foreign flag were unimportant, in view of the owner's residence here, and the claimant's knowledge of this fact.

The exceptions filed by Baring Bros. & Co. must also be dismissed. The instrument they hold is not a bottomry bond. The informality it exhibits would be unimportant if it contained the essential elements of such a contract. But it does

not. The element of *marine risk* is wanting. The language, "I shall make you a remittance from Oporto," etc., (relied upon by the claimants, in this respect,) does not indicate that reimbursement is to *depend* upon the safe arrival of the vessel there. It bears no resemblance to the expression, "The amount to be paid in one month after the ship's arrival at any port of discharge in Great Britain," contained in the instrument involved in *The Nelson*, 1 Haggard, Ad. Rep. 169; as the court there said, "If the port was never reached, the time appointed for payment would never arrive." While the language of a bottomry bond should not leave the question of marine risk open to doubt, that of the instrument before me seems to be plainly inconsistent with the assumption of such risk. The stipulation for the *owner's personal obligation* cannot be reconciled with the idea that the vessel alone was looked to. Where the instrument is executed by the *master*, and a bottomry contract clearly appears to have been intended, a provision for such personal responsibility (being clearly beyond the master's authority) has been held void. This is reasonable, as well as just. But where the instrument is executed by the *owner*, the provision not being liable to this objection, its insertion bears with very great (though, possibly, not controlling) force on the question of marine risk.

The instrument held by Baring Bros. & Co. cannot, therefore, be treated as a bottomry bond. Nor can the transaction out of which it grew, separately considered, be held sufficient to support an ordinary maritime lien. Furnishing the means required to relieve a vessel's necessities, in a foreign port, would undoubtedly be sufficient. But here, as has been determined in passing upon the claim of the stevedore, the vessel was at home; and (looking at the transaction independently of the paper, as must be done in considering this aspect of the claim) the inference that it was credited (the only ground on which such a lien can rest) is inadmissible. These claimants cannot, therefore, receive anything, as against the lien creditors. If a balance remained for the owner, they might stand in his stead, as upon a mortgage, or other hypothecation not of a maritime nature.

The second exception, filed by Merchant & Co., "that the commissioner erred in not paying *pro rata* all the claims for services rendered the vessel after arrival in Philadelphia on her last voyage, irrespective of the order of attachment," is more serious. The report in this respect is against the commissioner's judgment of the law, but in conformity to what he understands to have been the determination of this court in *The Pathfinder*, decided in 1877. Whether this understanding is correct I need not inquire. The case was peculiar in its facts, and upon the record is not readily understood. As no written opinion was filed, it cannot now be known, with certainty, what views controlled the court in entering the decree. According to the reported observations of the judge, made during the argument, his views of the law at that time were not such as the commissioner ascribes to him, though the decree subsequently entered seems to support the commissioner's conclusion, "that the case is authority for the rule that claims are to be satisfied out of the vessel's proceeds, according to the date of proceedings against it."

The commissioner does not, however, follow this rule thus broadly stated, but as he says: "Considering how such a rule would destroy the well-established principle of priority in maritime liens by which the material man or salvor, whose service or expenditure has preserved the vessel as a security for a pre-existing debt, has a priority, so that practically the last service advanced for the vessel's necessities takes precedence over a previous one, the commissioner believes that such was not the intention of the learned judge who decided the case, but that it was intended to apply the principles of *prior peteus* to the particular circumstances of that case." It is not clear, however, that the circumstances of the case justify this distinction; and the intelligent counsel of Thurlow & Son, (whose attachment was first in time,) earnestly contending that they do not, claims that his clients are entitled, under the authority of that case, to preference for supplies furnished on a *previous* voyage. The unreasonableness of the rule thus stated, and the great improbability that the learned and emi-

nent judge who decided the case would adopt it, are quite sufficient to justify serious doubt whether the case is correctly understood.

With the limitation put upon it by the commissioner, the rule is scarcely less unreasonable. Why should one of several individuals, who are concurrently crediting a vessel with supplies for an intended voyage, and entitled to liens, be preferred over the others because he happens to secure the first process? Why should the rights of parties thus be made to depend upon the result of a scramble? Such a rule would forbid all forbearance or indulgence of the vessel, and require each creditor to proceed to sue out an attachment at the earliest practicable moment. Support for the rule, however, in its broadest aspect, as well as the limited one adopted by the commissioner, may be found in a few cases; but, in my opinion, the decided weight of modern authority in this country is against it in either aspect. *The Paragon*, Ware's Rep. 330; *The America*, 16 Law Rep. 264; *The Fanny*, 2 Lowell's Rep. 508, each involved the question, and in each it was held, after a careful examination of the authorities, that liens of the same class or rank, upon a vessel, should (as a general rule) be paid out of the proceeds of sale in the inverse order of their creation, without distinction between creditors of the same class, who are concurrently engaged in fitting the vessel for an intended voyage, and without respect to the dates of attachment. In *The America* importance is attributed to the *decree* in this respect; but it is said the court will control the decree, so as to avoid an improper preference. In *The Fanny*, however, decided more recently, Judge Lowell says: "One who obtains a decree obtains no priority thereby over others whose liens are, of themselves, of equal degree, where all the claims are pending together If there has been a break, such as a voyage, those who have supplied the last voyage have a preference over those who furnished an earlier outfit." While thus repudiating the suggested advantage of a decree, he refers approvingly to the careful and elaborate opinion of Judge Hall as a correct exposition of the rules

and principles prevailing in this country respecting maritime liens.

In view of the high authority of these cases, and the justice of the principles they promulgate, I think *The Pathfinder* (granting that it is understood) should be treated as a mistake, and be disregarded. I feel the less hesitation in adopting this conclusion, in consequence of the presence of Circuit Judge McKennan at the argument, (who kindly consented to sit with me, that the benefit of his judgment might be had without an appeal,) and his concurrence in this opinion.

Had we here only the Philadelphia creditors, the decision of this question would have been unnecessary; as their liens depend on the *local statute*, they can claim only what it gives. And it expressly provides that if the proceeds of the vessel "shall not be sufficient to satisfy all the liens, the same shall be paid *pro rata*." The federal courts, in enforcing such liens, must necessarily look to the statutes out of which they grow to ascertain the rights of claimants. The claim of Thurlow & Son, however, for supplies furnished in a foreign port, renders a decision of the question necessary. These gentlemen, as appears by what has been already said, obtain no advantage by means of their early attachment; and in consequence of the supplies having been furnished for a previous voyage, their lien is inferior to that of the Philadelphia creditors. They cannot, therefore, participate with them in the distribution.

We agree with the commissioner respecting the claim of Mr. Wilson, and disallow it for the reasons he states.

All the exceptions are dismissed, saving the second, filed on behalf of Clark Merchant, which is sustained. The report of the commissioner must be reformed accordingly.

JUNE 3, 1880. While engaged in writing the foregoing opinion, I was impressed with a belief that the *statutory* liens should be treated as subordinate to the maritime lien of Thurlow & Son, although the latter is on account of a prior voyage; but as the point was not made before the commissioner nor

on the argument, I was indisposed to raise it. On a suggestion to counsel since, however, it has been carefully examined and discussed, and is ascertained to be well founded. The maritime law of the country is a part of the federal system, administered alone by the federal courts, and a concession of right to interfere with it in any respect by the states, is difficult to reconcile with reason. That they may interfere, however, to some extent, as by creating liens for supplies furnished, and repairs made in home ports, is well settled, though the fact is rarely referred to by the courts without an expression of regret that it is so. *The Gen. Smith*, 4 Wheat. 438; *Peyroux* v. *Howard*, 7 Peters, 324; *Orleans* v. *Phebus*, 11 Peters, 175; *The St. Lawrence*, 1 Black, 522; *The Lattawanna*, 21 Wall. 580. No further interference, however, has been permitted, and no instance is found in which such statutory liens have been allowed to displace or supersede liens created by the maritime law. They are but *quasi* maritime, have uniformly been so considered by the courts, and are recognized and allowed only after all maritime liens proper are paid. The creditors holding them are citizens of the state, and it is permitted to direct the order in which their claims shall be paid. To allow state legislation a greater effect would be to concede the right to alter and change the maritime law of the nation in a most material respect. The right so to change and alter has been most emphatically denied, (as in principle it must be,) whenever the subject has been mentioned. *The Lattawanna*, 21 Wall. 580; *The St. Lawrence*, 1 Black, 522; and other cases therein cited.

What alteration could be more material than that of divesting, superseding, or in any respect changing the order of satisfying, liens? While the precise question under consideration here has rarely been raised, under circumstances requiring decision, it has in a few instances; and the cases in which the general subject has been incidentally remarked upon by the judges are numerous. Every decision, and every expression, found, is in harmony with the view herein stated. *The St. Joseph*, Brown's Adm. R. 203; *The Harrison*, 2 Abb. U. S. 74; *The John Richards*, 1 Biss.

106; *The N. W. Thomas*, 1 Biss. 219; *The Royal Saxon*, 2 Am. L. Reg. 324; *The Chusan*, 2 Story, 455; 1 Sprague, 39; *Smith* v. *Steamer Eastern*, 1 Curtis, 259; *The Hiawatha*, 5 Sawyer, R. 160; *Francis* v. *The Harrison*, 1 Sawyer, R. 353; *Hill & Conn* v. *The Golden Gate*, 6 Am. L. Reg. (O. S.) 273; *The Kate Hinchman*, 6 Biss. 367; *The Grace Greenwood*, 2 Biss. 131.

The lien of Thurlow & Son was not lost, by lapse of time, or other cause; *The Atlantic*, Crabbe, 440; *The Rebecca*, 1 Ware, 188; *The Prospect*, 2 Blatch. C. C. 527; *The Young Mechanic*, 2 Curtis, 404; *The Chusan*, 2 Story, 468.

The claim of Thurlow & Son must, therefore, be paid in advance of the statutory liens.

ROBERTS *v.* THE BARK WINDERMERE, etc.

(*District Court, S. D. New York.* May 19, 1880.)

ADMIRALTY—MARITIME SERVICE.—The removal of ballast from a foreign vessel, while in port, for the purpose of putting her in condition to receive cargo for an intended voyage, constitutes a maritime service.

F. A. Wilcox, for libellant.

W. W. Goodrich, for claimant.

CHOATE, D. J. This is a libel *in rem* against a foreign vessel, upon a contract made by the master with the libellant, for labor and services in removing the ballast, while in this port, for the purpose of putting her in condition to receive the cargo for her intended voyage. The libel avers that the services were performed on the credit of the vessel. The owner has appeared as claimant, and excepts to the libel on the following grounds: *First*, that the same does not state facts sufficient to constitute a maritime lien or cause of action herein; *second*, that the court has no jurisdiction upon the allegations of the libel; *third*, that the action is founded upon a contract to pay for services performed by the libellant as stevedore, in unloading the said bark.

It is argued for the claimant that the contract sued on is not a maritime contract, and that it cannot be distinguished in principle from the contract of the master with the stevedore for unlading the ship, which, it is claimed, has been held not to be a maritime contract, giving a lien on the ship for its enforcement, or of which the admiralty has jurisdiction.

In the case of *The Amstel*, Bl. & H. 215, (1831,) the question, whether a stevedore has a lien on the vessel for his services, came before this court, and it was held by Judge Betts that the suit *in rem* could not be maintained. He says: "This action is resisted in the first place on the ground that the libellant has no lien upon the vessel, because his services as a stevedore were not in their nature maritime, and were really performed on land. It is to be remarked that the services consisted of nothing done to the vessel in her repairing and refitting, but of labor expended partly on board and partly on shore in discharging her cargo. This description of service has never yet been recognized as of a privileged order. It does not fall within the extensive list of debts privileged by the civil law, nor does it seem to be comprehended within the principle upon which a lien or privilege is allowed. A vessel is made chargeable with certain services because they are necessary for her preservation or useful employment. Under this head is embraced the compensation of material men and others for labor done upon the vessel, or in her navigation, or in promoting the health or comfort of the ship's company on a voyage. The language of the civil law has direct reference to this description of service, and the French law, which gives a broader application to the privilege than has ever been yielded in England, does not extend it beyond those engaged in labors connected with the equipment or refitment of the vessel, either in respect to the vessel herself or her necessary stores, her crew, etc., or in services performed on her during her voyage. The American law has never gone beyond the doctrines recognized in the continental courts of Europe, and it seems to me that it would be a departure from the well-understood

terms of the maritime law in this respect, and from the principle which pervades its enactments, to give a lien upon the vessel to a claim of the character of the one now under consideration. It in no respects merits such privileges any more than do the services of any other class of laborers in any work connected with the business of the ship. It does not seem to differ from a transportation of the cargo from one place to another on the land, and the cartman who hauls off the lading and facilitates the discharge of the vessel aids her in the same manner as the laborer who raises the cargo from the hold."

The learned judge also found in that case an additional reason for denying the lien: that the services were in fact not performed upon the credit of the vessel, but upon the personal credit of the master.

In *The Bark Joseph Cunard*, Olc. 123, (1845), Judge Betts adhered to this ruling and denied the lien of the stevedores, and, as within the same principle, rejected the claim of lightermen who took the cargo from the shore to the ship while lying in the port of Mobile. The vessel was under a charter which relieved the ship as between her and the charterers from the expense of loading the vessel. This circumstance, however, does not seem to form the ground of the decision. Referring to these two charges for stevedores and lighterage, Judge Betts says: "It is an employment outside of the vessel, not contributing to her capabilities or security in navigation, or serviceable to her voyage. There is no difference in principle whether the cargo is brought to her side in the stream, or placed near her on a wharf. The ship is responsible for disbursements necessary to equip and put her in a condition (by men, provisions, etc.) to perform her voyage; but it would be giving a novel extension to the notion and range of tacit liens to subject her to all claims collateral and incidental to her dispatch. A cargo is no more than an incident to a voyage, and in no sense necessary to enable the ship to perform one. Debts arising out of such collateral services or engagements may be chargeable upon the owner personally, as resting upon his implied contracts; but the ship is not

necessarily pledged to their satisfaction more than for wages of the master, or other benefits to the mercantile adventure of the owner."

In *Cox* v. *Murray*, 1 Abb. Adm. 341, (1848,) Judge Betts restates the grounds of the decision in the case of *The Amstel.*

In the case of *The S. G. Owens*, 1 Wall. Jr. 370, (1849,) Mr. Justice Grier held that a stevedore has no maritime lien upon a foreign vessel for services in loading her. It was argued that the service was essentially maritime, being done on the ship, and essential to her carrying freight; that formerly the mariners performed this service, and had a lien for their wages, whether earned in port or at sea, and that the stevedore, who for reasons of convenience is substituted for the mariners, is entitled to the same lien. The court observed that the argument was ingenious, but not supported by authority; that no decision or *dictum* was cited which would justify the court in treating this as a maritime service. He cites against the claim *Phillips* v. *The Sattergood*, Gilpin, 3, in which Judge Hopkinson made it the test of a contract not being maritime—that it was neither made at sea nor for a service to be performed at sea, but made and to be performed while the vessel was moored at a wharf within the body of a county. He then adds: "The stevedores are usually employed by the owner, consignee, or master, on their personal credit; the service performed is in no sense maritime, being completed before the voyage is begun, or after it is ended, and they are no more entitled to a lien on the vessel than the draymen and other laborers who perform services in loading and discharging vessels."

It cannot, however, I think, be denied that later adjudications have established a far less narrow and restricted definition and test of what constitutes a maritime contract, of which the admiralty has jurisdiction, and, also, of the extent of the maritime lien as an incident of such a contract, than that contained in these early cases. Thus, in *Ins. Co.* v. *Dunham*, 11 Wall. 26, the supreme court says: "As to *contracts*, it has been equally well settled that the English rule, which concedes jurisdiction, with a few exceptions, only to contracts made

upon the sea, and to be executed thereon, (making locality the test,) is entirely inadmissible, and that the true criterion is the nature and subject-matter of the contract, as whether it was a maritime contract, having reference to maritime service or maritime transactions."

In the case of *The A. R. Dunlap*, 1 Low. 361, (1869,) Judge Lowell followed, with hesitation, the cases of *The Amstel*, *The Joseph Cunard*, and *The S. G. Owens*, remarking, however, that the reason given that the service was not maritime did not appear to be decisive, because the contracts of other material men are no more so, and that the reason given that the cargo is a collateral matter, and no part of the necessary equipment of the ship, was also unsatisfactory, because a ship cannot be used to advantage without a cargo. He adhered to the rule, however, in respect to stevedores, while doubting its correctness, as a point settled by authority.

In the case of the *Bark Ilex*, 2 Woods, 229, (1876,) Mr. Justice Bradley denied the lien of a stevedore as settled by authority, citing *Cox* v. *Murray* and *The S. G. Owens*. Referring, doubtless, to the case of *The A. R. Dunlap*, he says that Judge Lowell thinks the reasons given in *Cox* v. *Murray* are not satisfactory; and referring to Justice Grier's views in *The S. G. Owens*, he says they are so clear and forcible "that he is not certain that he should come to a different conclusion if the question were a new one." But in the case of *The George T. Kemp*, 2 Low. 482, (1876,) Judge Lowell reconsidered his decision in *The A. R. Dunlap*, and came to the conclusion that the course of reasoning in the early cases, which he had followed before, had been declared unsound by the highest authority, so that "an adherence to the mere result of those cases is not defensible on the ground of *stare decisis*, because it is standing by the letter at the expense of the principle." Upon a careful review of the authorities he upheld the stevedore's claim for a lien on the vessel, enforceable in admiralty, as being for a maritime service.

The case of *The Ilex* is not cited by him. As it was decided but a few months earlier it had not probably then been published.

During the same year, and probably without the knowledge of either of these two decisions, Judge Welker held a stevedore entitled to a lien. *The Schooner Senator*, 3 N. Y. Wkly. Dig. 430. He cites no case directly to the point, but relies on the authority of *The Williams*, 1 Bro. 215, where Judge Emmons lays down the general rule, as the result of the authorities, that "all maritime contracts made within the scope of the master's authority do *per se* hypothecate the ship;" and he cites also, with approval, the opinion of Judge Ware, in *The Paragon*, that "every contract with the master within the scope of his authority binds the vessel, and gives the creditor a lien for his security." He then adds: "There certainly does not seem to be any difference in principle between this class of service and those performed by the sailors, the lightermen, the man who sets the rigging, who scrapes the bottom or paints the side of the vessel, or him who furnishes supplies, or tows the vessel in or out of port. They are all necessary to the general business of transportation of the cargo, and contribute to the reward of capital employed in the maritime service, and alike should be regarded as maritime service, and furnish a remedy against the vessel."

Recurring to those considerations of commercial necessity and convenience, out of which it is supposed that this whole system of tacit hypothecation has grown, it is difficult, as matter of principle, to limit the range of maritime service and maritime contracts, which carry with them, as an essential part, a maritime lien enforceable in admiralty short of whatever services the master may require, and whatever contracts he may find it necessary to make, as the agent of the foreign owner, in the performance of his duty in navigating and conducting the business of the ship, for the successful prosecution of the voyage or adventure upon which she has been dispatched by the owner; and this doctrine, which is inconsistent with that narrower principle by which the stevedore's lien was denied, seems to have received the sanction of the supreme court of the United States.

Thus, in *The Emily Souder*, 17 Wall. 669, Mr. Justice

Field says: "The steamer was detained at Maranham nearly five weeks, and the moneys advanced by the libellants, it is true, were not entirely for the repairs to the vessel and the supplies needed for the voyage; they were intended and applied in part to meet the expenses of her towage into port and of pilotage, and to pay the custom-house dues, consular fees, and charges for medical attendance upon the sailors. These various items, however, stood in the same rank with necessary repairs and supplies to the vessel, and the libellants, advancing funds for their payment, were equally entitled as a security to a lien upon the vessel." And, again, speaking of the presumption that the money was advanced upon the credit of the vessel, the court says: "The presumption arises that such is the fact from *the necessities of the vessel*, and the position of the parties considered with reference to the motives which generally govern the conduct of individuals. Moneys are not usually loaned to strangers, residents of distant and foreign countries, without security, and it would be a violent presumption to suppose that any such course was adopted when ample security in the vessel was lying before the parties."

This language is, of course, equally applicable to the parties who render services or supply anything necessary to the ship, as to those who furnish money to pay for the same. See, also, *Ins. Co.* v. *Dunham*, 11 Wall. 3; *Thomas* v. *Osborn*, 19 How. 28–30. In accordance with the same view it was held by Judge Benedict, in *The Onore*, 6 Ben. 564, that the service of a cooper rendered at the request of the master, in coopering casks to fit them for delivery according to the contract of affreightment, though rendered partly on the wharf, was a maritime service, which carried with it a lien on the vessel.

In England, the admiralty jurisdiction was, as is well understood, greatly curtailed through the action of the common-law courts. Yet when, by Stat. 3 and 4 Vict. c. 65, § 6, jurisdiction was conferred upon the admiralty court to enforce claims or demands for "necessaries supplied" to foreign ships, it was held that stevedores' services were necessaries within the meaning of the act, and that stevedores had

a lien on the ship therefor. *The Wabam,* 1 Pr. Adm. Dig. (2d Eng. Ed.) 364.

It is, therefore, entirely clear that the rulings of this and other courts, excluding stevedores' claims from the class of maritime contracts, can no longer be considered authority for the exclusion of services of an analogous character. If the rule as to stevedores is adhered to—a point which the court is not called on to decide in this case—it must be wholly on the doctrine of *stare decisis,* since it is now out of harmony with the accepted principles of maritime law as declared by the courts of admiralty. This is the view taken of the rule by Judge Benedict. *The Circassian,* 1 Ben. 209. In the present case there is, indeed, a very strong similarity between the services for which this suit is brought and the service of the stevedore. The work done is precisely of the same nature. The only distinction is in the subject-matter on which the labor is performed. In the one case it is work done in removing the cargo from the ship; in the other, it is work done in removing the ballast. This distinction is enough, however, to take the case out of the rule applicable to stevedores.

The ballast is not cargo. It is rather a part of the ship, like the boats, the sails, the anchors, the stores, and many other things that go to the full equipment of the vessel. The ballast is necessary to the complete and seaworthy ship, though unlike them it is so only under certain circumstances. While it is in its place in the ship it is to be regarded as a part of the ship and of her equipment. The service of removing it when she is to take on board her cargo is of the same character as would be the removal of the anchors, or stores, or part of the cargo, if required, for the purpose of lightening her, that she might cross a bar, or come up at the wharf at which she is to discharge her cargo. The facts that the service is rendered wholly in port, that the vessel is not actually on a voyage, that it may be partly rendered on the land, do not make it otherwise than a maritime service on the foregoing authorities.

Indeed, I think it may well be claimed that the service so

rendered comes fairly within the definition of maritime service as given by Judge Betts in *The Amstel*, as being "labor connected with the equipment or refitment of the vessel." But, however this may be, I am of opinion that it is, from its nature and on the authorities, a maritime service, because it is "necsary for the ship, her voyage or business." See, also, cases cited in 2 Low. 484; Ben. Adm. § 285.

Since the foregoing was written my attention has been called to a decision of Judge Dyer that the storage of the sails of a vessel on the land is not a maritime service, for which a suit in the admiralty will lie. *Hubbard* v. *Roach*, 12 Chic. L. News, 298, [2 FED. REP. 393.] He comments on and disapproves of the opinion of Mr. Benedict, cited above from his work on admiralty, to the effect that the stevedore's service is maritime; and also his opinion that the storage of the sails is a maritime service. Ben. Adm. (2d Ed.) § 283.

The authorities, however, which were cited in *Hubbard* v. *Roach*, and on which the decision is expressly put, very imperfectly represent the present state of this question, and for the reasons given above I am unable to concur in the reasoning of the learned judge so far as it affects the question now before this court.

Exceptions overruled, with leave to the claimant to answer within one week.

CONSTANTINE and others v. THE SCHOONER RIVER QUEEN.

(*District Court, S. D. New York.* May 19, 1880.)

ADMIRALTY—MARITIME SERVICE.—The weighing, inspecting and measuring of the cargo of a vessel constitutes a maritime service.

F. A. Wilcox, for libellant.

W. W. Goodrich, for claimant.

CHOATE, D. J. This is a libel against the schooner River Queen to recover for services alleged to have been rendered by the libellant in weighing, inspecting and measuring the cargo preparatory to its delivery, and which, by the contract of affreightment, was required to be done by the vessel before delivery. The service is alleged to have been rendered at the request of the master *and owners* of the vessel. It is not alleged whether the vessel is domestic or foreign, nor that the service was rendered upon the credit of the vessel.

The owner appeared as claimant, and filed exceptions to the libel (1) that the court has no jurisdiction upon the allegations of the libel, and (2) that the contract upon which the libel is founded is not a maritime contract, such as to give the court jurisdiction.

This case was heard with the case of *The Windermere, ante*, 722, and submitted as involving upon the exceptions the same point as that case; the only difference referred to by counsel being the difference in the nature of the service rendered. The point, therefore, does not seem to be raised whether, if the vessel is a domestic vessel, the libellant's claim, if in the nature of a claim for necessaries furnished to the vessel, is limited to a claim *in personam*, on the facts stated in the libel, on the principle declared in *The General Smith*, 4 Wh. 438. Nor is it made a ground of exception, as in *The Windermere, ante*, 722, that the libel does not state a cause of action.

The first exception seems not equivalent to that. The only point made in argument in support of either exception is that the contract declared on is not maritime. While, therefore, I have some doubt whether other points might not be raised

under the first exception, I shall assume that this is the only point which the claimant desires to make.

Upon this question I cannot distinguish the case from that of *The Onore*, 6 Ben. 564, in which it was held that the services of a cooper, in putting the cargo in order for delivery, performed partly on the ship and partly on the wharf, were maritime services. The reasons for this conclusion are given at length in the case of *The Windermere*, *ante*, 722.

As Judge Benedict says, in *The Onore*: "Many maritime contracts are performed on land and by persons having no immediate connection with the sea. The services in question are maritime, because they are a necessary part of the maritime service which the ship renders to the cargo, and without which the object of the voyage would not be accomplished."

Exceptions overruled, with leave to answer.

In re AH CHONG.

(*Circuit Court, D. California.* June 9, 1880.)

CHINESE TREATY—CONSTITUTION.—The statute of California prohibiting all aliens incapable of becoming electors of the state from fishing in the waters of the state violates the fourteenth amendment of the constitution of the United States, also articles 5 and 6 of the treaty with China, and is void.

Habeas Corpus.

Delos Lake and *Thos. D. Riordan*, for petitioners.

A. L. Hart, Attorney General, for respondents.

SAWYER, C. J. Article 19 of the new constitution of California, headed "*Chinese*," in addition to the provisions referred to in Parrott's case, recently decided in this court, forbidding the employment of Chinese by any corporation, or on any state, county, municipal, or other public work, also contains the following provision:

"Section 4. The presence of foreigners ineligible to become citizens of the United States is declared to be dangerous to the well-being of the state, and the legislature shall discourage their immigration by all the means within its power. Asiatic coolieism is a form of human slavery, and is forever prohibited in this state; and all contracts for coolie labor shall be void. All companies or corporations, whether formed in this country or any foreign country, for the importation of such labor, shall be subject to such penalties as the legislature may prescribe. The legislature shall delegate all necessary power to the incorporated cities and towns of this state for the removal of Chinese without the limits of such cities and towns, or for their location within prescribed portions of those limits; and it shall also provide the necessary legislation to prohibit the introduction into this state of Chinese after the adoption of this constitution. This section shall be enforced by appropriate legislation."

In obedience to the mandate of the constitution requiring these provisions to be enforced by appropriate legislation, the legislature, besides the act in question in Parrott's case, passed three other acts: One on April 3, 1880, entitled

"An act to provide for the removal of Chinese whose presence is dangerous to the well-being of communities outside the limits of cities and towns in the state of California," in which it is provided that "the board of trustees or other legislative authority of any incorporated city or town, and the board of supervisors of any incorporated city and county, are hereby granted the power, and it is hereby made their duty, to pass and enforce any and all acts or ordinances or resolutions necessary to cause the removal without the limits of such cities and towns, or city and county, of any Chinese now within, or hereafter to come within, such limits." St. 1880, p. 114. Another act on April 12, 1880, entitled "An act to prohibit the issuance of licenses to aliens not eligible to become electors of the state of California," which provides as follows: "Section 1. No license to transact any business or occupation shall be granted or issued by the state, or any county or city, or city and county, or town, or any municipal corporation, to any alien not eligible to become an elector of this state. Section 2. A violation of the provisions of section 1 of this act shall be deemed a misdemeanor, and be punished accordingly." And on April 23, 1880, still another act, entitled "An act relating to fishing in the waters of this state," which provides as follows: "Section 1. All aliens incapable of becoming electors of this state are hereby prohibited from fishing, or taking any fish, lobsters, shrimps, or shell-fish of any kind, for the purpose of selling or giving to another person to sell. Every violation of the provisions of this act shall be a misdemeanor, punishable upon conviction by a fine of not less than $25, or by imprisonment in the county jail for a period of not less than thirty days."

All these acts, as well as the acts and constitutional provisions considered in Parrott's case, are *in pari materia*; and, being so, indicate and illustrate the motive or purpose of the passage of any one of them. The petitioners in the several cases, subjects of China, of the Mongolian race, were arrested for taking fish in San Pablo bay, within the state, and selling the same in violation of the provisions of the last-named act, tried and convicted before the proper court, and sentenced to

imprisonment for the period of 30 days. Being imprisoned in pursuance of the judgments, they severally sued out writs of *habeas corpus*, and now ask to be discharged on the ground that their imprisonment is in violation of our treaty with China, commonly known as the Burlingame treaty, and the fourteenth amendment to the national constitution. The attorney general, who appears for the respondent in the interest of the state, does not seek to re-open the question decided in Parrott's case, but he endeavors to distinguish the two cases, and relies upon *McCready* v. *Virginia*, 94 U. S. 391, to support the distinction. Citizens of Maryland were in the habit of crossing over the line into Virginia, and planting oysters in the waters of the latter state. The state of Virginia, desiring to preserve the profits of the business to its own people, passed an act making it an offence for citizens of other states to take oysters from or plant them in the waters of Virginia. McCready was convicted and fined for planting oysters in Ware river, one of the waters of Virginia, in violation of this act. He claimed the act to be void on the ground that it was passed in violation of that provision of the national constitution which says: "Citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." The supreme court held that the right to take fish in the public waters of the state is not a privilege of inter-state citizenship. It held the state to be the owner, subject to the right of navigation, of the tide-lands, and the tide-waters covering them; also of the fish therein, so far as capable of ownership, while running in the waters. The court, speaking by the chief justice, says: "These (the fisheries) remain under the exclusive control of the state, which has consequently the right, in its discretion, to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is, in effect, nothing more than a regulation of the use by the people of their common property. The right which the people of the state thus acquire comes not from their citizenship alone, but from *their citizenship and property combined. It is, in fact, a*

property right, and not a mere privilege or immunity of citizenship. 94 U. S. 395. The right of citizens of Virginia to fish in the public waters of the state, therefore, is a *property right* vested in the citizen by reason of his local citizenship and as one of the common owners, and not a mere general privilege; and the title to the property being in the public—in the state—it was held that the state might exclude all others than citizens, the common owners, from enjoying the right. The court further says: "The right thus granted is not a privilege or immunity of *general* but *special* citizenship. It does not 'belong of right to the citizens of all free governments,' but only to the citizens of Virginia, on account of the peculiar circumstances in which they are placed. They, and they alone, owned the property to be sold or used; and they alone had the power to dispose of it as they saw fit. They owned it, not by virtue of citizenship merely, but of citizenship and domicile united—that is to say, by virtue of a citizenship confined to that particular locality." Id. 396.

Citizens of other states having no property right which entitles them to fish against the will of the state, *a fortiori*, the alien, from whatever country he may come, has none whatever in the waters or the fisheries of the state. Like other privileges he enjoys as an alien by permission of the state, he can only enjoy so much as the state vouchsafes to yield to him as a special privilege. To him it is not a property right, but, in the strictest sense, a privilege or favor. To exclude the Chinaman from fishing in the waters of the state, therefore, while the Germans, Italians, Englishmen, and Irishmen, who otherwise stand upon the same footing, are permitted to fish *ad libitum*, without price, charge, let, or hinderance, is to prevent him from enjoying the same privileges as are "enjoyed by the citizens or subjects of the most favored nation;" and to punish him criminally for fishing in the waters of the state, while all aliens of the Caucasian race are permitted to fish freely in the same waters with impunity and without restraint, and exempt from all punishments, is to exclude him from enjoying the same immunities and exemptions "as are enjoyed by the citizens or subjects of the most

favored nation;" and such discriminations are in violation of articles 5 and 6 of the treaty with China, cited in full in Parrott's case. The same privileges which are granted to other aliens, by treaty or otherwise, are secured to the Chinaman by the stipulations of the treaty. Conceding that the state may exclude all aliens from fishing in its waters, yet if it permits one class to enjoy the privilege it must permit all others to enjoy, upon like terms, the same privileges, whose governments have treaties securing to them the enjoyment of all privileges granted to the most favored nation.

The fourteenth amendment of the national constitution provides that "no state shall * * * deny to *any person* within its jurisdiction the equal protection of the laws." To subject the Chinese to imprisonment for fishing in the waters of the state, while aliens of all European nations under the same circumstances are exempt from any punishment whatever, is to subject the Chinese to other and entirely different punishments, pains, and penalties than those to which others are subjected, and it is to deny to them the equal protection of the laws, contrary to those provisions of the constitution. *Parrott's Case*, 21 Alb. L. J. 387, [1 FED. REP. 481;] *Strauder* v. *West Virginia*, 10 Cent. L. J. 227. It is obvious, also, from a consideration of these various provisions of the new state constitution, and the several statutes *in pari materia* referred to, considered in connection with the public history of the times, that the act relating to fishing in question was not passed in pursuance of any public policy relating to the fisheries of the state as an end to be attained, but simply as a means of carrying out its policy of excluding the Chinese from the state, contrary to the provisions of the treaty. The end to be accomplished being unlawful, as we held in Parrott's case, it is unlawful to use any means to accomplish the unlawful object, however proper the means might be if used in a proper case and for a legitimate purpose.

The act is clearly unconstitutional, and a violation of the treaty in discriminating against the Chinese and in favor of aliens of the Caucasian race in all other respects similarly situated. Acts when performed by Chinese are made an

offence punishable by imprisonment, while the same acts, performed in the same manner and under the same circumstances, by other aliens are not an offence; and such other aliens are exempt from the punishments denounced by the law against them. It is impossible, therefore, to say that the Chinese "enjoy the same privileges, immunities, and exemptions" as are "enjoyed by the citizens or subjects of the most favored nation," as is stipulated they shall by the treaty, or that the "state," by this act, does not "deny" to them "the equal protection of the laws," contrary to the fourteenth amendment to the national constitution.

While it is not very likely that the act in question was *in fact* intended by its framers to apply to any but Chinese, yet, owing to carelessness in the phraseology used, others than Chinese may have occasion to invoke the national constitution for their protection. The language is: "All *aliens incapable* of becoming *electors* of this state are hereby prohibited from fishing," etc. By article 2 of the constitution the right of suffrage is limited to "*male* persons;" so that all alien women are "*incapable of becoming electors,*" and, being so, are within the terms of the statute; so that German, French, Italian, English, and Irish women, before becoming citizens, are forbidden to take fish, shrimps, lobsters, oysters, etc., in the waters of California. So, also, under the act of April 12, before cited, it is provided that "no license to *transact any business or occupation* shall be granted or issued by the state, or any county or city, or city and county, or town, or any municipal corporation, *to any alien not eligible to become an elector of the state;*" and the violation of this provision is made a punishable offence. So that, under the terms of this act, it is an offence to grant or issue a "license to transact *any business or occupation*" to any alien Caucasian woman; and alien women of European extraction will be unable to engage in any such "business or occupation" as requires a license. A similar infelicity of expression is found in article 2 of the constitution, relating to the right of suffrage, in which it is provided "that no native of China * * * shall ever exercise the privileges of an elector in this state," without regard

to the race to which he belongs. Many persons of the Caucasian race are natives of China, and probably not a few descendants of citizens of the United States, who would fall within the terms of this provision.

Section 4, article 19, of the state constitution, in obedience to which the act now in question was passed, provides that "the presence of foreigners *incligible to become citizens* of the United States is declared to be dangerous to the well-being of the state, and the legislature shall discourage their immigration by all means within its power." It certainly cannot be the "ineligibility to become citizens" that renders the presence of foreigners "dangerous to the well-being of the state." If the presence of the Chinese as aliens, intending, dead or alive, to return or be returned to their own country, is objectionable to our citizens as being "dangerous to the well-being of the state," it is not difficult to perceive that their presence as citizens, permanently domiciled and multiplying in the state, would be far more objectionable and obnoxious to the welfare of our people. If ineligibility to citizenship were the only objection, it could easily be obviated by striking the single word "white" from the naturalization laws. Indeed, in the late revision of the statute, the word "white" was inadvertently omitted; but our people made haste to procure its re-insertion by amendment at the earliest opportunity. Thus, from June 22, 1874, to February 18, 1875, Chinese were eligible to citizenship. *In re Ah Yup*, 5 Sawyer, 155. But the people of California were not satisfied with their eligibility, and in deference to their wishes they were again made ineligible to citizenship. So ineligibility to citizenship is not the dangerous or objectionable feature. The real objection is more deeply seated and more substantial. Many believe that the time has come when all naturalization laws should be abolished. Should congress come to entertain that view, and repeal the naturalization laws, *then all aliens* would fall under the ban of this provision of the state constitution.

These various provisions are referred to as instances illustrative of the crudities, not to say absurdities, into which

constitutional conventions and legislative bodies are liable to be betrayed by their anxiety and efforts to accomplish, by indirection and circumlocution, an unconstitutional purpose which they cannot effect by direct means.

The act under which the several prisoners are held being void, for the reasons stated, they are in custody in violation of the constitution and a treaty of the United States, and are entitled to be discharged; and it is so ordered.

MURRAY *v.* HOLDEN and others.

(*Circuit Court, W. D. Missouri.* June, 1880.)

REMOVAL—TIME OF FILING PETITION.—Under the act of 1875 a petition for removal must be filed before or at the term at which the cause might first by law be tried, although the pleadings have not been settled at that time.

Motion to Remand.

This suit was originally brought to the September term, 1878, of the circuit court of Jackson county, Missouri, and it could have been tried at that term if the issues had been joined and the parties had been ready. At that term the defendants interposed a demurrer to the petition, which was argued and submitted, and taken under advisement by the court. The record does not show what action was taken by the court upon the demurrer, but counsel agree that it was held under consideration until the subsequent March term, 1879, when it was overruled. Whereupon, at the said March term, the defendants filed their petition for removal on the ground that the case is one arising under the constitution and laws of the United States.

The plaintiff moves to remand, upon the ground that the petition for removal was not filed in the state court within the time required by the statute, and upon another ground which need not be considered.

Comingo & Slover, for plaintiff.

Karnes & Ess, Tichenor & Warner, Gage & Ladd and *Brumback, Ferry & Black*, for defendants.

McCRARY, C. J. The statute of 1875 requires that the petition in the state court for removal shall be filed "before or at the term at which such cause could be first tried, and before the trial thereof." This language has been frequently construed by the circuit courts of the United States, but, unfortunately, these courts do not agree as to its meaning. It is impossible to harmonize the conflicting decisions on the subject. In this circuit, according to Judge Dillon's statement in his work on "Removal of Causes," the term referred to is "the term at which, under the legislation of the state, and the rules of practice pursuant thereto, the cause is first triable—*i. e.*, subject to be tried on its merits—not necessarily the term when, owing to press of business or arrearages, it may be first reached in its order for actual trial."

I think the practice in this circuit has been uniformly in accordance with the rule here stated, and it must be regarded as well settled. I am disposed to adhere to it, not only because it is the rule heretofore adopted and followed, but also because I consider it a correct exposition of the statute. One of the objects of the act of 1875 was to prevent the abuses which had been practiced under the acts of 1866 and 1867, which allowed a removal at any time before the final hearing. It was evidently the purpose of congress to fix an earlier and a definite time, which would not permit the litigant to experiment in the state court until satisfied that he would fail there, and then change his forum. In all the states there is, by law or rule, a trial term—*i. e.*, a term at which a cause may for the first time be called for trial. In practice but few contested cases are tried at the first trial term, and it often happens that controversies arise upon questions of pleading—so that, as in this case, no issues of fact are joined at that term. It is, nevertheless, the term at which, within the meaning of the law, such cases could first be tried, and, therefore, is the term at or before which the petition for removal must be filed. The statute does not contemplate any delay for the

purpose of settling the pleadings in the state court. These can be settled in the federal court after removal, if necessary. If the local law makes the first term after suit is brought an appearance term merely, and declares that the second term is the one at which the case may be brought to trial, then the latter is the term at or before which the petition for removal must be filed. But where the first term after service of process is the term at which by law a case is triable, then that is the term to which the act of congress refers.

In other words, the term at which a case can "first be tried" is the first term at which it may by law be tried. The statute should be construed so as to require litigants who have a choice of forums to make their election promptly. Besides, any other rule than the one above stated would cause vexatious delays. If, for example, we should adopt the construction contended for by defendants' counsel, and say that the term referred to by the statute is the term at which an issue of fact is joined, the result would be that litigants might in many cases postpone the joining of such an issue by raising and contesting questions of law in the state court for the purpose of gaining time, as well as of ascertaining the views of the state court before applying for a removal—thus continuing, under the act of 1875, the abuses which under the previous acts caused so much and such just complaint.

The motion to remand is sustained.

KREKEL, D. J., concurs.

NOTE.—See *Blackwell* v. *Braun*, 1 FED. REP. 351; *Forrest* v. *Forrest Home*, Id. 459; *Whitehouse* v. *Ins. Co.*, *ante*, 498.

KEITH and others v. LEVI.

(*Circuit Court W. D. Missouri.* May Term 1880.)

REMOVAL—WANT OF CONTROVERSY—REV. ST. § 639.—There is no right of removal, under section 639 of the Revised Statutes, after a stipulation has been filed in the state court admitting the claim sued upon.

SAME—ATTACHMENT—CONTROVERSY.—A controversy between citizens of different states, as to the validity of an attachment, may constitute a case removable, within the meaning of the statute, where the amount in dispute, exclusive of costs, exceeds the sum or value of $500.

SAME—SAME—AMOUNT IN CONTROVERSY—PETITION.—In such case the application for removal should be made upon the attachment issue, and should show affirmatively that the amount in value in that controversy was more than $500.

Motion to Remand.

L. H. Waters and *E. Torrence* for plaintiffs

Huston, Brownlee, Dobson and *Lander*, for defendant.

MCCRARY, C. J. The plaintiffs, citizens of Illinois, brought their action against the defendant, a citizen of Missouri, in the court of common pleas of Linn county, Missouri, to recover a debt due for merchandise amounting to $975.70. The petition alleges that the defendant is about, fraudulently, to convey and assign his property and effects so as to hinder and delay his creditors, and that he is about, fraudulently, to conceal, remove and dispose of his property and effects so as to hinder and delay his creditors. The affidavit for attachment required by the statute of Missouri was filed, and a writ of attachment was issued and levied upon certain goods of the defendant. The defendant filed in the state court a plea in abatement, in which he denied the truth of the allegations in the petition upon which the attachment was issued, and prayed that the attachment might be abated, and that the goods attached might be released, and that he recover costs. Thereupon the plaintiffs filed their petition for the removal of the cause to this court, on the ground of local prejudice, under the third subdivision of section 639, Revised Statutes of the United States. Pending the consideration of

this application by the state court, the defendant filed the following stipulation in that court:

"*Edson Keith et al.*, Plaintiffs, v. *Marcus Levi*, Defendant.

"IN THE LINN COUNTY COURT OF COMMON PLEAS, FEBRUARY TERM, 1880.

"Defendant herein, by his attorneys, in open court, and before the motion filed herein to remove this cause to the federal court is passed upon by the court, does hereby stipulate and admit that the claim sued upon is just and due to the plaintiffs, and that the amount sued for is correct; and, further, that he has not disputed said debt, and does not intend to dispute the same in any form of answer, but intends to allow plaintiffs to take their judgment for the amount claimed whenever they ask for it.

"MARCUS LEVI, Defendant.

"By his attorneys,

"HUSTON & BROWNLEE, with H. LANDER."

Whereupon the state court overruled the application for removal, and the plaintiffs filed the transcript in this court claiming that their petition and bond were according to the statute, and had the effect to remove the cause and to deprive the state court of further jurisdiction. The defendant appearing specially in this court moves to remand the cause, on the ground that, after the admissions contained in the foregoing stipulation were placed upon the record, there was no controversy or dispute which could be removed to this court.

