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CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

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UNITED STATES

CIRCUIT AND DISTRICT COURTS

WITH THE

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CASES

ARGUED AND DETERMINED

IN THE

United States Circuit and District Courts.

GOODNOW *v.* GRAYSON, Adm'r, etc.

(*Circuit Court, N. D. Iowa, C. D.* January Term, 1883.)

1. REMOVAL OF CAUSE—PREJUDICE AND LOCAL-INFLUENCE ACT.
   Under the prejudice and local-influence act a party, to have the right of removal, must be a non-resident when the petition for removal is filed. So, where a party, having a right to remove a suit into the federal court from a state court, fails to exercise that right, and subsequently removes into and becomes a citizen of the state where suit is brought, the right of removal is defeated and terminated by the change of citizenship.
2. SAME—ADMINISTRATOR SUBSTITUTED AS PARTY.
   Where a non-resident, having a right to the removal of suit into the federal court, fails to exercise that right, and removes into the state where suit is brought and becomes a citizen thereof and there dies, his executor or administrator substituted for him in the suit cannot remove it into the state court.

Motion to Remand Cause to State Court.

In August, 1876, this suit was brought in the circuit court of Webster county, Iowa, by the present complainant, then and now a citizen of New York, against Grace H. Litchfield, a citizen of New York and Webster county, Iowa, as co-defendant, to recover the amount of certain taxes paid by the Iowa Homestead Company, an Iowa corporation, upon realty situated in Iowa, the title to which had been in dispute between the homestead company and Mrs. Litchfield, but which was finally adjudged to be the property of the latter.

The homestead company claimed that it was entitled to recover back the sums by it paid to discharge the taxes on the realty, as such payment inured to the benefit of Mrs. Litchfield, and it assigned this claim and all rights under it to E. R. Goodnow, who thereupon instituted this proceeding in equity, praying, among other things, that the amount advanced in payment of taxes should be declared an equitable lien on the realty. January 19, 1877, Grace H. Litchfield filed an answer to the merits of the bill, and on April 8, 1879, filed a petition for a removal of the cause to the United States court. No action was taken thereon in the state court, nor did Mrs. Litchfield file a transcript of the record in the federal court. June 29, 1880, Mrs. Litchfield filed an amendment to her answer in the state court, and December 14, 1880, procured an order requiring complainant to give security for costs in the state court. In October, 1881, Mrs. Litchfield died, and R. O. Grayson, a citizen of Iowa, was appointed her administrator, and on September 14, 1882, he was substituted as defendant in place of Mrs. Litchfield, and on October 2, 1882, he filed a petition for removal of the cause to this court, under clause 3 of section 639 of the Revised Statutes, averring therein that the assignment of the cause of action by the homestead company to complainant was colorable only, and that the company remained the real party in interest. The state court refused to grant the order of removal, and Grayson procured a transcript of the record, and filed the same in this court, whereupon complainant moved to remand the cause.

M. D. O'Connell and *Geo. Crane*, for complainant.

C. H. Gatch, for Grayson, administrator.

SHIRAS, J. 1. The record shows that Grace H. Litchfield never invoked the action of the state court upon the petition for removal filed during her life-time. She simply filed it, and then ignored its existence. She took no steps to bring a transcript of the record into the United States court. She appeared in the state court and asked and obtained leave to amend the pleadings, and also demanded security for costs in that court. In other words, up to the time of her death, which was over two years after the date of the filing of the petition for removal, she fully recognized the jurisdiction of the state court, without protest, and without invoking the action of the state court upon the petition for removal. The facts do not present a case wherein a party having properly asked a removal, which is refused by the state court, then under protest continues to defend his rights in the state tribunal.

If Mrs. Litchfield had invoked the action of the state court, and upon its refusal to transfer the cause she had then endeavored to protect her rights in the state court, she would not have forfeited her right of removal. She would then be within the protection of the rule recognized in *Railroad Co.* v. *Koontz*, 103 U. S. 5. Under the facts, however, of this case, it must be held that Mrs. Litchfield never perfected the removal of the cause, but, on the contrary, that she abandoned her petition for removal, and fully recognized and submitted to the jurisdiction of the state court. This is further evidenced by the fact that the administrator did not rely upon the petition for removal filed by Mrs. Litchfield, but after his appointment he filed a second and independent petition. Under these circumstances it is clear that the cause has not been removed to this court by virtue of the petition filed during the life-time of Mrs. Litchfield.