It is manifest that there could be no removal of the original case, to-wit, the suit on the account set out in the petition, after the admission of its correctness by the defendant, and his offer to consent to judgment for the whole amount claimed.

The second section of the third article of the constitution declares that the judicial power of the United States shall extend to controversies between citizens of different states. The act of congress under which the removal was sought in this case, and which was passed in pursuance of said constitutional provision, provides: "Any suit commenced in any

state court, wherein the amount in dispute, exclusive of costs, exceeds the sum or value of $500, to be made to appear to the satisfaction of said court, may be removed for trial in the circuit court," etc. The term "dispute," as employed in the statute, must be held to be exactly synonymous with the term "controversy" in the above-mentioned clause of the constitution. The plain meaning is that before a cause can be removed there must be a litigation; that is to say, a matter either of law or fact asserted on one side and denied on the other. Where the matter is alleged by the plaintiff, and admitted by the defendant, there is no controvsrsy, no dispute, and therefore no case for removal.

If, therefore, there was nothing in the case except the question of the right of the plaintiffs to recover judgment for the sum claimed in their petition, I should hold, without hesitation, that they had no right of removal. But there is a controversy as to the truth of the allegations upon which the attachment was issued, and as to the validity of the attachment. Concerning this controversy the parties were at issue in the state court. I see no reason why a controversy as to the validity of the attachment may not constitute a case removable within the meaning of the statute. If the controversy arising upon the plea in abatement, in a case like the present, is between citizens of different states, and the amount in dispute, exclusive of costs, exceeds the sum or value of $500, I have no doubt the case is removable, even though there be no controversy upon the main case.

That the controversy arising upon the plea in this case is between citizens of Illinois on one side, and a citizen of Missouri on the other, is not disputed. Does the amount in dispute, exclusive of costs, exceed $500? Before we can answer this question affirmatively it must appear, from the record, that the recovery upon the issue joined upon the plea may exceed that sum. The value of the goods attached is more than $500, but the value of the goods attached is not the measure of the amount in controversy. The statute of Missouri (vol. 1, § 439) provides that if the issue upon the plea in abatement be found against the plaintiff, he and his sure-

ties "shall be liable on their bond for all damages and costs occasioned by the attachment, or any subsequent proceedings connected therewith." The most that can be said is that the amount in controversy in the question raised upon the validity of the attachment is the sum which the defendant may recover as damages resulting from the wrongful issuing of the writ. What that amount is nowhere appears. The defendant has made no formal claim for damages. He prays the return of the goods sued, and for judgment for costs only. If we were at liberty to enter into conjecture as to the probable amount of the damages, in case the attachment is set aside, there is no *data* in the record from which we could, with any certainty, estimate them at more than $500. The defendant's property was taken by attachment, (wrongfully, if the plea in abatement be true;) but it was taken to be applied upon a *bona fide* indebtedness.

What his damages would be might depend upon a variety of facts and circumstances which cannot be anticipated. But the court, in determining such a question as this, must not be left to speculation. The party moving for a removal must be able to show affirmatively that the sum in controversy exceeds $500, exclusive of costs. It is enough to say, in this case, that this does not appear. No sum is claimed as damages, and from aught that appears it may not be the intention of the defendant to claim damages. If he should hereafter, by proper pleading, in this case, or in a suit on the attachment bond, claim more than $500 damages, in the state court, I think his making such claim will constitute a case which can be removed; but no such claim has heretofore been made. The petition for removal evidently refers to the original cause, which, as we have seen, ceased to be a dispute or controversy the moment the defendant admitted all that the plaintiffs claimed. I have treated it, however, as applying to the issue raised by the plea in abatement, in order that I might dispose of the question upon the most favorable view for the plaintiffs. Strictly speaking, the application fell to the ground when the defendant's admission of the plaintiffs' claim was filed, and a new application for the removal of the

cause upon the attachment issue should have been made, and should have shown affirmatively that the amount in value in that controversy was more than $500. There is, in fact, no application for the removal of the case, as it stands, upon the plea in abatement. The petition is for the removal of the original or main cause, which is not removable because it does not involve a controversy.

The motion to remand is sustained.

KREKEL, D. J., concurs.

NOTE.—See *Ruckman* v. *Ruckman*, 1 FED. REP. 587.

SCHUELENBURG & BOECKLER v. MARTIN and others.

(*Circuit Court, D. Kansas.* June 14, 1880.)

MORTGAGE — FUTURE ADVANCES.—A mortgage given to secure future advances, at a time when no indebtedness existed, is valid.

DEBTOR AND CREDITOR—APPLICATION OF MONEY.—Where money has been received in part payment of a running account, and no specific application has been made of the same, a chancellor can, in his discretion, apply such money to that portion of the account which remains unsecured, without regard to the order of time in which the indebtedness for the several items of account was incurred.

MORTGAGE—DECEDENT'S ESTATE—PROOF OF DEBT.—Proof of a debt against the estate of a deceased mortgagor, and receipt of a dividend from the assets of the same, does not extinguish a mortgage given to secure a part of such debt.

MCCRARY, C. J. This is a bill to foreclose a mortgage executed by Hugo Kullak to the plaintiffs. The defendants are the heirs at law of the mortgagor, who, since the execution of the mortgage, has deceased.

The evidence shows that plaintiffs, and the said Kullak, about the first day of April, 1869, entered into a contract as follows: The plaintiffs, who were dealers in lumber at St. Louis, Missouri, agreed to furnish to said Kullak, who was engaged in the same business at Topeka, Kansas, such quantities of lumber as he might order for a period of one year, on a credit of 60 days, provided no order for more than

$5,000 worth of lumber should be made at any one time, and the indebtedness at no time during said year to exceed said sum of $5,000. To secure the payment of all bills or accounts for lumber ordered and delivered under this arrangement the mortgage sued on was executed. Numerous lots of lumber were ordered and furnished during the year covered by the mortgage, and payments were made on account, from time to time, but at the end of the year there was a balance due the plaintiffs of considerably more than $5,000. No settlement was made at the end of the year, but the account was continued through three additional years, and up to July 13, 1873, when the mortgagor died, being then indebted to plaintiffs, on the account, in the sum of $17,832.62. During the period covered by these transactions lumber was ordered by said Kullak, and furnished by plaintiffs, amounting in the aggregate to over $190,000, and payments thereon were made, from time to time, by Kullak, aggregating over $172,000. The parties frequently discussed the state of the account after the expiration of the year covered by the mortgage, and Kullak often said he considered the mortgage as security for $5,000 of his indebtedness, but no formal settlement was ever made, nor was any specific application of the payments to any particular portion of the account ever directed by Kullak or made by plaintiffs.

The plaintiffs have proved their whole claim against the estate of Kullak in the probate court of Shawnee county, Kansas, and the same has been allowed; no proof that the same, or any part thereof, was secured by mortgage, being made in that court. It appears, from the agreement of parties on file, that the whole amount of the plaintiffs' claim against said estate, as proved and allowed in the probate court, was $19,700.44, including the account in controversy here, and that the plaintiffs have received from the administrator two dividends upon the whole sum, amounting to $5,319.11. My conclusions are as follows:

1. It is no objection to the validity of the mortgage that it was given to secure future advances, no present indebtedness subsisting at the time of its execution. *Conrad* v. *Atlantic*

Ins. Co. 1 Peters, 386. This doctrine is now well settled, and it is not necessary to cite the numerous authorities in its support. It is not disputed by counsel for defendants.

2. The payments made after the expiration of the year covered by the mortgage should, under the circumstances, be applied to the liquidation of the unsecured portion of the account. There is some conflict of authority upon the question of the appropriation of payments in such a case. It is clear that the debtor may direct the application of money paid by him to a creditor having several claims against him, and it is also clear that if the debtor gives no direction he is presumed to leave the question to the discretion of the creditor, who may make the application. But there are cases which hold that where the debtor has given no direction, and the creditor has made no particular application, the court should presume, in favor of the debtor, that he intended to extinguish that debt which would bear most heavily upon him; as, for example, a mortgage or judgment. *Patterson et al.* v. *Hull et al.* 9 Conn. 747; *The Antarctic*, 1 Sprague, 206. But a different rule has been adopted by the supreme court of the United States. In *Field et al.* v. *Holland et al.*, 6 Cranch, 8, Chief Justice Marshall, in delivering the opinion of the court, said: "It is contended by the plaintiffs that if the payments have been applied by neither the creditor nor the debtor they ought to be applied in the manner most advantageous to the debtor, because it must be presumed that such was his intention. The correctness of this conclusion cannot be conceded. When a debtor fails to avail himself of the power which he possesses, in consequence of which that power devolves upon the creditor, it does not appear unreasonable to suppose that he is content with the manner in which the creditor will exercise it. If neither party avails himself of his power, in consequence of which it devolves upon the court, it would seem reasonable that an equitable application should be made. It being equitable that the whole debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious." And see *Mayor, etc.*, v. *Patten*, 4 Cranch, 317;

The U. S. v. *January et al.* 7 Cranch, 572. This rule has been applied by the supreme court of Kansas. *Shellabarger* v. *Binns*, 18 Kan. 345.

3. It is insisted by counsel for defendants that this rule is only applicable to a case where there are several separate and distinct debts, and that it is, therefore, not a proper guide for the determination of the present case, which is one of a continuous or running account. In such a case it is insisted that the payments must be applied to the extinguishment of the first or oldest items of the account. The general rule, that payments made on an open running account are presumably to be applied to the extinguishment of the items thereof in the order of their dates, is well settled. *Postmaster General* v. *Farlen*, 4 Mason, 333; *The U. S.* v. *Wardwell*, 5 Mason, 82; *The U. S.* v. *Kirkpatrick*, 9 Wheat. 738; *Jones* v. *The U. S.* 7 How. 681. But a different rule must prevail, under the authority of *Field et al.* v. *Holland et al.*, in a case where the earlier items of the account are secured, and the later items unsecured. Besides, the question of the application of the payments, in such a case, rests largely in the discretion of the chancellor, and in this case the proof shows, as already suggested, that the parties intended to preserve the security of the plaintiffs' mortgage to the extent of $5,000 of the indebtedness, and it is clearly equitable to apply the payments so as to carry out that intention. It may be added that we have here two separate contracts: first, the mortgage and the indebtedness secured thereby; and, secondly, the open account not connected with, or secured by, the mortgage. Viewed in this light, we may, for the purpose of applying the payments, separate the secured from the unsecured portion of the account, and treat them as separate debts.

4. The fact that plaintiffs proved their entire debt as against the estate of Kullak, and received two dividends thereon from the assets of said estate, does not extinguish their rights under the mortgage. The sum collected from the estate upon that portion of the debt which is secured by the mortgage must, however, be credited thereon. It appears from the stipulation of the parties that the plaintiffs have

received from the assets of the estate 27 per cent. of the entire claim, including the $5,000 covered by the mortgage sued on, or $1,350 on account of said mortgage debt. This must be credited, and the plaintiffs are entitled to a decree for the balance, to-wit, $3,650, and interest from April 1, 1870. The plaintiffs have offered to take a decree for $5,000, which, being less than the sum thus found due, including interest, the decree will be for that sum, with costs.

THE FARMERS' LOAN & TRUST COMPANY *v.* THE CENTRAL RAILROAD OF IOWA.

(*Circuit Court, D. Iowa.* May, 1880.)

RECEIVERS—ORDER OF COURT.—Order of court construed requiring the receivers of a railroad to account before a master.

In the matter of the petition of J. B. Grinnell, asking an order restraining the master from reporting on accounts of Grinnell, ex-receiver, which had been made and previously reported upon.

MILLER, C. J., (*orally.*) The order or final decree under which the master's proceedings were had, orders that the receivers shall account before the master, and that the new corporation may contest or correct their accounts. It is immaterial about that. It undoubtedly gives them the right to appear and contest the matter. The question to be considered—the main question—and perhaps the only one, is, what was meant by that order of the court? And, in order to determine what was meant, you must consider what was the condition of things in regard to receiverships, because there were more than one, and the language of the order is in the plural, that the receivers shall appear and account before the master.

There had been three receivers, no one of whom has been discharged. One of these receivers had made monthly presentations of his accounts, which had been referred to the master, and were passed upon by the master and confirmed,

with the exception of the last one. That one had been passed upon and confirmed, except as to a few items to which the receiver himself took exceptions. The two other receivers had never made any final account. As regards them, their last accounts were open and not passed upon. The last receiver in the case, Mr. Morrill, had, as far as I know, presented no account at all. If he has, there is nothing to show but what his account is open to determination.

Under that state of the case the court came to make a final decree, (as near as it could make a final decree.) Coming to make a final decree they tried to conclude as much as they could. Among other things, none of these receivers were discharged, and they made this order that the receivers should appear before the master and pass their accounts. What did the court mean by that, under that condition of affairs? Did they mean to make an order equivalent to this, that *all* the accounts of *all* the receivers for *all* the time shall be open for re-examination? That is contrary to the usual course of proceedings in court; contrary to all the practices of dealing with accounts with administrative affairs; and if the court had meant it, it would have been very easy to say that the accounts of all these receivers are *all* of them open to full investigation, and they shall all come and pass their accounts, as they have never been settled at all.

That would have been the proper way to say that thing if the court meant it; and I think that where there is such a departure from the practice of the court—from the sound principles in regard to all accounting—whether private accounts or otherwise, stated accounts, a passing of receipts, or any settlement whatever, or a settlement in court having a judicial character, such is the strength of the principle that if you can go behind these without formal proceedings, (which I will presently mention,) and if the court meant in that instance to say that much, that every one of these receivers should come here without regard to any accounting heretofore, and all should be open as if it had never been settled, they would have said it. Certainly, if I had been on the bench, I should have said it if I meant that.

In addition to that there was no proceeding before the court asking such a thing. There was no application before the court assailing these accounts either for error or for fraud. It is simply a general order, purporting to be made at the request of nearly all the parties to the whole transaction, that the account of the receivers should be passed before the master. Now the court cannot carry in its mind, and it is not to be supposed that it can, the knowledge of accounts filed month by month, passed upon month by month by the master, and by him confirmed. It is not to be supposed that although the court must take judicial notice of these things, that they did actually know that such was the condition in regard to Mr. Grinnell's account, and that they knew such was not the condition in regard to other accounts, or that they knew there was any distinction between the three.

It is not to be supposed that the court had that in its mind, but it is fair to suppose that they would pass an order including all the receivers, and instructing them in this. The receivers will pass their account subject to the rules of law concerning those accounts. If there is a receiver here who has any account which has not been passed before the master, he will pass the account and let it be settled. If there are two they will be settled. If there is a receiver, all of whose accounts are passed but the last account, he will settle as to that. If there is a receiver who has an account all of which is passed he does not need to settle, and the order does not affect him, except in general terms. I cannot suppose the court meant that all the receivers, every one of them, should appear before the master and re-open all their reports. Suppose you go that far, what rule should the master adopt? a different one from what had been adopted before in passing accounts? On the contrary, for all of them the rule would be that, as to those which have already been passed upon, it is settled, and I will report the fact that it is settled; and as to those which have not been passed upon, you must come up and settle.

With that view of the subject, about which I am very clear, I am supported by Judge McCrary, and the result is we

instruct Mr. Lomax that he has nothing to do with Mr. Grinnell's accounts. What is open, as I understand, of Mr. Grinnell's case, is simply his own exception to the last report of the master. Why it has not been disposed of, and why nobody takes any measures to dispose of it, we cannot say. We instruct the master that he has nothing further to do in the present condition of affairs with Mr. Grinnell's accounts.

Possibly it may be my duty, after the argument made here yesterday as to the proper mode of proceeding, to say that the mode of revising the report of the master on the receiver's account may be different from revising his report on any other subject. It is unnecessary to decide this, because even the authorities read by Judge Cole show that the receiver's report stands in the same attitude as if it had been passed by the master, and that it is only assailable by direct proceeding in court, in the nature of a petition, calling its attention to some error, fraud or mistake, or anything of the kind, and we are of opinion that no other mode of assailing these accounts exists but a direct proceeding in court and before the court, showing special reasons why the report should be re-examined over?

THE UNITED STATES *v.* SACIA and others.

(*District Court, D. New Jersey.* ———, 1880.)

CONSPIRACY—REV. ST. § 5440.—A conspiracy is an agreement or combination between two or more persons to effect an unlawful purpose.

SAME—SAME.—The agreement or combination is the offence, but the performance of the alleged act to effectuate it is necessary to make it indictable under the statute.

SAME—SAME—PARTIES.—A conspiracy may be inferred where it is shown that any two or more of the parties charged aimed, by their acts, to accomplish the same unlawful purpose or object, one performing one part and another another part of the same, so as to complete it, although they never met together to concert the means, or to give effect to the design.

SAME—SAME—SAME.—It is not necessary that the conspiracy should originate with the persons charged.

SAME—TESTIMONY—CO-CONSPIRATOR.—A co-conspirator is a competent witness upon the trial of an indictment for conspiracy.

This was an indictment, under section 5440 of the Revised Statutes, for conspiracy against the government. One Lewis had died at Hoboken, devising the greater part of his estate to his executors, in trust, to be applied by them to the reduction of the national debt incurred in the war with the rebellion. Jane H. Lewis had filed a caveat to the will containing this devise, and had adduced a large mass of testimony to prove that she was the widow of the testator. This testimony was subsequently shown to be false, and the alleged widow eventually filed a formal renunciation of her claim. The defendants were thereupon indicted for conspiracy. Jane H. Lewis pleaded guilty, and was used as a witness for the prosecution.

Mr. Hoffman, for A. J. Park.

Mr. Mayo, for Sacia, Allison and others.

Mr. Keasbey, U. S. Dist. Att'y, for United States.

NIXON, D. J., (*charging jury.*) The indictment in this case is found under section 5440 of the Revised Statutes of the United States. That section provides "that if two or more persons conspire either to commit any offence against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty," etc.

The offence, you perceive, consists in two or more persons conspiring to defraud the government in any manner whatever, in a case where one or more parties to the conspiracy shall do any act to effect the object—that is, to effect the fraud. It need not be successful. It may fall short of the actual commission of the fraud. Merely agreeing or combining together to commit the fraud is sufficient to constitute the offence, without any loss to the government, if any one of the parties has taken a step towards its execution. The section is very sweeping in its terms, and was doubtless intended to meet the party to the fraud against the government on the very threshold of the perpetration of his crime, and to render him liable to its penalties before the consummation of the fraud.

In the present case the indictment has been found against nine defendants, to-wit: Jane H. Lewis, Andrew J. Park, Marcus T. Sacia, Frank Allison, *alias* Ward, Henry T. Bassford, George R. Bradford, George W. Westbrook, Mary T. Russell, and Frances Helen Peabody. Five of them only are now on trial, to-wit: Andrew J. Park, Marcus T. Sacia, Frank Allison, Henry T. Bassford, and George R. Bradford.

The general charge against them is that they combined and confederated together to defraud the United States, and that one or more acts were performed by one or more of the parties to give effect to the fraud.

The indictment specifically sets forth that the nine defendants named therein entered into a conspiracy to defraud the United States in the following manner: By depriving the United States of the benefit and advantage of the provisions of a certain last will and testament, made on the first day of October, 1873, by one Joseph L. Lewis, whereby he devised and bequeathed, after making certain legacies, all the rest of his property, amounting in value to more than $1,000,000, as follows: "I give, devise and bequeath all the rest, residue and remainder of my estate, real and personal, and of every kind whatsoever, of which I may die seized and possessed, and to which, at my death, I may be entitled, unto my executors, in trust, to expend and apply in reducing the national debt of the United States of America, contracted in the cause of the rebellion in 1861," which said will was duly made and executed by said Joseph L. Lewis, who afterwards, on March 5, 1877, at Hoboken, in said district, departed this life, leaving the same unrevoked, and was duly presented for probate to the ordinary of the state of New Jersey; and further, by preventing the said residuary bequest from being applied by the said executors to the use of the United States, as provided in said will, by falsely and fraudulently opposing the lawful probate of said will, and falsely pretending that the said Jennie Holbrook was, in fact, the widow of the said testator, and that the said will was invalid and of no effect, and that she, as said widow, was entitled to a large share of the said estate bequeathed as aforesaid for the benefit of the

United States, and fraudulently, and by false testimony, preventing the said will from being proved before the ordinary, and thereby preventing the said bequest from taking effect and being applied to the use of the United States in manner aforesaid.

The jury is thus brought to the consideration of three questions, and the court suggests that when you retire to deliberate upon your verdict you should consider them separately, in the order stated: (1) Has the government proved the existence of such a conspiracy as is described in the indictment? (2) Were any of the alleged acts performed by one or more of the parties to give effect to the fraud? (3) If such a conspiracy existed were any of the defendants members of it?

1. Has a conspiracy to defraud the United States been entered into?

The general definition of a conspiracy is an agreement or combination between two or more persons to effect an unlawful purpose.

The statutory offence, under the laws of the United States, is not complete, however, until an act is done by some of the parties to carry into execution the fraud.

The agreement or combination is the offence, but the performance of the alleged act to effectuate it is necessary to make it indictable in this court; and such an offence is rarely provable by direct testimony. All the text books agree that the evidence in proof of the conspiracy may be, and from the nature of the case generally must be, circumstantial. All concerted action to violate the law or to commit a fraud is secret, and is ordinarily shown by separate independent acts, tending to exhibit a common design. The common design is the essence of the charge, and to prove it it is not necessary to prove that the parties came together and actually agreed in terms to have that design, and to pursue it by common means.

The jury will be justified in inferring the existence of a conspiracy when the government satisfies you beyond a reasonable doubt, by the testimony of credible witnesses, that any two or more of the parties charged aimed, by their acts,

to accomplish the same unlawful purpose or object, one performing one part, and another another part of the same, so as to complete it, although they never met together to concert the means, or to give effect to the design. Nor is it necessary that the conspiracy should originate with the persons charged. Every one coming into a conspiracy at any stage of the proceedings, with knowledge of its existence, is regarded in law as a party to all the acts done by any of the other parties, before or afterwards, in furtherance of the common design. 3 Gr. Ev. § 93.

In determining the question of conspiracy it will be safe for you to reckon Mrs. Lewis as one of the parties. She confesses in her testimony, and by her plea of guilty to this indictment, that she was one, and however much you may be disposed to weigh or sift or doubt her evidence as to others, you are authorized to accept it as altogether true as to herself. Did she stand alone in her attempt to defraud the government, or were others implicated with her? If one other, then you will find that a conspiracy was formed, because only two are necessary to complete the offence. She states that one of the defendants, Park, originated the scheme for her to personate the widow of Joseph L. Lewis, in order to defraud the United States, and that his motive in doing so was to share with her the fruits, to-wit, the money to be obtained from the estate of Lewis.

Much has been said as to the weight which the jury ought to give to the testimony of co-conspirators, and here is perhaps the proper place for me to submit to you a few observations on that subject. The fact that a witness is a co-conspirator doubtless operates, and ought to operate, largely against the credibility of his testimony, but the jury is not bound to reject it on that account. Whilst it would be unsafe, in ordinary cases, to convict any one upon the uncorroborated testimony of accomplices in the crime, the rule of law undoubtedly is that they are competent witnesses, and it is your duty to consider their evidence. You are to weigh it and scrutinize it with great care. You are to test its truth by inquiring into the probable motive which prompted it. You

are to look into the testimony of other witnesses for corroborating facts. Where it is supported in material respects you are bound to credit it, but where it is unsupported you are not to rely upon it, unless, after the exercise of extreme caution, it produces in your minds the most positive conviction of its truth.

Applying these well known principles of law to the case in hand, it will be your duty to inquire whether any other of the alleged conspirators were concerned with Mrs. Lewis in the attempt to defraud. One is sufficient, as I have already said, to make the offence complete. If her testimony, standing alone, produces in your minds absolute conviction of its truth, then you are at liberty to say, without looking further, that Dr. Park was in the conspiracy. If the testimony of Elijah Caldwell, another of the confessed conspirators, is accepted by you as true, you must also reach the conclusion that Sacia, Allison and Bassford were parties to the fraud. But if, in consequence of the previous misconduct of Mrs. Lewis and Mr. Caldwell, or if, in consequence of the revelations made in regard to their character during these proceedings, you are not willing to accept their individual testimony as true, then you should carefully inquire whether she or he has been corroborated in any material particulars; you will ascertain how far the testimony of Mr. and Mrs. Benson, the detective Julian, Mrs. Echorn, Judge Fullerton, and Mr. Whetlock, taken in connection with Dr. Park's own evidence, supports or fails to support Mrs. Lewis in regard to the defendant Park, and how far the testimony of O'Keefe, Julian, Mrs. Echorn, Mr. Lyons and young Caldwell supports or fails to support Elijah Caldwell. If, in either case, you find such corroboration, that you have no reasonable doubt about the connection of some of these parties with Mrs. Lewis in her attempt to defraud, you should not refuse to say so, because the direct testimony against them comes from the mouths of co-conspirators—the only source from which direct testimony usually comes in cases of this sort.

If, however, the government has failed to convince you that

any one of the defendants on trial was a party to the conspiracy at any stage of the proceedings, the case ends, and these persons are entitled to a verdict of acquittal.

2. If you come to the conclusion, as probably you will, that a conspiracy existed, your next inquiry will be, were any of the alleged acts done by one or more of the parties to give effect to the fraud?

The importance of this inquiry grows out of two facts: *First*, if none were performed the indictment cannot be sustained; *second*, if any one act was done by any one of the conspirators in furtherance of the fraud, every conspirator is chargeable in law with doing it, and is responsible for it and all the consequences which primarily flow from it.

Remembering this peculiar feature of the law in regard to conspiracy you will have no trouble here. It is admitted, for instance, that Mrs. Lewis falsely personated the widow of Joseph L. Lewis, and it is hardly to be disputed that she obstructed the probate of the will and payment of the legacy to the United States by filing a *caveat*. Every one of the defendants who are concerned with her in the conspiracy is to be treated as if he performed the act which she admits. Or, to take another illustration, Dr. Park went to Judge Fullerton to employ him as additional counsel to aid Mrs. Lewis in proving that she was the widow of Joseph L. Lewis. If he knew she was not the widow, he and every other defendant here charged, who are shown to be parties to the fraudulent combination, are to be held responsible for the act.

You will hence perceive, gentlemen, that it is not necessary that I should occupy your time with this inqury.

I proceed to the consideration of the third inquiry, which will doubtless give you more difficulty.

3. Finding that the conspiracy existed, and that some act was done to give it effect, the last inquiry is, were any of the defendants members of it?

I have no intention to review the evidence. You have heard the able argument of the counsel of the respective parties. Nor is it my province or disposition to express any

opinion as to the facts. It is for you to determine how far the testimony goes to satisfy you of the connection of the several defendants with the conspiracy.

I would suggest, however, that you take up the cases of each one of the defendants separately, and apply the testimony. For instance, consider the connection of Dr. Park. The testimony affecting him is direct and circumstantial. The only direct testimony is that of Mrs. Lewis, and he as directly denies the connection as she unequivocally charges it. His counsel very forcibly put the question to you, which will you believe, Mrs. Lewis or Dr. Park? It was and is a proper inquiry to make; but, in answering it, you are to bring into the account one or two things, which the counsel overlooked, or did not advert to—you will inquire what motive the parties had to assert or deny the fact: *First*, the motive of Mrs. Lewis in asserting it; and, *secondly*, the motive of Dr. Park in denying it.

The course of conduct in every one is influenced by motive. Has anything appeared in the cause which, in your judgment, would prompt a bad woman like Mrs. Lewis to falsely charge Dr. Park with complicity in the fraud? How does she benefit herself by attempting unjustly to drag him in? With regard to his testimony, he has every motive to deny it. You must ask yourselves, how, and how far, the advantage which must result to him affects the credibility of his testimony.

After thus contrasting the testimony of Mrs. Lewis and Dr. Park in the light of the motives which prompted it, turn to the other witnesses and ascertain how far they are supported and corroborated in any material points in the case.

I do not understand what the counsel for this defendant meant by saying to you that you had no right to believe a part of what Dr. Park says and disbelieve another part. I do not so interpret the duty of the jury. You may accept a portion of his testimony and reject another portion, if, comparing it with itself as a whole, and with the other witnesses, you are led to do so. Look at the testimony of the Bensons in this connection. The government charges that all of Park's steps in that direction were to get the necessary facts to aid Mrs.

Lewis in carrying out the fraud. Dr. Park says that, on the contrary, the information was obtained solely to prepare an article on the deceased Lewis for publication, and the reason assigned for not publishing is that the reporters had anticipated him. Inquire how the facts of the interview with the Bensons support these respective contentions. I was somewhat impressed with the importance which Dr. Park seemed, by his conduct, to attach to the color of the eyes of one or two of Lewis' old servants. Both Mr. and Mrs. Benson allude to the anxiety of the doctor on the subject.

The jury will inquire whether that was an important fact in posting Mrs. Lewis as to her duties and responsibilities, or an important fact to disclose to the public in an article in reference to the life and habits of Lewis. You have listened to the comments of the respective counsel, as to his motives in obtaining the information, and it is for you to decide where the truth lies.

The district attorney and the counsel for the defendants have entered so fully into the evidence of the different witnesses, showing the corroboration or want of corroboration to be found there, that I do not deem it necessary to pursue the subject further. I will only add, that if the testimony of Mrs. Lewis in regard to Park, taken in connection with his own evidence and the corroboration of other witnesses, do not satisfy you beyond a reasonable doubt that he was a party to the conspiracy, with a knowledge at any stage of the proceedings of the attempted fraud, it is your duty to acquit him. If, on the other hand, you have no reasonable doubt of the fact, you must not be deterred by any consideration of sympathy or mercy from finding him guilty. Your duty is to decide according to the evidence, without regard to the consequences.

You will then proceed in the same manner to consider the case of the other defendants. The direct testimony in regard to them is, to a small extent, from Mrs. Lewis, but mainly from Elijah Caldwell. If he speaks the truth, then, doubtless, Sacia, Allison and Bassford are parties to the fraud. But he also was, in the earlier stages of the proceedings in the state

court, a co-conspirator, and you may desire to have some corroboration of his testimony before you are willing to find the defendants guilty. If so, it will be your duty to ascertain whether Arnaux, Julian, Mrs. Echorn, Lyons and Henry Caldwell have so supplied the missing links in the chain of evidence as to satisfy you beyond a reasonable doubt that they were connected with the conspiracy. If yea, you will convict, and if not, it will be your duty to acquit.

With these observations I leave the case with you. Examine it without prejudice or partiality, and give the verdict of your honest judgment, as I am sure you will, according to the evidence. You may give to each one the benefit of every reasonable doubt respecting their guilt, and in all your deliberations remember that you are trying these defendants, not for the general misconduct and bad habits of their life, not for perjury in the state courts, but for a conspiracy formed to defraud the government of the United States.

Before the jury retired the counsel for the defendants handed up to the judge a large number of requests to charge. After examination Judge Nixon said that he had, in substance, embraced all these requests of which he approved in the charge already delivered, and that in regard to those of which he did not approve they were embraced in the following, to-wit: That while the will of Joseph L. Lewis vested in the executors, as trustees, the legal title to the residue of his estate, after the payment of the specific legacies, the United States had a beneficial equitable interest in the estate, of which it might be defrauded; and if the defendants, or any of them, entered into the conspiracy, and one of them performed any act to give it effect, he or they are guilty of the conspiracy to defraud the United States, and liable under the law for the consequences.

The jury found all the defendants guilty.

UNITED STATES *v.* AMBROSE.*

(*Circuit Court, S. D. Ohio.* June, 1880.)

INDICTMENT—DESIGNATION OF OFFICER—ITEMS OF ACCOUNT—REV. ST. § 5438.

On demurrer to an indictment under section 5438, U. S. Rev. St. for making, as clerk of a United States court, false claims against the government.

SWAYNE, C. J. *Held:*

1. That it is sufficient to charge a presentation to the "First Auditor of the Treasury" without naming the person who held such office.

2. That the different items of an account may all be included in one count of the indictment, and that it is not necessary that there should be separate counts for each false item.

3. Section 5438, U. S. Rev. St., provides that "every person who makes or causes to be *made*, or presents or causes to be *presented, for payment or approval,*" etc., any claim against the government, knowing it to be false, etc., shall be guilty, etc. In the original statute, (12 St. at Large, 696, 698,) from which this section in the Revised Statutes is taken, a *semicolon* followed the word "*made,*" in the first clause, instead of the *comma* now there, and there was no comma after the word "*presented,*" whereas in the Revision there is. An indictment under this 5438th section, which charges that the accused did "unlawfully *make* a claim against the government of the United States," well knowing the same to be false, etc., is insufficient. It should charge that the claim was made "*for payment or approval.*" The changes in the punctuation of the original statute have altered the meaning of this section, and the phrase "*for payment or approval*" is a part of both the first and second clauses of the section.

*Reported by Messrs. Florien Giaque and J. C. Harper, of the Cincinnati Bar.

In re PENNEY, Bankrupt.

(*District Court, W. D. Pennsylvania.* ———, 1880.)

BOND—ATTORNEY'S COMMISSIONS.—A stipulation in a bond for attorney's commissions in case of default is sustained by the supreme court of Pennsylvania.

In Bankruptcy.

Sur exceptions of the Dollar Savings Bank to register's report disallowing attorney's commission.

Rogers & Oliver, for Dollar Savings Bank, exceptant.

Kennedy & Doty, for assignee of John Penney.

ACHESON, D. J. The real estate of the bankrupt having been sold under an order of this court divested of liens, the distribution of the fund arising from the sale was referred to the register, to whose report the Dollar Savings Bank, a judgment creditor, has filed exceptions. The exceptions are to the disallowance, by the register, of the claim of the bank to attorney's commissions, upon its judgment. The register states, in his report, as the ground for disallowing the claim, that the "commissions were not liquidated in the judgment, and no process was issued for the collection of the judgment."

The bond of the bankrupt upon which judgment was confessed provides that in case of default in the payment of the principal debt, or any instalment of interest, the obligor "shall also pay all fees, costs and expenses of collecting the same, including an attorney's commission of 5 per centum;" and the warrant of attorney accompanying the bond authorizes the confession of judgment "for the penalty of the said bond, with costs of suit and attorney's commissions, as herein provided," upon any default being made in the condition of the bond. Pursuant to the terms of the bond and warrant, judgment was entered in the court of common pleas, No. 2, of Allegheny county, on February 14, 1878, in favor of the bank and against John Penney, the now bankrupt, "for the sum of $40,000, with costs of suit, * * * * to be released on payment of $20,000, with interest from May 1, 1877, at the rate of 8 per centum per annum, and 5 per centum attorney's commissions."

The right of the bank to attorney's commissions was not conditioned upon the issuing of execution upon default in payment. It had the clear right to enter judgment therein, including such commissions. Does the judgment, as confessed, include the attorney's commissions? Undoubtedly it does. *Schmidt and Friday's Appeal*, 1 Norris, 524. The judgment is for the penalty of the bond, viz., $40,000, and is to be satisfied only on payment of the real debt, $20,000, with interest from May 1, 1877, (at the rate the bank was authorized to charge,) "and 5 per centum attorney's commissions." The attorney's commissions are as much included in the judgment as is the interest, and as easily computed. Id.

A stipulation in a bond, or other instrument for the payment of money, that in case of the necessity of a resort to a suit the debtor shall pay and the creditor may recover a per centage as attorney's commissions, has been sustained by repeated decisions of the supreme court of Pennsylvania, beginning with *Huling* v. *Drexel*, 7 Watts, 126, and ending with *Daly* v. *Maitland*, 7 Norris, 384. In this latter case, indeed, it was held that the specified commissions are under the control, and may be reduced at the discretion, of the court. In the present case the Dollar Savings Bank does not insist upon the full 5 per centum commissions, but asks the reasonable allowance of 2 per centum only on the principal debt of $20,000. It is, therefore, not necessary now to determine whether, in the distribution of a fund raised by a judicial sale of real estate, the right of a judgment creditor to the attorney's commissions specified and included in the judgment may be called in question collaterally, and reduced if deemed excessive.

And now, to-wit, May 24, 1880, the exceptions filed by the Dollar Savings Bank to the report of the register are sustained, and the court allow the attorney's commissions on its judgment asked for by the bank, viz.: the sum of $400, or 2 per centum on the principal ($20,000) of said judgment, and it is ordered that said sum of $400 be paid by the assignees of the bankrupt to said bank.

In re McGONIGLE, Bankrupt.

(*Circuit Court, W. D. Pennsylvania.* June 3, 1880.)

BANKRUPTCY—AMENDMENT OF RETURN TO ORDER OF SALE.

In Bankruptcy.

Sur petition of G. I. Davis for amendment of return to order of sale, etc., and rule to show cause.

Wm. H. Semler, for amendment to deed.

Geo. M. Reade, for assignee.

ACHESON, D. J. The register to whom the case was referred after the original order of sale was made, to ascertain the liens upon the bankrupt's real estate, recommended that the order to sell be amended so that the real estate designated in his report as purparts Nos. 1 and 2 "be sold *subject to the lien* of the judgment of the *Heirs of Adam Moyers* v. *Jeremiah McGonigle*;" that the real estate designated as purparts Nos. 1, 2, 3 and 4 be sold "*subject to the payment* of the legacy of Michael A. McGonigle, when the different instalments fall due;" and that the "real estate of the bankrupt be sold discharged from all other liens."

This report the court confirmed absolutely May 9, 1876. The order of sale was not formally amended, but the confirmation of the register's report was equivalent to an amendment.

Why the register, in his recommendation, restricted the lien of the Moyer judgment to purparts Nos. 1 and 2, is not clear to me. It would seem to have been an inadvertence or clerical error. The original judgment had been revived, and manifestly at the time of the death of Jeremiah McGonigle, and at the date of the sale in this case, the four pieces of land designated as purparts Nos. 1, 2, 3 and 4 were bound by the lien of the Moyers judgment. However, as G. I. Davis bought these four pieces, the mistake in the register's report is not material.

From a careful examination of the whole record the following propositions appear to me clear—*First.* That the court

did not intend to divest or impair the lien of the Moyers judgment, or in anywise prejudice the rights of the plaintiffs therein, but intended that the purchaser of the real estate bound by the lien of the judgment should take it subject to that lien. It was not, however, intended that the purchaser should personally assume the payment of that judgment, or be deprived of any right to enforce contribution, or other like right, which the bankrupt himself had. *Second.* That the court did intend that the purchaser of the bankrupt's interest in the real estate designated as purparts Nos. 1, 2, 3 and 4, should take the same charged with the payment of Michael A. McGonigle's legacy of $500, which, by the terms of Jeremiah McGonigle's will, was payable by the bankrupt.

The distinction between the language "subject to the lien of" and "*subject to the payment of,*" as used in the register's report, in relation to said judgment and legacy respectively, is significant. The judgment was not a debt of the bankrupt but of Jeremiah McGonigle, and hence the purchaser was to take subject to the *lien* merely. But the legacy was a liability which the bankrupt had assumed to pay when he accepted the devise under his father's will, and it seems to me clear that the intention was to make the legacy a *charge upon* and *payable* out of the interest of the bankrupt in purparts Nos. 1, 2, 3 and 4, in the hands of the purchaser at the assignee's sale. Therefore, I see nothing in this record which calls for amendment so far as this legacy is concerned. The bankrupt himself most certainly could not have called upon his own vendees, James H. Dysert and Daniel Laughman, to contribute to the payment of that legacy. No more can the purchaser at the assignee's sale do so. But, in the return of sale, the assignee reports the sale to G. I. Davis as "subject to the payment of $759 at the death of Elizabeth Moyers, and the interest thereon, annually, during the life of the said Elizabeth, * * * * which said encumbrances the *said purchaser is to pay in addition to his said bid.*" The deed which the assignee has executed contains similar clauses. I think the return, in so far as it relates to the Moyers judgment, was unwarranted, and if permitted to stand may work

injustice to the purchaser. The confirmation of the return was, doubtless, in the mere routine of business, and without the attention of the court being called to the departure from the authorized terms of sale. It cannot be questioned, I think, that the court has the power to authorize an amendment. *Shamberg* v. *Noble*, 80 Pa. St. 158; *Slicer* v. *Bank of Pittsburgh*, 16 How. 571; *Supervisors* v. *Durant*, 9 Wall. 736.

The delay in applying for relief is satisfactorily accounted for. The purchaser lived in Cambria county, and the records of this court were not accessible to him without a journey to Pittsburgh. He had no reason to suppose that the return contained the objectionable clause. The deed from the asignee was not delivered until about April 1, 1878, and was then handed to the purchaser's attorney, William H. Sechler, Esq., who, without having it recorded, placed it among papers in his custody belonging to Mr. Davis. There it remained until last February, when, for the first time, it was examined by Mr. Davis and his attorney. Application to this court for relief was then promptly made.

The assignee has made no answer to the rule to show cause, and makes no objection to the allowance of an amendment to his return, or to the execution of a new deed. Clearly, the plaintiffs in the Moyers judgment have no right to object to the amendment.

And now, to-wit, June 3, 1880, it is ordered that the return of the assignee to the order of sale of the real estate of the bankrupt, so far as the same relates to the judgment of the heirs and legal representatives of Adam Moyers, deceased, against Jeremiah McGonigle, be amended as of the date of the return, *nunc pro tunc*, by striking out the clause, "subject to the payment of $759 at the death of Elizabeth Moyers, and the interest thereon annually during the life of said Elizabeth; * * * which said encumbrances the purchaser is to pay, in addition to his said bid," and in lieu thereof inserting, "subject to the lien of the judgment of the heirs and legal representatives of Adam Moyers, deceased, against Jeremiah McGonigle, No. 5, September term, 1870, of the court of com-

mon pleas of Cambria county, Pennsylvania, (*scire facias* to revive, No. 4, March term, 1876,") and that the assignee execute a deed to the purchaser, at the costs and expense of the latter, in accordance with the foregoing amendment.

SOUTHWICK *v.* WHIPPLE

(*District Court, D. Rhode Island.* March 31, 1880.)

BANKRUPTCY—MORTGAGE—FRAUDULENT PREFERENCE.

In Equity.

Chas. A. Wilson, Chas. Bradley and *A. Payne,* for complainant.

B. B. Hammond, for defendant.

KNOWLES, J. This is a suit in equity in which the complainant, as trustee of the estate of Frederic W. Whipple, prays that two mortgages made by said Frederic to his mother, Almira Whipple, April 27 and April 28, 1876, be set aside as invalid under the provisions of the bankrupt act. The first of these mortgages was of the Gaza mill estate, in Burrillville, comprising real and personal estate and property; the second, of a mansion house suitate in Elmwood, in or near the city of Providence. But as the Elmwood estate has proved insufficient to satisfy the claim of a prior mortgage, and of no avail to the defendant, the validity of that mortgage is not now a matter of controversy between the parties. Among the facts agreed are these:

First. The mortgage of the Gaza mill property was made and executed April 27, 1876.

Second. A creditor's petition in bankruptcy against said Frederic Whipple was filed June 26, 1876, to which the respondent filed a denial of the act or acts of bankruptcy charged, and also a denial of the sufficiency in number and amount of creditors, and that it was referred to a register to inquire and report upon the question of sufficiency.

Third. That before any report from the register was made—that is, sometime prior to February 3, 1877—said Frederic W. Whipple withdrew his denials aforesaid, and assented to a decree of bankruptcy against him, which was entered on said third of February, 1877.

Fourth. That said Southwick was duly appointed trustee on the fourteenth of April, 1877.

Fifth. That said Almira Whipple advertised the Burrillville property for sale under her mortgage, to be sold at auction on the seventeenth of May, 1877, and the Elmwood estate on the twenty-fourth of May, 1877.

Sixth. That the complainant's bill was filed May 7, 1877, the defendant's answer May 28, 1877, and complainant's replication June 11, 1877.

Of the bill, with its amendments of May 18 and October 18, 1877, it seems sufficient here to say that it embodies all essential and usual allegations and charges; and of the answer, that it admits some of those allegations, denies others, and sets up and avers readiness to prove a certain parol agreement, in view of which it was asserted said mortgages should and must be held unimpeachable by the trustee, even were it conceded or shown that but for this agreement the complainant would be entitled to the decree prayed in his bill. And here it seems proper to state that after the testimony, taken by the complainant and the defendant respectively, had been printed, preparatory to a hearing of the cause, the defendant prayed leave to file a supplemental answer, "setting forth the facts in said cause more precisely, and as explanatory of his answer already filed in the cause, and for the reasons set forth in his affidavit filed." This motion the complainant resisted, but the court, by a *pro forma* ruling, sustained it, and a supplemental answer was filed February 13, 1879.