2. Has this court obtained jurisdiction through the action of the administrator, who has filed a petition asking a removal under clause 3 of section 639 of the Revised Statutes? The theory upon which this petition proceeds is that the controversy, when the suit was commenced, was in fact between the Iowa Homestead Company, a corporation organized under the laws of Iowa, and Grace H. Litchfield, a citizen of New York, the transfer and assignment of the cause of action to E. K. Goodnow being colorable only; and that, as the real parties in interest were citizens of different states, the cause was removable under clause 3 of section 639 of the Revised Statutes, at any time before the final trial, and that the death of Mrs. Litchfield and the substitution of her administrator did not defeat the right of removal, even if the administrator is a citizen of Iowa.

As presented by counsel, the question for determination, therefore, resolves itself into the following:

> If A., a citizen of Iowa, sues B., a citizen of New York, in a state court in Iowa, for an amount in excess of $500, and B. joins issue therein, and the cause is continued over several terms, no application for a removal of the cause to the federal court having been made, and before trial B. dies, and thereupon C., a citizen of Iowa, is appointed administrator of B.'s estate, and is substituted as defendant in the cause, can C., as administrator, remove the cause into the federal court, under clause 3 of section 639?

It is settled that under the act of 1789, when the right of removal is dependent upon the citizenship of the parties, such diverse citizenship must exist at the time the suit was commenced. *Ins. Co.* v. *Pechner*, 95 U. S. 183. The same construction is applied when the

removal is sought under the act of 1875. *Kaeiser* v. *Ill. Cent. R. R.* 2 McCrary, 187; [S. C. 6 FED. REP. 1.]

It is further settled that when a party to a suit pending in the United States court dies, and his administrator or executor is substituted for the decedent, the suit does not abate, but the cause continues; and that the jurisdiction of the federal court, having attached during the life-time of the decedent, is not terminated or affected by the substitution of an administrator or executor who is a citizen of the state whereof the other litigants are citizens. *Clark* v. *Mathewson*, 12 Pet. 164; *Morgan* v. *Morgan*, 2 Wheat. 290; *Clark* v. *Dunn*, 8 Pet. 1. When, however, suits are instituted by or against administrators or executors in the first instance, then jurisdiction and the right of removal is dependent upon the citizenship of the person acting as administrator or executor, and not upon the citizenship of the decedent, creditors, legatees, or other beneficiaries. *Riel* v. *Houston*, 13 Wall. 66; *Amory* v. *Amory*, 95 U. S. 186. None of these authorities, however, exactly touch the question now before the court. Assuming that Grace H. Litchfield had the *right* of removal, she did not exercise it during her life-time. The jurisdiction of the United States court, therefore, did not attach to the case during her life-time. Did the right of removal possessed by her, at the instant of her death pass to her administrator? If the right of removal existed when the suit was commenced, could such right be terminated by a change of residence on part of Mrs. Litchfield or on part of her administrator?

In the case of *Relfe* v. *Rundle*, 103 U. S. 222, a case was removed from the state court by a trustee of an insolvent insurance company, who was substituted in the cause as the representative of an insolvent and virtually extinct corporation, and it would seem as though the court placed the right of removal upon the citizenship of the trustee, who was substituted in the cause after its commencement; but it is not made clear beyond question that such was the view of the supreme court. If it be true that the supreme court did place the right of removal upon the fact that the trustee was a citizen of Missouri, then it would seem to follow that if he had been a citizen of Louisiana he could not have removed the cause, even though the corporation which he represented had been a citizen of Missouri, and hence could have removed the cause. This would, in principle, be decisive of the question now before the court, but the facts of that case show that the insolvent corporation was a citizen of Missouri,

and in the opinion this fact is stated as though it might have weight upon the question, and hence it is not clear that the supreme court rested the right of removal upon the sole fact of the citizenship of the trustee.