The charge or charges in the bill as first amended, which the complainant assumed the burden of substantiating, were that on the twenty-seventh of April, 1876, the said Frederic W. Whipple, being insolvent or in contemplation of insolvency, made said conveyance or mortgage, with a view to give a preference to said Almira Whipple, and that said Almira

received the same having reasonable cause to believe said Frederic was insolvent, and knowing that said conveyance was in fraud of the provisions of the bankrupt act, and the amendments thereto. And, by the second amendment, to these was added the charge that said conveyance is void and of no effect in equity and at common law, being an instrument which, in effect, hinders and delays the creditors of said Whipple in the collection of their just debts against him, and is void, also, under the provisions of chapter 162 of the General Statutes of Rhode Island. But inasmuch as these points, though stated in defendant's brief, were not pressed by the complainant in the close, I dismiss them from consideration as not sustained.

Not so, however, as to the charges in the bill as first amended. The several averments as to the insolvency of the grantor, the belief of the grantee as to the grantor's insolvency, the intent of the grantor, and the knowledge of the grantee that the conveyance was in fraud of the provisions of the bankrupt act, were the subjects of prolonged and exhaustive discussion by the learned counsel of the parties, who, agreeing substantially as to the principles of law involved, differed widely and irreconcilably as to the weight and materiality of the facts claimed to be established by the testimony, bearing upon the relations, and dealings, and correspondence of the mother and son.

In view of these facts, and especially of the legitimate presumptions which they warrant and necessitate, I am constrained to adjudge that the complainant, by his testimony and argument, establishes satisfactorily the several allegations upon which his claim for a decree is grounded and pressed. As this evidence is set forth *in extenso* in the printed record, it seems not necessary in this connection to state it in detail, or to indulge in comment upon any portion of it. Neither does it seem necessary in this connection to state in explicit terms what portion of the testimony submitted I have been constrained to disregard as either incompetent, irrelevant, incredible or mendacious. It seems sufficient to say that, upon the issues presented at the hearing,

upon which the burden of proof rested on the complainant, I find for him and against the defendant.

This leaves for consideration only the special matter of defence set up in the defendant's answer, and referred to in her supplemental answer, and in the testimony of her son. This was, in substance, that she, early in 1874, began to indorse the paper of her son, under a promise and assurance that he would secure her against loss or damage, and that the conveyance of April 27, 1876, was made in fulfilment of that promise, and was therefore unimpeachable by the complainant. And in support of this view the testimony of the son, a recital in the deed of April 27th, and this defendant's allegations, in her general and supplemental answers, were referred to and made a subject of exhaustive argument. But on behalf of the complainant it was argued and insisted that the evidence failed to show that any sufficient agreement to give security was satisfactorily proven; the fact being, as contended, that this defence was purely an afterthought on the part of the defendant and her son, and his or her advisers; or, if anything more than a pretence, it had no other foundation than some mention of security, in which no specific property was named or pledged; and in support of this view the testimony of two witnesses, to the effect that the mother, shortly after the making of the deed, admitted that she had never heard anything of a mortgage to her until about the date of the mortgage, was cited, as also certain passages in letters from her to her son.

And, corroboratory of this view, too, it was argued, were the serious discrepancies and inconsistencies in the statements of the alleged promise and agreement, by the son, in his testimony as a witness, and his mother, the defendant, in her answer and supplemental answer. Her neglect, or rather refusal, to appear as a witness in the cause, and support, by her oath, as a party witness, the answer she had signed, and to contradict the testimony of the witnesses to her admission as above stated, was also referred to as a fact not to be ignored or undervalued.

Upon the defendant is the burden of substantiating this

defence. This, in my judgment, she fails to do. The weight of evidence—that which convinces the mind—and of argument, too, is against her.

A decree for the complainant must be entered.

The Eagleton Manufacturing Co. *v.* The West, Bradley & Cary Manufacturing Co. and another.

(*Circuit Court, S. D. New York.* June 9, 1880.)

Patent—Date of Invention—Burden of Proof.—When the application fails to take the date of the invention back of the date of the patent, and the defendant makes out prior knowledge and use by others, beyond any fair or reasonable doubt, as the law requires, the burden is shifted on to the plaintiff to show invention or discovery by the patentee still prior to that time.

Same—Amendment of Application—Authority of Attorneys.—The former attorneys of a deceased inventor have no authority to amend an application for letters patent, unsupported by the oath of the personal representative of the decedent.

Same—Same—Same—Pleading.—Such objection need not be specifically set forth in the answer, in the absence of a statutory requirement.

In Equity.

F. H. Betts and *Wm. D. Shipman*, for plaintiffs.

Wm. C. Witter and *Geo. Gifford*, for defendants.

Wheeler, D. J. This bill is brought upon letters patent No. 122,001, dated December 19, 1871, issued to J. Joseph Eagleton, Sarah N. Eagleton, administratrix, assignor to Eagleton Manufacturing Company, for an improvement in japanned furniture springs. The defences set up in the answer are that Eagleton was not the original and first inventor of the improvement; that the specification is not sufficiently full, clear and exact to enable persons skilled in the art to practice the invention; that the specification does not contain the whole truth relating to the invention; and that the defendants do not infringe.

The springs, which are the subject of the patent, are coiled helical or hour-glass springs, so-called, made of steel wire,

for furniture seats and beds. It is desirable that such springs should be protected from corrosion, and that they should be strong and elastic. The patent is for springs protected by japan, and tempered by the heat used in baking on the japan. It specifies no degrees of heat to be used, except that it is to be sufficient to bake and harden the japan. The evidence shows clearly that in coiling the wire of which these springs are made into the shape required, it is weakened by the strain on the outside and the compression on the inner portions, and that its strength and elasticity are restored and improved by subjecting them to heat, which need not be great enough to make them limber and to lose their shape, as would be necessary in tempering by the old process; that the best result is produced by heat at about 500 degrees, and that japan may be baked on them by heat at from 200 to 700 degrees, with the facility and rapidity sufficient for manufacturing establishments, and at still lower heats by taking longer time for the operation.

The oath of Eagleton that he believed himself to be the original and first inventor of the improvement described in his application was made June 26, 1868. He authorized the members of the firm of Munn & Co. to act as his attorneys in presenting the application, and making all such alterations and amendments as might be required, and his application was filed July 6, 1868. It was rejected, and he was notified by letter, in the care of his attorneys, dated July 10, 1868, of the rejection. He died in February, 1870. The application was renewed as in his name, by the attorneys, December 29, 1870. The specification was amended by them, in his name, October 19, 1871, and again rejected; was amended in like manner November 7, 1871, and was finally granted.

That steel furniture springs of this sort, tempered and strengthened in this manner, were known and used by various persons named in the answer, before the date of the patent, is fully and clearly shown by the evidence and not disputed. If the patent was not accompanied by the application the date of the patent would be deemed to be the date of the invention,

and that evidence would defeat the patent, without further proof of still prior invention by Eagleton. *Kelleher* v. *Darling*, 14 Off. Gaz. 673. And the application, when produced, in order to be effective evidence to carry the date of the invention back to its own date, must be an application for substantially the same invention for which the patent is granted, without material variation or addition. *Railway Co.* v. *Sayles*, 97 U. S. 554. The date of the application alone would not be sufficient for that purpose. In this view the original application of Eagleton is important. After the preliminary statement that he has made an invention, and referring to the following as a description, and to the drawing, stating that it "represents a furniture spring, provided, according to my improvement, with a japan covering," he proceeded: "The nature of this invention relates to improvements in helical furniture springs, such as are used for mattresses, sofas, etc., the object of which is to provide steel springs which will not be so liable to injury from corrosion as those now in use. It consists in providing steel springs, such as are commonly used, with a japan outer covering. Steel springs, as is well known, possess in a much higher degree the requisite qualities of strength, flexibility and elasticity than iron, copper or brass, and by reason of the susceptibility of steel to be tempered and thereby regulated to any degree of elasticity, it is much more preferable to use; but, owing to its great liability to deterioration from corrosion, it is but little used for such springs.

"To obviate this difficulty I propose to provide steel springs coated with japan, which I find to be of great advantage in resisting the corrosive action of the atmosphere on the steel, and whereby steel springs are made very much more durable than any other. To some extent the same purpose may be accomplished by coating the spring with tin or zinc, or other similar metal which will not suffer by corrosion, but the process of coating with such metal requires the use of acids for cleaning and preparing the steel, which, adhering to the steel, and being to some extent enclosed within the said coating and maintained in contact with the steel, have an injurious

effect thereon. I have, therefore, found that when the springs are protected by japanning they are much more durable and give more satisfactory results, the same being applied by the common japanning process.

"Having thus described my invention, I claim as new, and desire to secure by letters patent, japanned furniture springs, as a new article of manufacture, substantially as and for the purpose described."

Here is the whole of the specification and claim, and there is nothing in it nearly or remotely suggesting or hinting at anything more than merely protecting the springs by japan.

There is not a word about any method of tempering them whatever; nor that his treatment of them has any tendency whatever to temper them.

All that is said relates entirely to their need of protection, and to his mode of protecting them. The patent office so understood and construed it, rejected it because japanning was open to all, and informed him of the rejection and its grounds, and he acquiesced in it as long as he lived. There is no question but that the rejection upon that understanding was right. It is not claimed that this patent, or any patent, could be maintained for merely protecting steel or any other metal, in the form of these springs, or in any other form, by japan.

The discovery is that moderate heat, such as may be applied in japanning, will restore and impart temper to these springs.

The patent is, therefore, for the springs tempered in this manner.

The application does not take that discovery or invention back to its date at all. It shows nothing affirmatively about any such thing. Still, it is claimed that the proofs in the case show that Eagleton was in fact the first inventor or discoverer of this improvement. When the application fails to take the date of the invention back of the date of the patent, and the defendants make out prior knowledge and use by others beyond any fair or reasonable doubt, as the law re-

quires, the burden is shifted on to the plaintiff to show invention or discovery by the patentee still prior to that.

The evidence on which the plaintiff claims to make this out is weak; not so much in the number and character of the witnesses, as in what they pretend and appear to know that Eagleton discovered and did. They fail to set forth such experiments and tests, and results examined by him, as would ordinarily accompany such a discovery. On this subject his original application is very weighty and important. As said by Mr. Justice Nelson in *Manny* v. *Jagger*, 1 Blatchf. 372: "The description of the invention by the patentee, in his own language, affords the highest evidence of the thing or instrument which he claims to have discovered."

In view of all the evidence on this subject, it not only does not appear that Eagleton did make this invention or discovery before the others, but it appears that he did not, and that probably it never came to his knowledge while he lived.

It is said in argument that it is not necessary he should have known the full effect of the process he invented in order to uphold the patent, and that if he invented japanning it might not be necessary for him to know that japanning would temper. It is doubtless true that an inventor need not know all the uses to which his invention is capable of being put; and equally true that there must be some patentable invention patented before any use of it can be covered by the patent. Here, japanning by itself was not patentable. Eagleton described no mode of japanning which would temper or strengthen the steel. The temper and strength are produced by the heat altogether, and not at all by the japan. He did not even mention that the japan was to be applied with heat. Had a patent been granted to him on his application it would have covered japanned springs, not tempered springs. He did not invent or discover anything patentable of which any one use could be made, and, *a fortiori*, not anything of which more than one use could be made.

Upon this view of these questions of fact, the issue of fact joined upon the traverse of the answer must be found for the defendants.

Further, upon these facts, the law, both at the time when the original application was made and at the time of the amendments, required the applicant to make oath that he verily believed that he was the original and first inventor or discoverer of the art, machine, composition or improvement for which he solicited a patent, (Act of 1836, 5 St. at Large, 117, § 6; Rev. St. § 4892;) and that, if the application was by executors or administrators, the oath should be varied so as to be applicable to them. Act of 1836, § 10; Rev. St. § 4896. The invention which Eagleton made application for, and to which his oath was applicable, was japanning steel furniture springs merely. He authorized his attorneys to amend the application. At his death their authority ended. Bac. Abr. Authority, E; *Hunt* v. *Rousmanierc*, 8 Wheat. 174.

They made the amendments in his name without any authority in fact, whatever authority they may have supposed they had. The amendments were not mere amplifications of what had been in the application before, but carried into it the pith and substance of the whole invention for which the patent was granted. The patent was granted upon this without any new oath by the administratrix. Probably a patent may well be taken out by an administrator upon the application and oath of the intestate to that invention for which the patent issues; but that is not this case—this invention is entirely different.

This application, as to the invention for which the patent issued, was made and acted upon as upon the application and oath of a living person, when there was no such person and could not be any such application and oath.

The proceedings of the patent office are presumed to be regular, and founded upon proper proceedings, but they must necessarily be founded upon the applications of living persons or their personal representatives, such as the law recognizes, and not upon those of persons who are merely supposed to exist; and should be founded upon the oath of the inventor or his personal representative, in accordance

with the statute. In this case the substantial part of the thing patented was imported into the application of a person not in existence, in his name, without the support of the oath required by the statute from either him or his personal representative, or anything but the act of those who had been his attorneys, but who could not be such, for he could have no attorney, then. In *Railway Co.* v. *Sayles*, 97 U. S. 554, before cited, Mr. Justice Bradley says: "It will be observed that we have given particular attention to the original application, drawings and models filed in the patent office by Thompson and Batchelder. We have deemed it proper to do this, because, if the amended application and model filed by Tanner five years later embodied any material addition to or variance from the original,—anything new that was not comprised in that,—such addition or variance cannot be sustained on the original application. The law does not permit such enlargements of an original specification, which would interfere with other inventors who have entered the field in the meantime, any more than it does in the case of re-issues of patents previously granted. Courts should regard with jealousy and disfavor any attempts to enlarge the scope of an application once filed, or of a patent once granted, the effect of which would be to enable the patentee to appropriate other inventions made prior to such alteration, or to appropriate that which has in the meantime gone into public use."

This case is stronger against the patent than that there spoken of. Here the addition was made wholly without authority in fact, while there, apparently, it had the support of the inventors themselves all the way through.

This objection is not specifically set up in the answer, and it is claimed that for that reason it cannot properly be taken notice of. Some defences to suits on patents, like those resting upon prior knowledge and use by others, and those resting upon failure of the specification to disclose the whole truth in respect to the improvement, and others named in the statutes, have to be set out more fully in some cases than the ordinary rules of pleading would require, because the

statutes so require, but all defences are not required to be so specifically set forth. *Brown* v. *Piper*, 91 U. S. 37; *Terhune* v. *Phillips*, 99 U. S. 592.

The defendants deny infringement, and set up the right to make tempered springs, sufficiently to put the plaintiff to proof of the patent alleged in the bill; and that proof may be met by any proof on the part of the defendants, which will tend to show there was no valid patent; and such evidence is admissible under these pleadings unless it goes so far as to attempt to make out a defence which the statute requires to be alleged that is not alleged. This is like evidence under the general issue at law which is always admissible to show that a written instrument declared on never had any valid existence in fact, although it did have in form.

Let there be a decree dismissing the bill of complaint, with costs.

WISNER and others *vs.* DODD.

(Circuit Court, S. D. Ohio. May, 1880.)

RE-ISSUED PATENT No. 7,988.—Re-issued patent No. 7,988, granted to Wisner, as the assignee of J. H. Shireman, for an improvement in self-dumping horse hay rakes, sustained, and *held* to be infringed by the respondent.

Final hearing on pleadings and proofs. Bill in equity on patent for an "improvement in horse hay rakes," granted to J. H. Shireman, October 8, 1867, and re-issued to J. E. Wisner, as his assignee, December 11, 1877.

Wood & Boyd and *L. Hill*, for complainants.

Hatch & Stem and *George Harding*, for respondent.

SWAYNE, C. J. I have considered this case as far as my time would permit, and far enough and thoroughly enough to satisfy myself entirely as to the rights of the parties in interest.

I entertain no doubt, without going into the details, for I have not had time to do that—I entertain no doubt that Shireman was the first and original inventor, and first to use the

ratchets and pawls and the revolving axle, in combination with the lifting wheel adapted for horse-rake purposes, and with the rake head, rake teeth and other auxiliaries of the horse-rake, in combination with these elements of the machine, and that that combination was not contained in any prior machine.

I think, also, that the *prima facie* proof, which the issuing of the patent itself affords, is to the point that the instrument thus made by that combination is one of much more than patentable utility. I think that there is much more than the element of mere patentable invention in it. I am inclined to think, from the testimony, that the combination is not only new, but that the result is a machine of very considerable value in the useful arts that relate to agriculture. I therefore feel constrained to find in favor of the complainants.

I may also state, and I could not give such an opinion without coming to the further conclusion that I am about to announce, that under the circumstances of the case, and upon the facts disclosed by the record, the patent as re-issued is not, in fact, broader than is warranted by the prior patent of 1867.

Upon both grounds my judgment is with the complainants, and there being no serious controversy as to the infringement by the defendant, a decree will be made accordingly.

WHITE *v.* NOYES and others.

(Circuit Court, S. D. New York. May 15, 1880.)

PATENT NO. 221,721 SUSTAINED, AND HELD NOT TO INFRINGE THE CLAIM OF PATENT NO. 220,126.

Wyllys Hodges, for plaintiff.

Thomas H. Dodge, for defendants.

BLATCHFORD, C. J. I think it is quite plain that the structure described in patent No. 221,721 does not infringe the

claim of patent No. 220,126. The mode of operation of the combination of parts found in No. 221,721 is entirely different from the mode of operation of the combination of parts claimed in No. 220,126, and it required invention to pass from the latter to the former. If No. 221,721 had been the earlier patent, the structure in No. 220,126 would not infringe it. The converse of this is equally true. The motion for a preliminary injunction is denied.

BURDGE *vs.* TWO HUNDRED AND TWENTY TONS OF FISH SCRAP.

(*District Court, D. Maryland.* May 26, 1880.)

LOADING CARGO—DUTY OF MASTER.—It is the duty of a master, when fully cognizant of the facts, to determine when the vessel has taken as much cargo at a wharf as is prudent, in view of the depth of the water, although the cargo is being loaded by the shippers.

In Admiralty.

Brown & Smith, for libellant.

Marshall & Fisher, for respondents.

MORRIS, D. J. The respondents in this case chartered the schooner Martha Welsh for a voyage from Stearn's Works, Guilford, Connecticut, to Baltimore, Maryland, and they engaged to provide and furnish to the vessel at Guilford 200 tons of dried fish scrap, in bulk—cargo to be put in vessel's hold by shippers, but trimmed, stowed and discharged by vessel's dispatch in loading and discharging. The charter-party contains this stipulation: "*Charterers guaranty ten feet of water at wharf, at Guilford, and agree to lighter balance of cargo at their expense.*" I am satisfied from the testimony that before the master of the vessel got to the wharf at Guilford he was warned that there was not ten feet of water there, and that shortly after getting to Stearns' wharf he well knew, both from information given him by others and from his own soundings, that hardly eight feet could be expected at high tide. Notwithstanding that knowledge, he allowed the parties at the wharf to continue putting cargo on board until the ves-

sel was hard aground, and could only be gotten off by unloading some portion of it. This unloading occasioned considerable delay, which is one of the items of damage claimed by the libellant.

The other items of damage are alleged injuries to the vessel from the grounding and delay during the time required for the consequent repairs. The charterers were not themselves putting the cargo on board, but the manufacturers, from whom the charterers had purchased it; and, notwithstanding the misstatement in the charter-party as to the depth of water, I think it was the duty of the master of the vessel to exercise ordinary skill and judgment for the protection of all concerned. Because he did not find at the wharf the 10 feet of water guarantied in the charter party, he was not justified in allowing his vessel to be loaded down to an extent which, in view of the certain knowledge he had acquired, if he had exercised ordinary judgment, he should have known would entail unnecessary delay and damage.

He was aboard all the time and cognizant of all that was being done. It was his business to know when his vessel was loaded to a prudent depth, and then it was his duty to go into deeper water and require the balance of the cargo to be lightered; and he had a right to be paid damages for the delay arising from the lightering rendered necessary by the want of 10 feet of water at the wharf. If the parties had refused to put the cargo aboard in lighters, he could have sailed without it and recovered full freight.

The master appears from his own testimony to have mistaken his duty, and to have supposed that he could put upon the persons engaged in putting the cargo on board the responsibility of determining when they had put in the vessel as much cargo as it was prudent to take on at the wharf. In this he was in error. At that time he had been several days at the wharf and knew quite as much about the depth of water as any one, his own soundings having shown him that there was only between six and seven feet at high tide; and as to the capacity and draft of his own vessel he should have known more than any one else, and it was for him to

determine and decide when the loading at the wharf should stop.

It appears that 11 days elapsed from the time the vessel got hard aground at the wharf until she finally sailed for Baltimore. Six days of this time was consumed in unloading part of the cargo to lighten the vessel and get her out of the difficulty she should never have been gotten into, and the remaining five days were consumed in putting aboard the balance of the cargo from lighters after the vessel was anchored in deeper water. This last delay of five days would not have been necessary had there been 10 feet of water at the wharf, and demurrage at $25 a day for these five days is to be paid by the respondents.

The libellant is entitled to a decree for the unpaid freight, and $125 demurrage.

MARSHALL *v.* TUG CONROY and BARGE "E."

(*District Court, D. Maryland.* ———, 1880.)

COLLISION—TUG'S LIGHTS OBSTRUCTED BY TOW.—A tug is liable for a collision, when it permitted its side-lights to be obstructed by its tow, so that the same were not visible from the deck of a colliding schooner.

In Admiralty.

Collision between the steam-tug Conroy and barge "E," and the schooner Dexter.

John H. Thomas, for libellants.

John H. B. Latrobe and *James A. Buchannan,* for respondents.

MORRIS, D. J. The excuse of the tug for not keeping out of the way of the schooner is that the schooner changed her course. The master of the tug states that when he had taken the barge in tow and got out from Henderson's wharf and headed down the stream, on his course for the Baltimore & Ohio Railroad elevators, he saw both of the schooner's lights coming towards him head on; that he ported his wheel a little to

show the schooner his red light; that the result was that the schooner's red light opened more plainly to him. Finding that the schooner was getting close to him he put his helm hard a-port to avoid her, and just at that time she changed her course and showed her green light, and he then reversed at full speed but could not avoid the collision.

Assuming that the schooner did change her course, and assuming that the maneuvers of the tug were all of them proper, the tug has not exculpated herself for the reason that the schooner could not see her lights, and, having no warning of her approach, was not to blame for changing her course. It is to no purpose that the regulation lights are fixed and burning if they are so obstructed as not to be seen by approaching vessels. The tug was towing a barge 195 feet long, on which were double railroad tracks, and on these were eleven horse cars, such as are used for freight. The tug was made fast to the after end of the barge, and on the side furthest from that on which the schooner was approaching, so that there was not only the width of the barge and cars, but nearly the whole diagonal length of the mass of barge and cars, to obstruct the tug's lights. For the purpose of obviating the obstruction caused by the height of the cars on the barge, the tug's side lights had been fixed unusually high, and they were four feet higher than the tops of the cars, but by persons navigating a small vessel loaded down so deep in the water as was the schooner in this case, and approaching from the diagonally opposite end of the barge from the end to which the tug was made fast, they could not be seen.

The testimony of those on the schooner is that they were keeping along the southernmost side of the harbor, intending to anchor just above Locust Point; that when they got around the Baltimore & Ohio Railroad's long pier near Fort McHenry, and almost a mile from Henderson's wharf, from which the tug started, they did change their course a little to the southward, conforming to the outline of the shore, and keeping near the docks; that they saw no lights whatever on the tug and barge until they were hailed from the barge at a distance of about 70 yards off on their starboard side; that

they could then do nothing, as they had little more than steerage way, and the wharves were close on their port side; that they saw no light whatever, and were struck by the barge in less than two minutes after they heard the hail. The testimony of all on board the schooner is positive that they saw nothing but a dark mass moving down upon them. It is easy to believe that this was the fact. The only lights they could have seen were the two vertical mast head-lights of the tug, and the lantern which had been placed on the port side of the barge, on the platform beside the cars, midway of her length. It is quite possible, however, that to persons so near the surface of the water as those on the schooner these lights also were obstructed when close. But even if these lights could have been seen they would have afforded no sufficient indication of the direction in which the barge was moving, especially when surrounded by the numerous other lights of a crowded harbor.

It has been urged that the tug and tow were in fault in not observing the ninth rule prescribed by the board of supervising inspectors of steam-vessels, which, in addition to the other regulation lights, requires that on tows of canal-boats and barges a white light shall be carried on the extreme outside of the tow, and also on the extreme after part; but it appears to me that the fault which led to this collision was permitting the colored side lights of the tug to be so obstructed by the cars as not to be visible to any one low down on the water on her port side.

From these considerations, in my judgment, it results that the tug is to be held liable for the collision, and it becomes unnecessary to discuss the testimony tending to show that, even after the schooner is said to have changed her course, the tug might have avoided her by reversing at once, or going to port instead of continuing to go to starboard under a hard a-port wheel.

Proof has been offered showing the total damages to have been $4,501.28, itemized in a statement filed by libellant's proctor. The items of this statement are satisfactorily proved, with the exception of the propriety of the four and

a-half months' demurrage. From the ship-carpenter's own testimony it appears, I think, that three months should have been a reasonably sufficient time in which to have completed the repairs made necessary by the collision. I therefore deduct one month and a-half, which would reduce the demurrage from $553 to $368.67.

WHITE *v.* STEAM-TUG LAVERGNE, etc.

(*District Court, S. D. New York.* May 20, 1880.)

NEGLIGENCE—BOAT IN TOW OF TUG—LANDING BARGE.—A tug cannot expose a boat in its tow to any unnecessary peril in the course of the voyage, while leaving a barge in its tow at an intermediate landing.

SAME—LIABILITY OF TUG-BOAT PILOT.—A tug-boat pilot must ordinarily be held to be able to anticipate the action of the wind and sea on boats in his charge.

SAME—CONTRIBUTORY NEGLIGENCE—MASTER OF BOAT.—The master of a towed boat is not chargeable with contributory negligence in acquiescing in the exposure of such boat to an unnecessary peril by the tug-boat pilot, unless the danger about to be incurred is very obvious.

W. R. Beebe, for libellant.

S. H. Valentine, for claimant.

CHOATE, D. J. This is a libel to recover damages alleged to have been sustained by the libellant's canal-boat F. W. Walker, on the fourteenth day of April, 1878, while in tow of the steam-tug Lavergne, through the carelessness of the tug. The tug undertook to tow the canal-boat, which was light, from Nyack to Hoboken. She had also to tow from Nyack to Irvington, four miles below Nyack, on the east side of the Hudson, a heavily-loaded barge. She took the canal-boat on her port side and the barge on her starboard side, and proceeded down the river. There was a brisk north-west wind, making a short, chopping sea in that part of the river which broadens into what is known as the Tappan Sea. The weather was pleasant, and there is no evidence of any change in wind or sea up to the time of the accident. After getting into the middle of the river and proceeding down for about

two miles, the tug began to head towards the eastern bank, and when about opposite the dock at Irvington, and at a distance variously estimated by the witnesses from 300 to 900 feet from the dock, she began to round to in order to land the barge, the tide being then the first of the ebb.

The libel alleges that the "tug rounded to broadside to the sea and wind, bringing the libellant's boat into the trough of the sea, where the tug and canal-boat lay for several minutes, the tug pounding against the broadside of libellant's boat with such violence as to break in two a large timber or log, used in the construction of the canal-boat, at about the center of the boat, and doing other injury." The negligence of the tug is specified as follows: "That the said damage was caused by the want of skill and care of those navigating the said steam-tug; among other things, in placing the said boat broadside to the wind and sea, and in the trough of the sea, and there permitting the said vessels to pound until the said damage was caused."

The answer sets up no affirmative defence. It contains a general denial, except as to the taking of the canal-boat in tow from Nyack to Hoboken. The libellant's boat was a timber-built boat, the sides being constructed of timbers 14 inches wide and 4 inches thick, securely bolted together by bolts running from top to bottom. I think it is proved that the boat was in good and seaworthy condition when taken in tow, and that while they were rounding to at Irvington one of these timbers on her starboard side, a little above her light water-line, was so pressed in by contact with the tug or her fenders that it was broken or cracked across the width of the timber, and that that timber and the one immediately below it were sprung out of place so as to cause her to leak. The libellant has had the injury partially repaired by pressing the timbers out, and by calking and patching, but the boat still leaks from this injury. I think, also, it is proved that this injury was caused by the jumping up and down of the canal-boat with the sea, and her thumping against the side of the tug while they were exposed to the sea in rounding to, and were broadside to the wind and sea. There is no other adequate cause

shown or suggested for the break in the timber, and the springing of the timbers proved, except this.

The testimony of the libellant and his wife, which tend to show a very violent rocking and thumping of the canal-boat while in this position, is confirmed to some extent by the testimony of the pilot of the tug, who admits that while his engine was stopped and he was heading, about N. E. which would have brought him about broadside to the wind and sea, and in the trough of what sea there was, the libellant, from his boat hailing him, complained of his stopping there and said something about his boat jumping. I do not think it controls the evidence on the part of the libellant, that the witnesses from the tug and the barge did not observe or do not now recollect any such thumping as would account for so serious an injury to libellant's boat. The tug and the barge were deep in the water, and had the canal-boat on the windward side of them. The tug and barge were much less liable to be affected by the motion of the water than the canal-boat, and those on them were much less likely to notice its effect on the canal-boat than those on her.

Great importance seems to have been attached in the trial and the argument to the question, how long the canal-boat was thus kept broadside to the sea and wind in rounding to. The libellant insists that they stopped there several minutes; that they were held in that position much longer than was really necessary to effect the landing of the barge; that by going down stream a little further before rounding to, and keeping the engine working constantly till they got headed up the river, they would have passed more quickly through this dangerous point of the navigation, giving the canal-boat less opportunity to pound against the tug; that by handling her in this way the slowing or stopping of the engine to deaden the headway of the barge, which was necessary in order to bring her up to the pier without too violent contact, could have been avoided altogether, or, at any rate, might have been made after rounding to and while heading up the river, and not, as was done, while broadside to the wind and sea.

I think, upon the evidence, that the stopping of the engine

could, by the maneuver suggested, have been avoided while they were thus lying in this most exposed position, and that, therefore, the time they lay broadside to the wind and sea could have been shortened; but it is by no means clear on the proofs that this mere lengthening of the time they were in that position was the cause of the injury. Though the engine stopped, while they were in this position, to deaden the headway of the loaded barge, the stoppage was very brief, and they did not lose their headway entirely while the engine was thus stopped. The real question, however, I think, is whether the tug is chargeable with negligence in bringing the canal-boat into that position at all. If the position itself involved this danger of injury, it did so equally whether the position was maintained half a minute or two minutes. If the position did not itself involve the danger, if continued for the shortest time necessary for rounding to, it hardly seems to me that there was any negligence in rounding to as the tug did, with the slight delay made on this occasion. That this was the proper and usual way of landing the barge on the ebb-tide is not disputed. But the question is whether, under existing circumstances of wind and sea, the tug ought to have exposed the canal-boat, being light, to the peril involved in thus being brought broadside to the wind and sea.

The libellant cannot complain that the tug took another boat in tow. The canal-boat did not engage the exclusive use of the tug. Nor can the libellant, because he was to be towed to Hoboken, complain that the tug stopped at Irvington to leave the other boat. Parties who take their places in a tow with other boats do so on the understanding that those other boats are to be, or may be, left on the way. But while the right of the tug to land the barge at Irvington cannot be disputed, and the necessary delay and deviation from her own voyage, necessary therefor, must be submitted to by the canal-boat, yet it cannot be claimed that in the performance of its duty to another boat, in bringing her to her intermediate landing, the tug can rightfully subject the canal-boat to any extraordinary danger of navigation, or bring her into any peril from which the tug cannot, by the use of means at its

command, protect her. Thus the tug had the right to land the barge at Irvington, but was bound to do so in a mode which should be safe for the canal-boat; at least to this extent, that she should not be brought thereby into any position of peril into which it was inconsistent with the exercise of ordinary care on the part of the tug to bring her.

It is obvious that it was not absolutely necessary to keep the canal-boat along-side while landing the barge. She could have been anchored till the barge was landed, and perhaps she could have been safely cast off in the river before rounding to without being anchored The simple question, therefore, is whether it involved so much danger of injury to the canal-boat to bring her broadside to the wind and sea that the master of the tug failed to exercise ordinary care and the proper skill of a tug-boat pilot in doing so.

The evidence is somewhat conflicting as to the violence and strength of the wind, and as to how high the sea was. In that broad part of the river the wind has considerable effect in raising a sea, but I think the evidence of the injury actually done to the boat is entitled to very considerable weight upon this question. While it cannot, of course, be held, as an absolute rule, that pilots should always foresee what does take place as the result of the action of the wind and sea on the boats in their charge, yet, in the absence of anything to show that what has happened was something extraordinary, and not to be anticipated as the result of the causes open to their observation, and with which they are bound to be familiar, they must ordinarily be held to have been able to anticipate those effects.

In this case there was no sudden squall, no increase in the force of the wind or sea, but a state of wind and sea which the pilot of the tug knew from the start, and which he was, or should have been, competent to measure the force of in its effect on the light boat by his side. And in this case, I think, it may properly be held that he should have foreseen, and, therefore, have guarded against, this particular danger. It is no answer to say that the libellant, the owner and master of the canal-boat, did not object to proceeding after he knew the

barge was to be landed at Irvington, or that he did not object to the tug's rounding to, with his boat along-side. There may be cases where the danger about to be incurred is so very obvious that the master of the canal-boat may be chargeable with contributory negligence in voluntarily exposing his boat to the peril without objection, but this certainly is not such a case.

The captain of a canal-boat, though he may have had a long experience in being towed, is not, therefore, an expert in the handling of a tow by the tug. On such a question as this, whether the tug can safely, under the circumstances, round to with the sea that is running, he surrenders his judgment to that of the pilot of the tug, as his superior in technical knowledge, by putting his boat in the pilot's charge. The pilot of the tug takes entire control of the canal-boat, and even if the master of the canal-boat entertains some doubt about the tug's ability to execute the maneuver which it undertakes, he is to be presumed to have deferred to the superior judgment of the pilot of the tug, who takes the responsibility for the safe and proper towing of his boat.

On the whole evidence there must be a decree for the libellant, with costs, and a reference to compute the damages.

WOLF and others *v.* THE SCHOONER BERTIE CALKINS.

(*District Court, E. D. Wisconsin.* ——, 1880.)

COLLISION—FACTS DETERMINED.

In Admiralty.

This was a libel filed by the owners of the schooner R. P. Mason to recover damages sustained in a collison with the schooner Bertie Calkins, on Lake Michigan.

The case made by the libel was this: On the first of May, 1874, the Mason sailed from Manistee for the port of Milwaukee. At 10:30 o'clock P. M., and after the vessel had cleared Point Au Sable, her course was laid S. S. W. for Mil-

waukee. A moderate breeze was blowing from S. S. E. to S. E. by S. It was smoky and thick, and objects could only be discerned about a quarter of a mile distant. The lights of the Mason were burning brightly and her fog horn was sounded according to regulations. At 12 o'clock midnight, the atmosphere began to lighten. At 12:25 the vessel was heading S. S. W. and sailing at the speed of three knots an hour, with the wind S. S. E. ½ E. A vessel's horn was then heard a point or a point and a-half off the weather bow of the Mason, and appearing to be about a mile distant. Again the horn was heard bearing a little more to leeward. The horn was understood to be blown in single blasts, indicating a vessel sailing on the starboard tack, and that she would pass to the leeward of the Mason a considerable distance. The Mason kept on her course. In about five minutes after the first horn was heard the green light of the vessel, which proved to be the Calkins, was discovered about two points on the Mason's lee bow. Then both lights of the Calkins appeared, and then her green light disappeared, and her red light was only visible. The Calkins was then within 200 feet of the Mason. The Mason, in order to avoid a collision, luffed, and came into the wind, and the Calkins struck her just abaft the main rigging on the starboard side, the jibboom of the Calkins running through between the main rigging and mainmast. It is alleged that the horn of the Mason could be heard on the Calkins, and was heard for the distance of at least a mile; that the Calkins could have changed her course to port, but that instead of so doing she changed her course to starboard, and that those on board the Calkins knew that the Mason was to windward of the Calkins. Extensive injuries to the Mason as the result of the collision are alleged.

The case made by the answer was in brief this: The Calkins was on a voyage from Chicago to Manistee. The wind was S. S. E. and the vessel was under full sail, heading N. ½ W., sailing at a speed of five knots an hour, with lights burning and proper watches on deck. The weather was thick, and a fog horn was sounded at intervals, as required by the

rules of navigation. While the Calkins was thus proceeding, a horn was heard about a point and a-half on her starboard bow, sounding two blasts, indicating a vessel on the port tack, about a mile away. This horn was answered by three blasts from the Calkins, indicating that the latter vessel had the wind free. The wheelsman was at once ordered to put the Calkins up a point and to keep her up north-east, which order was promptly obeyed. The horn of the other vessel, which proved to be the Mason, was then heard about a point and a-half on the lee bow of the Calkins, and was answered with three blasts from the latter vessel. The lookout then reported a green light a little on the Calkins' port bow, close up, and the wheel of the Calkins was ordered hard down. Almost instantly the bows of the Calkins struck the Mason abaft the main rigging, her bowsprit pointing toward the bows of the Mason. It is alleged that it was the duty of the Mason, being on the port tack, to keep her course, and of the Calkins to give way; and that therefore the Calkins put her helm hard down to go under the stern of the Mason; but that the Mason did not keep her course on the port tack, but luffed up and came across the bows of the Calkins; that the Mason was in fault for luffing, and that the collision would have been avoided if the Mason had kept her course when her fog horn was heard on the lee bow of the Calkins. It is further alleged that if the collision was not the result of the Mason's negligence, then it was occasioned by the thick, foggy weather, and the wind, whereby the crew of the Mason might have been misled as to the course and condition of the Calkins, and was an inevitable accident.

H. H. & Geo. C. Markham, for libellants.

W. P. Lynde and *Robert Rae,* for respondent.

DYER D. J. The difficulties which attend a determination of this cause, arise, as in most collision cases occurring in the night, from uncertainty as to material facts. Witnesses on both sides have given their opinion as to the positions of the two vessels at the time of and before the collision; they have stated their estimates of distances and theories of the disaster; and counsel have endeavored in argument, even by math-

ematical demonstration, to maintain their views upon these questions. It is plain, however, that, considering the state of the weather on the night of the collision, points of position and distance cannot be arrived at with exactness, and that much that is claimed in this respect, perhaps on both sides, is little more than conjecture and pure theory. In such a state of facts it is clearly important that undeniable facts be first eliminated from the mass of testimony presented, and that such facts be kept prominently in view in connection with all the circumstances of the occurrence as they are disclosed.

The collision occurred soon after midnight. From all the testimony it is clear that the wind was S. S. E.; this, indeed, is admitted on both sides. The Mason was heavily laden with a cargo of lumber. The Calkins was light. The lights of both vessels were in proper place and burning. It was mate's watch on the deck of both vessels. The watch on the Mason consisted of the mate, wheelsman, and one man stationed as lookout. The watch on the Calkins consisted of the mate, wheelsman, and two lookouts. The Calkins was sailing with the wind free, and her course was N. ½ W. *At sometime* before the collision the Mason was sailing on the port tack, close hauled, steering S. S. W. The course on the two vessels intersected. Whether the Mason was pursuing her course, shortly before the collision, is one of the questions of fact in dispute. From libellants' testimony it is safe to say that the Mason was sailing between four and five miles an hour. The speed of the Calkins was at least between five and six miles an hour, probably a little more, since she was sailing free and light. Both vessels were carrying full sail. The weather was thick, occasioned chiefly by smoke from burning woods on the Michigan shore, which settled over the lake and rendered navigation, in the locality of these vessels, somewhat difficult. The watch on the Mason heard three blasts of a horn, indicating a vessel sailing free. From the testimony of the crew of the Mason it would appear that these blasts were heard a little on the weather bow of that vessel, which would be the port bow if she was on

the port tack, sailing S. S. W., and would be the starboard bow if she was on the starboard tack, steering eastward or south of east. Some of the witnesses are somewhat uncertain whether the horn was heard on the weather bow or nearly ahead, but the weight of the testimony on this point is as stated. Upon response being made from the Mason, with two blasts, indicating a vessel on the port tack, the horn of the approaching vessel, which proved to be the Calkins, was again heard on the Mason about ahead, but appearing, in the language of the mate of the Mason, to be working to leeward. A third blast was soon heard still more to leeward. A green light was almost immediately seen from a point to a point and a-half on the lee bow of the Mason. Very quickly both a green and a red light were visible. The two vessels were then very close, and the mate of the Mason shouted to the Calkins, "Why don't you starboard your wheel?" or, "Put your wheel hard up—you are running into us;" which was answered from the Calkins with the inquiry, "Why don't you luff?" to which the master of the Mason, who was then on deck, responded, "We are by the wind and can't lay any higher." The collision occurred almost instantly, the Calkins striking the Mason on the starboard side, abaft the main rigging. To this extent we have, as shown by libellants' testimony, what may be regarded as accepted facts touching what transpired on the Mason immediately before the colision.

The horn of the Mason was first heard on the Calkins about a point and a-half off the starboard bow. The second horn was heard right ahead, or nearly so, and the third horn was heard on the lee bow. When the first horn of the Mason was heard, the master of the Calkins, who was on deck, though it was the mate's watch, ordered the vessel luffed up, which was done, and her course changed from N. ½ W. to northeast. the object of this movement being to go astern of the Mason,

The horn of the Mason was heard to leeward as this maneuver was executed. The wheelsman of the Calkins says he at first tried to luff three points to N. N. E. ½ E. and then he luffed her up again. The master of the Calkins says at

the time of the collision that the Calkins was heading N. E. by E. or N. E. by E. ½ E., and the mate, who was at the compass, testifies that she stood N. E. by E. ½ E. As the course of the Calkins was changed, and immediately or very soon after the Mason's horn was heard on the lee bow of the Calkins, the green light of the Mason was seen, but her red light was not seen at any time before the collision. The hail of the Mason to the Calkins to starboard her wheel was heard on the Calkins, but this was not done, the master of the Calkins responding to the Mason, "Why don't you luff?" This is admitted by witnesses for respondent. The vessels immediately struck. These may be accepted as facts shown by respondent's testimony, touching what occurred on board and in connection with the movements of the Calkins just before the collision, and thus far, and to the extent thus stated, as to both vessels, their movements, the observations taken on board of each vessel by the crew of each, and the circumstances of the collision, we are able to proceed on what may be regarded as uncontroverted facts.

Now, in considering the respective theories maintained by libellants and respondent, there yet remains to be determined certain questions of fact, of the highest importance and open to much dispute, since they constitute the very points in controversy. What was the actual course of the Mason at the time and immediately preceding the collision? What was the actual position of the two vessels, and in what proximity were they, each to the other? Had or had not the Calkins crossed the Mason's course when the course of the first-named vessel was changed from N. ½ W. to N. E.? These, with other incidental points of inquiry, are the great questions in the case, and as they are determined, certain conclusions seem necessarily to follow.

The libellants maintain that the Mason was on her course—that is, on the port tack—close hauled, steering S. S. W.; and their theory is that when the Calkins changed her course from N. ½ W. to N. E. she was crossing, or had crossed, the Mason's course, and that the collision was occasioned, other secondary causes contributing, by her persistent luffing to

eastward, and by putting her wheel down when the Mason's green light was visible.

Respondent maintains that the Calkins had not crossed the Mason's course, and the whole defence proceeds upon that theory. Further, that it was her duty, upon hearing the Mason's horn, indicating that she was on the port tack, to change her course and luff to windward, for the purpose of going astern of the Mason; and that, as the Calkins struck the Mason on the starboard side, abaft the main rigging, raking her, as it is claimed, from aft forward, it must be the fact that the Mason was not on her course, but had changed her course, and was on the starboard tack steering eastward. Further, that it was impossible for the Calkins to cross the Mason's course, and then change her own course from N. ½ W. to N. E., thus going to leeward, and, as it is claimed, coming up in the wind, and by an evolution describing a circle, strike the Mason, if on the port tack on the starboard side, abaft the main rigging, from aft forward.

As the two vessels had the wind, it was the duty of the Mason to keep her course, and of the Calkins to keep away. There can be no doubt, as the horns of the two vessels were heard, that the men on the Calkins understood the Mason to be on the port tack, and that those on the Mason understood the Calkins to be sailing with the wind free.

Did the Mason pursue or did she change her course? She had sailed from Manistee, and her port of destination was Milwaukee. Her natural course was S. S. W. There could be no object in changing her course to eastward unless a special emergency required it. No change of wind occurred, and no such emergency was presented, unless it arose, in the judgment of those in command of the vessel, by the supposed proximity of *another* vessel. There can be no doubt that at *sometime* before the collision the Mason was sailing on her course S. S. W. It is conceded by libellants, and so testified by their witnesses, that just before the collision the wheel of the Mason was put hard down, and she, to some extent, luffed. The claim of the respondent is that, when the horn of the Calkins was first heard, the wheel of the Mason must have

been put hard down, and that she must have gone in stays and come around upon the starboard tack. But this is wholly denied by the crew of the Mason. The lookout testifies that the course of the Mason was not changed, to his knowledge; that he was in a position to know whether there was a change or not; that she was close hauled, and that if she had been brought up a half point she would have been in the wind and the head sails would have begun to shake; that they did not begin to shake until the jib-boom of the Calkins was pointing to the Mason, and that when the two lights of the Calkins were visible the Mason's sails were still full. The wheelsman states that when he took the wheel the Mason was on her course; that after the signal from the Calkins was heard, he received from the mate an order to keep the vessel steady and not let her run off, and that when the red light of the Calkins was alone visible he received an order from the master to put the helm hard down. He states positively that until he received this order he did not change the course of the Mason from the time he took the wheel, and it is evident that when this order was given a collision was imminent, and the wheelsman says that he then put the wheel down and lashed it, and, apprehensive of personal injury, so left it and took refuge in the vessel's boat; further, that after he put the wheel down, and the last time he looked at the compass, the Mason was heading S. by W. The mate testifies, after stating the Mason's course, that upon first seeing the Calkins' green light he ordered the man at the wheel to keep the Mason up or keep her steady; that he gave no order to change her course after he took command of the deck; that she did not change her course, to his knowledge; that he would have known it if a change had occurred; that when he saw the red light of the Calkins the sails of the Mason were full, and continued so until just before the collision, when the stay-sail and jibs were shaking. The master testifies that when he heard the mate order the wheelsman to keep the Mason steady, he came on deck; that he saw the Calkins' green light from the lee side of the Mason; that he looked at the compass as he passed it, and that his vessel was

heading S. S. W.; that he gave no command to change the the helm till the green light of the Calkins disappeared and her red light was alone visible, when the collision being imminent he ordered the wheel put hard down, and the vessel swung, in response to her changed helm, as the collision occurred, going off S. S. E. This is the positive evidence upon this question on behalf of the libellants. Is the court justified in disbelieving and adopting the oposing theory of respondents, especially when the evidence in support of that theory is, to a considerable extent, inferential and argumentative?

Witnesses swear that the Mason must have been on the starboard tack and out of her course, because otherwise she would not have been struck by the Calkins on the starboard side. But this is opposing theory and opinion to positive testimony. The wheelsman of the Calkins says he cannot tell how the Mason was heading when struck, but *thinks* she was heading eastward; that after she was struck she was heading about S. E. The steward testifies that as near as he can guess the Mason was heading E. S. E. Other witnesses speak of her position, after the collision, as pointing eastward. In considering this testimony it is to be borne in mind that it is a conceded fact that when a collision appeared imminent the Mason's wheel was put hard down and was lashed to that position, so that the vessel must have been swinging up in the wind when struck. And, added to the movement thus given by a starboard helm, the force of the blow given by the Calkins would tend to accelarate that movement and swing her off in the precise direction in which it is claimed she was heading at or after the collision. The respondents' case is destitute of any affirmative evidence other than certain alleged admissions, to which I shall presently refer, to show that when or about the time the horn of the Calkins was first heard the Mason luffed and changed her course so that she stood on the starboard tack. And I can hardly doubt that when witnesses express the opinion that she was pointing S. E., or eastward, they are speaking from observations of her position made immediately after the

collision, and that, too, in moments of excitement and confusion, when it was difficult to judge from the deck of the colliding vessel with accuracy. Moreover, as we have seen, the effect of the collision, added to the movement which the Mason was then making, would have a direct tendency to put her, at that instant of time, in a position varying from her previous course, while at the same time these circumstances would be consistent with the fact that she had adhered to her course until a collision was imminent. The master of the Calkins says that he thinks the Mason changed her course because the Calkins made her green light, which indicated a vessel on the starboard tack, but this is upon the supposition that the Calkins had not crossed or was not crossing the Mason's course; for if she did cross her course, and approached her on the leeward side, it would be the Mason's green light that would necessarily be observed, and, as we shall hereafter see, the master of the Calkins could not know, with certainty, that he was not intersecting or had not crossed the course of the Mason. So, too, the mate of the Calkins says that if the Mason had been on the port tack and the Calkins was luffing up, *according to his calculations* the Calkins would have been at least a quarter of a mile to the eastward of the Mason, and he could not account for the situation in which the vessels seemed to be placed; but when he saw the Mason he observed that she was ahead, crossing the bows of the Calkins, and he knew the Calkins was heading N. E. by E. ½ E., and then he says he knew the Mason was heading to eastward and on the other tack. But this, too, is on the supposition or conjecture that the Calkins was to windward of the Mason and had not crossed her course, and his conclusion was of course fallacious unless his supposition was right, and it *might* be wrong. In like manner the lookout, Benson, says: "The Mason was heading eastward because the Calkins was heading northward, and the Mason was crossing the Calkins' bows;" all of which is mere opinion, in the absence of actual knowledge of the Calkins' position with reference to the Mason's original course. *All* of this testimony is largely matter of opinion, resting upon possibly mis-

taken supposition, and is not, I think, sufficiently convincing to overcome the positive testimony of witnesses who were on the deck of the Mason at the time of the collision. It is said by the master and mate and one of the lookouts of the Calkins, that the booms of the Mason were on the port side. But their testimony does not convince me that such was the position of the booms before the Mason starboarded her helm, just before the collision, nor until after the collision occurred, and the mate says that he saw the booms of the Mason on the port side after the collision, but did not see them before.

It is urged in the brief of the respondents' counsel that the position of the scar on the mast of the Mason, produced by the blow from the bowsprit and jib-boom of the Calkins, is convincing evidence that the Mason was not on her course. Testimony on the part of the Calkins tends to show that on examination the star was found to be at an angle of 45 degrees. The argument is that the sides of the vessel would be the base; the fracture at the rail to the mast would be the hypothenuse, running from stern forward; and the mast to the rail, at right angles with the longitude of the vessel's decks, would be the perpendicular. Then place the Calkins on her course at the moment of collision, N. E. by E. ½ E., and lay her jib-boom and bowsprit on the scar, pointing N. E. by E. ½ E., and the course of the Mason, at the moment of collision, must be E. by S. The argument is very ingenious, but it wholly ignores the posibility that the shape and position of the scar on the mast may have been produced by a change in the Mason's course and Calkins' line of approach when a collision was impending. And it was held in the case of *The Fairbanks*, 9 Wall. 420, that direct and positive oral testimony going to show that a vessel kept properly on her course, at least until a collision became inevitable, will not be controlled by the fact that the shape of the wound tended to show that the vessel could not have been, at the instant of collision, on such course, but must have changed it; it being possible enough that the shape of the wound was produced by a change in the vessel's course, made in the last moment, to avoid a collision.

Testimony of certain witnesses is produced as to statements said to have been made by the master and mate of the Mason, after the collision, as to the course of the vessel, such as, that the Mason came about and was on the starboard tack, or that she went in stays. In view of the denials interposed to this testimony, the liability of mistake in understanding, recollection and restatement of what was said by the master and mate of the Mason, and in view of all the circumstances and the present sworn testimony of libellants' witnesses, I have concluded, after reflection, that I ought not to give these alleged admissions such weight as to overthrow the positive testimony in the case, on this question of the course of the Mason. Some of the witnesses testifying to admissions do not themselves agree in their statements of what would seem to be the same conversation. The alleged admissions consist of statements to the effect that the Mason came about from the port tack and went in stays, or went upon the starboard tack; and since, as we find from the testimony in the case, when a collision was imminent the helm of the Mason was put hard down, and she then did vary from her course and luff more to windward, it is not difficult to see how a recital of these circumstances might convey the impression that she was put in stays or on the starboard tack before the collision occurred. These alleged admissions mainly comprise the testimony, which is in the nature of affirmative proof on the part of the respondent, to show a deviation of the Mason from her course. Whatever else is presented by respondent on the question is almost wholly inferential. And after careful examination and consideration of all the evidence, I cannot say, as the result of my judgement, that the circumstances urged by respondent, and the testimony touching the alleged admissions, are sufficiently strong, in the language of Justice Clifford, in the case of *The Winona*, 19 Wall. 41, "to justify the court in adopting a conclusion directly opposed to the positive testimony of the witnesses who were on the deck of the vessel just before and at the time the disaster occurred. Beyond doubt, they must know what the circumstances were,

and the record furnishes no sufficient reason to warrant the court in imputing to them wilful falsehood." On the whole, the conclusion is, that the Mason maintained her course on the port tack until peril was impending and a collision was imminent, and a change of course at that time was not a fault within the meaning of the rules of navigation.

The question of the course of the Mason being disposed of, there remains to be considered the movements of the Calkins. We have already seen what is the uncontroverted testimony on both sides touching the position of the two vessels as indicated by their horns. On the Mason, after the third horn of the Calkins was heard, her green light was seen. How long after the horn was heard the light was visible is not entirely clear, but the testimony indicates that it was immediately. The light was located about a point or a point and a-half on the Mason's lee bow. In a very brief space of time both lights of the Calkins were seen and continued to be visible, until just before the vessels struck, when the green light of the Calkins was shut out. On hearing the Mason's first horn, the master of the Calkins ordered her wheel down, so that she luffed to N. E., and it was after this movement that the horn of the Mason was heard on the lee bow of the Calkins. As this horn was heard, or immediately thereafter, the green light of the Mason was seen, and continued in view till the collision. The lookout, Townsend, says that when he descried the Mason's light it was a little on the Calkins' weather bow. From the time the Mason's horn was first heard the Calkins continued to luff, until, at the time of the collision, she stood, as admitted by respondent, about N. E. by E. ½ E. The testimony on the part of the libellants tends to show that a vessel's light could be seen from a quarter to a half a mile away. That on the part of the respondent tends to show that it could not be seen at a greater distance than from 120 to 150 feet, though at 12 o'clock the wheelsman of the Calkins says he could see a light about 200 feet.

The lookout of the Mason says that the sound of the first horn of the Calkins indicated that she was one-half or three-quarters of a mile away; that when he saw the Calkins' green

light he thinks she was one-quarter of a mile off, and to leeward of the Mason. The mate says when the Calkins' green light was seen, she was about one-quarter of a mile away, and that when he saw both her lights her distance was about 500 feet. The wheelsman says that when he saw the Calkins' green light she was from 600 to 700 feet away; that when he saw her red light she was from 300 to 400 feet distant, and that when he put the Mason's wheel hard down the Calkins was from 150 to 200 feet distant. The master testifies that when he saw the Calkins' green light he judged she was a quarter of a mile away to leeward of the Mason, and that this light disappeared when the two vessels were between one and two hundred feet apart, and he instantly ordered the wheel hard down. Simmons, one of the crew, who came on deck from the watch below, says the Calkins was about 500 feet distant when he saw both her lights.

On the part of respondent the testimony tends to show that the two vessels were about a mile or a mile and a-half apart when the horn of the Mason was first heard, and that they were not much more than a vessel's length apart when the Mason's light was seen. The witnesses differ in their testimony of the time that elapsed between the first signal heard and the time of the collision, and as to the time between the discovery of lights and the collision, and in estimates of time and distance there is a greater liability to error; but I am convinced that the Calkins' lights were seen on the Mason before the Mason's lights were seen on the Calkins.

Now, it is plainly shown, by respondent's proofs, that the movements of the Calkins proceeded wholly upon the supposition that she had not crossed the Mason's course, and I regard it equally clear that if she was about to cross, or was crossing, or had crossed her course when the signals were first heard, then the movements she made were just such as might bring the vessels together. It is a most singular circumstance that it does not seem to have occurred to the master of the Calkins, when he changed the course of his vessel, nor even when he saw the Mason's lights, that he

might have crossed the latter vessel's course. He does not appear to have paused to consider the possibility of such a contingency, nor to have reflected upon the possible effect of a change of course if such were the case. He says that his vessel had not crossed the Mason's course, and that she was not to leeward at any time. But how could he know this in weather so thick that, as it is claimed, a vessel's light could not be seen more than 120 or 130 feet. He gives as a reason for his statement that the Calkins was not to leeward, because she did not come up to the Mason when her horn was heard on the Calkins' starboard bow. But if the Calkins was about to cross, or was crossing, or had just crossed the Mason's course, if the Mason was sailing S. S. W., her horn would be heard on the Calkins' starboard bow, and as she was then immediately luffed up and continued steadily to luff, the Mason's horn would afterwards naturally be heard more off the lee bow of the Calkins, precisely as the testimony shows it was heard. The master of the Calkins testifies that his vessel luffed till she brought the Mason's horn on her lee bow, and it is evident that a radical change was made in the Calkins' course, because, acting upon the supposition that he had not crossed and was even distant from the Mason's course, he wanted, as he says, to bring the Mason on the Calkins' lee.

In short, if the Calkins, on a course N. ½ W., was approaching the Mason's course, which was S. S. W., or was about to cross it, the Mason's horn would be heard off the Calkins' starboard bow; then, as the Calkins luffed to N. E. and continued still to luff, the Mason's signal would be heard more ahead, and, as the change of course of the Calkins was persisted in, if the Mason was keeping her course her horn would be heard off the Calkins' lee bow. It must be remembered that the Calkins was being crowded up with persistence. Her wheelsman says that he luffed her up nearly east and then tried to stop her; that first he tried to bring her up three points, and then he luffed again and the collision followed. So, in view of the movements of the Calkins, the points from which the horns were heard as stated by re-

spondent's witnesses, are quite consistent with a probability that the Calkins was about crossing and crossed the Mason's course. So, too, if the Calkins was approaching the Mason's course it is not unreasonable that her first horn should be heard on the Mason, a little off her weather bow, as testified, and *if* she crossed, and *as* she changed her course, her horns would be heard on the *lee* bow of the Mason, as further testified.

Then, considering the question with reference to the lights of the two vessels, we find that a green light was first seen from the Mason, and this would be the light first seen, either as the Calkins crossed, or after she had crossed the Mason's course; then both lights of the Calkins appeared, which would naturally result from the Calkins' change of course to eastward, if she was to leeward and the Mason was on *her* course. Then, on the Calkins, the green light of the Mason was seen, and her red light was not, at any time before the collision. This, too, is consistent with the approach of the Calkins on the lee of the Mason, because the latter vessel's green light would be on the starboard side; so, as to both signals and lights, it is found that the testimony is consistent with libellants' claim, that the Mason was on her course, and that if the Calkins crossed the Mason's course and then changed her own course and approached the Mason, as indicated, the lights of the Calkins would be seen on the Mason, in the order and from the points stated by her own crew.

As before stated, evidently the master of the Calkins, from the moment the horn of the Mason was heard, assumed that he was all of the time to windward of the Mason's course, and did not pause to consider the possibility of error. In this I am convinced he made a fatal mistake. He was warned by the horns of the Mason that she was on the port tack. He knew the Calkins was sailing with the wind, and when the first horn of the Mason was heard off his vessel's starboard bow he was admonished of danger in changing his course to eastward, for by so doing there was liability that he was going *toward* the Mason instead of from her,

and that he was thereby *approaching* her instead of *keeping away* from her.

It is a circumstance of moment, in this case, that even after the green light of the Mason was seen on the Calkins the latter vessel's wheel was kept hard down. This had a tendency to bring the vessels nearer together, and why, when the Mason's green light was seen, the Calkins' helm was not starboarded, so that she might bear away, is unexplained. It is true, undoubtedly, that the vessels were near together and that the time for action was very short, but no attempt appears to have been made to arrest the movement which the Calkins was making under a helm which had changed her course.

Even when the master of the Calkins heard the hail of the Mason to starboard his wheel no change was made, and the only response he gave was a hail to the Mason to luff and push up into the wind. And at last, instead of endeavoring to maintain a position, when, as to their lights, the two vessels would display only green to green, such a movement was persisted in as brought in view the red light of the Calkins, and even ultimately shut out the green light.

But it is said that the Calkins struck the Mason on the starboard side, abaft the main rigging from aft forward, and it is urged with much force, by the learned counsel for respondent, in support both of the view that the Mason changed her course and that the maneuver of the Calkins was proper, that the collision could not have occurred if the libellant's theory of the disaster is right. Masters of vessels called by respondent have been asked, supposing the Mason was heading S. S. W., with the wind S. S. E. and the Calkins heading N. $\frac{1}{2}$ W., and they should hear each other's horns about a mile apart, and the Calkins should hear the Mason's horn on her starboard bow, whether the Calkins, with her booms aft to the rigging on the port side, could go to the leeward and westward of the Mason and make a circle so that she would strike the Mason abaft the main rigging on her starboard side from aft forward, and they have answered that she could not, although one of the witnesses states it as

his opinion that under such a state of the case the Calkins *could* strike the Mason from forward aft. The witnesses who were on the vessel at the time of the collision are not wholly united in recollection or understanding of the precise manner in which the Calkins struck the Mason, and it cannot be assumed, as an absolute certainty, that the blow was received wholly from aft forward. It is, however, true that some of the libellant's witnesses so state. The question, as put to experts and answered by them in the negative, assumes that the position of the Mason on a S. S. W. course remained unchanged to the very moment of the collision. It assumes the vessels to be a certain distance apart, and that the Calkins described a circle in her movement after crossing the Mason's course, and in such movement came up into the wind's eye, or nearly so. Now, it is to be borne in mind that the wheel of the Mason was put hard down when a collision was imminent, so that she was coming up in the wind and could not have been pointing S. S. W. at the moment when struck. Both vessels were in motion, and the Calkins was moving under a helm that had changed *her* course from N. ½ W. to N. E. by E. ½ E. It is by no means certain, from the testimony, that she ceased luffing even at that point, because it is evident that the luffing movement was most persisently adhered to, and even when the hail of the two vessels was exchanged the master of the Calkins renewed his order to put the wheel hard down. So that, from these movements of the two vessels, it would appear that in this respect the question put to experts omits conditions which existed in the case. Further, the distance that the vessels were apart cannot be stated with certainty. If nearer than supposed, the movement of the Calkins would be less descriptive of a circle; and it is evident from the testimony that her change of course was abrupt and decisive, and was made under full sail and speed, as stated by one of respondent's witnesses. If the Calkins could make such a movement and strike the Mason on a S. S. W. course, from forward aft, then it is not difficult to understand, especially if at the moment of collision the two vessels were pressing up into the wind, as the

proofs clearly indicate one vessel might strike the other at right angles, or to some extent from aft forward.

On the whole, after bestowing much consideration upon this case, although I have not at all times been free from doubt, it has become a settled conviction in my mind that this collision was occasioned by the fault of the Calkins, and such will be taken as the judgment of the court.

NOTE.—This judgment was affirmed, on appeal, by *Drummond*, C. J.

WEAVER and others *v.* SCHOONER ONMST, her tackle, etc.

(*District Court, D. Rhode Island.* April 19, 1880.

COLLISION—FACTS DETERMINED.

In Admiralty.

KNOWLES, D. J. The libel in this cause of collision was filed January 21, 1880, the answer February 11, and the cause brought to a hearing on the seventh of April following.

Upon the points of contention raised and discussed at the hearing I propose now to announce my conclusions, first stating the allegations and claims of the respective parties as set forth in the libel and the answers:

ALLEGATIONS IN THE LIBEL.

First. That your libellants, before and at the time of the collision, in the second article hereof mentioned, were the owners, and the said Lafayette Weaver was the master, of said schooner Mary Weaver, her tackle, apparel, and other furniture, which your libellants employed in the coastwise freighting business between different ports and places in the United States; that she was of 222 tons burden, as registered, with a carrying capacity of 350 tons; that she was duly enrolled and licensed for said business, and was actually employed therein at time of said collision, and was light, staunch, sound, fully equipped, and had the usual compliment of men and officers on board.

Second. That on the fifteenth day of December, A. D. 1879, said schooner Mary Weaver sailed from Port Comfort, in the state of Virginia, with a valuable cargo of coal on board, bound for the port of Providence, in the state and district of Rhode Island, and that during said voyage, to-wit, about 11 o'clock P. M. of the seventeenth day of December, A. D. 1879, when in Long Island sound, off Saybrook, in the state of Connecticut, and about six miles southerly therefrom, and heading east by north, with the wind blowing an eight-knot breeze from a little west of north, and with her lights all as required by law, set and burning brightly, and the master and two of crew on the lookout for the protection and management of the vessel, the said master and crew descried at some distance ahead, to-wit, about half of a mile, and about one point on their starboard bow, a vessel which afterwards proved to be the schooner Onmst, aforesaid, approaching and heading about from west to north, to west by north-west, or thereabouts, and being on her starboard tack, and showing to those on the Mary Weaver her red light plainly. Whereupon, the master of said schooner Mary Weaver ordered the helm of his vessel put hard a-port, which was done, and thereby opened the lights of said Onmst fully five points to the windward or port, said Mary Weaver keeping her wheel hard a-port, when of a sudden the red light of the said Onmst was obscured to him and his crew, and her green light became visible; and although he kept his helm hard a-port as possible, and slackened his main peaks and tried to keep out of her way, yet the said Onmst continued to bear down on the weather or port side of the said Mary Weaver, and struck her on that side near her stern, cutting her down to within one streak of her water line, carrying away one corner of her house, and her wheel and wheel-post and attachments, and the stern-post and davit, and rail and attachment, and injuring and carrying down her boat, and doing much other damage to said schooner Mary Weaver.

Third. That said collision and damage were caused solely by the fault of the person having charge of and navigating said schooner Onmst, in not keeping her on the course she was sailing when the vessels descried and neared each other,

or in not porting her helm at that time, and in starboarding her helm after that time and before the collision, and not by any neglect, omission or fault on the part of said schooner Mary Weaver, her master or crew.

Fourth. That said collision so much injured said schooner Mary Weaver that she was in great danger of sinking, and her master, springing on board said Onmst, made fast a line to the capstan of said Onmst, informing the master of the Onmst of the critical condition of the Mary Weaver and her boat, and asking him to stay by and take off the crew of the Mary Weaver, in case it should become necessary so to do to save their lives, which the master of the Onmst promised to do till light; and when the master of the Mary Weaver returned to his own schooner he let go his largest anchor and 60 fathoms of chain, and an equal length of the line attached to the Onmst, set and kept his pumps agoing, and endeavored to fasten a piece of canvas over the breach in the side of and under his vessel, and endeavored in every way possible to keep his vessel afloat and save her, and continued thus engaged with his crew till about half-past 1 o'clock on the morning of the eighteenth of December, A. D. 1879, when the master of the Onmst, or some one on board of the Onmst, cut the line that had been attached to her as aforesaid, and the Onmst sailed off, though the wind was still high and the night bitterly cold, leaving the Mary Weaver and her master and crew to save themselves as best they could. The master and crew of the Mary Weaver, finding themselves left in this critical condition, set themselves to work to extricate and repair their boat, which had been broken somewhat and driven under the side and stern of the schooner by the collision, and after great labor and suffering and danger succeeded in getting it out and fixing it so that it might possibly be used; and the wind soon after abating somewhat, the injured schooner did not make so much water as she had been doing, and the pumps, which had been kept in constant operation, kept her afloat till the next forenoon, when the New London freight boat came along and towed her into the harbor of New London, where she lay nine days making such

temporary repairs as were necessary to enable her to reach her port of destination, to-wit, the port of Providence, and discharge her cargo, which she did about the twenty-ninth day of December, 1879, and now lies in said last named port; and that the owners of said schooner Mary Weaver have and will sustain damages in consequence of said collision to the amount of $1,200.

Fifth. That the owners of said schooner Onmst are unknown to your libellants, and that her master and the vessel have not been seen by any of your libellants since she so sailed away; but they are informed and believe said schooner Onmst and her said master have just arrived, and now are in said port of Providence, and they so aver, and within the jurisdiction of this honorable court.

Sixth. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States, and of this honorable court.

ALLEGATIONS IN THE ANSWER.

First. That said respondent is ignorant of the matters contained in the first and fifth articles of said libel; and as to the matters contained in the second, third and fourth he has no personal knowledge, but understands that the same are in great part falsely alleged, and that the truth is as hereinafter alleged.

Second. That the said schooner Onmst, being in good order, and well equipped and manned, was, on the night of the seventeenth day of December, 1879, between the hours of 11 and 12 P. M., sailing up Long Island sound, and about three miles east of Saybrook, with a strong breeze blowing from between N. W. and N. N. W., said schooner sailing close hauled on the starboard tack, with her port and starboard lights set and burning brightly, as required by law, with a competent man at the wheel, and the mate forward on the forecastle deck, on the lookout; that the red light of a vessel, which afterwards proved to be the Mary Weaver, was descried between one and two miles off, and about one point on the port bow; that after an interval of a few minutes—the Onmst in the

meantime keeping her course—the green light of the Mary Weaver suddenly came into view, and her red light was obscured. The Mary Weaver continued showing her green light, and the Onmst continued on her course until the latter had the former about three or four points on her starboard bow, and at a distance of about three or four lengths, and the two vessels were in such relative positions that if the Mary Weaver had then kept her course they would have easily gone well clear of each other. When in the position just described the red light of the Mary Weaver suddenly came into view and her green light was obscured, and almost immediately, on account of the relative speed of the two vessels, the Mary Weaver was across, or nearly across, the Onmst's bows. The captain of the Onmst, seeing that a collision was inevitable, ported his helm and luffed up, in order to ease the blow as much as possible, and succeeded so far that, instead of striking the Mary Weaver a direct blow, either forward or amidships, which he would have done if he had starboarded his helm or kept his course, and have immediately sunk her, he struck her a partially glancing blow near the stern.

Third. That said collision was not caused by any negligence or carelessness, or breach of sailing rules, on the part of those on board the Onmst; but that, on the contrary, it was caused by the negligence and want of care, and the violation of the rules of navigation, and the dictates of ordinary prudence and good seamanship, on the part of those navigating the Mary Weaver—first, in starboarding her helm just after the vessels came in sight of each other, and secondly, in porting her helm in the manner and under the circumstances above described; that, had the Mary Weaver kept on the original course on which she was sailing when first seen, and which she ought to have done and could have done, she would have passed well to leeward of the Onmst.

Fourth. That after the collision had occurred the captain of the Onmst took a lantern and examined the hull of the Mary Weaver, and saw a hole in her side, but above the water line, so that there was no immediate danger of sinking on the part of the Mary Weaver. The captain of the Mary Weaver

was in a very excited condition, and kept calling, in a distracted way, to his men, to know if the pump sucked. At last one of them replied: "Yes, damn her, she sucks." Just after the two vessels came together some one on board of the Mary Weaver jumped on board the Onmst with a bight of a line, and made it fast to the capstan of the Onmst. Another line was passed from the Onmst to the Mary Weaver. The captain of the Mary Weaver asked the captain of the Onmst to lie by him, which the latter consented to do for awhile, although not deeming the Mary Weaver in danger of sinking. The Onmst laid by the Mary Weaver for more than two hours, and, after staying this length of time, and after hearing from some one on her deck that the pump continued to suck, (indicating that she was free from water, and in no danger of sinking,) and also hearing that the Mary Weaver's boat was in good condition, and the Long Island shore being only from a mile and a half to two miles distant, and the Onmst herself being in a crippled condition, having lost her head-gear and liable to lose her masts, the captain of the Onmst did not regard it that the dictates either of humanity or prudence required him to lie by any longer. In order to cast off it was necessary to cut the line, as it was so far turned around the capstan that any other method was impracticable.

Fifth. That all and singular the premises are true.

It is seen at a glance that one question, not to say the principal question, presented for inquiry and adjudication is, was the Onmst or the Mary Weaver the blameworthy vessel as regards the collision of the seventeenth of December? The libellants allege that the Onmst was in fault and the Mary Weaver innocent—the libellees alleging that the Mary Weaver was in fault and the Onmst innocent. As bearing upon this point, the sixteenth and seventeenth Rules of Navigation were cited and expounded by the parties, the discussion terminating in an agreement between them that, whichever of these rules governed the case at bar, it was the statutory duty of the Mary Weaver, under the circumstances in proof, to keep out of the way of the Onmst—that is, to turn and keep to the right. The questions at issue, then, became these: 1. Did

the Mary Weaver bear to the right, and keep on her course without change down to the moment of collision? 2. Did the Onmst keep on her course, without any culpable or material change, until a collision became inevitable? These are the agreed principal issues. As bearing upon them, many subordinate points or questions were raised and contested, having relation to the position of the two vessels when they first descried each other; the state of the wind and weather; the maneuverings of the vessels previous to the collision; the number and special occupations of the several persons on the decks of the two vessels at, before and after the collision; the state of the tide, and the importance or non-importance of it as a factor in estimating the speed of a vessel on or through the water; the relative speed of the two vessels; the time required to change the course of a vessel four or five points, under supposed circumstances; the non-production by the libellants of any deposition of the wheelman of the Mary Weaver; the alleged *impossibilities* of the conflicting theories of the collision, each party branding as erroneous, or wilfully untrue, the other's theory, and as deceptive and unreliable the plats or diagrams purporting to embody those theories; the alleged stealthy departure of the Onmst from the scene of the collision after the lapse of about two hours, her captain having promised to lay by the crippled Mary Weaver until daylight; the credibility and honesty, or the opposite, of the witnesses in mass, and singly, considered; the value of experts' testimony in general, and especially the value of the testimony of the thirteen whose depositions were exhibited in evidence, to refrain from further enumerations.

Of the evidence submitted by the parties it seems sufficient here to say it was very voluminous, remarkably contradictory, and wholly irreconcilable. It was embodied in depositions, which were read, and in great part repeatedly reread, at the hearing, and was the subject of exhaustive comment by the learned, astute and zealous counsel of the parties. To that evidence and those comments I gave undivided attention, throughout a hearing prolonged almost beyond precedent—

not to say beyond reason—and since the hearing have given to them that second thought, which is the due of litigants, when to the court is submitted a case upon the facts as well as the law; and the conclusion to which I have arrived is that the libellants have failed to substantiate against the Onmst their charge as set forth in the second and third articles of their libel, and that I must pronounce for the Onmst, as regards those articles.

As regards the fourth article of the libel, relating to the abandonment of the Mary Weaver by the captain of the Onmst, shortly after the collision, but little needs be said in this connection. It was contended by the libellants that, upon the facts and the law, the court would be justified in regarding the abandonment as a *quasi* confession of guiltiness of the misdoing charged in articles second and third; that, as such, it is entitled to a prominent place among the facts put in proof on behalf of the libellants. In this view I cannot concur. The evidence, it cannot be questioned, convicts the captain of the Onmst of unseamanlike and unmanly, not to say inhuman, conduct on this occasion—conduct which, it is to be regretted, is not punishable under some penal statute of the United States; but that, in view of all the circumstances in proof, any considerable weight can be accorded it, as a confession or admission of guiltiness in the matter of the collision, is not to be conceded.

An order must be entered dismissing the libel, without costs for either party.

CAMPART and others *v.* THE STEAMSHIP PRIOR.

(*District Court, E. D. New York.* June 2, 1880.)

BILL OF LADING—DELIVERY OF CARGO—"QUANTITY AND QUALITY UNKNOWN"—BURDEN OF PROOF.—Where wheat was shipped to France by several parties under bills of lading, specifying that the quantity and quality of the wheat was unknown, and suit was brought for non-delivery of the whole amount, *held*, that the burden of proof was on the libellants to show the quantity of wheat delivered in Havre, and their case must fail for lack of evidence—the claimants of the ship showing that all the wheat shipped was delivered, and the bills of lading surrendered by the consignees.

In Admiralty.

W. H. Goodrich, for libellants.

Coudert Bros., for claimants.

BENEDICT, D. J. This is a consolidated action, wherein several shippers of wheat seek to recover damages for an alleged failure on the part of the above-named vessel to perform certain bills of lading, duly issued by the master of said vessel, for a quantity of wheat to be transported in said vessel from New York to Havre. There are four sets of these bills of lading, issued to three different shippers. One set acknowledges the receipt of 7,939 50-60 bushels of wheat in bulk. Another set acknowledges the receipt of 15,000 bushels of wheat. Another set acknowledges the receipt of 16,227 40-60 bushels of wheat, and another set acknowledges the receipt of 4,100 bushels of wheat. All these bills of lading are similar in form, and all contain the following provisions in print: "Weight, measure, contents, quality, brands and value unknown; not accountable for bursting of bags; not accountable for weight, measures, decay, breakage, or damage by rats;" and also the provision in writing, "quantity and quality unknown."

In regard to the first set the breach alleged is the failure to deliver 394 4-60 bushels of the wheat shipped; in regard to the second and third sets the breach alleged is the failure to deliver 462 4-60 bushels of the wheat shipped; in regard

to the fourth set the breach alleged is the failure to deliver 214 42-60 bushels of the wheat shipped.

The answer denies all knowledge as to the quantity of wheat shipped; avers that it was expressly understood that the quantity shipped was unknown; denies any breach of the contract, and avers a delivery of all the wheat shipped under the bills of lading referred to. Under these pleadings the burden of proof is upon the libellants, and in order to recover they must show a deficiency in the wheat delivered, and the amount thereof. This has not been done. No witness has been called who undertakes to state or pretends to know the quantity of wheat delivered in Havre; and the case, so far as the libellants are concerned, is bare of evidence upon that point. But the master of the vessel is sworn by the claimants, and testifies, without qualification or dispute, that all the grain shipped was duly delivered in Havre; and in this he is confirmed by the circumstances that the bills of lading are produced by the claimants at the trial, and must therefore be presumed to have been surrendered by the consignees of the grain upon the delivery of the grain.

I have not overlooked the testimony from which it was argued that upon the arrival of the steamship at Bristol, England, whither she proceeded from Havre, that the master there sold wheat from the vessel to the value of some nine pounds. The master's explanation of this circumstance is that he had the steamer cleaned at Bristol, and what he sold was "sweepings" of the value of five pounds, which he paid over to the owners. But if the facts in regard to this transaction be as contended by the libellants, (and I confess that the weight of the evidence appears to me to be with the master,) still it would do no more than create a suspicion. There would still be a total failure of evidence upon which it would be possible to find that any specific quantity of grain shipped under any of the bills of lading in suit had not been delivered.

The result is that the libel must be dismissed, and with costs.

THE MIDDLESEX QUARRY COMPANY and others *v.* THE SCHOONER ALBERT MASON.

(*District Court, S. D. New York.* May 25, 1880.)

COLLISION—ANCHOR LIGHT—BURDEN OF PROOF.—In a case of collision the libellant must show, by a preponderance of the evidence, that a necessary light was set and burning.

R. H. Huntley, for libellants.

S. H. Valentine, for claimants.

CHOATE, D. J. This is a libel to recover damages sustained by the schooner Robert Smith, and her cargo, by a collision with the schooner Albert Mason, in the harbor of New Haven, on the evening of the eighth day of November, 1877. The Robert Smith was bound on a voyage from Portland, Connecticut, to New York, with a cargo of about 90 tons of brown stone. Between 6 and 7 o'clock she put into New Haven for a harbor, the wind being S. S. E. to S. E., and blowing hard. She came to anchor about two miles inside the light, on the west side of the channel, as the libel states, in about eight feet of water, at low tide. When she came in it was the last of the ebb.

Between 8 and 10 o'clock the Albert Mason also came in for a harbor. She intended also to come to anchor on the west side of the channel, and in fact proceeded directly towards where the Robert Smith was lying at anchor, and to within a very short distance from her, when she undertook to round to for the purpose of anchoring, and just then her stern grounded. Before this she had taken in her jib and mainsail, under which she entered the harbor. Up to the time of so rounding to those on board of her had not seen the Robert Smith. To work off the bottom she hoisted the peak of her mainsail, intending to work off more to the eastward. While doing this her master and others of her crew discovered something to *leeward*, and very near to them, which was in fact the Robert Smith, but which, as they say, they took for a wreck or a sunken canal-boat. They approached it a little

nearer, as they worked a little further to the eastward, still being aground, but rising and moving with the rise and fall of the sea. They then discovered that this object was a vessel, and that if they kept on as they were going they were likely to come into collision with it, and they let go their starboard anchor. As the vessel was brought up by her anchor she gradually approached the Robert Smith, and her bowsprit and head rigging came foul of the fore rigging of the Robert Smith, and finally she swung along-side of the Robert Smith, and was got clear of her by paying out chain, so that she drifted astern of her. But in going by her stern the injury was done which is the subject of this action, and from the effect of which it is claimed that the Robert Smith leaked so badly that she was obliged to slip her cable and go ashore, where she became a total wreck.

The libel avers that immediately after the Robert Smith anchored a signal light was hung in the fore rigging, on the starboard side, and a proper watch placed on deck, and "that from the time said signal light was lighted and watch set to, and until the collision, the said signal light was in its proper place and burning brightly." The answer denies that the Robert Smith had any anchor light, and charges the absence of the light on her part as the cause of the collision. The only question fairly arising on the pleadings and the evidence is whether the Robert Smith had an anchor light set and burning as the Albert Mason came into the harbor and approached her. Though it was a dark and stormy night, lights of vessels could be seen at a considerable distance, and if the Robert Smith had her light set it was inexcusable in the Albert Mason to approach her so closely as she did before rounding to, to anchor.

The point made that the Robert Smith was in fault in not hoisting her jib and paying off to the eastward, so as to aid the Albert Mason in her efforts to avoid the collision, is not, I think, open under the pleadings. There can be no question that it was the duty of the Robert Smith to have a light. She was not fairly out of the channel or that part of the harbor

where other vessels were likely to come, and the burden is on her to show by a fair preponderance of evidence that she had a light. Her crew consisted of four men, all told, who swear positively to the light being set after they came to anchor, and to its continuing to burn brightly afterwards up to the time of the collision. Three of them say it was taken down after the Albert Mason had let go her anchor. They do not quite agree as to the time when it was taken down, but the three swear it was not taken down till after the bowsprit of the Albert Mason came into contact with the fore rigging of the Robert Smith. On the other hand, five witnesses are called from the Albert Mason who swear positively that after this object was discovered to leeward they looked for a light, and that she had no light visible to them; yet, if it was hung in the starboard fore rigging, as testified to by those on board the Robert Smith, it must have been plainly visible to all those on the Albert Mason, and at a distance of from 100 to 300 feet, which was being constantly diminished until the two vessels came in contact.

It is impossible to reconcile the testimony upon any theory of mistake. Nor is the theory of inattention or failure of those on board the Albert Mason to observe a light, which they might have seen if they had looked, tenable in this case. The vessel lay in this close proximity a considerable time, and the light which they looked for and did not see, if it was there, was very near to them, and on the side of the vessel towards them. While there are some serious discrepancies between the testimony of those on the Robert Smith and the other and credible proofs in the case as to the movements of the Albert Mason and the sail she carried, and some inconsistencies in their testimony, and between it and the averments of the libel, these alone would not be sufficient to impeach or discredit the witnesses of the libellant. Nor, on the other hand, are the witnesses for the claimants in any way discredited except by this flat contradiction in respect to the light. In fact, the witnesses on both sides appear to be alike credible, and I have not been able, after the most careful

study of the testimony, with the aid of the able arguments and briefs of counsel, to come to any reasonably certain conclusion as to which of these two classes of witnesses tells the truth in respect to this light. I think neither can be mistaken, therefore I am obliged to hold that the libellants have not sustained the burden of proof which is upon them to show that they had a light.

Libel dismissed, with costs.

TOPFER *v.* THE SCHOONER MARY ZEPHYR, etc.

(*District Court, D. California.* May 19, 1880.)

FUND IN REGISTRY — ADVANCES BY PART OWNER — STATUTORY LIEN — CIVIL CODE CALIFORNIA, § 3055.—Where the part owner of a ship has a statutory lien for advances, (Civil Code California, § 3055,) as against a co-owner, he may be paid out of surplus proceeds remaining in the registry of the court.

Petition against Proceeds.

HOFFMAN, D. J. It cannot be disputed that the petitioner to establish his right to be paid out of the surplus proceeds remaining in the registry, must show not merely that his co-owner is indebted to him, but that he had a lien upon the vessel for the debt.

This court cannot, in an admiralty suit, exercise the functions of a court of bankruptcy and distribute the surplus proceeds of a vessel sold under its decree among the general creditors of the owner. But the privilege, or *jus in re*, which the court in such cases will recognize and enforce need not necessarily be a maritime lien, or a lien on which an original suit in the admiralty could be brought. Thus a mortgagee, though his rights could not be enforced by a libel to foreclose, may, nevertheless, claim and receive as against the mortgagor the remnants and surplus in the registry, and apply them in satisfaction of his mortgage. In like manner the lien of an attaching creditor will be respected after the satisfaction of

maritime liens entitled to priority. See *The Mary Anne*, Ware, 104. If, therefore, the petitioner can show that he had a lien on the vessel for the amount of his advances at the time of her seizure, he will be entitled as against the owner to payment out of the proceeds. It is unnecessary in this case to discuss the vexed question whether a part owner of a ship has a specific lien on the share of his co-owner for his portion of the expenses of fitting out and running her. Lord Hardwicke was of opinion that he has, and he decreed in favor of the part owners against the share of a co-owner who had died without contributing his share of the expenses. With respect to this ruling Judge Story observes: "After all, there would seem to be intrinsic equity in the doctrine maintained by Lord Hardwicke, and, as liens may arise either from express or implied agreements, it is but a reasonable presumption (in the absence of all controlling circumstances) that part owners do not intend to rely solely upon the personal responsibility of each other to reimburse themselves for expenses and charges incurred upon the common property for the common benefit, but that there is a mutual understanding that they shall possess a lien *in rem*." Story on Part. § 444.

In England the law appears to be settled adversely to the existence of the lien, (*Ex parte Harrison*, 2 Rose, 76; *Ex parte Young*, Id. 78, note;) but in America much diversity of opinion has prevailed. Mr. I. Curtis thinks that the decisions may in some degree be reconciled by attending to the distinction between cases where the owners occupy towards each other the relation of mere tenants in common of a chattel, and those where they are partners in a common adventure. In the latter case the lien unquestionably exists, but if there be not the relation, the learned judge was of opinion that there was no lien. *The Larch*, 2 Curtis, 434. If, as held by Mr. I. Curtis, the lien be confined to cases of actual partnership between the part owners, there would be much ground to contend that, under the circumstances of the present case, the parties bore that relation to each other, or, at least, such

a relation of *quasi* partnership as would be sufficient to give rise to a lien. But this question it is not necessary now to decide, nor the further question whether if the lien exists it could be enforced by an original proceeding in the admiralty. See *The Larch, ubi supra; The Young Mechanic*, 2 Curtis, 404; *Kellum* v. *Emerson*, Id. 79. The vessel in question in this case was a small craft owned in this state and employed exclusively in the navigation of its interior waters. Section 3055 of the California Civil Code provides that "the master of a ship has a general lien, independent of possession, upon the ship and freightage for advances necessarily made, or liabilities necessarily incurred, by him for the benefit of the ship, but has no lien for his wages."

Whether the lien thus created is a strictly maritime lien, and capable of being enforced by a direct proceeding *in rem* in the admiralty, is not material now to inquire or decide. The present proceeding is against surplus proceeds in the registry. The duty of ascertaining to whom they belong devolves upon the court, as a necessary incident to the jurisdiction it incontestably possessed, to decree a sale to satisfy maritime liens, and the objection that the admiralty has no jurisdiction over matters of account, whatever be its force where an original suit is brought to enforce a lien not strictly maritime, and, therefore, "not peculiarly within the jurisdiction of a court of admiralty," has no application to a case like the present, where the court is obliged to determine to which of two opposing claimants a fund in its possession should be paid.

My opinion is that the petitioner, as master of the ship had, under the state law, a lien upon her for his advances incurred for her benefit; that that lien attaches to her surplus proceeds remaining in the registry, and that, as between him and the representative of the other part owner, he is entitled to be paid out of the proceeds.

It appears by the commissioner's report that, on accounting and settlement between the petitioner and his co-owner, there was found to be due him $371.88.