On principle, the question, in my judgment, resolves itself into the proposition whether Mrs. Litchfield could, after the cause had been commenced, have removed to and become a citizen of Iowa, and still retained the right of removal under the local-prejudice act. That act gave the right of removal to the party who was a non-resident of the state wherein the suit was pending, and seems to proceed upon the theory that, by reason of such non-residency, a prejudice or local influence may exist against the non-resident, which will prevent the non-resident from obtaining justice in the local court. If, then, a non-resident, after being sued in the state court, before trial removes to and becomes a citizen of the state wherein the litigation is pending, has not the fundamental reason, upon which removals are permitted under this act, ceased to exist, and does it not follow that the right of removal has ceased to exist? In my judgment, the party asking a removal under the act of 1867 must be a non-resident when the petition for removal is filed; and hence, if Mrs. Litchfield during her life-time had removed to Iowa, such change of citizenship would have defeated or terminated the right of removal. If the jurisdiction of the United States court had attached, and then she had removed to Iowa, such change of citizenship would not have affected the jurisdiction that had already attached.

If then, Mrs. Litchfield, by removing to Iowa, would have terminated the right of removal, should not the same result follow if the party who is substituted for her, and succeeds to her rights, is a citizen of Iowa? Viewing the question in the light of the position taken by counsel for the administrator,—*i. e.*, that the administrator succeeds to, and stands exactly in the place of, the decedent,—it still seems to me that when the *administrator* asks to remove the cause, the court must consider the question in the light of the facts as they now exist, and that in this view, as already stated, it must be held that the *party* to the suit had removed from New York to Iowa, and that it makes no difference whether such removal took place during the life-time of Mrs. Litchfield, or after her death, by substituting in her place a citizen of Iowa. The fact in either case would be the same, to-wit, that the application for removal is made by one who is a citizen of Iowa, and, being such, a removal cannot be had at his instance under the act of 1867, as the right, under that act, is re-

stricted to non-residents. If, however, the question is to be determined by the citizenship of the parties to the record at the time the administrator became a party to the record, which position is sustained by our view of the ruling in *Relfe* v. *Rundle, supra,* and also by the case of *Burdick* v. *Peterson,* 2 McCrary, 135, [S. C. 6 FED. REP. 480,] the same result follows, as the administrator was then a citizen of Iowa, and hence could not remove the cause under the act of 1867. Under either view, Grayson did not possess the right of removal under the act of 1867 at any time, and hence the cause could not be removed to this court under that act. The motion to remand must therefore be sustained.

TOMPKINS *v.* LITTLE ROCK & FT. S. RY. and others.

(*Circuit Court, E. D. Arkansas.* October Term, 1882.)

1. STATE LOAN—IN AID OF RAILROAD.

   The act of the legislature of Arkansas, providing for a loan of the bonds of the state to railroad companies, construed, and *held* (1) to create a statutory mortgage on the roads, and their income and revenues, to secure the payment of the state bonds by the companies accepting the loan; (2) that such lien took effect from the date of the award of the loan, by the board of railroad commissioners, to the company applying for the same; (3) that the duty of the governor to issue the bonds, after the award of the loan, was ministerial; (4) that all persons were bound to take notice of the lien reserved by the act, and when it accrued; (5) that the lien reserved to secure the payment of the bonds is primarily a security for those holding the bonds; (6) that as between the state and the company receiving the bonds, the company was the principal debtor and bound to pay the bonds, or furnish the state means for that purpose; and if the bonds are void as obligations against the state, the company which received and negotiated them as genuine is bound to pay them to *bona fide* holders, and the latter may enforce the lien reserved by the act to secure this result.

2. DEBTOR AND CREDITOR—LIEN BY CONTRACT—ENFORCEMENT.

   Where a creditor acquires the right by contract to seize and sell the property of his debtor, or sequester its income and revenues to pay the latter's debt, such contract necessarily imports and creates a lien on the property, which may be enforced by any lawful holder of the debt.

3. "INCOME AND REVENUES" OF A RAILROAD COMPANY.