From this, by consent of parties, six dollars is to be deducted, leaving due the petitioner,		$365 88
He also, after the death of the other part owner, paid for bills and liabilities previously incurred for the benefit of the ship,	$288 69	
Less his share, one-fourth,	72 17	
Balance due,		$216 52
		$582 40
Less Captain Zephyr's share of net earnings on ten trips,		183 95
Balance for advances,		$398 45

Some question was made as to the terms on which the trip of December 9, 1879, was made by the master. My opinion is that it should be deemed to have been made under the same agreement as that on which the previous trips had been made, and, if so, the petitioner has no claim against the fund; on the contrary, he is liable to his co-owner for three-fourths of $10.50—the net profits of the voyage—$7.87.

If, as he claims, the trip was made by him on wages, it is sufficient to say that for any balance of wages he can assert no claim upon the fund to be distributed, for he had no lien on the vessel.

There should also be deducted from the petitioner's claim the sum of two dollars, being amount paid for board bill of Captain Zephyr. This charge, however just, cannot be allowed as a lien on the vessel or her proceeds. The accounting will, therefore, stand as follows:

Due on accounting and settlement,	$371 88	
Less as above,	6 00	$365 88
Due for advances,	$288 69	
Less Captain's *pro rata* share,	72 17	216 52
		$582 40

Amount brought forward, - - -		$582 40
Less Zephyr's share of profits of 10 trips, - - - - - -	$183 95	
Less two dollars as above, - -	2 00	
Less $7.87 as above, - - -	7 87	
		$193 82
Due petitioner, - - - -		$388 58

which he is entitled to receive out of the fund in the registry.

The remainder of the fund is to be divided between him and the representative of the other part owner in the proportion of their respective interests in the vessel, viz: Petitioner, one-fourth; Captain Zephyr, three-fourths.

An order to this effect will be entered.

THE EUREKA CONSOLIDATED MINING COMPANY v. THE RICHMOND CONSOLIDATED MINING COMPANY, (limited.)

(*Circuit Court, D. Nevada.* June 14, 1880.)

REMOVAL.—A suit brought in a court of the state of Nevada, by a citizen of California against a citizen of England, may be removed into the circuit court under act of March 3, 1875.

Motion to Remand.

Crittenden Thornton, for the motion.

John Garber, opposed.

HILLYER, D. J. This is a motion to remand the cause to the state court from which it was removed. The plaintiff is a corporation of California, and the defendant an English corporation, doing business in Nevada. The sole question is whether the character of the parties is such as gives this court jurisdiction. On both sides it has been assumed, and correctly, no doubt, that the case stands precisely as if the plaintiff and defendant were natural instead of artificial persons. The defendant makes this motion upon the ground that neither party is a citizen of the state in which the suit is brought, and it is argued that, notwithstanding the omission from the act of 1875 of the words in the act of 1789, confining the jurisdictiom to suits "brought by a citizen of the state in which the suit is brought," (1 St. 79,) the meaning of the act of 1875 is, in this respect, identical with that of 1789, and subsequent statutes prior to that of 1875, prescribing the same restriction, that the word "foreign" must relate to the residence of the party suing, and not to the forum in which suit is brought; that is to say, in order that there may be a right of removal in a case like this the suit must now, as before the act of 1875, be brought in the state in which the plaintiff resides.

The question, upon examination, appears to me to be entirely free from difficulty. Under the constitution the judicial power extends to controversies "between a state or citizens thereof and foreign states, citizens and subjects." There is nothing here limiting or qualifying the power in the enumer-

ated cases. It is only in the acts of congress passed subsequently that the restrictions are found. So long as it kept within constitutional bounds congress might place limitations on the jurisdiction of the circuit courts, and in like manner it had power to take them away. This it has done in the act of 1875, § 2, which, so far as it bears on the present case, is in the language of the constitution, and gives the circuit courts jurisdiction, and the right of removal thereto, in suits wherein there is "a controversy between citizens of a state and foreign states, citizens or subjects."

There is nothing said about the suit being brought in the state where the "citizens of a state" in a given case reside. Nor is there any warrant for any qualification of that sort. All that is necessary under this clause is that one party shall be a citizen or a subject of a foreign state and the other a citizen of "a state."

The distinction here taken between a "foreign state" and "a state" is, it seems to me, an answer to the position of defendant stated above, viz.: That the word "foreign" must be referred to the residence of the citizen of the United States, and not to the district in which the suit may be brought. In order to maintain his position the defendant is obliged to bring into this statute a provision not put there by congress, but studiously left out.

The plaintiff properly sued the defendant in a court of this state, and afterwards it, being a citizen of "a state," (California,) and the defendant being a foreign citizen or subject, (of Great Britain,) transferred the suit to this court, that being the very case made by the statute in which a removal is authorized. It is said no case in point can be found—that is, a case between a citizen of a state, a member of the Union, and a citizen of a foreign state. But there is a universal concurrence of opinion that since the act of 1875 it is no longer necessary, in suits between citizens of different states, that either shall be a resident of the state in which the suit is brought. Dillon on Removals, 26; *Cooke* v. *Ford*, 16 Am. Law Reg. 417; *Peterson* v. *Chapman*, 13 Bl. 395.

But it is impossible to distinguish the present case from

these in principle. In both instances the language conferring the jurisdiction is general—in one case extending the judicial power to controversies between citizens of states, and in the other to those between a citizen of a state and a citizen of a foreign state. But it is said that the fundamental ground upon which jurisdiction, by reason of citizenship of parties, rests, is the fear of local prejudice, and that this cannot possibly exist in a case like the present. A sufficient answer to this, it seems to me, is that when the constitution and the law give the jurisdiction in plain language, it is unprofitable to look further for the legislators' motive.

But counsel is in error when he assumes that the fear of local prejudice was the only ground for the grant of jurisdiction. The case of aliens stands among another class, namely, those involving the peace of the Union. Mr. Hamilton shows in the *Federalist* (No. 80) why the judicial power was extended over cases in which aliens were parties, even when the case depended wholly upon the *lex loci*, and it was undoubtedly the intention to refer all such cases to the national tribunals. Page 554.

The motion is denied.

FIRST NATIONAL BANK OF ST. JOHNSBURY *v.* PORTLAND & OGDENSBURG RAILROAD COMPANY and others.

(*Circuit Court, D. Vermont.* May, 1880.)

CORPORATION—INDORSEMENT—CONDITION—WAIVER.—A breach of the condition does not relieve a corporation from liability upon a conditional indorsement, where performance of such condition has been duly waived.

GARNISHMENT—TRUSTEE—RECEIVER.—The earnings of a railroad are attachable in the hands of a trustee, although they came into his possession as the receiver of a connecting railroad.

Luke P. Poland, for plaintiff.

Daniel Roberts, for defendants.

WHEELER, D. J. This cause has been tried by the court upon the written waiver of a jury trial, and been heard as to

the liability of the trustees upon their disclosure. The defendant, by its treasurer, became indorser upon two notes made by other railroad companies, forming a connecting and continuous line with the defendant's road, for the purpose of raising money for those companies to enable them to complete a small portion of the line, and to carry out a consolidation arrangement between them. The defendant is a corporation of the state of Maine, and the incurring such liability is brought directly within the scope of its corporate powers by chapter 591 of the acts of the legislature of that state for 1868, and an amendment thereto passed in 1875. The directors of the defendant voted that the treasurer should be authorized to indorse such notes, provided 'that Horace Fairbanks should agree that the portion of the line to be built should be completed before the first note should fall due, and to save the defendant harmless if it was not so completed. Severe sickness of Fairbanks stood in the way of obtaining such agreement from him seasonably, and it was waived by the officers of the defendant on other assurances, and notes were indorsed by the treasurer and discounted by the plaintiff. The piece of road was completed before the first note fell due. The notes were not paid when due, and these two notes were afterwards made and indorsed in renewal of them. The plaintiff knew all the facts connected with the indorsements. By the provisions of the by-laws of the defendant the treasurer had not authority to indorse these notes without the approval of the directors; and it is contended, in behalf of the defendant, that as the directors only authorized the indorsement of these notes provided Fairbanks should give the guaranty, there was no authority, and the indorsements could not be binding without the guaranty. The principal question as to the liability of the defendant arises upon this claim.

The law of the defendant's existence did not require any such guaranty in order to create such liability. The directors were in no wise compelled to require it. They could require it or not, and if they did require it could waive it. It was waived, and must have been waived by them. The indorse-

ments made pursuant to the waiver were expected by all to be, and were, as binding as if the condition had not been varied, and this ought especially to be so as to the defendant, when the assurances accepted by its directors accomplished all that the guaranty sought was to insure.

A question is made about the chargeability of the trustees because they are receivers running a railroad connecting with the defendant's road, and the effects in their hands belonging to the defendant consist of money received by them as such receivers in the course of the operation of the roads in connection with each other for freights due the defendant collected by the trustees. It is argued that these funds can only be reached through the interposition of the court which appointed the receivers. These funds are not earned by the property of the receivership. They are the earnings of the defendant, and are attachable by this process, apparently. If there is anything about the position of the receivers with respect to the court which appointed them that requires any protection to be afforded in order to protect the rights of those for whom the receivers were appointed, that court must afford the protection. The receivers do not set up any claim that this debt cannot be holden by this process; neither do they show that any other person is such a claimant of the fund that he ought to be made a party to the proceedings to assert his right. For anything that appears the money is the property of the defendant in the hands of these persons, who are also receivers of other property, and because they are such receivers happen to be in position to receive this, not as a part of the trust property of which they are appointed to take charge, but because it was entrusted to them by the defendant. As such it is liable to this process by the statute of Vermont. The amount so received is, as appears by the disclosure, $2,865.26.

There must be judgment for the plaintiff for the amount of the note, which is $26,904.55, and the trustees are adjudged chargeable on the disclosure for the sum of $2,865.26, mentioned therein.

KEITH *v.* TOWN OF ROCKINGHAM.

(*Circuit Court, D. Vermont.* May, 1880.)

JURISDICTION — STATE STATUTE. — The fact that an action is wholly founded upon a state statute does not necessarily defeat the jurisdiction of the circuit court.

Motion to dismiss for want of jurisdiction.

Jonathan B. Farnsworth, for plaintiff.

Charles N. Davenport, for defendant.

WHEELER, D: J. This is an action on the case founded upon section 41, *c.* 25, Gen. St. Vt., which provides that "if any special damage shall happen to any person, his team, carriage, or other property, by means of the insufficiency or want of repairs of any highway or bridge in any town, which such town is liable to keep in repair, the person sustaining such damage shall have the right to recover the same in an action on the case in any court proper to try the same." The plaintiff is alleged to be a citizen of Massachusetts, and the defendant is a town in Vermont. The defendant moves to dismiss for want of jurisdiction, because, as is argued, this is not an action at common law or in equity, of which jurisdiction is given to the circuit courts of the United States by section 629, U. S. Rev. St., and section 1 of the act of March 3, 1875, to determine the jurisdiction of the circuit courts of the United States, (18 St. at Large, 470, *c.* 137,) but is an action founded wholly upon the statutes of the state, and a proceeding of which the state courts only can have jurisdiction. The cause has been heard upon this motion.

The constitution of the United States extends the judicial power of the United States to controversies between citizens of different states. Article 3, § 2. Under this section, and the one next preceding, authorizing congress to ordain and establish courts, jurisdiction has been given to the circuit courts, by the statutes cited, of suits of a civil nature at common law, in which there shall be a controversy between citizens of different states. The question is whether this is an action at common law. The same expression is used in arti-

cle 8 of the amendments to the constitution, where it is declared that in suits at common law the right of trial by jury shall be preserved. This expression has been held to mean there all suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized and equitable remedies administered, and to admiralty proceedings, and not merely suits which the common law recognized among its old and settled proceedings. *Parsons* v. *Bedford*, 3 Pet. 433. The right of recovery in this action is founded upon the statute, but an action at common law may be founded upon a statute. Bac. Ab. "Statute," K. The rights to be determined are purely legal rights, as distinguished from equitable rights. The action on the case given by the statute is a common-law action. The parties to it have the right to a trial by jury according to the course of the common law, which the legislature of the state cannot take away or abridge. *Plimpton* v. *Somerset*, 33 Vt. 283. This court has concurrent jurisdiction with the courts of the state of actions of this nature in which there is a controversy between citizens of different states of the required amount, as there is here, and, therefore, this is a proper court to try the action, within the meaning of the statute of the state giving the action.

Motion overruled.

MORGAN *v.* GILBERT.

(*Circuit Court, W. D. Michigan, S. D.* April 22, 1880.)

MORTGAGOR AND MORTGAGEE—INJURY TO SECURITY.—Where the mortgagor is insolvent, a mortgagee may maintain an action for an unauthorized injury to the mortgage security.

Trespass on the case. Tried without a jury.

Simonds & Fletcher, for plaintiff.

Champlin & More, for defendant.

WITHEY, D. J. On the second of January, 1875, the members composing the firm of Colby & Co. owned and mortgaged lands to plaintiff to secure the payment of $25,000; among other lands, lot No. 2, of section 10 north, of range 7 west, situated in Montcalm county, Michigan, on which was pine timber constituting the principal value of the premises. Ten thousand dollars, with interest, were payable July 2, 1876, and $15,000, and interest, January 2, 1877.

In January, 1878, while the mortgage remained wholly unpaid, defendant entered upon said premises, and cut and removed 650,000 feet, board measure, of pine timber, of the value of $1,300, or two dollars per 1,000 feet. It was without the knowledge of plaintiff, who alleges that thereby defendant "greatly injured and damaged said premises," etc., "whereby the plaintiff's security for the said sum of $25,000 and interest was greatly lessened, impaired and destroyed, to the plaintiff's damage," etc.

Defendant pleaded the general issue.

It appears that defendant and the mortgagors, after the date of the mortgage, agreed to exchange the pine upon their respective lands for convenience in hauling, defendant to pay $1,000 as the difference in value, he to have the pine in question. Defendant paid part of the $1,000 to the mortgagors, Colby & Co., and the balance was subsequently paid to their assignees in bankruptcy.

When the mortgage was given there were over 13,000,000 feet of pine timber on the mortgaged land. At the time defendant took the timber in question from this particular lot the quantity remaining on the entire tract had been reduced to about 6,500,000 feet by Colby & Co., in their lumbering business, and with the knowledge and consent of plaintiff, but upon an understanding between them not necessary or material to be stated.

It further appeared that at the time of the agreement to exchange timber defendant was informed by Colby & Co. that they had no right to permit the timber to be cut without the consent of the mortgagee.

There was a prior mortgage upon the lands covered by

plaintiff's mortgage of $10,000, which plaintiff bought for $6,000, subsequent to the alleged trespass, and caused to be discharged of record.

Pending a suit by the mortgagee to foreclose the $25,000 mortgage, and prior to bringing this suit, but subsequent to the alleged trespass, he accepted a quitclaim deed of the mortgaged premises from the assignees in bankruptcy of the mortgagors, whereby the mortgage and the debt became merged in the fee thus acquired.

At the time the timber was taken there was due on the mortgage, of principal and interest, about $32,875; amount plaintiff paid for prior encumbrance, $6,000; making, as the total lien, $38,875.

The value of the security is shown to have been as follows:

On the mortgaged land was a steam mill worth -	$20,000
Six million five hundred thousand feet of pine timber, at two dollars, - - - -	13,000
Value of the land without the timber, - -	1,964
	$34,964

From which it appears the value of the security did not equal the amount of the lien into nearly $4,000.

The declaration counts upon damages to the premises and to plaintiff's security, and it is claimed that any reduction of the mortgagee's security gives the right of action.

We are of opinion that if plaintiff can recover it must be for an injury to his security, and on the ground that it was inadequate. In Massachusetts the legal title is in the mortgagee, who may sue for an injury affecting the mortgaged estate, though not in possession, and the owner of the equity of redemption has no more right than a stranger to impair the security of a mortgagee by permanent injury and depreciation of the mortgaged estate. It has there been held that the damages are measured by the extent of injury to the property, and do not depend upon proof of the insufficiency of the remaining security; that the mortgagee is not obliged to accept what remains, but is entitled to the full benefit of the entire mortgaged estate for the full payment of his entire

debt. *Gooding* v. *Shea*, 103 Mass. 360; *Byron* v. *Chapin*, 113 Mass. 308. See, also, *Sanders* v. *Reed*, 12 N. H. 558; *Smith* v. *Moore*, 11 N. H. 551; 5 N. H. 54; and *Hutchins* v. *King*, 1 Wall. 54. But in *Kings* v. *Bangs*, 120 Mass. 514, it was held, in an action by the mortgagee against one who had injured the mortgaged property by removal of fixtures, that evidence that the mortgagee under the power in his mortgage sold the premises for more than enough to pay his debt and all prior encumbrances is admissible in mitigation of damages.

In Illinois the mortgagee is held to be the owner of the fee, as against the mortgagor or those claiming under him, and may have an injunction to stay waste upon the mortgaged lands. He is entitled to all the rights and remedies which the law gives to an owner. *Nelson* v. *Pinegor*, 30 Ill. 473.

In New York a mortgage constitutes a lien upon and does not vest title to the land in the mortgagee. This is the law in Michigan, where the title remains in the mortgagor. Wherever such is the relation of mortgagor and mortgagee to the mortgaged property, the rule is that the mortgagee may maintain suit against one who impairs his security, and the damages are limited to the amount of injury to the mortgage as a security, however great the injury to the land may be. *Van Pelt* v. *McGraw*, 4 Comstock, 110. It has been in some cases held necessary to show that the mortgagor is insolvent or not personally responsible for the debt. See *Gardiner* v. *Heartt*, 3 Denio, 232; *Same* v. *Hitchcock*, 14 John. 213; *Yates* v. *Joyce*, 11 John. 136; *Wilson* v. *Maltby*, 59 N. Y. 126; *Jones* v. *Costigan*, 12 Wis. 757; *Buckout* v. *Swift*, 27 Cal. 436.

Upon the general doctrine as stated, where title remains in the mortgagor, see *State* v. *Weston*, 17 Wis. 757; *Jones* v. *Costigan*, 12 Wis. 757: *Jackson* v. *Turrell*, 39 N. J. 329, in a well-considered case. It is not necessary to say what the rule would be in Michigan in a suit by a mortgagee, when the mortgagor is personally liable and pecuniarily responsible. In the case at bar the mortgagors were insolvent. One case lays stress upon the intent with which the injury was

committed, (*Gardner* v. *Heartt*, 3 Denio, 232,) which we do not follow.

We are not aware of any decision by the supreme court of Michigan touching the right of a mortgagee to maintain an action for an injury either to the mortgaged premises or to his security. We entertain no doubt that the common law gives a remedy to a mortgagee against one who, by an unauthorized act, has so far injured his security as that damage results. The cases in New York, New Jersey, and Wisconsin, where the rights of a mortgagee are the same as in Michigan, are authority for this view. The court, therefore, finds that the plaintiff is entitled to judgment against the defendant for the sum of $1,300. It is also found that defendant had no valid license from the mortgagors, as against the mortgagee, to cut and remove timber from the mortgaged land.

The plaintiff is entitled to judgment against the defendant for the sum of $1,300. Judgment will be entered for that amount, with costs.

WOODMAN and another *v.* ELY and another.

(*Circuit Court, W. D. Michigan, N. D.* June 9, 1880.)

TAXATION—COLLECTION—INJUNCTION.—A court of equity will not restrain the collection of a tax, upon a purely legal objection, where the land has been duly assessed.

SAME—VALUATION—INJUNCTION.—A court of equity will not restrain the collection of a tax upon the ground of excessive valuation.

SAME—JURISDICTION.—The criterion of jurisdiction is the amount of the tax in dispute.

In Equity. Hearing on pleadings and proofs.

S. S. Olds, for complainants.

L. D. Norris, for defendants.

WITHEY, D. J. Bill to restrain the collection of taxes upon the undivided three-fourths of what are known as canal-land groups 666, 667, 668 and 669, in Mackinaw county, Michigan, for the year 1877. Upon the other undivided quarter the

taxes have been paid. Complainant Woodman owns a half, and Washburne a quarter interest.

Prior to 1877 the lands were assessed at five dollars per acre; in that year they were assessed at $10. It is alleged in the bill of complaint that no assessment roll was made out until sometime in June, 1877, and that these complainants were thereby deprived of the opportunity which the statute gives them as owners of the land to show cause on the third Monday of May and on the two following days, at the supervisor's office, why the assessment as to the valuation thereof should be altered. It is admitted that complainants did not visit the supervisor's office upon either of the days named, so that if the valuation was excessive, in the opinion of the tax payers, they lost nothing by the supervisor's delay in not completing the roll until June.

The question was presented whether the supervisor has any power to make out his assessment roll subsequent to the time when it is to be ready for review in May. Whatever view I might take, the supreme court of Michigan, as I understand the ruling in the case of *The Albany & Boston Mining Co.* v. *Auditor General*, 37 Mich. 391, has settled the question against complainants. Chief Justice Cooley, p. 397, speaks of the failure of the supervisor to have his roll ready as a mere irregularity, and the case holds that upon a purely legal objection a party whose land has been assessed cannot come into a court of equity to have the collection of the tax restrained. The supreme court of the United States, in *State Railroad Tax Cases*, 92 U. S. 613, says: "It has been repeatedly decided that neither the mere illegality of the tax complained of, nor its injustice, nor irregularity, of themselves, give the right to an injunction in a court of equity."

According to these decisions, in addition to the alleged illegality of the assessment, complainants were bound to have made a clear case for equitable relief before they were entitled to have the collection of a tax enjoined.

The bill alleges a fraudulently excessive levy, and inequality in the valuations on the roll. Mere excessive valuation does not justify an injunction restraining the collection of a

tax, and there is an entire failure to prove fraud on the part of the assessor. The only evidence tending to establish inequality of valuation is that in 1876 these lands were assessed not above five dollars an acre; that in 1877 they were (most of them) assessed $10 an acre. A witness testifies that the lands of the Mackinaw Lumber Company, in the same township, were assessed not above five dollars an acre. Both tracts are pine land, and the same witness testifies that complainants' lands are not worth over five dollas an acre. There is other evidence as to their value not exceeding that sum, but there is no testimony to show the comparative value of the two tracts, or why one tract or description should not be valued higher than another. There is, therefore, no ground for saying that complainants are entitled to be relieved as tax payers on the ground of inequality or injustice in the assessment of their property, if the ground was sufficient.

The amount of the tax which they dispute as illegal and fraudulent does not exceed $500, and it is not believed, therefore, that the court has jurisdiction. The entire tax against the three-fourths interest of these complaints was $920.76. They tendered to the auditor general $650 as a just amount of tax for them to pay, leaving only $270.76 in dispute. Complainants claim that it is the value of their interest in the land that controls as to jurisdiction. But we regard the amount of tax in dispute as the criterion of jurisdiction, so far as depends upon the sum or value in dispute. *Adams* v. *Board of County Commissioners*, McCahon's R. 241. The bill is dismissed upon all the grounds stated.

WOODMAN and another *v.* LATIMER and another.

(*Circuit Court, W. D. Michigan, N. D.* June 9, 1880.)

TAXATION—COLLECTION—INJUNCTION—JURISDICTION.

In Equity. Demurrer to bill.

L. D. Norris, for demurrer.

S. S. Olds, contra.

WITHEY, D. J. Bill filed to restrain the collection of taxes of 1878, upon the sole ground that the tax roll was not ready for review on the third Monday of May, to which a demurrer was interposed by the defendants. The state supreme court in 37 Mich. 391, cited in the other case, (*ante*, —,) having held that this was not a sufficient ground for relief in equity against the collection of a tax, it must be regarded as decisive of this case. A federal court will, with few exceptions, follow the decision of the highest tribunal of the state as to the construction of a state law, and a ruling as to the effect of a failure to complete an assessment roll within the time prescribed by such statute does not seem to be within the exceptions. 15 Wall, 548, and 92 U. S. 613, hold that mere illegality in a tax is not a sufficient ground upon which to sustain a bill in equity to restrain the collection thereof. The whole amount of tax in dispute is $820.60. Complainant Washburne's one-quarter interest is but $205.15; Woodman's $410.30—neither interest amounting to $500. The rule seems to be that while different tax payers may join in such a suit there must as to each be in dispute an amount exceeding the sum or value of $500, the interest of each being in its nature several. *Adams* v. *Board of County Commissioners,* McCahon's R. 235; *King* v. *Wilson,* 1 Dil. 568. But it does not become necessary to decide this question

Demurrer sustained, with costs.

WOOD *v.* SEITZINGER.*

(Circuit Court, E. D. Pennsylvania. April 30, 1880.)

NEGOTIABLE NOTE—TRANSFER OF AS COLLATERAL SECURITY FOR PRE-EXISTING DEBT—RIGHTS OF HOLDER—FRAUD.—The holder of a negotiable note, who has taken it as a security for a pre-existing debt, is a holder for value, and is protected against any equities subsisting between the original parties.

Case stated between R. D. Wood & Co., plaintiffs, and Fergus G. Farquhar and others, assignees in bankruptcy of Huddell & Seitzinger, defendants, in which the following facts were agreed upon: That R. D. Wood & Co. were the holders of two promissory notes drawn by Jacob J. S. Seitzinger to the order of Huddell & Seitzinger, and by the latter indorsed—one dated June 23, 1876, for $4,000, at two months, and the other dated June 24, 1876, for $3,000, at two months—each duly protested and notice of dishonor given to the indorsers.

That both of said notes were received by said R. D. Wood & Co. from one B. T. Boyer, under the following circumstances: R. D. Wood & Co., on June 2, 1876, delivered to said Boyer two of their own notes, for $4,000 each, Boyer agreeing to have the same discounted and to apply the proceeds to the redemption of certain accommodation notes of the same amount given to the Mill Creek Iron Company. Some time afterwards Boyer improperly used for his own purposes one of these notes, and R. D. Wood & Co. thereupon called upon him to return them the other note, which was still in his possession. In consideration, however, upon June 24, 1876, of the delivery by Boyer to said R. D. Wood & Co. of the two notes of Jacob J. S. Seitzinger, now claimed upon, and two other notes of other persons, said R. D. Wood & Co. permitted the said Boyer to retain and use for his own benefit their (R. D. Wood & Co's.) other notes, aforesaid, which said Boyer did, and R. D. Wood & Co. paid said last-mentioned note at maturity.

*The opinion in this case was inadvertently published on page 285 of this volume, before this report of the case, prepared by Frank P. Prichard, Esq., of the Philadelphia bar, came to hand.

That the notes claimed upon were procured by said Boyer from Seitzinger upon June 24, 1876, by untrue representations made by Boyer to Seitzinger that R. D. Wood & Co. needed accommodation. That neither Seitzinger nor Huddell & Seitzinger received any consideration therefor. That R. D. Wood & Co. had no knowledge or notice of this, and supposed the notes represented a debt due by the maker to Boyer.

That if the court should be of opinion that the plaintiffs are entitled to recover, judgment is to be entered for the plaintiffs for $351.49, being 5 per cent. on the amount of the said two notes, with interest, viz., $7,029.84, the said 5 per cent. being the dividend theretofore declared upon the allowed claims against the estate of Huddell & Seitzinger, bankrupts; otherwise, judgment for defendants. Both parties reserved the right to take a writ of error to the judgment.

Thomas Hart, Jr., for plaintiffs.

E. G. Platt and *Samuel Dickson*, for defendants.

PER CURIAM. Is the holder of a negotiable note, who has taken it as a security for a pre-existing debt, a holder for value, and so protected against any equities subsisting between the original parties to it? This is the only question presented by this case. If the rule established in Pennsylvania by the decisions of her highest court is to be followed, it must be answered in the negative. But these decisions are only persuasive, as may be said also of the recent decision in this court by a late eminent judge, conformably to the state rule. The question involved is not one of local law, but of general commercial jurisprudence; hence the duty of the court is imperative to follow the guidance of general judicial opinion concerning it. As to the preponderating weight of this opinion there is scarcely ground for doubt.

In perhaps a majority of the United States the law is settled that the taking of a note as collateral security for a pre-existing debt is a holding for value. So it is held in England. See 2 C. M. & R. 180; *Percival* v. *Frampton* and *Poirier* v. *Morris*, 2 E. & B. 89. It is stated to be the better doctrine in 3 Kent's Com. *81; in Story on Prom. Notes, § 195; in 1 Parsons' Prom. Notes, 218; and in Byles on Bills, by

Sharswood, *28. It has the judicial sanction of Judge Story in *Swift* v. *Tyson*, 16 Pet. 1, whose adoption of it is distinctly approved by the supreme court in *McCarty* v. *Root*, 21 How. 439.

Such weight of authority must be regarded, in this court, as decisive, and judgment is therefore entered for the plaintiffs on the case stated.

NOTE.—The "recent decision in this court," referred to in the above opinion, is probably the case of *Mack* v. *Baker*, reported in 5 Weekly Notes of Cases, 212.

In re MAY, Bankrupt.

(*District Court, W. D. Pennsylvania.* June 9, 1880.)

FRAUD—CONVEYANCE—MARRIED WOMAN.—A conveyance to a married woman in fraud of her husband's creditors is valid as to a subsequent creditor with notice.

SAME—SAME—MARRIED WOMAN—TRUST.—Such conveyance will not create a trust in the wife for the benefit of her husband.

In Bankruptcy. *Sur* exceptions to the report of the register in distributing the proceeds from sale of real estate.

Geo. K. Powell, for exceptions.

Wm. M. Piatt & Son, for report.

ACHESON, D. J. This case comes before the court upon exceptions to the report of the register distributing the fund derived from the sale of the real estate of Thomas May, the bankrupt, which was sold under an order of this court divested of liens. The bankrupt acquired, by purchase, an equitable interest in this real estate about the year 1851, and thereafter, and until the sale by the assignee in bankruptcy, he and his wife resided on the land. His equitable title was sold at sheriff's sale in 1861. He purchased it back from the sheriff's vendees and caused them to convey the title to his wife, Marilla, in 1867. Having paid the balance of his original purchase money, he caused the legal title to be conveyed by his vendor and the grantee of his vendor to his wife,

in the years 1865 and 1867. The title to the land remained in the wife until March 2, 1872, on which day Thomas and Marilla May conveyed the land to William M. Piatt, who, on March 4, 1872, conveyed it to Thomas May. All the foregoing conveyances were promptly recorded.

Judson Lutes obtained judgments against Thomas May in the years 1870 and 1871, when the title to the land was in Marilla May. Before the register he claimed the fund for distribution in preference to judgment creditors of Thomas May, whose judgments were obtained after March 4, 1872, and when the title to the land was in him. The register appropriated the fund to the latter judgment creditors. To this appropriation Judson Lutes has filed exceptions. If the rights of the parties are to be determined by what appears on the face of the record, the appropriation is clearly correct. But the exceptant contends that although, at the dates of his respective judgments, the legal and recorded title was in Marilla May, yet her husband was then in fact the owner of the land, or had such interest therein as was bound by the lien of his judgments.

The fourth exception is as follows: "The register erred in not finding that the conveyances of said land to Marilla May were fraudulent and void as to the creditors of Thomas May."

In connection with the fact that Thomas May was somewhat indebted when he caused the aforesaid conveyances to be made to his wife, and owned no other real estate, the exceptant's case rests mainly upon his own testimony, and that of one Christian Shook, as to alleged declarations of Thomas and Marilla May, made in the fall of 1868, immediately before the exceptant made his first loan to Thomas May, for which he took the joint note of the husband and wife.

Lutes testifies: "I asked him (May) as to the title to the land. He replied that the deed he had made to his wife for the reason that he had been so harassed by the sheriff; that he did it for a scare to his creditors, so that he could keep them off until he had a chance to turn himself and pay them; but that he had bought and paid for the land, and his wife

would make the same statement about the ownership of the land."

A few days afterwards, Lutes says, he, in company with Christian Shook, visited May's house, and there saw Mr. and Mrs. May, and that the former then repeated to his wife what he had previously told him, (Lutes,) and she said "that Thomas had bought the land and paid for it, and had the deed made to her for the purpose of keeping folks from crowding him, so that he would have a chance to turn himself and pay his debts. * * * I remember (Lutes testifies) Mrs. May said I needn't be afraid to trust Thomas, for the reason of the deed being in her name, for he was the real owner and not her, and that they had got their debts pretty well paid up, and she didn't see any reason why he couldn't get along."

Christian Shook testifies: "Mr. Lutes was going to let May have some money, and Lutes wanted Mrs. May to go Tom's security. Mrs. May laughed, and said she thought there was no use in going as Tom's security, for the place belonged to Tom."

This testimony of Judson Lutes and Christian Shook is denied *in toto*, and flatly contradicted from first to last, by Thomas May, who was examined at length. It is also contradicted by Marilla May. Neither of these witnesses has any pecuniary interest in the present controversy. On the other hand, Judson Lutes is a party in interest; moreover, he is seriously discredited by testimony in the case affecting his reputation for truth and veracity.

One of the exceptions now pressed is that "the register erred in not finding that both Thomas May and Marilla May told Judson Lutes, at the time he loaned his money and took his first judgment, that the land belonged to Thomas May." But, after a careful consideration of all the evidence in the case, I cannot say the register was wrong in not so finding.

Were it conceded, however, that the alleged declarations were made, what then? The register finds, and, I think, rightly, that all the debts which Thomas May owed when the conveyances were made to his wife were paid long since.

Now, it is not pretended that at the time of the conveyances to the wife Thomas May contemplated embarking in any hazardous business, nor is it shown that he then had any intention to contract new indebtedness. Indeed, there is not a particle of evidence to show that any fraud was intended upon future creditors. Therefore, even if the conveyances to his wife were fraudulent as to then-existing creditors, they were good and valid as respects subsequent creditors. *Snyder* v. *Christ*, 39 Pa. St. 499; *Monroe* v. *Smith*, 79 Pa. St. 459; *Harlan* v. *Maglaughlin*, Pittsburgh L. J., May 19, 1880. Moreover, before Judson Lutes made his first loan to Thomas May he was fully informed of the conveyances to the wife. As to him, therefore, there could be no fraud. *Snyder* v. *Christ*, *supra*; *Monroe* v. *Smith*, *supra*.

Most certainly a fraudulent conveyance is binding on the grantor and those claiming under him. Hence, if it ever so clearly appeared that the intentions of Thomas May were covinous as respects his then-existing creditors, yet as against him and a subsequent creditor, who became such with full knowledge of the facts, the estate conveyed to the wife was as absolutely hers as if the transaction was free from the taint of fraud. But one of the exceptions is that "the register erred in not finding that Marilla May held said land in trust for her husband, Thomas May, the bankrupt;" and a very earnest and able argument to show that such trust relationship existed was made by the learned counsel for the exceptant, who cited in support of the proposition *Kelly's Appeal*, 77 Pa. St. 232. But in that case the court adopted the theory of a trust in the wife for her husband, because the wife never claimed the land, but permitted it to be taken in execution and sold as the estate of her deceased husband, and there was no evidence that the title was put in the wife to defraud her husband's creditors. Here, however, the very evidence upon which the exceptant relies to show the trust arrangement alleged, if accepted as true, establishes that the conveyances to Marilla May were in fraud of her husband's creditors, and that the intention was to withdraw the land from their reach—a purpose entirely inconsistent with any

beneficial ownership of the land remaining in the husband. Assuredly there is no evidence in this case of any express trust, and none which warrants the implication of the trust attempted to be set up. I entirely agree with the register that the alleged declarations of Marilla May to Judson Lutes, if made, did not affect her, or operate as an estoppel either against her or the parties to whom the register awarded the fund.

The conclusion of the whole matter, therefore, is that whether the conveyances to Marilla May were, on the part of her husband, *bona fide*, conferring upon her a valid gift, (as the register finds,) or were made with fraudulent intent, the land was hers when the exceptant's judgments were entered, and the exceptant has no right to the proceeds of the assignee's sale in preference to *bona fide* creditors without notice, whose judgments against Thomas May were obtained after the title vested in him by virtue of the conveyance from William M. Piatt.

The assignee has excepted to the disallowance of a bill of costs and attorney's fees incurred in the trial of a *scire facias* to revive the judgment of one Detrick, in the court of common pleas of Wyoming county. It was objected to this claim that these expenditures were not necessarily or legally incurred by the assignee; that the contest was wholly between judgment creditors, and the assignee had no interest in it, and that the expenses were incurred, in fact, on behalf of Judson Lutes. The presumption is that the register rightfully decided against the claim, and evidence has not been submitted to me to convict him of error.

And now, to-wit, June 9, 1880, the exceptions to the register's report are overruled, and the report is confirmed absolutely by the court.

In re BAILEY, Bankrupt.

(*District Court, W. D. Pennsylvania.* June 11, 1880.)

RENT—DISTRESS—GOODS OF STRANGER—AUCTIONEER.—The goods of a third person on the premises of an auctioneer for the purpose of sale, are not liable to distress for rent, even although the auctioneer may have made advances thereon for which he may have a lien.

In Bankruptcy. *Sur* petition of John Liggett, landlord of the bankrupt, for an order upon the assignee to pay rent.

J. H. Baldwin, for assignee.

S. Schoyer, Jr., for John Liggett.

ACHESON, D. J. There was due the landlord at the date of his petition arrears of rent amounting to $1,000; but it is admitted that since the present application was made the assignee has paid the landlord the amount, viz., $698, realized from the sale of the personal property belonging to the bankrupt which was upon the demised premises at the date of the bankruptcy. But the landlord claims the further sum of $119 now in the assignee's hands.

The bankrupt was an auctioneer, and carried on his business on the demised premises. At the time of his bankruptcy there were upon the demised premises, for sale by the bankrupt as auctioneer, a piano, upon which he had advanced to the owner $48, and some other personal chattels, upon which he had advanced freight to the amount of $71. These sums have been paid to the assignee. The landlord claims this money. But upon what principle? If he has a valid claim thereto it must be on the ground that these goods were distrainable for arrears of rent. But it is settled law that the goods of third persons upon the premises of an auctioneer, for sale, are privileged from distress for rent. Did the fact that the tenant here had made advances upon the goods subject them to distress? I think not. The tenant, at most, had a mere lien. The entire title remained in the owners of the goods

It may well be assumed that the owners of the goods selected the bankrupt as their auctioneer on account of his

supposed personal fitness in that department of business. At any rate, he was employed by them to sell their goods at his auction stand, in the course of his business. This was the sole purpose of the bailment. But this purpose was liable to be frustrated if the landlord acquired the right to distrain by reason of the auctioneer's advances; for the right of distress involves the right to take the goods out of the hands of the tenant, and to remove them from the demised premises, and, after appraisement, to sell them. Such proceeding would be wholly inconsistent with the nature of the bailment in this case, and in violation of the rights of the owners of the goods, and this whether such sale passed to the purchaser the entire title to the goods, or an interest therein commensurate with the advances.

And now, to-wit, June 11, 1880, it appearing to the court that the assignee has paid to the landlord the net amount realized from the sale of the goods belonging to the bankrupt which were upon the demised premises at the time of the bankruptcy, further relief under the prayer of the landlord's petition is denied by the court.

In re HICKS, STEWART & ROSENBERG, Bankrupts.

(*District Court, S. D. New York.* May 28, 1880.)

REGISTER—SUMMONS—TRUSTEE UNDER SECTION 43 OF THE BANKRUPT ACT.—A register in bankruptcy has no power, on the mere application of creditors, to issue a summons for the examination of a trustee, or for the production by him of the books and papers mentioned in the summons, where such trustee has been duly appointed under section 43 of the bankrupt act.

G. H. Crawford, for creditors.

C. E. Souther, for trustee.

CHOATE, D. J. This case comes up on a certificate from the register requiring the opinion of the court upon the following facts stated: This was a proceeding wherein the estate of the bankrupts has been wound up by a trustee, under

the direction of a committee of creditors, pursuant to section 43 of the bankrupt act. No schedules were ever filed in the case. No reports have been made to the register. No account has been rendered except one dated December 31, 1879, which has been submitted to the committee and by them confirmed. It shows, or purports to show, the receipts and disbursements of the trustee, including amounts paid for expense of administration, and for dividends, and an undistributed balance of $3,549.44. The trustee has never been examined under any order of the court or the register; the account rendered by him to the committee is not verified, nor was it accompanied by vouchers.

Two of the creditors, whose debts together amount to about two-thirds of all the debts proved, applied to the register for an order for the examination of the trustee, and accordingly the register issued a summons requiring the trustee to appear for examination, and to produce upon such examination all books of account belonging to the bankrupts, and all the books kept by him as trustee, and all his vouchers. The questions certified by the register are—(1) whether the register had power to issue the summons; (2) whether these applying creditors have the right to examine the trustee in this proceeding before the register pursuant to the summons; and (3) whether they have the right on such examination to call for the production of said books and papers.

It has been held that after the due appointment of a trustee, under section 43 of the bankrupt act, the rights and powers of creditors inconsistent with the full and free exercise of the power and authority given by the statute to the trustee to settle and wind up the estate under the direction of the committee are taken away. *In re Jay Cooke & Co.* 11 N. B. R. 1. And in the case of *In re Trowbridge*, 9 N. B. R. 274, it was said by Judge Longyear: "The proceeding contemplated by section 43 is evidently intended to be one by arrangement and not by judicial process or proceedings. The power and jurisdiction of the court are, however, retained over the matter in order that it may interfere whenever it may become necessary for the preservation and enforcement of the rights of all

parties concerned. The committee of creditors represents the entire body of the creditors, and its acts and doings are their acts and doings. All the details of the winding up and settlement of the estate are carried on through and by the trustee and committee, by arrangement and amicable adjustment, and until some dispute or other exigency arises which cannot be settled and disposed of in that way, none of the processes, powers or jurisdiction of the court are brought into requisition, and they can be set in motion only by a special application for that purpose."

I think it is clear upon these authorities, and upon the terms of the statute, that the trustee and the committee are not liable to the ordinary processes and modes of proceeding prescribed by the bankrupt law for the regulation of assignees, and for the enforcement of those obligations which assignees assume towards creditors and the bankrupt. At the same time the statute sanctions and these cases recognize the power and duty of the court to intervene, upon cause shown, for the purpose of preventing a violation of their trust on the part of the trustee or creditors, and to secure the equal rights of all creditors in the distribution of the assets, which is expressly provided for in the act. The most common cause for the interference of the court is upon a question being made as to whether or not a person making a claim is entitled to share as a creditor. Such a question, if mooted and not adjusted by the parties, must necessarily be determined by the court. In this very case such questions have been so determined in favor of the applying creditors. So there can be no doubt that any action of the trustee or committee in excess of their lawful powers, as, for instance, a diversion of funds to a purpose not authorized by the terms of their trust, will be corrected on application to the court. *In re Bonnett*, 19 N. B. R. 309.

Nor does the trustee any more than any other trustee, hold the funds of the estate without a liability to be called to an account. As a trustee for creditors he is probably bound to afford them on request all proper information as to his perform ance of his trust. There is nothing, however, in the statute,

or in the general principles of law governing the subject, prescribing that his account rendered to the creditors shall be under oath, or in any particular form, or that when it is rendered his vouchers shall accompany it. While the approval of the committee will be conclusive as to all matters that are within the discretion of the trustee and committee, except in cases of bad faith, the approval of the committee cannot affect or cure positively unlawful applications of the fund, nor inequality of distribution among creditors. *In re Baxter*, 19 N. B. R. 295.

That this court has authority, in proper cases, to call the trustee to an account, is unquestionable; but I think it is equally clear that it can properly be done only on a petition, by a creditor or other party in interest, setting forth the grounds on which the court is asked to intervene in the matter, to which the trustee will have an opportunity, by answer or otherwise, to interpose objections before an order can properly be made against him. I think it clear that any other or more summary mode of proceeding against him would be inconsistent with his relations to the court and the creditors established by the statute. If such proceedings are taken, and an accounting ordered, the powers of the court are ample to direct a personal examination of the trustee, under oath, and the production of all books and papers necessary to the full elucidation of his accounts.

But it follows from the views above expressed that the register had no power, on the mere application of creditors, to issue a summons for the examination of the trustee, or for the production by him of the books and papers mentioned in the summons. Section 5087 provides that the court may require the attendance of any person as a witness in a bankruptcy proceeding, either before the court or before a register; and, by section 5002, registers are vested with the same powers as the court for the summoning and examination of persons or witnesses, and for requiring the production of books, papers and documents. This summons was, no doubt, issued upon the theory that these sections still applied in this case notwithstanding the appointment of the trustee.

They are applicable to ordinary proceedings in bankruptcy. For the reasons stated above they are superseded and made inapplicable to this case by the adoption of the alternative method of winding up the estate through the agency of a trustee and committee of creditors. The questions submitted by the register must all be answered in the negative.

ROBERTS and others *v.* SCHREIBER.

(Circuit Court, W. D. Pennsylvania. June 19, 1880.)

PATENT NUMBER 6,258 SUSTAINED — METHOD OF INCREASING THE CAPACITY OF OIL WELLS.—Re-issued process patent number 6,258, granted January 6, 1875, for a new and useful improvement in the method or process of increasing or restoring the productiveness of oil wells, by causing an explosion of gunpowder, or its equivalent, at or near the oil-bearing point, in connection with superincumbent fluid tamping, is not invalid for want of novelty and originality, or for any other reason.

SPECIFICATION—CONSTRUCTION.—The specification of a patent is to be construed with reference to the purpose of the patent.

PATENT NUMBER 47,458 SUSTAINED.—Patent number 47,458, for an improvement in exploding torpedoes in artesian wells, sustained.

In Equity. Bill for infringement of two patents.

D. F. Patterson and *George Harding*, for complainants.

James C. Boyce and *Henry Baldwin, Jr.*, for defendant.

STRONG, C. J. The bill charges infringement of two patents belonging to the complainants. The first is a process patent (No. 6,258) granted on the sixth day of January, 1875, to Edward A. L. Roberts, a re-issue of letters patent, (No. 5,434,) which was itself a re-issue of original letters, dated May 20, 1866, granted to said Roberts, and numbered 59,936. The original was for a new and useful improvement in methods of increasing the capacity of oil wells, described in the specifications and drawings. The specification of the re-issued patent No. 6,258, upon which this suit is partly founded, sets forth subtantially the improvement or process described in the original, and the claim is for "the method or process of increasing or restoring the productiveness of oil wells, by

causing an explosion of gunpowder, or its equivalent, at or near the oil-bearing point, in connection with superincumbent fluid tamping, substantially as set forth" in the specification.

The other patent belonging to the complainants, and alleged to have been infringed by the defendant, numbered 47,458, and dated April 25, 1865, was granted, also, to the said Edward A. L. Roberts. It is for a new and useful improvement in apparatus for exploding gunpowder or other explosive material when submerged in water in artesian or other similar wells. The apparatus is clearly and minutely described in the attendant specification, and the claims are as follows: *First*, the priming chamber *b*, in combination with the flask, plug and nipple, substantially as set forth; *second*, the arrangement of the tube *f*, or its equivalent, composed of India rubber, or other similar material, with the guard *d* and bolt *e*, substantially as described, in combination with the flask *a*.

The answer of the defendant to the charge of infringement of the process patent, while admitting the issue of the original, and the re-issues, as set forth in the bill, denies generally that the alleged improvement was new and useful; that Roberts was the original, true, or first inventor; and it denies also that the invention was not known or used before application was made for the patent, and denies that the invention was not, for more than two years prior to the date of Robert's application for a patent, in public use, or on sale in this country. Passing from these general denials, the answer proceeds to allege that the re-issue 5,434 was invalid and void, because it described and claimed things substantially different from what was described and claimed in the original patent. It also alleges that the second re-issue (that upon which this suit is brought) was not for the same invention as that described and specified in the original patent, or in the first re-issue. There is also a general denial that the defendant has infringed the complainant's invention claimed in the re-issue 6,258.

The answer then proceeds to set forth these and other de-

fences more particularly. Repeating the averment that Roberts was not the first and original inventor of the process claimed, but that the same, "or a substantial and material part thereof, or substantial and material parts thereof, claimed therein as new, was, or were before the said Roberts' supposed invention, known to and used" by numerous persons, whose names and the places of use are specified, the answer further avers that the invention was described in certain patents and in printed publications in this country and in Europe before it is claimed to have been made by the patentee.

The answer also alleges that Roberts had never reduced to practice his supposed improvement when he filed his application for a patent, or, in other words, that it was not then a complete invention; that the re-issue 6,258 does not describe any practically useful mode of increasing or restoring the productiveness of wells; that it has no utility; that for the purpose of deceiving the public the description in the second re-issue was made to contain less than the whole truth relative to the invention or discovery, and that for that reason the patent is void; that for the purpose of deceiving the public the application for the re-issue was made to contain more than is necessary to produce the desired effect, or the alleged useful result, and that the patent is void for that reason; and that the specification of the re-issued patent does not describe the alleged invention in such full, clear and exact terms as to enable any person skilled in the art to which it appertains to use the same, and that for this reason the patent is void.

Passing from the process patent to patent 47,458, the defendant's answer denies any infringement thereof, and avers that the letters patent are for a combination of parts not new, and constituting a cartridge or torpedo which was not new, if at all, otherwise than as specific devices or specific combinations of the parts constructed and combined as described in the specification, and specified in the claims; that Roberts was not the true original and first inventor of said parts, nor of any or either of them, nor of either of the combinations specified in the letters patent, if at all, except when such parts respectively were constructed and combined sub-

stantially as set forth in the patent; that the same, or substantially the same, things claimed in the patent as new, or material or substantial, parts thereof, were long prior to the supposed invention of the said Roberts known by and used at certain places designated by persons whose names are given, and that they were described in certain letters patent specified, and in certain printed publications.

Such are the defences set up against the bill of the complainants, and a very elaborate argument has been submitted in support of them. It must be admitted that the answer, so far as it relates to the process patent, is exceedingly full. It avers almost everything that may in any case be relied upon as a defence to the charge of infringing a patent, but most of its allegations are totally unsustained by anything in the record. They have not been insisted upon in the argument, and some of them have been expressly disclaimed. They will, therefore, require only a passing notice.

First, as to those which relate to the validity of the patent. There is no evidence to sustain the averment that the invention was in public use or on sale more than two years prior to Roberts' application for a patent, which was in 1864. The proof is directly to the contrary, and the averment is inconsistent with another allegation contained in the answer, to-wit, that at the time of filing his application he had never reduced to practice his supposed improvement or invention.

Nor is there anything to sustain the assertions of the answer that the patentee was guilty of fraud in this, that for the purpose of deceiving the public he made his application for the re-issue to contain less than the whole truth relative to his invention, and also that, for the same purpose, he made it to contain more than is necessary to produce the desired effect, or the alleged useful result. Such averments tend to awaken a suspicion that the defendant mistrusted having any substantial defence.

Equally unfounded is the defence that the description of the invention in the specification is not sufficiently full, clear and exact to enable any person skilled in the art to which it appertains, or with which it is most closely connected, to use it.

In face of the proofs, the denial of the utility of the invented process is most remarkable. The evidence shows the invention or process to have been pre-eminently useful. It has gone into very extended use throughout the entire oil region, and its use has immensely increased the production of oil. It has been this large and useful efficiency which has stimulated so great a number of infringers to invade the patentee's rights. Nor is there any reasonable pretence that the re-issued patent is for a different invention from that described in the specification of the first re-issue, or that described in the original patent of 1866. The three patents are in evidence, and there is nothing in the one upon which this suit rests, in part, which is not exhibited in the original specification. Indeed, the claim of the last re-issue is almost identical with the claim of the original patent. This defence has been abandoned. We come, then, to the only defence upon which any reliance is placed, so far as it relates to the validity of the patent. It is the alleged want of novelty and originality of the invention. It is strenuously insisted that the patented process was known and in use before Roberts invented it and made application for his patent.

The question thus presented is not a new one in this court. It was raised and vigorously urged in *Roberts* v. *Dickey*, reported in 4 Fisher, 532. In that case the original patent was assailed for alleged want of novelty, and after an extended argument, and the presentation of much evidence, the patent was sustained. No appeal was taken from the decree, and the patent, since the decree was made, has been enforced in numerous cases. We do not say our former decision is conclusive upon this defendant. The parties are not the same now, and there is some evidence which was not in the former case. In *Roberts* v. *Dickey* we stated at length what we regarded as the true meaning of the patent, and what, in our opinion, was the process claimed. We shall not repeat what we then said, only observing that we adhere to what we decided.

In support of his averment of the want of novelty of the Roberts invention the defendant has given evidence of nu-

merous acts which he claims to have been anticipations. Some if not most of them were in evidence in the former case, and were held insufficient to establish the invalidity of the patent. They will require but brief notice. There are several, however, that appear in evidence first now. They will be particularly considered. One of these, and one upon which much stress has been laid in the argument, is described in the testimony of George W. Beardslee. In 1844, at Rochester, New York, he excavated an ordinary well, six feet in diameter, and 12 to 15 feet down to limestone rock of a peculiar formation, and then from two to five feet into the rock. The strata were thick, two or three feet, and without fissures. Finding it difficult to blow out the rock by ordinary blasting he drilled a two-inch hole in the center of the excavation, to the depth of four or five feet, without striking the water he anticipated. He then put a charge of powder in a tin case into the hole and fired it by a fuse. When fired the water had risen over the hole, as he says, three or four feet. The result of the explosion was, he thinks, to reach a substratum of water for which he was seeking. Before the blast he could bail out the well with a bucket, and afterwards he could not.

It would, we think, be a very unwarranted conclusion to draw from Beardslee's evidence that his experiment was an anticipation of Roberts' process. The well was in no sense an artesian well. The cartridge was 13 or 14 inches long, and it was of such a diameter as to fill the hole during its length. It was not arranged in a position having particular reference to the place where the effect of an explosion was desired. It rested on the bottom of the hole, without being suspended. Obviously it was a case of ordinary blasting. The proportion to which the hole was filled with powder, about one-third, is the proportion required and ordinarily adopted in common blasting. 1 Knight's Mechanical Dictionary, 295. Plainly the purpose was to blow out the rock above the cartridge into the well. We fail to see the identity of such a process with exploding a torpedo many hundred feet below the surface of the ground, and below the top of

the rock through which an artesian well has been sunk, and exploding it at the exact point in the well where the effect of such an explosion is desired, with a water tamping sufficient to confine the effect to the vicinity of its location.

But this is not all of Beardslee's testimony. It does not appear that he repeated his experiment for years. In May, 1865, after Roberts had applied for his patent, he went to the oil region, having meanwhile made experiments and manufactured apparatus to determine the best method of firing, and there experimented in firing torpedoes in oil wells. He appears to have had very poor success. His trials were substantial failures. Evidently he did not regard them as anything more than experiments, and unsuccessful ones. He received nothing for them, and in July next, following, he left the region and never returned. Then a successful mode of exploding a torpedo in an oil well was in demand, and if his operations had revealed it, it is incredible that it would have been abandoned.

Our attention was next directed to the Thomas well, and the operations there. Mr. Thomas, in 1858, made an application for a blast in a bore hole sunk in the bottom of an ordinary well. The well was sunk about 80 feet through clay, the inside diameter being six feet and four inches. When the rock was reached some water was found. The excavation was then continued some 15 or 16 feet through solid rock, the water somewhat increasing. A bore hole about four inches in diameter was then sunk from the center of the bottom 37 feet deep. The water increased during this process. A cartridge of powder was then placed in the bottom of the bore hole and exploded by a fuse, leading to the cartridge through a gas pipe. The cartridge was an India ruber tube, made to fit the hole, and it contained about 12 feet of powder. The water filled the hole above the cartridge, and a foot or two was in the bottom of the well. There was no other tamping. The result of the blast seemed to be some increase in the water. A second blast was then made, after the hole had been extended five or six feet deeper; but there was still an insufficiency of water.

In regard to this experiment it is to be observed that it had the characteristics of ordinary blasting. The blast was at the bottom of the hole. The hole was filled by the cartridge 12 feet, about one-third of its depth, the proportion to common blasting. There was an open space above of about 36 square feet. It might have been expected that the rock between the blast and that open space would have been broken and lifted, if not blown out. A much greater quantity of rock has been moved in some cases. The second blast below seems to indicate such an intention. However this may have been, Thomas' was a single experiment. He never repeated it. Though he sunk many wells afterwards, he dug them of the ordinary size—six feet in diameter—and, on reaching rock, blew out the bottom by ordinary blasting. It seems never to have occurred to him, or to any person who saw it, that it was a process that was useful, or that could be applied to artesian wells hundreds of feet deep, some of them 1,500 or more, of uniform bore from the surface of the ground. Though it was tried in public, and was somewhat remarkable in its character, it never suggested to Mr. Thomas, or to any one, that it could be applied to increase the productiveness of oil wells, though some successful process of causing explosions at particular points in such wells was very much needed and very much considered. It may, we think, very properly be denominated an abandoned experiment, never perfected so as to reveal the process Roberts afterwards discovered.

Of the Boltze explosion we propose to say nothing more than we said in *Roberts* v. *Dickey*. Maillifert's blasting was upon the surface, and though it showed water tamping to be useful and effective in some circumstances, it bore no resemblance to the process exhibited in the complainant's patent. It may be that water tamping, or the resistance of a body of water above a blast, had been known before Roberts applied it in his process, but water tamping is but one element of that process.

The other alleged anticipations of Roberts' invention require but brief notice. The first oil well was bored by Col. Drake, in August, 1859. In the September following A. W.

Raymond commenced drilling one, and stopped drilling in the spring of 1860. In the summer or fall of that year he attempted to explode in the well a tin case filled with powder, but the fuse went out, the case collapsed, and he never tried the experiment again. In May or June, 1860, Henry H. Dennis unsuccessfully exploded a torpedo in an oil well, and abandoned the experiment.

In 1860 John C. Ford exploded a torpedo in a well some 248 feet deep, employing a round or oblong tin can filled with powder. It had a nozzle with a screw thread on the end of it. To this he screwed a gas pipe of sufficient length, and dropped a heated iron down the pipe into the torpedo, thus causing the torpedo to explode. The experiment was a complete failure, and the well was abandoned. How Ford regarded it is shown by the fact that he afterwards had Roberts' process applied to his well. Another torpedo was fired in 1860, on the Stackpole farm, with like ill success, and the experiment was not repeated. George B. Walhee also made an unsuccessful experiment in 1860 at Tidioute. Other fruitless experiments are proved to have been made. The Reed trials we fully considered in *Roberts* v. *Dickey*, and it is unnecessary to say more of them. We refer, however, to the report of the examiners in a case of interference, No. 3,859, dated July 10, 1869.

It may be noticed that most of these unsuccessful experiments were made in 1860 or 1861. Roberts conceived the idea of his process in 1862, and in 1864 he applied for his patent. Up to that time there is no proof that any torpedo had been exploded in an oil well with any substantially good results. Numerous experiments had been tried and abandoned; but when the Roberts process was tried it was immediately successful. The first trial increased the production of oil 60 barrels a day, and the process has continued to be a success. Doubtless there has been an occasional failure, but in comparison with complete success it has been very rare. It is in proof that it has increased production at least one-half—in some wells from five to six barrels a day to one hun-

dred; and in a single territory along Oil creek, where one operator operated, it has increased the production several hundred thousand barrels. In the Bradford oil district, where the daily production is from 22,500 to 25,000 barrels daily, one-half is proved to be due to the Roberts invention. The cause that works such results cannot be the same as that exhibited in the abandoned experiments. Holding them up as anticipations of the patented device is another illustration of what is very common, an attempt to defeat a meritorious patented invention by proof that something similar had been previously known, though it had never been perfected, and had never been any useful contribution to human knowledge or convenience.

We conclude what we have to say upon this branch of the case by quoting what we said in the former case: "Roberts was the first to reduce the method invented to actual and successful practice, and all that was done by others may be properly classified among unsuccessful experiments. However suggestive they may have been they cannot be made available to defeat a patent granted to an inventor who, subsequently to the failure of others, reduced his idea to practice, and revealed to the public a useful process, which the crude and fruitless experiments of others had not made known. In *Partchnut* v. *Kinsman*, 1 Blatch. 494, Mr. Justice Mason said: 'Crude and imperfect experiments, equivocal in their results and then given up for years, cannot prevail against an original inventor, who had perfected his improvement and obtained a patent.' There can be no better evidence that all the trials of blasting in oil wells which were made before the complainant Roberts obtained his patent were immature, and inadequate to the accomplishment of the desired result, than the fact that they were abandoned, and the patentee's method was resorted to as soon as it became known. Certain it is, a great boon has been given to the oil-producing regions. Something has been conceived and worked out that has immensely increased production. It is confessedly embodied in this patentee's method, and it

is described in his patent. Certain it is that no one of the experimenters, whose testimony we have been considering, can say 'I did it.'"

Our conclusion, then, is that the defendant has not succeeded in showing that the patent, No. 6,258, is invalid for want of novelty and originality of the invention, or for any other reason. The patent is therefore sustained. The defendant's answer substantially admits the infringement charged. In describing the mode of torpedoing an oil well practiced by him and his servants, agents and employes, since the third of April, 1875, it states that iron casing is put down within the well to a point below where fresh-water veins are struck in boring, and the borer is then projected down until the oil-bearing rock is reached. A pump tube is then inserted through the casing and lowered down into the oil rock. This relates to the construction of the well.

The answer then proceeds to say that if it is deemed advisable to try the experiment of torpedoing the well the sucker rods and tubing are drawn, and the well is left with the casing in it to keep the water in it from coming in—meaning, of course, only that from the fresh-water veins. The torpedo is then placed at such point as the manager of the well may direct, and is exploded. No water or other fluid is put in the well, or permitted to come into it, so far as its entrance can be controlled, and fresh water is effectually excluded by the casing. No extraneous fluid is ever introduced into the well, though it may and sometimes does happen that there will be fluid in the well above the point at which the explosion is effected; but it will be only oil, or salt water and oil, which comes in, if at all, at points below the casing, and no regard is placed to its presence so long as it does not fill up the well to the bottom of the casing. Such fluid cannot be excluded, as the fresh-water veins can be and are by the casing; nor is any regard paid to the absence of fluid in the well, because fluid is not at all desired; nor is it relied upon for any effect to be produced thereby. Such is the defendant's description. It will be observed he does not deny that water tamping always attends his process, and the proof is quite clear that,

in practice, he has always had a body of fluid in the well above the torpedo, which, of course, operated as tamping, and thus he has succeeded in increasing the production of oil, and obtaining the results which the Roberts process secures.

It is too obvious for denial that there is no essential difference between this process, as described in the answer, and that described in the Roberts patent, unless it be that the defendant does not fill the well with water up to its top. To establish that as an essential difference we are asked to give a very strict and limited construction to the patent, and to hold it indispensable to the Roberts process that superincumbent fluid tamping be introduced or admitted into the well, and used therein substantially as described, the well being entirely filled with water or fluid. It is said that if the well be filled to the top the casing will be destroyed by the explosion, or displaced, and that Roberts does not now use his own process, or allow the water to rise in the well above the bottom of the casing, or up to it. In short, the argument is that because the defendant does not allow the fluid in the well to rise above the bottom of the casing when he explodes a torpedo in a well, his process is not the same as that of Roberts, which requires the well to be entirely filled.

The argument is plausible, but unsound. It requires an unreasonable construction of the patent. Looking to the specification, it is evident that the presence of the superincumbent column of water was regarded as essential only for sufficient tamping of the blast. It is not a fair construction of it that it requires the well to be filled to the top. Its language is: "When the flask has reached a position opposite the oil-bearing rock," (where the effect of an explosion is desired,) "if the well above should not be filled with water when the flask is let down, which will almost always be the case, unless it has been pumped out, it is then to be filled up before the contents of the flask are ignited. The columns of water above the flask will then be of so great gravity as to confine the effect of the explosion to the rock in the immediate vicinity of the flask, without materially affecting the stratums of rock above, and I make use of it for that purpose." It is obvious

from this that all the patentee sought was a sufficient column of water thus to confine the effect of the blast. The direction to fill up the well, if not already filled, was for that purpose only, and that purpose is to be kept in view in the construction of the patent, and in following its directions.

It is not to be inferred from the language used that in all cases the well is to be filled to the very top. The specification is intended to inform those who are skilled in the art to which it relates, and it is to be such that the process may be advantageously used by them, and if it be sufficient for their direction it is all the law requires. As was said in *Mory* v. *Whitney*, 14 Wall. 645, "it would be most unreasonable to read the directions of the specification without reference to the object they have in view." Upon this subject we refer at large to what was said in that case, and especially to pages 643, 4, 5, and 6. It has a direct hearing upon the subject we are now considering. See, also, *Tilghman* v. *Mitchell*, 2 Fisher, 518.

At the time when the Roberts patent was granted oil wells were comparatively shallow—not much, if any, over 500 feet deep. Very many of them were not more than half that depth, and some were not more than from 40 to 70 feet deep. Few of them, if any, had any casing exterior to the tube through which the pumping was done. Later, the depth of the bore has been greatly increased. It now is driven through an upper, what is called a surface, rock, and below through one, two or three oil-bearing rocks. As the casing only extends down to the surface rock there is generally a much greater length of bore below than above. There may be, therefore, and such we apprehend is generally the case, a sufficient column of water in the bore below the casing and above the torpedo to answer all the purposes of fluid tamping contemplated by the patent. If the wells be, as in many districts they are, 1,500 feet deep, and the casing extends from 300 to 500 feet deep to the surface or upper rock, which is more than it usually does, there will be hundreds of feet below the casing and above the point of the explosion which may be

filled with fluid tamping more than the entire depth of the well, as they were in 1864.

Now any operator with common sense, having knowledge of oil wells and having Roberts' patent before him, and thus being informed of the object which it seeks to secure by water tamping, cannot fail to see that he accomplishes all the patent proposes, secures all the tamping needed by a column of fluid wholly below the casing, and that a column permitted to come up to the surface of the ground would be not merely useless but positively hurtful. He would be no skilful operator if he did not perceive that Roberts intended no unnecessary filling, when his avowed purpose was to use the water only for the purpose of confining the effect of the explosion to the vicinity of the point at which the torpedo was placed. We must hold, therefore, that the averment of the bill that the patent has been infringed by the defendant, and that he has been using the process which belongs exclusively to the complainants, is sustained, and we shall decree accordingly.

We pass next to the charge made in the bill that the defendant has infringed patent No. 47,458, granted on the twenty-fifth of April, 1865, to Edward A. L. Roberts, and assigned to the complainants. That patent was, as we have heretofore stated, for a new and useful improvement in apparatus for exploding gunpowder, or other explosive material, in artesian or other similar wells. To understand the device it is necessary to notice both the object sought to be accomplished and the manner contrived for obtaining it. The evil sought to be overcome is thus described in the specification. It has always been found difficult to explode gunpowder in a vessel in the water several hundred feet below the surface, and at any given point above the bottom of an artesian well, for two reasons—*First*, that the powder is liable to become dampened from exposure to the water about the place where it is connected with the machinery for igniting it; and, *second*, such machinery, being usually connected with the top of the vessel containing the powder, which is usually

a flask, made of considerable length, in order to hold sufficient powder to create the force required upon its explosion, the powder is very liable to settle down so far in the flask, on account of the motion and jamming that it necessarily undergoes in being placed in position, as to fall beyond the reach of the fire intended to ignite it.

It was these hazards that the patented device was intended to meet. It is a combination of a flask to contain powder, or some explosive material, constructed with a close cover; a priming chamber in the cover being a tube extending down into the interior of the flask; a hollow nipple in the upper part of the priming chamber for the purpose of receiving a percussion cap on its upper end, and a guard around the nipple, extending above it about one inch, serving as a guide to a bolt, and keeping it in place directly over the nipple, the bolt being used to explode the cap on the nipple, and sliding easily in the nipple guard. A plug is used to stop the lower end of the priming chamber. This description will be more fully understood by observing the mode of operation of the device. The flask is filled with powder, and the priming chamber also, its bottom being closed by the plug, inserted tightly enough to keep the powder from falling out, but not so tightly that it will not be driven out when the material in the priming chamber explodes. A percussion cap is placed on the nipple, the lower end of the bolt is placed on the guard, an India-rubber tube is drawn over the guard and bolt and tied closely at its lower end around the guard, and at its upper around the head of the bolt, to keep the percussoin cap dry. Thus equipped the apparatus is lowered to its proposed position in the well, and the torpedo is exploded by dropping a weight guided by the wire that sustains it, which forces the bolt upon the percussion cap, thereby exploding the powder in the priming chamber, and forcing the fire and the plug into contact with the explosive material in the flask.

It is this combination of the flask, the priming chamber, the plug, (shutting off the chamber from the body of the flask,) and the nipple, which is the first claim of the patent. It constitutes the first claim. After an examination of the pat-

ented combination and the device of the defendant, which it is admitted he has used, both of which have been before us, we cannot doubt that they are substantially the same. The differences, so far as they exist, are merely formal. The function performed by each device is the same; the mode of performance is substantially the same in each, and the elements of the combination are found in each. Those elements are four. Each has a flask to contain material for a blast, and each flask has a cover. It is immaterial how the cover is attached to the body. The mode of attachment constitutes no part of what the patentee claims, nor does the shape of the cover. Both devices plainly have reference to a torpedo to be set vertically, and to be fired by a weight dropped from above. The patentee has a priming chamber entered through the cover. The priming chamber is a small apartment entered through the cover, intended to contain a charge to be fired into the body of the flask. Of what material the chamber shall be made is not made essential or specified.

The defendant's device has three priming chambers entered through the cover of the flask, or plate or disk, which constitutes the cover. Through this cover three perforations are made, extending into the interior of the flask, and a Smith & Wesson pistol cartridge is forced into each. It is needless to say, what is too obvious to need any remark, that the copper case of the cartridge, filled as it is with powder to be exploded by a fulminate in the vein, is a priming chamber answering all the purposes of that in the Roberts patent, and a clear equivalent for it; and the bullet which confines the powder in the copper case is a plug answering all the purposes of the plug in the complainant's device.

The remaining element of the patentee's device is the nipple. The function of the nipple is twofold: to hold the cap in position over the priming chamber, and to supply an anvil upon which the fulminate in the cap may be exploded into the chamber by the falling of the weight. There is no nipple in form in the defendant's apparatus, but there is a clear equivalent, performing the same functions, and in substantially the same manner. The perforation holds the cap in

place, and the top of the cover, adjacent to the perforation, is made an anvil. The rim of the cap which contains the fulminate rests on that anvil. Thus, the shoulder on which the rim rests becomes a nipple, answering all its purposes. A patented mechanical arrangement cannot be thus evaded without liability to the charge of infringement.

Only two things have been urged in support of the defence that Roberts was not the first inventor of his apparatus. One of these is the Crocker torpedo. We have already observed that the Roberts invention is a device for exploding from the top of a shell or flask placed vertically in an artesian well. Crocker's was a device for exploding it at the bottom or lower end. The torpedo had a pistol cartridge in its bottom, and a rod beneath it, varying in length. The torpedo was lowered into the well and allowed to drop to the bottom. By this means, when the end of the rod struck the bottom it discharged a hammer, which struck the head of the pistol cartridge and caused the cap to explode. There was no plug. Mr. Crocker himself testifies that the bullet was taken out of the cartridge, and as the cartridge was placed in an upright position, with the mouth upwards, a plug or bullet was not needed to keep the powder from falling out of the chamber, the purpose it subserved in the Roberts combination. Besides, the device was an experimental one, immediately abandoned, and Mr. Crocker afterwards employed Roberts for torpedoing his wells.

The other alleged anticipation is the Plant torpedo. It is described in the Plant patent, dated November 18, 1862. It is a submarine torpedo, intended for a purpose entirely different from what is sought to be secured by that of Roberts. It is fired horizontally from a war vessel or a fort, arranged so as to explode when it strikes a hard opposing object, such as the hull of a ship, and it is protected by a spring in front against the resistance of the water through which it passes in its rapid flight. This spring is an element not found in the Roberts device. If used in that device it would im ede the operation, if not prevent it entirely. It would offer resistance to the drop weight, and tend to prevent driving the bolt upon the cap. The purpose was to secure an easy and

certain explosion. That of Plant was to guard against an explosion from any less cause than violent concussion with a hard and unyielding object. Roberts sought to overcome the difficulty arising from the settling of the powder in the flask from its top. In Plant's torpedo no such difficulty existed, since its motion was horizontal. Moreover, Plant's device has five elements instead of four. Roberts, with four elements, accomplishes a different result from that which Plant only reaches by five. For these reasons we cannot think they are the same combinations, either in principle or results.

It follows, from what we have said,--*First*, that the reissued process patent No. 6,258, belonging to the complainants, is valid, and that the defendant has been guilty of infringing it; and, *second*, that the patent for an improvement in exploding torpedoes in artesian wells, No. 47,458, is also valid, and that the first claim thereof has been infringed by the defendant.

A decree will therefore be entered for an injunction and an account. Let a decree be prepared accordingly.

BROOKS *v.* THE STEAMER ADIRONDACK, etc.*

(*District Court, S. D. New York.* June 11, 1880.)

SALVAGE—APPORTIONMENT—DECREE.—It is proper to direct an apportionment of a salvage recovery before it is paid out of the registry.

SAME—NOTICE TO CREW—DUTY OF LIBELLANT.—Where the crew have not received the usual notice by publication to come in and make claim upon the vessel attached, or upon the fund in court, it is incumbent upon the libellant, when not acting in the interest of such crew, to bring them in or have them duly notified to come in for the purpose of making the apportionment.

J. E. Parsons, for libellant.

Butler, Stillman & Hubbard, for claimants.

CHOATE, D. J. This was a suit upon a special agreement for a salvage compensation rendered to the steamship Adiron-

*See *ante*, 387.

dack by the steamship Plainmeller. The relief prayed for in the libel was the recovery of the amount named in the agreement, or for such other relief as in law and justice the libellant should be entitled to. The libellant, who was the master of the salving ship, sued on behalf of himself and the owners of the Plainmeller. A monition having issued, and the Adirondack having been attached, the owners of the Adirondack appeared and filed their claim, and put in an answer admitting the liability of the Adirondack for a salvage compensation, and tendering and paying into court the sum of $7,500 therefor, but denying the libellant's claim for the amount named in the special agreement. The crew of the Plainmeller have not been made parties, and no publication of notice to other persons to come in has been made.

The cause has proceeded to a trial and decision upon the issues raised by the libel and the answer, resulting in the allowance of the sum tendered as a proper amount of salvage, and the avoidance of the special agreement as inequitable and extortionate. A question is now made as to the form of the final decree. The claimants' proctors have submitted a form of decree providing that the libellant recover for himself and for the owners and crew of the Plainmeller, and for all others interested, the amount of the tender. To this the counsel for the libellant objects that the decree should not provide specifically that the libellant recover for the crew, but that he recover for himself, the owners and all others interested, omitting any reference to the crew. The suggestion is that the decree shall not pass upon the question whether the crew have any interest or not. I think the proper practice is to direct an apportionment of the salvage recovery before it is paid out of the registry. If the master had assumed to act for the crew in bringing this suit they might, perhaps, be considered as parties libellant represented by him. But as he repudiates that character, and as the crew have not received the usual notice by publication to come in and make claim upon the vessel attached, or upon the fund in court, I think it is incumbent on the libellant now to bring them in, or to have them duly notified to come in for the purpose of making the apportionment.

The position taken by the libellant hostile to any claim on their part makes it improper, even if it would be regular, that their shares should be paid over to him or the owners, and that they should be remitted to an action to recover them. No reason is shown why the crew should not, as in other cases of salvage, participate in the recovery. The court will make no order that shall appear to be a denial of their right. If such a reason exists it should be shown in this court, and upon notice to them upon proceedings duly taken for an apportionment.

Let a decree be entered that the libellant recover the amount of the tender on behalf of himself and the owners, and all others who may be interested therein, including the crew; the same to remain in the registry of the court subject to a final order of distribution to be made pursuant to proceedings to be instituted therefor by the libellant or any other party interested.

McWILLIAMS *v.* THE STEAM-TUG VIM and SCHOONER SPARTEL.

(*District Court, S. D. New York.* May 15, 1880.)

COLLISION—LIBEL—ESSENTIAL AVERMENTS—ADMIRALTY RULE 23.

In Admiralty.

S. H. Valentine, for the steam-tug.

W. W. Goodrich, (*Mr. Deady*,) for the schooner.

E. D. McCarthy, for libellant.

CHOATE, D. J. This is a libel brought by the owner of the canal-boat Captain Geo. M. Wright to recover damages for a collision. The libel alleges that the steam-tug Vim, on the fifth day of March, 1880, was proceeding up Long Island sound, bound from New York to Glen Cove, having in tow the libellant's canal-boat on her port side, and two other boats or barges on her starboard side, when, at about 2 o'clock in the morning, and when two-thirds of the way, or nearly that, between Hart's island and Sand's Point, the said tug came into collision in mid-channel with said schooner Spartel, bound to New York, so that the Spartel struck libel-

lant's boat in the stern, and inflicted such severe injuries that she had to be towed ashore and beached; that libellant's boat was under the control of the Vim, and entirely helpless and unable to avoid the collision; that she was seaworthy, and properly manned and equipped.

The libel then proceeds as follows: "Your libellant charges, in general terms, both the tug Vim and the schooner Spartel for the said collision. The channel is many miles in width at the place of the collision, and there was no need of the schooner and the tug coming in contact, and it was gross negligence for them to have done so. Your libellant particularly charges negligence in the steam-tug and the schooner for not having seasonably seen each other." Then follows the statement of damage and the prayer for process.

To the libel the owners of the schooner and the owners of the tug, both of whom have appeared as claimants to defend the suit, have filed the following exceptions: (1) That it does not allege any particular act of negligence on the part of the said schooner, [or steam-tug,] except that she did not see the said steam-tug [or schooner] in time; (2) that it does not state which way the wind was blowing or the tide running; (3) that it gives none of the particulars of the collision.

The exceptions are well taken. The rules in admiralty require the libel to contain a statement of "the various allegations of fact upon which the libellant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article." Adm. Rule 23. The practice under this rule requires a plain statement of the movements of the two vessels as they approached each other, their courses, and the mode in which they were sailed or handled, and the circumstances of wind and tide, where these have any bearing on the case, as they generally have, and also a distinct statement of the acts of negligence or faults of navigation which are claimed to have caused or contributed to the disaster, and such a statement of the circumstances of the collision that the connection between the alleged faults and the collision, as cause and effect, can be plainly understood. This libel contains no such

statement or details. The averment of a charge of negligence, in general terms, against both schooner and steam-tug, is too uncertain and indefinite to be considered an allegation of any particular negligence at all.

The only specific charge is the not seeing the other vessel seasonably. This may possibly be equivalent to the ordinary averment of not keeping a good lookout. But there is nothing to show how or why this fault caused the collision.

If the claimants had seen fit to go to trial on this libel, the only act of negligence upon which either of the vessels could be held would be the not seeing the other in time. If libellant failed to prove this his libel would be dismissed. But the claimants, even as to this charge, are entitled to a more definite and detailed statement of the facts of the collision.

It is suggested that the owner or master of the canal-boat, not being in any way responsible for her navigation while in tow, lashed along-side of a tug, has not the means of knowledge, or the information as to the circumstances and causes of the collision, which the owners of the two vessels, or those whom they have placed in charge of them, must be presumed to have.

If, however, a libellant on this ground seeks to excuse himself, in some particulars, from that fulness of statement which the practice requires, it should appear in the libel that he has not knowledge, or means of information, sufficient to state the details in question. The presumption is that there was somebody on the canal-boat at the time, and that a party having a cause of action can ascertain the material facts on which it is based. Of course, greater indulgence, both in the matter of pleading and in the matter of amending pleadings to conform to the facts proved, will be granted to persons thus situated, having less full means of information, and less obligation to observe the movements of the vessels, than the principal actors in them have.

But this rule of practice is wholesome and necessary for the ascertainment of the real issues to be tried, and for fair play between the parties upon the trial of the cause. Exceptions sustained; the libellant to have one week to amend his libel, and to recover no proctor's fee in the suit in any event.

THOMAS, Trustee, *v.* THE BROWNVILLE, FORT KEARNEY & PACIFIC RAILWAY CO. and others.

(*Circuit Court D. Nebraska.* May, 1880.)

CONTRACT—PARTIES—RAILROAD—DIRECTORS.—A contract between a railroad and a construction company is void where any of the directors of the railroad are members of the construction company.

SAME—ESTOPPEL—RATIFICATION.—The stockholders of the railroad are not estopped by long acquiescence in such contract, nor can the same be ratified by a board of directors composed in part of members of the construction company.

SAME—EQUITABLE RELIEF—PUBLIC POLICY.—Public policy will not permit a court to grant equitable relief under such contract, where it further appeared, upon the face of the contract, that each director of the railroad received a pecuniary consideration for entering into the contract.

In Equity. Mortgage foreclosure.

J. M. Woolworth and *J. R. Webster*, for complainant.

J. H. Broady, for defendants.

MCCRARY, C. J. The defendant railway company is a corporation organized under the laws of Nebraska, and had authority to construct a railroad from Brownville westward to the west line of Gage county, Nebraska. It possessed certain property and assets which, on the eighteenth day of September, 1871, according to the report of the master herein, amounted to $117,042.56. Said company having commenced the construction of said railroad, and being unable to complete it without securing capital from other parties, on the said eighteenth day of September, 1871, entered into a contract with Benjamin E. Smith and William Dennison, of Ohio, and J. N. Converse, of Indiana, and such others as might thereafter be associated with them, whereby the latter, for certain considerations named, agreed to complete the construction of the the road over and along the route above named.

The mortgage sued on in this case was executed to Joseph T. Thomas, trustee, to secure the payment of certain bonds issued under the said construction contract for the purpose of building the road. The validity of this contract is assailed upon the ground that subsequently to its execution, and before any work was done under it, two of the stockholders and di-

rectors of the defendant corporation became interested with Smith, Dennison and Converse as parties thereto, so that two of the five contractors were parties to the contract on both sides. The construction company thus organized went on under the contract for several years, expending large sums of money in the construction of the road, and now claims a large balance as due to it on said contract, for which it holds bonds secured by the mortgage sued on. It seeks to recover judgment and a foreclosure of said mortgage. The validity of the mortgage, and of the bonds to secure which it was given, depends upon the validity of the construction contract, which is the foundation upon which alone they must be supported.

Upon consideration of the proofs in the case, the master's report, and the law, I have reached the following conclusions:

1. That the admission into the construction company, under the construction contract, of two officers of the railroad company was unlawful and vitiated the contract. It matters not whether the contract was entered into with the understanding that the two railroad directors were to be admitted or not, their presence as parties on both sides during the progress of the work, and when payments and settlements were to be made under the contract, is enough. *Wardell* v. *R. Co.* 4 Dillon, 33; *R. Co.* v. *Poor*, 59 Me. 270.

2. It is insisted that there has been such acquiescence on the part of the stockholders of the defendant company, in the matters of which they now complain, that they are estopped. It appears that the contract was openly made and reported to the board of directors of the railroad company, and by them approved, without any apparent effort at secrecy, and that the work of constructing the road was carried on by the construction company under the contract for a period of several years. It is inferred, and perhaps not without reason, from these facts that the stockholders generally were advised of the particulars of the contract, including the fact that two members of the board of directors were interested in it. It does not, however, follow in my opinion that the contract should be upheld and enforced in a court of equity as against the stockholders.

A ratification, to have this effect, must be made by a board composed of *disinterested* directors. It is not enough that such a contract has been ratified by a board composed in part of the interested directors. The least that can be required in such a case is that the directors concerned in the contract shall resign, and allow their places to be filled by persons who can, without bias, represent the interests of the corporation, and particularly of the individual stockholders.

In the case of *R. Co.* v. *Dewey*, 14 Mich. 477, the supreme court of that state had occasion to comment upon a contract made with a corporation by a company in which two of the directors were interested, and in the course of the opinion grave doubts were expressed by the court as to whether a ratification by the board, even with full knowledge of all the facts, could render the contract valid while the two interested directors remained influential members of the board, especially if they took part in such ratification.

The court was evidently strongly inclined to the opinion that such a ratification, even if made upon a full disclosure, would amount to nothing. The vice of the original contract would, in such a case, enter into the act of ratification—the latter, like the former, being a transaction in part by directors with themselves. Besides, where shall we draw the lines? If the presence of two interested directors in the board at the time of ratification does not vitiate the act, would the presence of a larger number of such directors have that effect, and if so, what number?

3. It remains to be determined whether the plaintiff can have relief to the extent that the railroad company has been benefited by the contract. This depends upon the question whether the contract was tainted with vice or immorality. *Creath* v. *Sims*, 5 How. 204. If it were possible to do so, consistently with well-settled principles of great public importance, I should be inclined to grant this relief, since, as between the parties, it is equitable that the corporation should account for whatever of value it has received from the construction company. But if there is in the contract the element of moral turpitude which the law denounces so strongly,

I am bound to hold that the parties must be left, without relief from the courts, where they have placed themselves.

The fact that two of the directors of the corporation were admitted to an interest in the contract, bad as that is in itself, is not all, nor the worst part of the transaction. On the same day that the construction contract was executed, and as a part of the transaction, the members of the construction company executed the following agreement with the members of the board of directors and certain other stockholders.

"In consideration of the execution and delivery of a certain contract to construct the Brownville, Fort Kearney & Pacific Railroad of Nebraska, wherein said railroad company agrees to turn over to us and our associates all of the property owned, and assets, subscriptions, etc., of said company, we, therefore, do promise and agree and bind ourselves to relieve the following, named subscribers to the capital stock of said company from the payment of any further amounts or assessments upon the stock which they may have subscribed thereto, by our paying out said stock, and receiving same assigned by them to us, viz.: Henry M. Atkinson, John L. Carson, R. W. Furnas, F. A. Tisdell, James L. McGee, C. F. Stewart, A. J. Ritter, H. C. Lett, T. W. Bedford, T. W. Tipton, John McPherson, and $500 on the stock of Evan Worthing, in all not to exceed $16,500 of the $41,000 of individual subscriptions to said company.

"Witness our hands, this eigthteenth day of September, 1871, at the the city of Columbus, state of Ohio.

"Witness: G. Moodie. B. E. Smith,
[U. S. Int. Rev. Stamp, 5c.] "W. Dennison,
"J. N. Converse."

The list of stockholders in this agreement includes all the directors and five others. I am unable to construe this contract as anything else than a promise to pay each member of the board individually a consideration for his action as a director in voting for and executing the construction contract. The members of the board were stockholders, and as such liable to assessments. The construction company, "in con-

sideration of the execution and delivery of" the construction contract, undertook to relieve the directors "from the payment of any further amounts or assessments upon the stock which they may have subscribed," etc.

The construction company agreed to "pay out" the stock of each director. The transaction then was as follows: The directors executed a contract by which they transferred to the construction company substantially all the property of the corporation and employed them to construct the road. In order to secure this contract the construction company took two of the directors into their firm, giving them an interest in the contract, and agreed to pay each of the other directors a pecuniary consideration for making the contract. There was, therefore, not a single member of the board who was not personally interested in favor of making the contract and in hostility to the interests of the stockholders for whom they were trustees, and whose rights they were bound to protect.

It may be that this agreement was not much considered at the time; that the directors and others interested were anxious to induce the construction company to take hold of the enterprise upon any terms, the company being unable to go on with the work. All this is doubtless true, but it does not change the character of the written contract with which we have now to deal.

I am clearly of the opinion that the contract is so clearly illegal, against public policy, and vicious, that a court of equity cannot enforce it or grant any relief upon it. The bill must, therefore, be dismissed.

Marshall v. *R. Co.* 16 How. 314; *Bank of the United States* v. *Owens*, 2 Peters, 539; 2 Redfield on Railways, 576, 584; Pomeroy on Contracts and Specific Performances, §§ 284, 285, 286; *Wight* v. *Rindskoff*, 43 Wis. 344; *McWilliams* v. *Phillips*, 57 Miss. 196; *Guernsey* v. *Cook*, 120 Mass. 501; *Letter* v. *Alvey*, 15 Kan. 157

WILLIAMS *v.* REES, Collector, and another.

(*Circuit Court, N. D. Illinois.* ——, 1880.)

TAXATION — GAS COMPANIES — STATUTE OF ILLINOIS.—The legislature of the state of Illinois intended by the act of March 13, 1872, § 3, clause 4, as amended by the act of May 13, 1879, to except all manufacturing companies, except gas companies, from a capital stock tax.

SAME—SAME—CONSTITUTION OF ILLINOIS.—The legislature of the state of Illinois can constitutionally assess and tax the capital stock of gas companies, while it exempts the stock of purely manufacturing companies from such taxation.

J. M. Jewell, for complainant.

J. K. Edsall, for defendants.

BLODGETT, D. J. Complainant, who is a citizen of the state of Pennsylvania, and a stockholder of the Chicago Gas-Light & Coke Company, brings this suit to enjoin the collection of the state, county and city taxes assessed upon the capital stock of the company for the year 1879.

By an act of the legislature of Illinois, approved February 12, 1849, entitled "An act to incorporate the Chicago Gas-Light & Coke Company," certain persons therein named, and their associates, were created a body politic and corporate, with perpetual succession, by the name and style of the "Chicago Gas-Light & Coke Company," with a capital stock of $50,000, which, by an amendment approved March 12, 1869, it was authorized to increase to $5,000,000, and with authority to manufacture and sell gas to be made from any or all substances, or a combination thereof, from which inflammable gas is usually made or obtained, and to be used for the purpose of lighting the city of Chicago, or the streets thereof, and any buildings therein, and to lay pipes for the purpose of conducting the gas in any of the streets or avenues of said city, with a further right, by the original charter and amendments, to purchase such an amount, in value and extent, of property and premises, in the city of Chicago, as may be necessary for its business, and to carry out the objects of its incorporation.