   "Income and revenues" of a railroad company are all the income and revenues of the company, and necessarily embrace the "earnings" of its road.

4. MORTGAGES FOR FUTURE ADVANCES.

   It is a well-settled rule that where the mortgagee has the option to make the advances or not, each advance is as upon a new mortgage; but where the mortgagee is bound to make the advances, the lien relates back to the date of the mortgage, and is superior to any subsequent lien or conveyance.

5. NEGOTIABLE PAPER.

The payee of negotiable paper who transfers it for value thereby guaranties the genuineness of the paper, and the truth of every recital on its face material to its validity and value.

In Equity.

On the twenty-first of July, 1868, the general assembly of the state of Arkansas passed an act to aid in the construction of railroads by a loan of the state's credit.

The provisions of the act upon which the material questions in the case arise are as follows:

"Section 1. For the purpose of securing such lines of railroad in this state as the interests of the people may from time to time require, the faith and credit of the state of Arkansas are hereby irrevocably pledged, and the proper authorities of the state will and shall issue to each railroad company or corporation, which shall become entitled thereto, the bonds of this state, in the sum of $1,000 each, payable in 30 years from the date thereof, with coupons thereto attached for the payment of interest on the same in the city of New York, semi-annually, at 7 per cent. per annum, in the sum of $15,000 in bonds for each mile of railroad which has not received a railroad land grant from the United States, and $10,000 in bonds for each mile of railroad which has received a land grant from the United States, on account of which such bonds shall be due and issuable as provided."

"Sec. 2. The board of railroad commissioners are hereby authorized and required to receive the application for the loan of state credit herein provided for, and to designate the roads entitled to the same."

"Sec. 7. The legislature shall, from time to time, impose upon each railroad company, to which bonds shall have been issued, a tax equal to the amount of the annual interest upon such bonds then outstanding and unpaid, which tax may be paid in money or in the past-due coupons of the state at par, and, after the expiration of five years from the completion of said road, the legislature shall impose an additional special tax of $2\frac{1}{2}$ per cent. per annum upon the whole amount of state aid granted to such company, payable in money or in the bonds and coupons of the state at par; and, if in money, the same shall be invested by the treasurer of the state in the bonds of the state, at their current market value. The taxation in this section provided to continue until the amount of bonds issued to such company, with the interest thereon, shall have been paid by said company as herein specified, in which case the said road shall be entitled to a discharge from all claims or liens on the part of the state: provided, that nothing herein contained shall be so construed as to deprive any company, securing the loan of the bonds of the state herein provided for, from paying the whole amount due from such company to the state, at any time, in the bonds of the state loaned in aid of railroads, or the coupons thereon, or in money.

"Sec. 8. In case any company shall fail to pay the taxes imposed by the preceding section at the time the same become due, and for 60 days thereafter, it shall be the duty of the treasurer of the state, by writ of sequestration, to

seize and take possession of the income and revenues of said company until the amount of said defaults shall be fully paid up and satisfied, with costs of sequestration, after which said treasurer shall release the further revenues of said company to its proper officers."

"Sec. 12. At the next general election to be holden under the provisions of section 3 of article 15 of the constitution of this state, the proper officers having charge of such election shall upon a poll, as in other cases, take and receive the ballots of the electors qualified to vote for officers at such election for and against this act, in compliance with section 6 of article 10 of the constitution,—such ballot to contain the words, 'For Railroads,' or 'Against Railroads;' and if it appear that a majority so voting have voted 'For Railroads,' this act shall immediately become operative and have full force, and all laws heretofore passed for loaning the credit of this state in aid of railroads shall cease and be void; but if a majority shall be found to have voted 'Against Railroads,' this act shall be void and of no effect."

The election mentioned in section 12 was held on the third of November, 1868, and a large majority of the votes cast were "for railroads." The general assembly which passed this act adjourned on the twenty-third of July, 1868, to meet on the seventeenth of November, 1868, and it did meet at that time, and did not adjourn *sine die* until the tenth day of April, 1869.