By an act of the general assembly of this state, approved

May 13, 1879, entitled "An act to amend sections 3 and 32 of an act entitled 'An act for the assessment of property, and for the levy and the collection of taxes,' approved March 30, 1872," it is provided:

"*Fourth.* The capital stock of all companies or associations now or hereafter created under the laws of this state (except those required to be assessed by the local assessors, as hereinafter provided) shall be so valued by the state board of equalization as to ascertain and determine, respectively, the fair cash value of such capital stock, including the franchise, over and above the assessed value of the tangible property of such company or association. Said board shall adopt such rules and principles for ascertaining the fair cash value of such capital stock as to it may seem equitable and just; and such rules and principles, when so adopted, if not inconsistent with this act, shall be as binding and of the same effect as if contained in this act, subject,—however, to such change, alteration, or amendment, as may be found, from time to time, to be necessary by said board: *Provided*, that in all cases where the tangible property or capital stock of any company or association is assessed under this act, the shares of capital stock of any such company or association shall not be assessed or taxed in this state. This clause shall not apply to the capital stock, or shares of capital stock, of banks organized under the general banking laws of this state: *Provided, further*, that companies and associations organized for purely manufacturing purposes, or for printing, or for publishing of newspapers, or for the improving and breeding of stock, shall be assessed by the local assessors in like manner as the property of individuals is required to be assessed.

"32. Banking, bridge, express, ferry, gravel road, gas, insurance, mining, plank road, savings bank, stage, steamboat, street railroad, transportation, turnpike, and all other companies and associations incorporated under the laws of this state, (other than banks organized under the general banking laws of this state, and the corporations required to be assessed by the local assessors, as hereinbefore provided,) shall, in

addition to the other property required by this act to be listed, make out and deliver to the assessor a sworn statement of the amount of its capital stock, setting forth particularly—

"*First.* The name and location of the company or association.

"*Second.* The amount of capital stock authorized, and the number of shares into which such capital stock is divided.

"*Third.* The amount of capital stock paid up.

"*Fourth.* The market value, or, if no market value then the actual value, of the shares of stock.

"*Fifth.* The total amount of all indebtedness, except the indebtedness for current expenses, excluding from such expenses the amount paid for the purchase or improvement of property.

"*Sixth.* The assessed valuation of all its tangible property.

"Such schedule shall be made in conformity to such instructions and forms as may be prescribed by the auditor of public accounts. In all cases of failure or refusal of any person, officer, company, or association, to make such return or statement, it shall be the duty of the assessor to make such return or statement from the best information which he can obtain."

It is charged in this bill that the defendant corporation is organized for "purely manufacturing purposes," within the intent and meaning of the fourth clause of section 3 as the same now stands, amended by the act of May 13, 1879, because it is alleged that its sole business is manufacturing and selling of gas and coke, and the other products of the business of making gas, and that as such manufacturing corporation its capital stock is not taxable. It is further alleged that the assessor for the town of South Chicago, within which the principal office of the company is situated, assessed the property of said company for the year 1879 at a valuation of $75,000, which was increased by the board of equalization of the state to $90,000, which valuation, complainant charges, represented the entire property of the company liable to taxation, and that the state, county and city taxes, for the year 1879, on the said sum, amount to $4,300.20, which

complainant avers is all the taxes which the company is liable to pay. But complainant charges that, in addition to said assessment, and the tax extended against the same, the board of equalization of this state, at its meeting in 1879, valued and assessed the capital stock of said company at $150,000; that the auditor of state certified the said assessment, under direction of said board, to the clerk of said Cook county, for the purposes of taxation, and that the county clerk extended a capital-stock tax upon the assessment rolls against said company, according to the percentage required, for state, county and other municipal purposes, amounting to the sum of $7,167, in addition to the tax upon the property of the company extended against the valuation by the town assessor, and that a warrant for the collection of said property and capital-stock tax has been duly issued, and is in the hands of defendant Rees, collector for the town of South Chicago, for collection; that the company has paid the taxes extended against the valuation of its property made by the town assessor, and will pay the capital-stock tax so assessed, and in the hands of the collector, unless restrained by the order of this court; and because the said capital-stock tax is wholly unauthorized and illegal, the complainant prays for an injunction restraining the collection of the said tax by the assessor, or the payment by the said corporation.

It is admitted, for the purposes of this case, that the company had, in the year 1879, laid down in the streets and alleys of the city of Chicago 184 miles of main or pipes for the purpose of conveying gas to its consummers.

To this bill the defendant Rees has demurred, and the right of complainant in the case made by the bill to the relief asked for has been ably argued by the solicitors for the complainant and the defendant.

The decision of the case seems to me to be involved in the answer to two questions which naturally arise upon the statute under which this tax was assessed: *First.* Did the legislature of this state intend that the capital stock of gas companies should be assessed or valued, for the purposes of taxation by the state board of equalization? *Second.* Can the

legislature constitutionally assess and tax the capital stock of gas companies, while it exempts the stock of purely manufacturing companies from taxation?

By the original act "for the assessment of property, and for the levy and collection of taxes," approved March 13, 1872, it is provided, in section 3, clause 4, as follows: "The capital stock of all companies and associations now or hereafter created, under the laws of this state, shall be so valued by the state board of equalization as to ascertain and determine, respectively, the fair cash value of such capital stock, including the franchise, over and above the assessed value of the tangible property of such company or association;" and by the thirty-second section of the same act certain enumerated classes of corporations incorporated under the laws of this state, among which are gas companies, are required to make out and deliver to the assessor a sworn statement of the amount of their capital stock, which was to be forwarded to the auditor, and by him laid before the board of equalization for valuation and assessment.

The amendment of May 13, 1879, to the fourth clause of section 3 simply inserts in brackets, immediately after the words "the laws of this state," in the second line of the clause as printed in the Revised Statutes, ("except those required to be assessed by the local assessors hereinafter provided,") and adds to that clause the following proviso: "*Provided, further*, that companies and associations organized for purely manufacturing purposes, or for printing, or for publishing of newspapers, or for the improving and breeding of stock, shall be assessed by the local assessors in like manner as the property of individuals is required to be assessed."

While the amendment to the thirty-second section of the same acts consists in omitting the word "manufacturing," as descriptive of one of the classes of corporations who are required to make out and deliver to the assessor a sworn statement of the amount of their capital stock, to be laid before the board of equalization, and the insertion of the words "and the corporations required to be assessed by the local assessors, as hereinbefore provided," after the word "state,"

in the fifth line of that section, as printed in the Revised Statutes, while gas companies are still described as one of the classes of corporations whose capital stock is to be valued and assessed by the board of equalization. I think it clear, therefore, from the manner in which the amendment is made, that the legislative intention was to require gas companies to make returns of their capital stock for assessment by the board of equalization. In other words, the legislature did not intend to include gas companies in the class of corporations "organized for purely manufacturing purposes," whose "property shall be assessed by the local assessors in like manner as the property of individuals is required to be assessed."

I have no doubt the purpose of the legislature was to except manufacturing companies, other than gas companies, from a capital-stock tax, and to continue to impose a capital-stock tax on gas companies; and this brings me to consider the second proposition—the constitutionality of the law under consideration.

Section 1, art. 9, of the constitution of this state is as follows:

"Section 1. The general assembly shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property, such value to be ascertained by some person or persons; to be elected or appointed in such manner as the general assembly shall direct, and not otherwise; but the general assembly shall have the power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, innkeepers, grocery keepers, liquor dealers, toll-bridges, ferries, insurance, telegraph and express interests or business, vendors of patents, and persons or corporations owning or using franchises and privileges, in such manner as it shall, from time to time, direct by general law, uniform as to the class upon which it operates."

It will be seen that the legislature is clothed with full power, to be exercised in its discretion, as to the manner in which persons or corporations owning or using franchises

shall be taxed, the only limitation upon that discretion being that the tax shall be imposed by a general law, and be uniform as to the class upon which it operates.

In the case of *The State Railroad Tax Cases*, 2 Otto, 575, the supreme court of the United States says, at page 611: "As to section 1 we need not inquire very closely whether the mode adopted by the statutes, and the rules of the board of equalization, produces a valuation for railroad companies different from that of individuals, though, as we have already said, it does not appear to us to produce any inequality to the prejudice of the companies. But we need not pursue that inquiry very closely, because the latter part of the section, in express terms, authorizes the legislature to 'tax persons and corporations owning or using franchises in such manner as it shall from time to time direct, by general law;' and the only restriction on the power, as applied to this class, is that it shall be 'uniform as to the class upon which it operates.'

"There can be no doubt that all the classes named in this clause, including peddlers, showmen, innkeepers, ferries, express, insurance and telegraph companies, are taken out of the general rule of uniformity prescribed by the first clause, and the only limitation as to them is that of uniformity as to the class upon which the law shall operate; that is, innkeepers may be taxed by one, ferries by another, railroads by another, provided that the rule as to innkeepers be uniform as to all innkeepers, the rule as to ferries be uniform as to all ferries, and the rule as to railroad companies be uniform as to all railroad companies."

At page 602 it says: "It is obvious that, while a fair assessment under these two descriptions of property (real estate and track) will include all the visible or tangible property of the corporation, it may or may not include all its wealth—there may be other property of a class not visible or tangible which ought to respond to taxation, and which the state has the right to subject to taxation. * * * This element the state of Illinois calls the value of the franchise and capital stock of the corporation—the value of the right to use this tangible property in a special manner, for the purpose

of gain. This constitutes the third valuation, which is likewise to be made by the board of equalization; and, when thus ascertained, is subjected to the taxation of the state, counties, towns and cities, by the same rule that the value of the road-bed is—namely, according to the length of the track in each taxing locality."

So, too, in *Society for Savings* v. *Coite*, 6 Wall. 607, the same court says: "Nothing can be more certain in legal decisions than that the privileges and franchises of a private corporation, and all trade and avocations by which the citizens acquire a livelihood, may be taxed by a state for the support of a state government."

The same painciple is asserted in *Porter* v. *R. R. I. & St. L. R. Co.* 76 Ill. 561: "That every corporation possesses a franchise of some value can admit of no doubt. Even where it is created for the purpose of pursuing a business that may be lawfully pursued by any individual in the state, the privilege of the combination of capital by many persons, with the capacity to hold and manage it under one direction, in perpetual succession, like a single individual, free from competition among those interested, and from change or disturbance by the changes of individual life, and without incurring any personal hazard or responsibility, or exposing any other property than what belongs to the corporation in its legal capacity, must necessarily have a value beyond and distinct from the mere value of the money or property which the corporation is created to hold and use in its business.

"But it is again insisted that, even conceding that it is competent for the legislature to provide that the franchise shall be taxed, its value should be determined by itself, as that of other property is determined, and not in connection with the value of other property, in the manner required by the act.

"It surely cannot be doubted that the requirement that the board of equalization shall ascertain and determine the fair cash value of the capital stock, including the franchise, of all companies and associations now or hereafter created under the laws of this state, over and above the assessed value of the tan-

gible property of such company or association, is a general law, or that it is uniform as to the class upon which it operates. It is not restricted to any particular part of the state, nor is it limited to a special tax. It extends to the entire state, for the purpose of general taxation, and it applies the same rule to all within the class upon which it operates—namely, the corporations now or hereafter created under the laws of this state. It is not required, as seems to be thought by some of the counsel with whose arguments we have been favored, that the legislature shall, in providing for the taxation of corporations, under the last clause of the section referred to, designate the precise amount which the corporation shall pay, and that this shall be the same on each corporation, without regard to the value of the franchise or privileges enjoyed, nor that such taxation shall be of like character with that which may be imposed on innkepers and others pursuing the particular vocations named. It is only required that they shall be taxed in such manner as the general assembly shall, from time to time, direct by general law, and the only uniformity required is as to the class upon which such general law shall operate. It is, therefore, left entirely to the legislature to determine whether corporations shall be taxed only on their tangible property, on the amount of their capital paid in, on the amount of their gross receipts, or, as in the present instance, on the value of their tangible property, and on the fair cash value of their capital stock, including their franchises, over and above the assessed value of their tangible property, subject merely to the limitation that it shall be directed by general law, uniform as to the class upon which it operates."

And the rule fairly deducible from these cases, I think, is that the power of the legislature is not only plenary as to the manner in which the property and franchises of corporations created by the state shall be taxed, but it can also classify such corporations for the purpose of taxation—that is, it can provide a mode of fixing the value of the franchises or capital stock of railroad corporations, another for mining corporations, and another for manufacturing companies; and I

see no reason why it cannot, within certain limits, make different classes of manufacturing companies, and provide different rules for assessing the value of their capital and franchises.

Applying these views to the case before court, it seems to me wholly within the province of the legislature to say whether gas companies shall be classed with other manufacturing companies for the purposes of taxation, or whether they shall form a distinct class by themselves.

One cogent reason suggests itself why they should be classified separately from companies engaged exclusively in manufacturing: They usually, if not always, exercise not only the franchise of being a corporation, but also the right to use the public streets and highways for the purpose of conveying the gas made by them to their consummers.

In the case of this defendant company, it has, by its charter, the vested right to lay its pipes in all the streets and avenues of this city—a franchise presumably of great value, and differing essentially from the franchise of a mere manufacturing company; and, as a general rule, this class of corporations always uses the streets, alleys and highways of the cities and towns in which they carry on their business for the purpose of laying their pipes therein; and, indeed, this privilege, whether derived from the legislature, as in the case with this company, or from the city or town authorities, is almost a necessary incident to the successful practical operation of a gas company, as it is doubtful if any of them could be profitably worked if compelled to obtain the right to lay their pipes solely on private property. From the very nature of their business they must depend upon and enjoy an easement in the public streets, such as is not enjoyed by other manufacturers.

And if the legislature deems this or any other distinction between the business of gas companies and other manufacturing companies sufficient to justify a different mode of taxation, the courts cannot interfere.

For these reasons the injunction is denied. The demurrer to the bill is sustained, and the bill discharged for want of equity.

WATERS *v.* CONNECTICUT MUTUAL LIFE INS. CO.

(Circuit Court, D. New Jersey. ———, 1880.)

LIFE INSURANCE—POLICY—"DIE BY HIS OWN HAND."—A man does not "die by his own hand," within the meaning of a clause in a life insurance policy, although he puts an end to his life, if impelled to the act by an insane impulse which he has not the power to resist, or commits the act without a knowledge, at the time, of its moral character, and its consequences and effects.

INSANITY.—"In law a man is insane when he is not capable of understanding (1) that a design is unlawful, or that an act is morally wrong; or, (2,) understanding this, when he is unable to control his conduct in the light of such knowledge."

Thos. N. McCarter, for plaintiff.
Courtlandt Parker, for defendant
Assumpsit.

NIXON, D. J., (*charging jury.*) There are no controverted questions of law in the case. It turns upon questions of fact, and it is the duty of the jury to determine these. But a few suggestions will not be out of place. The action is upon a contract, and we must so construe it as to give effect to the intention of the parties. The contract was between the plaintiff and the defendant corporation. The $2,500 payable upon the death of the husband was to be paid to the wife—not an unusual, and in many cases a proper, method of making provision for a family by a husband, where the family depends upon his earnings for support. On the fifteenth of October, 1862, the plaintiff obtained a policy for the sum of $2,500 in the defendant company, payable to her on the death of her husband, or in the event of her death before his decease then payable to her children. No question is made but that the annual premiums were duly paid to the company from the date of the insurance to the death of the assured. It is sufficient for the purposes of this case to say that the company inserted in the policy, and the plaintiff agreed to the proviso, that nothing should be due and payable by the company if the assured, Matthew Waters, should "die by his own hand." This expression is not to be taken literally.

In law, a man does not die by his own hand, although he puts an end to his life, unless he commits the act which results in death with a knowledge at the time of its moral character, and its consequence and effects. Nor does he die by his own hand if he is impelled to the act by an insane impulse which he has not the power to resist. Observe, gentlemen, that I speak of an insane impulse. No matter how strong the impulse may be, or how wicked, if he be not insane, or if he has the power to resist, and does not choose to do so, the person acting under it dies by his own hand.

1. Your first inquiry will be, did the assured take his own life? You will probably have no difficulty in deciding that question. From the evidence it will be proper for you to infer that he was attending to his ordinary business in the usual way, and was in good health, on the 19th of July, 1877; that leaving his home in the earlier part of the evening, and after making one or two calls upon friends, he disappeared from mortal sight. He was never seen alive again, but was found the next morning upon the floor of the office of his place of business, dead, with no marks of violence upon his person, and near him an empty glass, which had contained corrosive sublimate, and near to that the letter addressed to his brother in which he announced the fact of his intended self-destruction, and the reasons which impelled him to the course. Such circumstances leave no room for reasonable doubt that, physicially, he died by his own hand.

2. You are then brought, gentlemen, to the next inquiry, was he insane at the time of the commission of the act which resulted in his death?

Your verdict hangs upon the decision of that question. And it is a difficult one, for it involves the definition of insanity, and the detection of its existence from the conduct of the individual. What is insanity? It may be defined generally to be a disease of the mind. It is such a derangement of the mental faculties that the individual has lost the power of reasoning correctly. But it differs so much in kind and degree that no precise definition can be given applicable to the varying circumstances of every case. Medical men whose studies

and observations are in the line of mental disorders seldom agree, either as to the definition of the disease, or as to the fact of its existence in a particular case. Dr. Hammond, in his work on Diseases of the Nervous System, (p. 332,) defines it to be "a manifestation of disease of the brain, characterized by a general or partial derangement of one or more faculties of the mind, and in which, while consciousness is not abolished, mental freedom is perverted, weakened or destroyed."

But this is too general for our present purposes. We want now, not a medical but a legal definition of insanity—one which will aid us in forming a correct judgment in the case under consideration. After carefully weighing the opinion of the supreme court of the United States, to which our attention has been called by both parties to this controversy, (*Terry* v. *Ins. Co.* 15 Wall. 590,) I have come to the conclusion (and I so charge you) that in law a man is insane when he is not capable of understanding (1) that a design is unlawful, or that an act is morally wrong; or, (2,) understanding this, when he is unable to control his conduct in the light of such knowledge. Bearing this definition in mind, what was the condition of Matthew Waters, the insured, on the evening of July 19, 1877? Doubtless, his latest utterances to the world are contained in the letter to his brother, and the counsel on both sides, in their able presentation of the case to your consideration, attempted to sustain their different theories largely, if not mainly, from its contents; the one counsel finding in the letter the most indubitable evidence of the insanity of the writer, and the other, the equally clear proof of his mental soundness.

It is not the province or the disposition of the court to express any opinion on the subject. The law casts that duty and responsibility upon you. But it is my province to say to you that in considering it you must dispossess your minds of all prejudice or partiality. You must allow your judgment and not your feelings to control you, and, placing yourself in such a frame of mind, you should consider the contents of the letter in the light of the circumstances which surrounded

the writer when it was penned. Do its contents, interpreted and explained by the evidence in the case in regard to his mental peculiarities, and his business and family relations, satisfy you in regard to the writer's insanity? The law presumes him to be in his right mind, and the burden is upon the plaintiff to prove the existence of such facts and circumstances as to convince your judgment that he was not so; or, in other words, that he was not capable of understanding the moral character of his act, or was urged on to its commission by an insane impulse which he had not the power to resist.

I shall not detain you by recapitulating the evidence. It has been fairly stated to you by the counsel of the respective parties. It is rarely that a case is tried more ably or in a better spirit. But let us examine the letter more closely and see whether we can ascertain, from its contents, the probable causes or motives which impelled him to the act that he had in contemplation when it was written. It was addressed to his brother, with whom he was engaged in business—not as partner, but as an employe. He writes as follows:

"Abe, I cannot live any longer with such a woman as my wife, and her family. She and they are perfect. I and my family are rascals, drunkards, gamblers, etc. Whatever you can do for my two daughters, do it; but as for my wife and son George, let him and his mother and the unborn look out for themselves.

"Look you well to what has been done, and mind rules laid down for you. Do not hire an assayer, but practice and do it yourself. You can if you will, by practice, as good as I can.

"This step I hate and despise, but, whether I am to go to a hell or a heaven, I am satisfied, and may God, who rules over all, guide, direct and govern you and yours and mine in the right and perfect way, and give you each a fortune here and hereafter."

Then follow these directions in a handwriting quite changed from the foregoing, as if written at a different time:

"My watch to Carrie, and my locket to Lulu, and chain

and tobacco box to you; my studs to George; my sleeve-buttons to Lulu.

"Hoping that all will be satisfied more with my death than they have been with my life, and that my body may be buried along-side of my father, and not in my lot, I remain,

"Your brother,

"MATTHEW WATERS."

At the end of the letter, on the same sheet, and written in an almost illegible hand—as if penned in the last agonies of life—the following sentences were added:

"Smith is to have a good chance. Let C. S. D. & Co. stand out in the 'cold.' M. W."

"Wages are good, but self-respect is better. M. W."

"Abe, see that my wife has no benefit. M. W."

I shall detain you no further, except to add that the letter undoubtedly indicates an intention on the part of the writer to take his own life.

The plaintiff admits that the self-destruction was voluntary, and that the insured intended that death should be the result of his act; but she insists that his reasoning faculties were so far impaired that he was not able to understand the moral character, general nature, consequences and effect of the act; or, at least, that he was impelled to its commission by an insane impulse, which he had not the power to resist.

If a careful review of the whole testimony brings you to such a conclusion, your verdict will be for the plaintiff for $2,500, less $25, the amount of a note held by the company against the assured, with interest at 7 per cent. from November 3, 1877.

The defendant, on the other hand, insists that the insured was in the possession of his ordinary reasoning faculties, and intentionally took his own life from pride, jealousy, disappointment, or desire to escape from the troubles of life.

If such should be your judgment, your verdict will be for the defendant.

The jury found a verdict for the plaintiff for the full amount of her claim.

FLOWER v. GREENBAUM.

(Circuit Court, N. D. Illinois. ———, 1880.)

BANKRUPTCY — COMPOSITION PROCEEDINGS — CONTINGENT LIABILITY — STOCKHOLDER.—A stockholder's contingent liability will not be discharged by composition proceedings where the bankrupt has not included such liability in his statement of debts.

BLODGETT, D. J. This suit is brought against defendant, as a stockholder of the German National Bank, to secure the amount of an assessment of 25 per cent., made by the comptroller of the currency on the stockholders of the bank, for the purpose of paying the indebtedness of the bank.

The fact that defendant was the owner of 277 shares of $100 each, of the stock of the bank, at the time the bank failed, is admitted; and it is also admitted that defendant was duly appointed receiver, and that the asssessment has been regularly made by the comptroller is also admitted.

The defence is that defendant was duly declared a bankrupt, and obtained a composition with his creditors, at the rate of 25 per cent., under said proceedings in bankruptcy; that plaintiff is bound by said proceedings, and can only recover in this suit 25 per cent. of said assessment.

It is admitted that defendant applied to the bankrupt court for a creditors' meeting to consider proposals for a composition; that said meeting was duly held; that defendant submitted to his creditors a statement of his assets and debts, and that among the assets scheduled by defendant was the bank stock in question; but no liability as such stockholder was scheduled or included in defendant's statement to his creditors.

The defendant offered to pay 25 per cent. to his creditors in composition, and for settlement of his debts, which offer was accepted, ratified by the creditors, and confirmed by the court. The bank was named in defendant's statement as a creditor to the amount of $40,000 on an overdrawn account, and was represented at the creditors' meeting, and voted in favor of the composition. Defendant now insists

that having disclosed the fact that he was a stockholder, upon which the law created a contingent liability, to the creditors of the bank, in case an assessment should be made upon the stockholders to meet the liability of the bank, his said liability as such stockholder comes within the operation of the composition, and plaintiff can only recover the amount paid other creditors by the terms of the composition.

I do not concur in the position taken by the defendant. The law under which this composition was obtained provides that "the provisions of a composition accepted by such resolution, in pursuance of this section, shall be binding on all the creditors whose names and addresses, and the amounts of the debts due to whom, are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditor."

The proceeding to obtain a discharge must be strictly construed. The bankrupt must substantially comply with all the conditions requisite and precedent to obtain his discharge.

At the time this creditors' meeting was held, and this composition considered and approved by the creditors and court, this liability as a stockholder was only contingent,—no assessment had been made, in fact no receiver had been appointed. Admitting, for the purpose of this decision, that a contingent liability can be discharged by composition proceedings, there can be no doubt that, in order to secure this result, the bankrupt must include such contingent liability in his statement of debts; that the creditors holding such contingent indebtedness must have notice that a discharge from such liability is sought. But here there is no reference to this liability in the schedule of debts. No notice was given in any form that the bankrupt desired a discharge from this liability. Indeed, it is difficult to see how this could have been done at the time this composition was obtained, as no receiver had been appointed at the time, and no one could tell what rate of assessment upon the stockholders would be made.

But it seems very clear to me that the defendant cannot be held to have taken any step to secure his discharge from this liability. He did not include it in his statement of debts, and therefore the resolution of the creditors and action of the court did not prejudice the rights of the creditors of the bank to have this assessment made and collected.

Issue for plaintiff.

McNish, Administratrix, *v.* Everson, Macrum & Co.

(*Circuit Court, W. D. Pennsylvania.* June 8, 1880.)

Patent—Prior Use of Invention.

In Equity.

Wm. A. Stone and *D. F. Patterson*, for complainant.

Bakewell & Kerr, for defendants.

McKennan, C. J. The defendants do not deny infringement of the patent on which this suit is founded, but they allege prior use by others of the invention claimed, and that, therefore, the plaintiff's intestate is not the first inventor thereof. The invention is a very simple one, and its nature and scope are very clearly defined in the claim. It is there stated to be "a bottom for annealing boxes having ribs or bars of wrought iron, or other metal of a similar fibrous elastic nature, extending through it, substantially as described." The method of forming these ribs is by placing wrought-iron rods in the moulds for casting the annealing boxes, and extending throughout their whole length, so that the molten metal, when poured into the moulds, will completely surround the rods, and thus they will be incorporated with it. The object of the invention is to give these boxes additional strength in the line of the strain upon them, and so prevent their transverse fracture.

The patent is dated April 21, 1874, upon an application filed March 17, 1874, and the question is, was the invention described and claimed practiced by others than the patentee before the date of the application? The answer to this ques-

tion is decisively furnished by the testimony of Robert C. Totten. He was a machinist and founder, and testifies that he made annealing carriages for the defendants or their predecessors as early as July 13, 1866, which had iron rods embedded in them, and that he subsequently made several others of the same kind for the same persons. To use his own words: "The general shape of the boxes was like the drawing in exhibit 'McNish's Patent,' and the bars of iron were cast in the sides of the box, as shown in this drawing. The bars were placed in the space in the moulds before casting, and then the iron was cast on them." The object of the introduction of the bars was stated to him by Mr. Everson, and is thus explained by him: "The ordinary boxes were found to break crosswise, and it was proposed to obviate this by the use of these wrought-iron bars." This is an exact statement of the nature, object and mode of construction of the invention described and claimed in the patent, and leaves no room for doubt that the device made by Mr. Totten and that covered by the patent are the same. And there is just as little room for doubt that the boxes made by Mr. Totten were used by the firm of Everson, Preston & Co., and that the advantage expected from their peculiar construction was realized in their use.

After some time Everson, Preston & Co. ceased to use annealing boxes, as described by Mr. Totten, and it is argued that such use is to be regarded as an unsuccessful experiment. We cannot concede this. The device used was complete in its construction, and it was used sufficiently to demonstrate its practicability. Indeed, in view of the proofs of the completeness and utility of the device described in the patent, the conclusion is irresistible that a prior device, exactly similar to it and used in the same way, must have been alike successful in practice. It was clearly a complete and useful invention, and the abandonment of its use by Everson, Preston & Co. furnishes no warrant to the patentee to claim it as the first inventor.

The bill is dismissed, with costs.

KNEELAND and others *v.* SHERIFF and others.

(Circuit Court, W. D. Pennsylvania. June, 1880.)

PATENT—INCEPTION OF INVENTION.—"A patentee whose patent is assailed upon the ground of want of novelty may show, by sketches and drawings, the date of his inceptive invention, and if he has exercised reasonable diligence in perfecting and adapting it, and applying for his patent, its protection will be carried back to such date."

In Equity.

Geo. H. Christy, for complainants.

Bakewell & Kerr, for defendants.

MCKENNAN, C. J. The only defence set up and relied upon in this case is that the complainant E. G. Kneeland is not the first and original inventor of the device described and claimed in his patent. This defence rests entirely upon alleged prior invention by one Robert M. Davis. The decisive question, then, in the case is one of dates.

It would not be profitable to collate the proofs on this point. That Kneeland conceived the idea of his invention in 1863; that he described it partially to different persons afterwards; that he made sketches, and had a drawing of it made in the summer of 1864; and that he was diligent in reducing it to a practical form, and in obtaining a patent for it, is all satisfactorily shown.

The precise date of the occurrence of these facts does not appear, but it is evident that the statements of the witnesses on this point are approximately correct, because, from the nature of the transactions stated, they must have occurred, if the witnesses are to be believed at all, sometime anterior to the date of the application for the patent, which was February 27, 1865.

It is not satisfactorily proved that before the date of Kneeland's invention, thus established, the device of Davis was made and used. There is at least plausible reason for the inference that the conception of Davis' valve was not matured in his own mind earlier than the latter part of 1864, and was not constructed and used until sometime during the

year 1865. This, at least, seems to me to be clear, that the conception and description of Davis' valve is not carried back by any witness to the time when it is shown Kneeland described and sketched his invention in the early part of September, 1864. That this is the latest period at which Kneeland's invention can be fixed is settled by numerous decisions. As was said in *Reeves* v. *The Keystone Bridge Co.*, 1 Off. Gaz. 466: "But a patentee, whose patent is assailed upon the ground of want of novelty, may show, by sketches and drawings, the date of his inceptive invention, and if he has exercised reasonable diligence in perfecting and adapting it, and in applying for his patent, its protection will be carried back to such date."

Kneeland's inceptive invention was the earliest, and he was diligent in perfecting and adapting it, and in applying for his patent. He is, therefore, prior in right to Davis, and is entitled to a decree as prayed for.

Let a decree accordingly be prepared.

LORILLARD *v.* THE STANDARD OIL COMPANY.

(*Circuit Court, S. D. New York.* May 27, 1880.)

INFRINGEMENT—SUIT BY MARRIED WOMAN.—In the southern district of New York a married woman is not disqualified by reason of coverture from bringing and maintaining a suit in her own name, without joinder of her husband, for the infringement of a patent within the state of New York.

In Equity. Infringement of patent.

Abraham L. Jacobs, for plaintiff.

T. B. Kerr, for defendant.

BLATCHFORD, C. J. This is a suit in equity for the infringement of letters patent. The bill alleges that the plaintiff is the sole owner of the entire patent. The answer sets up that the plaintiff was, at the time of bringing this suit, a married woman, having a husband, Blaze Lorillard, in full life, and that by reason of coverture the plaintiff is incapable of, and

disqualified from, bringing and maintaining the suit in her own name, without joining her said husband as a party thereto.

The plaintiff, although a general replication has been filed to the answer, has, under rule 52, in equity, set down the cause for argument on such objection, and the defendant takes no point that this is irregular, because a replication has been filed, and the question involved has been argued.

The defendant contends that the rule of practice of the courts of New York, regulated by the statutes of New York, which permits suits by a married woman in her own name, does not apply to suits in equity in this court; that there is no statute or rule which permits the plaintiff to bring this suit without joining her husband; and that, under the general principles of equity practice, and the practice of the high courts of chancery in England, the husband must be joined. Rule 90 of the rules in equity, prescribed by the supreme court, provides as follows: "In all cases where the rules prescribed by this court, or by the circuit courts, do not apply, the practice of the circuit court shall be regulated by the present practice of the high court of chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice."

The legal title to this patent is in the plaintiff. By the law of New York, as interpreted by the courts of New York, a married woman may hold property of every description in the same manner as if she were a *feme sole*. *Gage* v. *Danchy*, 34 N. Y. 293; *Buckley* v. *Wells*, 33 N. Y. 518; *Knapp* v. *Smith*, 27 N. Y. 277. The bill alleges that the plaintiff belongs to New York, and is a citizen of the United States, and that some of the infringements were committed in New York. Under the provisions of sections 629, 4919 and 4921 of the Revised Statutes of the United States, suits in equity for the infringement of letters patent must be brought by the party in interest in his or her own name, and such right cannot be delegated to another person, to bring the suit in the name of such other person, when the suit is not for the benefit in any way

of such other person. *Goldsmith* v. *American Paper Collar Co.* 2 FED. REP. 239. On the same principle such other person is neither a proper nor a necessary party to be joined with the real party in interest, as plaintiff, when such other person has no interest in the patent, and when the suit is not for the legal benefit in any way of such other person. Under rule 90 it is inconsistent with the local circumstances of this district to require the wife in this case to join her husband with her. The rule of joining husband with wife in suits to recover her personal property was founded upon the principle of unity of existence and interest between husband and wife, in law, and the right of the husband in the wife's personal property, and the care exercised by courts in regard to those who are not in a situation to take care of their own rights. These principles being now changed for this jurisdiction, the practice based on them necessarily falls. *Cessante ratione cessat lex.* *Voorhees* v. *Bonesteel*, 16 Wallace, 16, 31.

The objection taken is overruled.

THE NEW YORK COFFEE POLISHING COMPANY (limited) *v.* WILSON.

(*Circuit Court, E. D. New York.* June 11, 1880.)

PATENT FOR COFFEE POLISHING.—The first claim of a patent being abandoned at the trial, and no defence being made to the averment of infringment of the second claim, *held*, that a decree must be given against the defendant for infringement of the second claim.

In Equity.

W. W. Goodrich, for plaintiff.

Richards & Held, for defendant.

BENEDICT, D. J. This is an action brought by the assignee of a patent for an improvement in cleaning and polishing coffee, which patent was issued to William Thompson and Samuel Thompson, on January 31, 1871, numbered 111,403. Upon the trial the plaintiff abandoned the first claim of the patent and relies only upon the second claim.

In regard to the second claim, the defendant did not at the trial undertake to dispute his liability, or to deny the plaintiff's right to a decree. Under such circumstances I discover no reason why, in this case, a decree should not go against the defendant for an infringement of the second claim of the patent.

MAGUIRE *v.* THE STEAM-BOAT SYLVAN GLEN, etc.

THE HARLEM & NEW YORK NAVIGATION COMPANY *v.* THE SLOOP MAGUIRE BROTHERS, etc.

(*District Court, S. D. New York.* May 26, 1880.)

COLLISION—BURDEN OF PROOF.—The burden is on a steam-boat to clearly prove that the luffing of a sloop would have saved a collision made imminent by the negligence of such steam-boat.

In Admiralty.

W. W. Goodrich, for sloop.

S. H. Valentine, for steam-boat.

CHOATE, D. J. These are cross libels to recover damages caused by a collision between the steam-boat Sylvan Glen and the sloop Maguire Brothers, on the evening of November 1, 1878, in the East river, about off pier 41. The steam-boat was on her regular trip to Astoria, having left Peck slip at 10 minutes past 6 o'clock. The sloop was light, bound from Newtown creek to Haverstraw. She was beating down the river, the wind being about west, or nearly ahead—a fresh breeze. She left the creek about 5 o'clock, and had made several tacks across the river before the collision. The collision happened while she was on her starboard tack, standing across from the New York shore to the Brooklyn shore. The tide was strong ebb.

The case made for the sloop in her pleadings is that both her side lights were set and burning brightly; that she ran out her port tack close to the New York shore, and stood about on the starboard tack, and after having gathered headway and while upon this tack, and when about three lengths

away from the New York shore, the red and green lights of the steam-boat were observed, the steam-boat then running at a greater rate of speed than 10 miles an hour, and not near the center of the river; that the steam-boat was then heading for the sloop in such a manner as to render it probable that she was going under her stern, when she suddenly and without notice made a rank sheer to starboard across the bows of the sloop; that the sloop held her course, and that by thus running across the bows of the sloop the steam-boat hit the bowsprit and bow of the sloop with the port paddle-box, or guard of the steam-boat, the wheel being still in motion, whereby the bowsprit of the sloop was taken out of her, her wood ends were bursted open, her mast sprung, her bows crushed in, and other damage done. It is further charged that the collision was occasioned solely by the fault and negligence of the persons managing said steam-boat in that, among other things, she was not running near the center of the river, but near the New York shore; that she was running at a higher rate of speed than is allowed by the statutes of the state of New York; that she did not discover said sloop in time to avoid her, and did not see her red light; that she attempted to pass across the bows of the sloop instead of under her stern, and that she did not stop in time to avoid the collision.

The pleadings on the part of the steam-boat allege that she proceeded up the river about one-third of the distance across from the New York shore; that when she arrived at about opposite pier 45, East river, the green light of the sloop was suddenly seen, a short distance on the port side of the steam-boat, the sloop being on the starboard tack and heading for about the forward port gangway of the steam-boat; that the sloop had no red light on the port side; that the sloop was seen by those on board of, and in charge of, the steam-boat as soon as she exhibited her green light, but said vessels were then so near each other that all that could be done by those on board the steam-boat was to port her wheel and sheer towards the Brooklyn shore, which was immediately done, and a long, loud blast of her whistle was sounded; that from that

time till the collision which ensued the said sloop held her course without changing, although it was entirely manifest that a slight change of her wheel would carry her under the stern of the steam-boat, and she ran into the steam-boat, striking her in her port wheel and doing serious damage. It is also alleged that the speed of the steam-boat in no way contributed to the collision, and that no collision would have occurred if the sloop had had her red light set and burning, and that the collision was caused wholly by the negligence of those in charge of the sloop in having no proper lookout, in not having her red light set and burning, and in not going under the stern of the steam-boat, (as a slight change of her course would have carried her,) and in not avoiding the steam-boat, as she easily could have done. It is also alleged on behalf of the steam-boat that she could not stop and back when the green light was seen without the risk of serious damage and loss of life, she being at that time crowded with passengers, and the only thing she could do was to port her wheel and sheer to starboard, which she did as soon as the sloop showed her green light.

It was not contested upon the trial that the sloop beat out her port tack and came about as close to the New York shore as she was bound to do, and the only faults insisted upon as against her were that she had no red light, and that she did not luff up under the stern of the steam-boat to prevent the collision after it became imminent. If the sloop had her red light set and burning as she ran towards the New York shore on her port tack, it is obviously no excuse for the steam-boat coming into collision with her while on her starboard tack; that there was no way of avoiding the collision after the steam-boat saw the green light, for in that case the failure of the steam-boat to observe the red light and to govern herself accordingly was negligence, and the cause of her getting into such close proximity to the sloop that she could not avoid her.

The first question, therefore, is whether the red light of the sloop was set and burning while she was on her port tack. On this question the preponderance of the evidence very clearly

is with the sloop. It was proved that the side lights were set about the time the sloop left the mouth of Newtown creek, and the red light, or its reflection on the shrouds, was observed by several of the crew at several different times during the port tack in question, and afterwards by one of them before the collision. It was seen by a witness from another vessel which passed up the river just before the collision, and which passed the sloop while she was on that port tack. It is also positively sworn to by two witnesses who were standing on the pier near which the sloop went about. Against this evidence there are from the steam-boat three witnesses—the pilot and assistant pilot, who were in the wheel-house and the mate, who was on the lookout forward—who testify that they saw no red light; and the pilot of a ferry-boat which was going up the river between the steam-boat and the New York shore, and which slowed for the sloop as she went out on her last starboard tack, who testifies that she had no red light.

As to the three witnesses from the steam-boat it is evident that, though they swear positively that the sloop had no red light, they do so wholly on their inference to that effect from the fact that they saw no red light up the river about where she must have been, and that they kept, as they believed, a careful lookout for lights and would have seen it if it had been there. But considering the speed of the steam-boat, which her pilot admits to have been about 11 miles an hour, and which the evidence tends to show was considerably more than that, it is obvious that her distance from the sloop while the latter was drawing near to New York on the port tack was such that the failure to see the red light then can be easily accounted for by inattention or by intervening objects. It took some little time for the sloop to go about and gain headway on her new tack. Meanwhile, the steam-boat was going at the rate of half a mile in two minutes and a half.

As to the pilot of the ferry-boat, called as a witness to this point, his testimony is entitled to much greater weight, because he evidently believed that he saw the sloop while she was still beating out her port tack, and that she had no red light. He says he saw a shadow of something go in towards

the pier, and then he saw the green light as the sloop came about. It is not always possible to account for the errors of observation or memory so often disclosed in this class of cases, but the testimony of this witness, though apparently entirely honest, is overborne by the great weight of testimony showing that the sloop had her red light burning. The statements of this witness as to other matters, especially the relative position of the ferry-boat and the steam-boat, are very difficult to reconcile with the other proofs, and his testimony on this point of the light must be held to be a mistake.

It is observable in this connection that, though it is admitted in the pleadings that the steam-boat was crowded with passengers, and although it was testified by her lookout that there were many passengers on the forward deck who were known to him as regular passengers, none of them were called. Nor was the engineer called in respect to the speed of the steam-boat, although the witnesses from the sloop testified to their opinions that she was going 15 miles an hour, which the proof as to her time for running to Astoria rather tends to confirm.

It must be held, therefore, upon the proofs that the sloop had proper lights; that the steam-boat was in fault in not seeing them, and in not keeping out of her way. The other faults charged against the steam-boat, that she was going at a rate of speed exceeding the limit fixed by the state statute—10 miles an hour—and that she was running up the river at this excessive rate of speed, not near the center of the river, but near the New York shore, are also established by the evidence. It is not at all probable that if she had been one-third of the way across the river when she saw the green light on her port hand, slowly moving out on the starboard tack and then close into shore, she would have found the difficulty stated in the pleadings and described by her witnesses, in going under the stern of the sloop, between her and the New York shore, or in slowing and stopping so as to avoid the collision.

The other charge of fault against the sloop has no founda-

tion. She was bound by the rule to keep her course. There was nothing in the situation to require or to justify any departure from that rule on her part. She was just getting headway, being close hauled on the starboard tack, and the steam-boat going at full speed on her starboard hand was coming up to her and sheering more and more towards the Brooklyn side, so that, as one of the steam-boat's own witnesses says, she sheered off four points from her original course up the river. The steam-boat was acting in open disregard of the state statute and the rules of navigation in thus trying to cross the bows of the sloop at full speed when it was at best very doubtful whether she could clear her. If it were a case in which the sailing vessel would be justified in departing from her course, the evidence does not show that she was at fault in not doing so.

The burden is on the steam-boat to prove very clearly that the luffing of the sloop would have saved the collision, especially as she herself had made it imminent. And certainly no duty devolved on the sloop to make any movement other than to keep her course until after it became evident to those in charge of her that the steam-boat could herself do nothing to avoid the collision, for till that was evident the sloop must act on the supposition that the steam-boat would perform her duty and keep out of the way, and any movement of the sloop other than keeping her course would only cause embarrassment to the steam-boat in the performance of this duty. The blowing of a whistle by the steam-boat to the sloop, if she did so before the collision, which is disputed, was an unmeaning signal. She had no right to call on the sloop to give way or change her course. Nor upon the evidence is it shown that if the sloop had luffed at the last moment it would have averted the collision. They came together at an angle of about 45 degrees, the steam-boat crossing the sloop's bow diagonally forward at that angle. If the sloop had luffed immedately before the collision, it is not shown that they would have cleared each other. It is quite probable, on the evidence, that they would not. The collision was caused wholly by the reckless navigation of the steam-boat.

Decree for libellant in suit against the Sylvan Glen, with costs, and a reference to compute the damages.

Libel against the Maguire Brothers dismissed, with costs.

KENNEDY and others *v.* STEAMER SARMATIAN.

(*Circuit Court, D. Maryland.* June 10, 1880.)

STEAMER AND SAILING VESSEL—SHOWING LIGHTED TORCH—REV. ST. § 4234.—Section 4234 of the Revised Statutes, enacting that every sailing vessel "shall, on the approach of any steam-vessel during the night, show a lighted torch upon the point or quarter to which the ste m-vessel shall be approaching," is sufficiently broad to require such light to be exhibited to a steamer coming up astern.

LOOKOUT—REV. ST. § 4234.—The rule contemplates the keeping of a sufficient watch over the stern to enable the vessel to perform her duty as to the lights, and if the situation is such that one lookout is not enough there must be more.