Another act on the same subject was passed, and went into effect on the tenth day of April, 1869, the material portions of which are set out in the opinion. State aid was awarded to the defendant, the Little Rock & Ft. Smith Railroad Company, to the amount of $1,500,000, and bonds to the amount of $1,000,000 issued. After the bonds had been issued to and negotiated by the railroad company, the supreme court of the state, in 1877, decided they were unconstitutional and void, upon the ground that the act of July 21, 1868, was not in force when the election was held, in pursuance of the twelfth section of the act, to take the sense of the people at the ballot-box on the question of loaning the credit of the state, as required by section 6 of article 10 of the constitution. The reasoning by which this result was reached was as follows: The constitution provided that "no public act shall take effect or be in force until 90 days from the expiration of the session at which the same is passed, unless it is otherwise provided in the act;" and the court held that the adjournment of the general assembly on the twenty-third of July, to meet the seventeenth of November next, was not an "expiration of the session" within the meaning of this clause of the constitution, and that the provison in the act itself for holding an election under it did not sufficiently evince the legislative intent that it should be in force and effect for that purpose, and that an act could only be made to take effect before the

lapse of 90 days from the expiration of the session "by an express declaration in the act itself," which this act did not contain.

The defendant, the Little Rock & Fort Smith Rail*way*, derives title to the railroad through the foreclosure of a mortgage executed by the rail*road* company on the twenty-second of December, 1869.

The award of state aid was made to the railroad company on the twenty-eighth of April, 1869, and the first issue of bonds thereunder was on the twenty-fifth of March, 1870, and the last on the twenty-third of February, 1873.

The plaintiff, a holder of state aid bonds issued to the railroad company, filed his bill, alleging that the acts of the legislature under which the bonds were issued, reserved and created a statutory mortgage on the road, and an equitable lien on its income and revenues, to secure the payment of the state bonds, issued to and negotiated by the company, and prayed for the enforcement of such lien in his favor. To this bill the rail*way* company demurred. The following are the only grounds of demurrer much relied upon or necessary to be noticed:

(1) That the act of 1868 was not in force when the election was held under it, and that the consent of the people to the loan not having been given at an election held in pursuance of law, the act of 1868 and the bonds issued thereunder are unconstitutional and void. (2) That no lien in favor of the state or of any holder of the bonds is created or reserved by the act in question. (3) That the lien created by the mortgage deed under which the defendant, the rail*way* company, claims title, is superior and prior to the lien, if any, reserved and created in favor of the state or the holders of the state bonds under the act of 1868.

John McClure and *John R. Dos Passos*, for plaintiff.

C. W. Huntington, for defendant, Little Rock & Ft. Smith Railway.

CALDWELL, J. We are confronted at the threshold of this case with the question, whether the acts of the legislature, under which the bonds were issued to the railroad company, created a statutory mortgage or lien upon the railroad, or an equitable lien or charge on its earnings and income, to secure the payment of the principal and interest of the state bonds.

Before discussing the provisions of the act relating to this question, it will be well to have an accurate understanding of the relation the state and company sustained to each other in the matter of the bonds. It was contemplated that the company would sell the bonds to raise money to build its road. They were loaned by the state to the company for that purpose. They were accommodation paper,

and, as between the state and the company, the company was the principal debtor and the state only a surety.

The company was bound to save the state harmless by paying the interest on the state bonds as it fell due, and the principal of the bonds at maturity, or provide the state with funds for that purpose. It was not necessary that this obligation of the company should be expressed; the law would imply it from the transaction itself. And if the loan was to constitute a debt at large against the company, without lien or security, there was no occasion for the act to have said more than that the bonds were loaned to the company for its accommodation. From such a contract the law would imply an obligation on the company to provide funds to pay the bonds. If more was said, it was probably said for a purpose, and with a view to secure performance of this duty on the part of the company.

In determining the question under consideration, the acts of 1868 and 1869 are to be construed together as one act, and considered in all their parts. By the terms of the act of 1869, the company was to provide the state with funds to pay the semi-annual interest on the state bonds three months before it fell due, and after five years was to pay 2½ per cent. on the principal of the bonds annually, to raise a sinking fund with which the bonds might be anticipated, or liquidated at maturity.

The interest on the bonds fell due on the first day of October and April in each year. The treasurer of state was required to make requisition on the company for funds to pay the October interest on or before the first day of the preceding June, and a requisition to pay the April interest on or before the first day of the preceding December, and the company was to make payment within 30 days from the date of the requisitions, respectively, and if payment was not made within that time sequestration of the income and revenues of the company was to follow. It was not contemplated that the state should at any time pay the interest on these bonds out of her general revenues, and hence the provision giving the state power to sequester the income and revenues of the company to provide funds to pay the interest 30 days in advance of the time it fell due.

The stipulations and provisions of the acts constitute a contract between the state and the company, and that contract, like all contracts, is the law by which the parties to it are bound and are to be governed. Ordinarily, the legislative expression of the sovereign will binds all the citizens, whether they desire to be bound thereby or not. These acts are to be viewed in the double aspect of public statutes

and of a contract. But the contract is in no sense unilateral. The company was not bound to borrow the state bonds; the loan was tendered on certain terms and conditions, and when it applied for and accepted the bonds, it voluntarily assented to be bound by the provisions of the acts, which at once constituted a contract between the company and the state. By the terms of this contract, if the company did not pay the interest on the state bonds as stipulated, it authorized the treasurer of state, "by writ of sequestration, to seize and take possession of the income and revenues of said company until the amount of said default be fully paid up and satisfied, with costs of sequestration, after which said treasurer shall return the further revenues of said company to its officers." Such seizure and sequestration might be repeated from time to time as often as the company made default. The "claims and liens on the part of the state" were not to be discharged until "the bonds issued to such company, and the interest thereon," had been fully paid. Section 7. There is nothing mysterious or doubtful in the meaning of "sequestration" and "writ of sequestration," as used in the acts. The word is here used in its usual sense, and means "to seize or take possession of the property belonging to another, and hold it till the profits have paid the demand for which it was taken." Worcest.

This is precisely what the company agreed the state might do with its property if it failed at any time to furnish the state with the funds to pay the interest and principal of the state bonds according to the terms of its contract. Where a creditor acquires the right by contract to seize and sell the property of his debtor, or sequester the incomes and revenues of the same, to pay the latter's debt, such right, in equity, necessarily imports and creates a lien. Jones, Mortg. § 162.

A creditor at large possesses no such right, and cannot seize and sell the property of his debtor or sequester its income.

The terms "tax" and "taxation" are not used in the act in the sense of a tax that is to be assessed and levied for the support of the state or any of its subdivisions. A tax, in the legal signification of the term, has to be levied on all property "by a uniform rule," not only as to the rate, but in the mode of its assessment. Article 10, § 2, Const.; *Fletcher* v. *Oliver*, 25 Ark. 295.

Clearly, this word as used in the act has no reference to a tax in its strict legal signification. The sense in which a word is used in any given case is to be determined by the context.

Among the meanings of the word "tax" are "a requisition; a demand; a burden," (Worcest.;) and it is here used in the sense of a charge or burden, for which the state may make a requisition in the prescribed mode.

It is obvious, therefore, that what is said by the supreme court in *Haine* v. *Levee Com'rs*, 19 Wall. 655, that "taxes not assessed are not liens, and that the obligation to assess taxes is not a lien on the property on which they ought to be assessed," has no application to the case at bar. The taxes there spoken of are taxes, in the legal acceptation of the word, levied on the property of all the citizens alike to support the government or discharge a common burden.

It is argued that the right to tax or charge the "railroad company," and sequester its "income and revenues," did not give an equitable lien on the road itself for the income and revenues derived therefrom. The company was created to build and operate a railroad. Under its charter it could lawfully conduct no other business. From what source, then, was it expected to derive its income and revenues? Obviously from the operation of its road. How could the state sequester the income and revenues of the company without sequestering the income and revenues derived from the operation of its road; and how could the income revenues derived from that source be sequestered unless the state or her representatives had possession of the road?