BRITISH VESSEL—REV. ST. § 4234.—The rule can be invoked in defence of a British steamer colliding with a United States vessel, while both are in the water of the United States and upon pilot ground.

COLLISION—NEGLIGENCE—SHOWING TORCH-LIGHT.—It is negligence in a schooner, under the general rules of the sea, not to show a torch-light, or do something else calculated to give notice of her dangerous proximity to an approaching steam-vessel.

SAME—STEAM-VESSEL—RATE OF SPEED.—A steam-vessel is not bound to slacken her rate of speed until there is apparent danger, and has a right to presume that every vessel approached will give such notice as the local usages of the place, or the general rules of the sea, require.

FOREIGN VESSEL—LOCAL USAGES—PILOT.—Local usages growing out of the observance of acts of congress are binding upon foreign vessels, and pilots are employed not only to keep such vessels on their proper course, but also to enable them to understand the local usages governing the navigation of the waters in which they are sailing.

In Admiralty.

FACTS FOUND BY THE COURT.

1. A collision occurred between the American schooner Newell B. Hawes, owned by the libellants, and the British steamer Sarmatian, at about 5:45 in the morning of November 29, 1878, in the waters of Chesapeake bay, five miles or

thereabouts north by west from Cape Henry. The night was clear, but a slight haze rested on the water.

2. The schooner was a small craft, chiefly employed in the oyster trade. She was on a voyage, in ballast, from Boston, Massachusetts, to Tangier sound, Maryland, for a load of oysters. Her course was about north, up the bay, with the wind W. N. W. She was on her port tack, with her sails hauled as flat aft as possible, and making not more than two or three miles an hour. The collision occurred during the mate's watch, which came on at 3 o'clock, and consisted of the mate and one seaman. The seaman took the wheel at 4 o'clock, and from that time the mate was the only lookout. There were six other vessels in sight, all of which had come in from sea in company with the schooner.

3. The Sarmatian had all her regulation lights set and brightly burning, and was seen by the mate of the schooner a considerable time before the collision, and when she was some miles away. She was on a voyage from Liverpool to Baltimore, having touched at Halifax. When first seen by the mate she showed her green and white lights off the starboard quarter of the schooner. The mate watched her until she appeared to be passing as if to cross his stern and go into Norfolk. He then went forward and kept a lookout ahead. While he was forward the man at the wheel saw the red light of the steamer and her white light. He also saw the lights in her cabin, and came to the conclusion in his own mind that she would pass up the bay to the leeward of the schooner. He gave her, however, but little thought, and did not tell the mate what he saw. Afterwards the mate started aft to look again for the steamer. Not seeing any light to the starboard, as he expected, he stooped down and looked under the yawl, which hung from the davits at the stern. He then saw the red light and at once ran to the cabin for a torch. As he went he told the man at the wheel that a steamer was coming up behind, and he was going to show her the torch-light. The captain, who was in the cabin smoking, hearing this remark, reached for the torch, but before he could get it out of the can the mate seized it, and,

when the captain had removed the chimney from the lamp, lighted it and ran at once on deck, where he held it out over the taffrail. The captain followed the mate to the deck immediately.

4. The Sarmatian took a licensed Baltimore pilot on board just outside the capes, and from that time until after the collision the captain, pilot and second mate were on the bridge attending to their respective duties, and two able seamen were at the bow, one on the starboard and the other on the port side, as lookouts. From the time the pilot came on board the steamer proceeded on her course at the rate of 12½ or 13 miles an hour, and did not slacken her speed until just at the moment of the collision. Her deck, on which the lookouts stood, was 20 or 25 feet above the water, and the bridge still higher. As the night then was, a small vessel like the schooner, with her sails hauled down close, and without any lights except her regulation side lights, could not be seen for any considerable distance from the steamer, and the schooner was not actually discovered by any one until the torch-light was displayed. Then she was seen by all five of the persons on watch almost simultaneously. At first the reflection of a light on the masts, sails and rigging was seen by all, and then for a very short time only the torch itself was seen by the pilot, who stood at the starboard end of the bridge, and by the lookouts. The vessels were so close together that the hull of the steamer intercepted the view of the torch from where the captain and second mate stood on the bridge, and very soon shut it out from the others. As soon as the light was discovered the wheel of the steamer was put to starboard, and her engine backed at full speed, but before the course of the steamer could be materially changed, or her speed slackened, she passed along-side the schooner so close as to carry away some of the schooner's rigging, but did not injure the hull. No hail was given the steamer from the schooner until after the damage was done.

5. Had the torch-light been exhibited sooner from the schooner, it is not probable the collision would have occurred.

CONCLUSIONS OF LAW.

1. The schooner was in fault for not showing her torch-light in time, or giving some equally good notice of her presence and position.

2. As this was the sole cause of the collision the libel should be dismissed.

Brown & Smith, for appellants.

John H. Thomas & Son, for appellees.

WAITE, C. J. I have had no difficulty in reaching the conclusion that the torch-light was not shown from the schooner until it was too late for the steamer to avoid the collision, and that if it had been shown at a proper time no damage would have been done. Although all the witnesses from the schooner concur in saying that some minutes elapsed after the light was displayed before the vessels came together, it is clear to my mind that they were mistaken. Mere estimates, by witnesses in collision cases, as to time and distance can rarely be relied on with confidence. It is always safer in determining such questions to be governed by the attending facts and circumstances.

The lights were first brought to the attention of the five persons looking out from the steamer at the time by its reflection on the sails and rigging of the schooner, and they all saw it simultaneously. This, I think, must have been when the mate was coming out from the cabin with the torch lighted, and before he got on deck. Under such circumstances the reflection would almost necessarily be seen before the light itself. Immediately afterwards the torch was seen for a moment only by the two lookouts on the bow, and the pilot at the starboard end of the bridge. The captain, at his place near the middle of the bridge, and the second officer at the port end, did not see it at all, as the hull of the steamer intercepted their view, and it was soon shut out from the others in the same way. These facts are fully established, and satisfy me that the reflection was seen as soon as the mate came out from the cabin, and that the vessels must have been very close together.

The testimony from the schooner is to the same effect, and

equally conclusive. The mate saw the green and white lights of the steamer when he thought she was a good distance away, and not anticipating any danger went forward to look for vessels ahead. While he was there the steamer changed her course so as to expose her red and white lights, and yet near enough to render her cabin lights visible. This was noticed by the man at the wheel, but, as he thought she would pass to the leeward, he did nothing, and gave the mate no warning. A while afterwards the mate turned aft to see where the steamer was, and not finding her lights off to the starboard stooped down, and, looking under the yawl, discovered her red light. He started immediately for the torch in the cabin, and ran as fast as he could, telling the man at the wheel there was a steamer behind, and that he was going to show her a light. The captain in the cabin hearing what the mate said reached for the torch, but before he could get it out of the case the mate snatched it from him. The captain then removed the chimney from the lamp, and the mate, after lighting the torch, ran back on the deck as fast as he could, the captain following him. As soon as the mate got on deck he swung the light over the taffrail. All this indicates haste and excitement, and is entirely inconsistent with any idea that the steamer was five or six minutes away when the light was exposed. Unless I disregard entirely the testimony of all the witnesses from the steamer, and pay no attention to what happened on the schooner, I must find, as I do, that when the torch was first brought out from the cabin the collision was imminent, and could not have been avoided.

The rule is imperative which requires a steamer to keep out of the way of a sailing vessel, and this whether the steamer is overtaking a sailing vessel or passing her from the other way. But it is equally imperative on the sailing vessel in the night-time to notify the steamer of her presence and position by the display of such lights and signals as the law or the usages of navigation prescribe. If she fails in this, and a collision occurs on that account, she must bear the loss. Section 4234 of the Revised Statutes requires that every sailing vessel "shall, on the approach of any steam-

vessel during the night-time, show a lighted torch upon the point or quarter to which the steam-vessel shall be approaching." This seems sufficiently broad to cover all cases, but the libellants contend it does not require the light to be exhibited to a steamer coming up astern. Certainly, there is nothing in the language to indicate any such exception. The light is to be exhibited on the approach of any steam-vessel in the night. Nothing is said about the direction, thus implying that the signal must be given if the approach is from any quarter.

The rule is of comparatively recent origin, having been adopted by congress for the first time in 1871, (16 St. 459, § 70,) and was undoubtedly intended to supply a defect in the regulations of 1864, (13 St. 58,) which only required a sailing vessel, when under way, to carry her colored side lights, and they could not be seen astern. Under such circumstances a vessel coming up from behind had nothing to guide her except the hull or sails of the one ahead, when they can be seen. When both were sailing vessels this was comparatively unimportant, because it is rare that the speed of the following vessel is such as to prevent her from getting out of the way after she is near enough to see what is ahead. With steamers, however, it is different. For this reason, when such a vessel was approaching, another light seemed sometimes to be necessary, and the torch was provided. As the side lights were visible ahead, it is clear that the primary object of the additional rule must have been to show a light behind where there was none before.

It is objected, however, that this would require a lookout at the stern as well as the bow, and, therefore, such could not have been the intention of the rule. The office of a lookout is to watch for and report danger from whatever quarter it may be expected. It it can come from behind, he must look there enough to see when it is approaching and give the necessary warning. He must be stationed where, under the circumstances of the situation, he can best perform all his duties, and if one cannot do all that is required another must be added. Ordinarily, on a sailing vessel in open

waters, one is enough for all purposes, and his station will be at or near the bow. From there he can usually see a steamer coming up behind in time to give the necessary warning without interfering with his duties ahead. But, whether that be so or not, it is clear that the rule contemplates the keeping of a sufficient watch over the stern to enable the vessel to perform her duty as to the lights, and if the situation is such that one lookout is not enough there must be more.

It is next insisted that as the Sarmatian was a British vessel, and by the laws of Great Britain sailing vessels are not required to show torch-lights, the schooner can recover notwithstanding she exhibited hers so late. The two vessels were at the time on American waters and not on the high seas; they were in the Chesapeake bay, and *infra fauces terræ*. A vast majority of the commerce carried on there was coastwise and local. The Sarmatian was subject to the operation of pilot law and within the limits of pilot service. If she had attempted to proceed without a pilot, after one could have been had, she would have been guilty of a breach of duty, and liable to her shippers and insurers for any loss on that account. While the rules of navigation adopted by congress are only intended for the government of vessels of the navy and mercantile marine of the United States, no vessel forming part of that marine can excuse herself from following their requirements while in the waters of the United States and on pilot ground, simply because the vessel it meets is sailing under a foreign flag. Pilots are employed not only to keep a vessel on her proper course, but to enable her to understand the local usages governing the navigation of the waters in which she is sailing. As the law requires a foreign vessel to have a pilot on board, it is to be presumed he will be at his post and govern himself by the rules prescribed by the proper authorities regulating navigation in that locality. Under such circumstances every pilot has the right to believe that all vessels he meets will do what the local laws or usages require of them and act accordingly.

While the acts of congress may not be binding on foreign vessels, the local usages growing out of these observances

are. *The Fynewood*, Swabey, 374. I see nothing in the cases of *The Zollverein*, Swabey, 96; *The Saxonia*, 1 Lushington, 410; *The Dumfries*, Swabey, 63; or *The Chancellor*, 4 Law Times Rep. 627, to the contrary of this. The acts complained of in *The Zollverein*, *The Dumfries* and *The Chancellor* were all on the high seas, off from pilot ground, and the authority of *The Fynewood*, subjecting a foreign vessel to liability for the non-observance of local usages in territorial waters, is clearly recognized in *The Saxonia*, (p. 421,) where the Eclipse was condemned, not because she did not carry the regulation lights, but because she showed no light at all until it was too late to prevent the collision. As was said by the master of the rolls in the case of *The Saxonia*, (p. 422,) "no blame can attach to a vessel for running foul of another vessel if it has been impossible to distinguish it until the collision was inevitable." In the condition the schooner in this case was, with the edge of her sails towards the steamer and her small hull low in the water, at the darkest hour in the night, it is clear beyond question that she could not be seen from the steamer unless something was done to make her presence known. If as against a foreign vessel she was not bound to show a torch-light, she certainly was not at liberty to abstain from doing anything calculated to give notice of her position, and of the danger the steamer was approaching. Had she shown her torch-light in time it would have been enough, but as she neglected that, and did nothing else calculated to effect the same object, she was clearly at fault under the general rules of the sea, as well as the statutory rules. This brings her within the rule under which the Eclipse was condemned as against the Saxonia, and is enough for the purpose of this case.

It is next contended that the Sarmatian was at fault for going too fast. She was proceeding at her usual speed in an open sea. While the night was dark, it was clear, and lights, when displayed, could easily be seen. She had a full watch on deck, attending to all their duties. She was not bound to slacken her speed until there was apparent danger, (*The Scotia*, 14 Wall. 181,) and she had the right to act on the belief that every vessel she approached would give such no-

tice as the local usages of the place, or the general rules of the sea, required. In order to know what the local usages were she took a licensed pilot on board. Under these circumstances she might keep up her usual speed until something appeared to make it improper. Had the schooner performed her duty this speed would not have involved any loss to her.

On the whole, I am satisfied that the decree below was right, and a decree may be entered here dismissing the libel, with costs in both courts.

APPLEBY and others *v.* THE BARK KATE IRVING and THE STEAM-TUG ALICE M. EHRMAN.

BROWN and others *v.* THE STEAMSHIP WINTHROPE and THE STEAM-TUG ALICE M. EHRMAN.

(*District Court, D. Maryland.* June 1, 1880.)

COLLISION—NEGLIGENCE—RATE OF SPEED.

In Admiralty.

John H. Thomas, for libellants.

Sebastian Brown, and *I. Nevett Steele*, for respondents.

MORRIS, D. J. This collision occurred off North Point Light, in the Brewerton channel of the Patapsco river, about 5 o'clock in the afternoon of January 13, 1880. The British steamship Winthrope, 1,500 tons, with a cargo of iron ore, had entered the river and was proceeding up the channel for Baltimore at eight miles an hour. The steam-tug Alice M. Ehrman, towing the bark Kate Irving, 710 tons, laden with grain, had just left the port of Baltimore, and was proceeding down the channel at about four miles an hour. The channel is about 350 feet wide.

The case on behalf of the steamer Winthrope is that the tug, when about a mile and a-half off, blew one blast of her whistle, indicating that she intended to pass the steamer port to port; that the steamer responded with one whistle, ported her helm, and kept near the northerly bank of the channel; that when some 300 or 400 yards off the tug again blew one

whistle, to which the steamer responded, and putting her helm hard a-port ran so far to starboard that she ran upon a buoy on the northernmost edge of the channel; that the tug had also ported her helm, but had so little power, and the bark was so badly managed, that although the steamer passed the tug without accident, and although the bow of the bark was drawn out of the way, the stern of the bark swung around, and her port quarter came into contact with the port side of the steamer, about eight feet from her stern, and seriously damaged her.

The case on behalf of the tug is that she saw the steamer coming up the middle of the channel, about three or four miles off, and having a heavy, deeply-ladened ship in tow, she desired, in passing the steamer, to go to the windward, or northerly side of the channel, and accordingly, when the steamship was a little over a mile off, she gave not *one*, but *two* blasts of her whistle; that to this she received no reply, and, being herself in the middle of the channel, she continued some minutes without changing her course, in expectation of a reply, when, perceiving that the steamer had already got somewhat to the north of the middle of the channel, she gave *one* blast of her whistle, at the distance of a half a mile apart, to which the steamer at once responded; that the helm of the tug and that of the bark were immediately ported, and both tug and tow went gradually to southward, and the helm of the steamer being apparently at the same time ported, she went off to northward, but was so badly steered that she ran upon one of the buoys marking the northernmost edge of the channel, and immediately thereafter took a strong sheer to port, so that, as she passed the tug, her direction was at a considerable angle with the line of the channel, and four men were seen at her wheel putting it over hard a-port; that the steamer began to yield to the port helm, and by the time she got to the bark, which was being towed 300 feet behind the tug, she had rounded somewhat to starboard, but nevertheless she struck the bark on her port quarter, about 30 feet from her stern, with the anchor of the steamer, which was improperly hanging over the port bow, and considerably damaged the bark;

that the steamship was moving at the rate of eight or nine miles an hour, and, in approaching the tug and tow, did not lessen her speed.

The libel on behalf of the bark charges the blame of the collision upon both the steamer and the tug; upon the tug for giving conflicting signals, and upon the steamer for not slowing or stopping, and for improper steering. It is obvious that the care and skill required to enable a large steam-ship and a tug, encumbered with a heavy tow, to pass each other in the Brewerton channel, without risk of collision, have not been exercised in this case. The wind was light, the water smooth, and the day clear, so that there was nothing but want of seamanship to account for the collision. That the tug did not do all that, in the exercise of proper skill and diligence, she should have done, appears, I think, from the testimony of her own officers and from the admitted facts. Her master states that he did at first propose to take the northerly side of the channel, and gave notice to the steamer of his intention by two blasts of his whistle when a mile and a-half off. He states that he got no reply, but kept on down the middle of the channel, until within half a mile of the steamer, without giving any other signal, or at all changing his course. Notwithstanding he received no answer to his signals, from which the inference was that they were not heard, it appears that he must have continued his course as if he were going to the northernmost side of the channel for some five minutes without repeating them. Then, seeing that the steamer had gone to the northernmost side, he gave one blast, to signify that he was going to the southernmost side, which was responded to by the steamer, and then, he says, "we changed our wheel *a little to port.*"

The engineer of the tug who executed the master's orders shows how little this porting was. He says: "When half a mile off the captain ordered me to blow one whistle. The steamer was then tending a little to the north side of the channel. I blew one whistle *and had ported my wheel about a minute or two when the captain told me to steady her.*" It is not surprising that, being encumbered by a tow quite suffi-

ciently heavy to tax her capacity, this brief porting of the tug's wheel had but little effect upon the position of the bark. It is evident that the tug wished to keep as near as she could to the northern bank of the channel, because there was the deepest water and the least risk of her tow grounding, and with this fact before me, and the testimony of her own officers as to how little and how late she ported her wheel, and with the testimony of those on the steamer as to how near to the north bank the bark was at the moment of collision, I have no difficulty in believing that the bark was well north of the center of the channel, and that the tug was in fault in taking the bark dangerously and unnecessarily near to the course of the steamer.

The other question presented is, was the steamer also to blame? The testimony shows that the steamer was proceeding at nearly if not quite full speed. She was in command of one of the regular Chesapeake bay pilots, and he has testified that in his judgment it was safe and prudent for him to bring the steamer up the channel at that speed, notwithstanding there was in sight ahead of him, a tug encumbered with a tow.

But several others of the Chesapeake pilots, of equal skill and experience, have unqualifiedly expressed the contrary opinion. They say that in the Brewerton channel, if there is no obstruction of any kind ahead, and every vessel within reasonable distance is well out of the way, so that the channel appears free, they deem it safe to proceed at eight or even ten miles an hour; but they all agree that it is not prudent, and that it is never their practice, to run a steam-ship eight miles an hour (if she is of such draft that she must keep to the channel) when approaching a tug and tow. Their testimony is that in such cases they invariably slow the steamer down to half speed, so as to have her perfectly in hand.

If we take the statements of the witnesses on board of the steamer to be literally true, it is evident that to them the channel must have appeared very much obstructed. They testify that although at the moment of passing the tug the steamer was so near the northernmost bank of the channel that

she struck one of the buoys, yet that the tug passed so near them that, as the captain of the steamer says, he "could have nearly jumped on to the tug from the steamer's bridge." The pilot himself testifies that when they collided with the bark the steamer's bow was only about 30 feet from the line of the buoys on the northernmost side of the channel.

These statements show conclusively that the pilot and captain of the steamer could not have regarded the channel as clear, and as, according to their own testimony, they saw that the tug and tow were on the extreme northern edge of the channel, they knew that there was no possibility of them passing in safety unless the tug and tow suceeeded in getting out of the way. The pilot gives the situation, as it appeared to him, when he says "that he had no apprehension of danger until he found that the bark *was not getting out of the way sufficiently to give him room to pass.*" It is true that vessels meeting each other end on, at a considerable distance from each other and with plenty of sea-room, have a right to proceed at full speed, each having a right to act upon the assumption that the other will perform its duty. But this rule is not applicable to the navigation of the Brewerton channel by large vessels, of heavy draft, and I think it plainly appears that the rule with regard to speed, which the testimony of the pilots, who were examined as experts, shows has been generally adopted by them, is, in so narrow a water, only a reasonable and necessary precaution against danger.

It appears to me, however, from the testimony, that the captain and pilot of the steamer are somewhat mistaken in supposing that the tug and bark had not succeeded in getting further from the north edge of the channel than they represent in their evidence. It would seem that there was another cause which contributed to bring the vessels into collision, and which they underestimate. This cause was the fact that about the time the tug passed the steamer, which was also nearly about the same time that the steamer ran on to the buoy, the steamer took a decided sheer to port away from the north side of the channel and headed for the bow of the bark, and at quite an angle with the direction of the buoys.

What it was that caused this sheer the testimony does not satisfactorily establish. It may have been bad steering in the attempt to steady the ship on her course after she ran on to the buoy, under the excitement of apprehension that she was in danger of grounding, or it may have resulted from a tendency which some of the witnesses say vessels have to sheer off when approaching shallow water.

That the steamer did make such a sheer is satisfactorily established, not only by the direct testimony of those on board of the tug and bark, but also by the facts and admissions contained in the testimony of those on the steamer. These latter testify that they had the helm hard a-port when the steamer was 300 or 400 yards from the tug; that even after she ran on to the buoy her helm was never put to starboard, and it also appears that when the steamer was abreast of the tug the captain and pilot were assisting the two wheelsmen in the attempt to get the wheel still more to port. So that it seems evident that if the steamer had not taken a sheer she must certainly, under a hard a-port helm, have run outside of the buoys. One great danger of a high rate of speed is the short time allowed in which to rectify any error of judgment or counteract any unexpected occurrence; and, whatever may have been the cause of the sheer, no collision would probably have occurred if a less rate of speed had allowed more time to overcome it or more time for the bark to escape from it. In navigating such a channel allowance must be made for unusual emergencies, and precaution and care must be increased in proportion to the increased risk and difficulties; and in this case I have been unable to bring my mind to any other conclusion than that the tug was in fault in delaying until so late in getting herself and her tow out of the way of the steamer, and that the steamer was also in fault in maintaining her full speed up the channel in the face of such obvious obstructions. The bark appears to have governed her movements in strict conformity to those of the tug, and not to have been in fault.

It therefore results that the whole damage is to be equally borne by the tug and the steamer.

INDEX.

BILLS OF EXCHANGE.

BILLS OF LADING.

BONDS.

BOOKS.

BOTTOMRY BOND.

See ADMIRALTY, 40.

BREWERS.

See INTERNAL REVENUE, 1, 2.

BRIDGES.

1. MISSISSIPPI AND MISSOURI RIVERS—SECTION 2, ACT OF CONGRESS OF JULY 25, 1866—PASSAGE WAY BETWEEN PIERS—WIDTH OF.—Section 2 of the act of congress of July 25, 1866, authorizing the construction of bridges across the Mississippi river and across the Missouri river at Kansas City, construed as requiring that the passage way for vessels between the piers of any draw-bridge built under said act shall be 160 feet wide in the clear, measured by a line running directly across the channel, and at right angles with the piers of the bridge. Where a bridge is built diagonally across the river, a measurement along the line of the bridge is not the proper measurement. *Missouri River Packet Co.* v. *H. & St. J. R. Co.*, 255.

2. SAME—GRANT, WHEN NO PROTECTION.—The fact that a bridge has been constructed under said act of congress does not render it a legal structure, except in so far as it conforms to the terms and limitations of the act. If the powers granted by the act were exceeded, or were exercised in a manner different from that provided in the grant of authority, the grant will be no protection. *Id.*

3. BRIDGE CONSTRUCTED WITH TOO NARROW A PASSAGE WAY—PASSING VESSEL—LIABILITY OF OWNER.—Although the width between the piers of such a bridge may be less than the act of congress requires, yet this will not render the owner of the bridge liable for damages to a passing vessel unless the unlawful structure caused or contributed to the injury. *Id.*

4. SAME—SUNKEN PONTOON CONTRIBUTING TO VESSEL'S INJURY.—Where it was alleged that a sunken pontoon, placed and kept in the channel by the defendant, had caused a change in the current of the river which had thrown plaintiff's vessel over against a pier of defendant's bridge, and that the accident was the result of two causes combined, to-wit, the presence in the channel of the pontoons and of the bridge pier, both unlawful structures, *held*, that these facts being established plaintiff could recover. *Id.*

5. NAVIGABLE STREAMS—WRECK—CHANGE OF CURRENT—LIABILITY OF ONE CAUSING.—Those navigating the river are under no obligation to remove wrecks which may be made in the proper and ordinary course of navigation, but he who, for his own benefit, uses any part of a navigable river, is liable in damages to any party injured, if such use causes a change in the ordinary course of the channel. *Id.*

6. SAME—DUTY TO REMOVE.—If defendant had a right to keep the pontoon in the river in connection with the bridge, and it was sunk by unavoidable accident, defendant was entitled to a reasonable time in which to raise and remove it, but was not at liberty to leave it in the channel for an indefinite period. *Id.*

7. COLLISION—CONTRIBUTORY NEGLIGENCE—INSTRUCTION AS TO.—An instruction to the effect that if the plaintiff has proved the facts necessary to make out his case he must recover, "unless unskilfulness or neglect on the part of the plaintiff in handling his boat caused or contributed to the collision," *held*, a sufficient charge on the subject of contributory negligence. *Id.*

CIRCUIT COURTS.

See PATENTS, 24.

CIRCULARS CONCERNING LOTTERIES.

See INDICTMENTS, 3, 4.

CLERKS OF COURT.

See DISTRICT JUDGES, 2; JUDGMENTS, 5; RECOGNIZANCES, 3, 4.

CO-CONSPIRATOR.

See CRIMINAL LAW, 6.

CODICIL.

See WILLS.

COLLATERAL SECURITY.

See NEGOTIABLE INSTRUMENTS, 9.

COLLISIONS.

See ADMIRALTY, 3, 5, 6, 7, 15, 30, 44, 48, 49, 51, 55, 56, 60, 61, 63; BRIDGES, 7, 9.

COMBINATIONS.

See PATENTS, 2, 27, 49, 55.

COMMERCE.

See ADMIRALTY, 19.

COMMISSIONS.

See ATTORNEYS AT LAW, 1.

COMMON CARRIERS.

1. LIMITATION OF LIABILITY—REFUSAL TO DISCLOSE VALUE OF GOODS.—A statute of the state of Illinois, which prohibits a common carrier from limiting its common-law liability, does not prevent such carrier from limiting its liability where the shipper refused to inform the carrier of the value of the goods at the time they were shipped. *Mather* v. *American Express Co.*, 49.

2. RAILROAD — EXPRESS BUSINESS — Railroad companies, as common carriers, are not authorized to carry on an express business. *Dinsmore* v. *Louisville, Cincinnati & Lexington Railway Co.*, 465.

3. SAME — RIGHTS OF EXPRESS COMPANIES. — As such carriers they are bound to provide for those doing an express business over their road reasonable and necessary facilities for such business, and to all upon equal terms. They cannot insist upon the exclusive right to do such business over their lines of road, nor grant such right to one express company to the exclusion of others, but are bound to carry for every one offering to do the same sort of business upon the same terms. *Id.*

4. SAME—EXPRESS COMPANY.—Where an express company had, under special contract, been for many years engaged in that business over the system of roads controlled by defendants, and had built up a large and valuable business, and established valuable connections, all of which would be much depreciated if defendant should be allowed to refuse to further allow it to carry on such business over its line of road, *held*, that for that reason an injunction restraining such action might be granted. *Id.*

See ADMIRALTY, 11, 28.

COMPLAINT.

See COPYRIGHT, 3.

COMPOSITION.

See BANKRUPTCY, 29, 33.

COMPROMISE.

See SPECIFIC PERFORMANCE, 1, 2.

CONSIDERATION.

See DEEDS, 1; PATENTS, 32.

CONSIGNORS AND CONSIGNEES.

See ADMIRALTY, 32 50.

CONSPIRACY.

See CRIMINAL LAW, 2, 3, 4, 5, 6.

CONSTITUTIONAL LAW

TRAVELING MERCHANTS — LICENSE TAX — SUBD. 2, § 10, ART. 1, AND SUBD. 3, § 8, ART. 1, OF THE CONSTITUTION. — A statute of Nevada provided that "every traveling merchant, agent, drummer, or other person selling, or offering to sell, any goods, wares, or merchandise of any kind, to be delivered at some future time, or carrying samples and selling, or offering to sell, goods, wares, or merchandise of any kind similar to such samples, to be delivered at some future time," should obtain a license, and pay $25 a month for the same. The statute further provided that any person without such license, "so offering any goods, wares, or merchandise for sale, shall be guilty of a misdemeanor, and on conviction shall be fined in any sum not less than $50 nor more than $500." *Held*, (1,) that said statute did not violate subd. 2, § 10, art. 1, of the constitution, prohibiting the states from laying imposts or duties on imports; (2,) that such statute did not violate subd. 3, § 8, art. 1, of the constitution, conferring upon congress power to "regulate commerce among the several states." *In re Rudolph*, 65.

See CHINESE.

CONTEMPT.

See PATENTS, 39.

CONTRACTS.

1. DEMURRAGE—CONSTRUCTION. *Kimball* v. *The Tudor Company*, 51.

2. CAPACITY TO CONTRACT—LAW TO GOVERN.—Where a contract is made in one state, to be performed in another, the capacity of the parties to make the contract is, as a general rule, to be determined by the law of the place where it is entered into. *Campbell* v. *Crampton*, 447. 441

3. AGREEMENT TO MARRY—NEPHEW AND AUNT.—Where a contract for marriage between a nephew and aunt was entered into in Alabama, where such marriages were declared incestuous, upon the trial of an action for a breach of such contract in New York the court charged that, if the parties could lawfully marry in New York, and by the terms of their promises they were to be fulfilled by a marriage in New York, the agreement was valid, and damages for the breach of such contract recoverable. *Held*, erroneous. *Id.*

4. CONDITIONAL CONTRACT—ACTION TO ENFORCE—BURDEN OF PROOF. In an action to enforce a special and conditional contract, the burden is on the plaintiff of showing an actual compliance with the conditions imposed. *First Nat. Bk. of Lacon* v. *Bensley*, 609.

5. FRAUD—RATIFICATION.—Inexcusable delay will operate as a ratification of a fraudulent contract. *Cummins* v. *Lods*, 661.

CONVEYANCES.

COPYRIGHT

CORPORATIONS.

CRIMINAL LAW.

See INDIANS; INDICTMENTS.

CURATIVE ACT.

See DEEDS, 2.

DAMAGES.

See ADMIRALTY, 10, 15, 16, 26; BRIDGES, 3, 4, 5, 9; COVENANTS, 5; PATENTS, 45, 50, 51.

DATE OF INVENTION.

See PATENTS, 58, 67.

DEBTOR AND CREDITOR.

See ASSIGNMENTS, 1, 2; BANKRUPTCY, 4, 5, 6, 8, 10; HUSBAND AND WIFE, 4, 5, 6, 7, 8; WARE-HOUSE RECEIPTS, 2.

DEBTS.

See BANKRUPTCY, 27: MORTGAGES, 8.

EQUITABLE TITLE.

EQUITY PLEADING.

EQUITY PRACTICE.

IMPORTS.

IMPROVEMENTS.

INDIANS.

INDICTMENTS.

INSURANCE, (LIFE.)

See USURY, 2, 3.

INSURANCE COMPANY.

See JURISDICTION, 1.

INTEREST.

See BANKRUPTCY, 27; MORTGAGES, 1; PATENTS, 3, 51, 53.

INTERNAL REVENUE.

See FEES.

INTERROGATORIES.

See EQUITY PLEADING, 2, 5.

INVENTION.

See PATENTS, 3, 58, 67.

JUDGMENTS.

1. LIEN—DORMANT EXECUTION.—Under the laws of New York the lien of a judgment, except as against *bona fide* purchasers for value and subsequent judgment creditors, attaches to the goods and chattels of the debtor from the time the execution is issued to the sheriff to be executed, though no levy is made, and such lien does not become dormant merely by virtue of instructions to the sheriff to delay his levy. *Crane* v. *Penny*, 187.

2. DEFAULT—MOTION TO VACATE—SUBMISSION TO JURISDICTION.—An application by a defendant in an action, against whom a judgment by default has been entered, for a vacation of the same, and for other relief, and procuring a stay of proceedings until the hearing and determination of such motion, is such a submission to the jurisdiction of the court as will cure all defects of jurisdiction to the person of such defendant. *Id.*

3. ENFORCEMENT AND SATISFACTION.—In the absence of statutory regulation no one but a party, or his attorney or agent, can satisfy a judgment, or direct its enforcement by execution. *Willis* v. *Chandler*, 273.

4. SHERIFF—CONTROL OVER JUDGMENT.—A sheriff has no interest in or control over a judgment, which may include his fees, that will authorize him to enforce it. If same is settled or discharged he must look to the plaintiff or his attorney for his fees. *Id.*

5. CLERK—ISSUING EXECUTION.—A clerk has no authority, in the absence of statutory regulation, to issue execution without the direction of the plaintiff or his attorney. *Id.*

6. SATISFACTION—ATTORNEY.—An attorney who has given a release and satisfaction of a judgment cannot, without the consent of the other, cancel the same, and authorize an execution to issue. *Id.*

7. EVIDENCE.—Judgments and decrees are conclusive evidence of facts only as between parties and privies. *Day* v. *Combination Rubber Co.*, 570.

See BANKRUPTCY, 17, 18, 27.

JUDICIAL SALES.

See SALES, 1, 2, 3.

JURISDICTION.

1 FOREIGN INSURANCE COMPANY.—A foreign insurance company is subject to the jurisdiction of a circuit court in a district other than that of which it is an inhabitant, when, in accordance with the statutory provision of the state in which such district is situated, it has duly authorized an agent of the company in that state to acknowledge service of process in such state for and on behalf of the company, and has consented that the service of process upon such agent shall be taken and held to be as valid as if served upon the company according to the laws of that or any other state or country. *Runkle* v. *The Lamar Insurance Co.*, 9.

LEASE.

LEVY.

LEX LOCI CONTRACTUS.

LIBEL.

LIBELLANT.

LICENSE.

LIENS.

LIGHTED TORCH.

LIQUOR.

LOCAL USAGES.

LOOKOUT.

LOTTERIES.

MANSLAUGHTER.

MARRIAGE.

MARRIED WOMEN.

See REMOVAL OF CAUSES, 2.

MURDER.

See CRIMINAL LAW, 1; INDICTMENTS, 6.

NAVIGABLE STREAMS.

See BRIDGES, 5, 6, 8.

NEGLIGENCE.

See ADMIRALTY, 4, 10, 11, 12, 13, 31, 34, 45, 46, 47, 60, 63; BRIDGES, 3, 4, 5, 6, 7, 9; DAMAGES.

NEGOTIABLE INSTRUMENTS.

1. EARLY BLANK INDORSEMENT—SUBSEQUENT INDORSERS.—The holder of a negotiable instrument who makes an early blank indorsement, payable to himself, does not thereby discharge all subsequent indorsers. *Bank of British North America* v. *Ellis*, 44.

2. ACCOMMODATION INDORSERS—ATTORNEY'S FEE.—Accommodation indorsers are liable for the payment of a stipulated attorney's fee, in case suit should be instituted for the payment of the note. *Id.*

3. BILLS OF EXCHANGE—ACCEPTANCE.—Any act clearly indicating an intention to comply with the request of the drawer of a bill of exchange, as paying part in cash, and issuing certificate of deposit for the balance, will constitute an acceptance. *Andressen* v. *First Nat. Bk. Northfield*, 122.

4. SAME—SAME—REVOCATION OF ACCEPTANCE.—After a bill of exchange has been received, and the proceeds credited to the payee, who presents it, the drawee cannot thereafter, by arrangement with the payee, revoke such acceptance and hold the drawer. *Id.*

5. SAME—REPAYMENT BY DRAWER OF ACCEPTED DRAFT.—Repayment of a draft in this case by the drawer, having been made in ignorance of facts showing an acceptance by the drawee, it cannot be regarded as voluntary, and the amount thereof may be recovered from such drawee. *Id.*

6. DRAFT—AGREEMENT TO ACCEPT—CONDITIONS—MUST BE COMPLIED WITH.—Where an agreement was to pay the draft of J. B. & Bro., with bills of lading attached, *held*, that to make the promissor liable thereon there must be a literal compliance with the conditions, and the presentation of a draft drawn by A. D. B. & Bro., or one unaccompanied by bills of lading, was not a sufficient compliance, although the names J. B. & Bro. and A. D. B. & Bro. were used by the same firm interchangeably, and the property represented by the bills of lading to be attached came into the possession of the promissor. *First National Bank of Lacon* v. *Bensley*, 609.

7. SAME—AGREEMENT TO ACCEPT—WHEN MUST BE PRESENTED.—Where no time is specified within which a draft agreed to be accepted shall be presented, it must be presented within a reasonable time. *Id.*

8. SAME—UNREASONABLE DELAY IN PRESENTATION.—Delay of more than a year in the proper presentation of a draft agreed to be accepted, is unreasonable. *Id.*

9. NEGOTIABLE NOTE—TRANSFER OF AS COLLATERAL SECURITY FOR PRE-EXISTING DEBT—RIGHTS OF HOLDER—FRAUD.—The holder of a negotiable note, who has taken it as a security for a pre-existing debt, is a holder for value, and is protected against any equities subsisting between the original parties. *Wood* v. *Seitzinger*, 843.

PATENTABLE DEVICE.

See PATENTS, 7, 17, 42, 43.

PATENTEES.

See PATENTS, 10.

PATENT OFFICE.

See PATENTS, 25.

PERJURY.

See CLERKS OF COURT, 3.

PETITION

See MUNICIPAL BONDS, 3, 4; REMOVAL OF CAUSES, 3, 6, 9

PILOT.

See ADMIRALTY, 46, 47, 62.

PLEADING.

See ADMIRALTY, 55; CLERKS OF COURT, 2; COPYRIGHT, 3; COVENANTS, 3; INSURANCE, (Fire,) 14; PATENTS, 13, 15, 16, 29, 32, 60, 69.

RAILROAD.

See COMMON CARRIERS, 2, 3, 4; CONTRACTS, 6; GARNISHMENT; MUNICIPAL BONDS, 1, 2; STOCKHOLDERS.

RATE OF SPEED.

See ADMIRALTY, 61, 63.

RATIFICATION.

See CONTRACTS, 5, 7; LEASE, 2.

RECEIVERS.

ORDER OF COURT—ACCOUNT. *Farmers' Loan & Trust Co.* v. *Central Railroad of Iowa*, 751.

See GARNISHMENT.

RECOGNIZANCES.

1. SCIRE FACIAS—DEFENCE.—Where a recognizance was given for the appearance of a defendant to answer a "charge against him for passing counterfeit money," *held*, that the fact that the indictment was defective could not be asserted as a defence to a *scire facias*, upon such recognizance, after forfeiture. *The United States* v. *Evans*, 147.

2. SUFFICIENCY OF BOND.—In Tennessee every bond or recognizance that would have been good at common law will be regarded as a sufficient statutory bond in any proceeding where it may be questioned. *Id.*

3. EXECUTION OF BOND—PRESUMPTION AS TO ACTION OF CLERK.—A bail-bond present in the record was executed before a clerk, who wrote at the foot of it "signed, sealed and acknowledged, and approved by," signing his name thereto. It did not appear from the bond or otherwise that the defendant was brought before the clerk for examination and bail as a magistrate. The court was in session that day. *Held*, that it would be presumed to have been taken by the clerk under the immediate direction of the court. *Id.*

4. POWER TO TAKE—CLERKS.—Courts have inherent power to take a recognizance. Clerks have such power only by virtue of statute. *Id.*

See POWER.

REFEREE.

See JURISDICTION, 4.

REGISTER.

See BANKRUPTCY, 32.

REHEARING.

See EQUITY PRACTICE, 2.

RELIQUIDATION.

See IMPORTS, 2.

REMOVAL OF CAUSES.

RENT.

RESIDENCE.

See REMOVAL OF CAUSES, 10

ROYALTIES.

See PATENTS, 50, 51.

SALES.

See BANKRUPTCY, 21, 30; EXECUTION; HUSBAND AND WIFE, 3; MORTGAGORS AND MORTGAGEES, 1; PATENTS, 3.

SALVAGE.

See ADMIRALTY, 17, 21, 22, 53, 54.

SAVINGS BANK.

See REMOVAL OF CAUSES, 1.

SCHEDULES.

See BANKRUPTCY, 25.

SCIRE FACIAS.

See RECOGNIZANCES, 1.

SEAMEN.

See ADMIRALTY, 1.

SHERIFF.

See EXECUTION; JUDGMENTS, 4.

SHIP KEEPER.

See ADMIRALTY, 38.

SPECIFICATION.

See PATENTS, 64.

SPECIFIC PERFORMANCE.

1. COMPROMISE—AGREEMENT.—It would seem that where an agreement is made for the compromise of litigation, involving a great number of details, some not within the subject-matter of the suit, specific performance thereof cannot be compelled upon an interlocutory application. *Sutherland* v. *Straw*, 277.

2. PARTIES—ASSIGNMENT—RIGHTS OF ASSIGNEE—DISMISSAL.—Complainant in this action having, before answer, transferred all his rights and interest therein to defendant Straw, and constituted him his attorney, irrevocable, to prosecute, compromise, etc., such action, *held*, that the defendant Straw is entitled, if he so desired, to a decree dismissing the bill, without costs. *Id.*

See VENDOR AND VENDEE, 2.

STATE OFFICERS.

See REMOVAL OF CAUSES, 2.

STATUTES.

See MUNICIPAL BONDS, 1, 2; JURISDICTION, 1, 2, 3.

STATUTES CITED, CONSTRUED, ETC.

REVISED STATUTES.

REVISED STATUTES—Continued.

STATUTES AT LARGE.

STAY.

See BANKRUPTCY, 2.

STEVEDORE.

See ADMIRALTY, 39.

STIPULATION.

See ADMIRALTY, 32.

STOCK.

See BANKRUPTCY, 20; CORPORATIONS, 3, 4.

STOCKHOLDERS.

PREFERRED STOCKHOLDERS—RAILROAD—MORTGAGE.—It is a general rule that the stockholders of a railroad are only to be paid after the claims of other lien holders, and where they come forward and insist upon having a priority of payment over mortgage creditors, a specific lien beyond all doubt should be shown to exist in their favor. *King* v. *Ohio & Mississippi R. Co.*, 36.

SEE BANKRUPTCY, 33; CONTRACTS, 7; LEASE, 2.

STORAGE OF SAILS.

See ADMIRALTY, 23.

STOWAGE.

See ADMIRALTY, 10.

SUMMONS.

See BANKRUPTCY, 32.

SURETYSHIP.

INSURANCE AGENT—APPLICATION OF MONEYS REMITTED—RESTRAINING ENFORCEMENT OF JUDGMENT.—An insurance agent, by requirement of the company for which he was acting, gave a bond for the faithful performance of his duties, and an accounting of moneys received. At the time of giving such bond he was delinquent to said company on account of past transactions. Such agent afterwards made remittances to the company, directing that they be applied upon past transactions. A judgment at law having been recovered against the sureties on the bond, a bill was filed by them to restrain its enforcement, claiming that the remittances made were from current business, after the bond was given, and should be applied upon such account. *Held*, that to entitle complainants to the relief prayed, it must appear that the moneys remitted were in fact from current business, and that the company had knowledge of that fact when it received and applied the money on account of former transactions, as directed, and proof not sufficiently showing this, the bill should be dismissed. *Hecox* v. *Citizens' Ins. Co. of St. Louis*, 535.

TAXATION.

See BANKRUPTCY, 1, 2; MUNICIPAL BONDS, 2.

TAXES.

See COVENANTS, 2; VENDOR AND VENDEE, 2, 3.

TITLE.

See PATENTS, 25, 31.

TOWNSHIP.

See BONDS, 1, 2.

TRAVELING MERCHANT.

See CONSTITUTIONAL LAW.

TREATY.

See CHINESE.

TRUST.

See BANKRUPTCY, 28; HUSBAND AND WIFE, 8; TRUSTEES, 2, 3.

TRUSTEES.

TUGS.

ULTRA VIRES.

UNDERWRITERS.

UNSEAWORTHINESS.

USURY.

VENDOR AND VENDEE.

WILLS.

WITNESS.

WORDS.

WORKMEN.

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