In *Ketchum* v. *St. Louis*, 101 U. S. 306, the supreme court quotes approvingly what was said by the chancellor in *Legard* v. *Hodges*: "I take the doctrine to be true that when parties come to an agreement as to the produce of lands, the land itself will be affected by the agreement." Taking all the provisions of these acts into view, the implication is irresistible that it was the intention of the parties to fix a charge or lien on the railroad, or its earnings, or both, for the whole debt. This intention seems too obvious for serious question, and the court will give effect to that intention.

In *Ketchum* v. *St. Louis*, *supra*, the court approved the language used in another English case, where Lord Justice TURNER said:

"There can, I think, be no doubt that it was intended by these agreements to create a charge upon the property of the company; but it is said on the part of the official liquidator that this intention was not well carried into effect. I apprehend, however, that where this court is satisfied that it was intended to create a charge, and that the parties who intended to create it had the power to do so, it will give effect to the intention, notwithstanding any mistake which may have occurred in the attempt to effect it."

But in the case at bar the intention of the parties to create a lien on the road, and its income and revenues, is not left to implication or interpretation. It is expressed in terms. The seventh section of the act declares:

"The taxation in this section provided to continue until the amount of bonds issued to such company, with the interest thereon, shall have been paid by said company as herein specified, in which case the said road shall be entitled to a discharge from all claims or liens on the part of the state."

When "shall the said *road* be entitled to a *discharge* from all claims or *liens* on the part of the state?" The answer given in the very language of the act is, *when* "the amount of bonds issued to such company, with the interest thereon, shall have been paid by said company as herein specified." If the state had no "lien" on the "road," why make provision for discharging it?

Again, the act (section 5, Act 1869) provides that, when the company has paid the debt, the treasurer of the state shall "withdraw said receiver from the management of its affairs."

"Affairs" is a word of large import, and a receiver having the management of the affairs of a railroad company must necessarily have the control and management of its road.

The receiver here spoken of was to be designated by the treasurer of the state, and to give such bond as he required, and was removable at his pleasure, thus in effect making him an agent of the state.

Any discussion of this question would seem to be unnecessary, in view of the decision of the supreme court of the United States in *Ketchum* v. *St. Louis*, 101 U. S. 306; S. C. 4 Dill. 78, under the title of *Ketchum* v. *Pacific R. Co.* In that case the act authorized the county to loan its bonds to the railroad company, and provided that the fund commissioner of the road, an officer theretofore created by law to receive the earnings and income of the road, to secure the state from liability on its bonds before that time loaned to the company, should pay into the county treasury, out of the earnings of the road, a specified sum to pay the interest and principal of the bonds which the county might loan to the company. This act was passed in 1865, and the same year the county agreed with the company to issue the bonds. But this agreement was not carried out and no bonds were issued under it until 1875. For a period of 10 years this agreement lay dormant. In the mean time, in 1868, the office of fund commissioner was abolished. *Ketchum* v. *Pacific R. R.* 4 Dill. 85, 86. This was the condition of affairs when the company executed one or more mortgages on its road. One of these

mortgages was executed six years after the date of the agreement between the county and the company, for the loan of its bonds, and four years before they were issued, and three years after the office of fund commissioner had been abolished, and the company had come into the full enjoyment of its earnings and income. And on this state of facts the court held that the equitable lien of the county for the bonds loaned had relation back to the date of the agreement for the loan, and was superior and paramount to that of the mortgage. This conclusion was reached upon the ground "that all parties claiming under mortgages executed after the acceptance of the act of 1865, are chargeable with notice of the appropriation of the earnings made by that act;" that this appropriation of the earnings constituted an equitable lien; and that "with that lien the property itself was chargeable by whomsoever it, or the funds accruing therefrom, are or may be held." It is futile to say that there is a distinction between a pledge or appropriation of the "earnings of the road," as in the *Ketchum Case*, and the "income and revenues of the company," as in the case at bar. The "income and revenues" of a railroad company are *all* the income and revenues of the company, and, necessarily, embrace the "earnings" of its road.

Undoubtedly it would have been competent for the legislature to have loaned the state bonds to the railroad companies on their corporate credit alone. But such action, on so extended a scale, would have been without precedent in the history of the country, and would practically have amounted to a donation of the bonds to the companies receiving them. It is part of the public history of the state, and the records of this court disclose the fact, that insolvency was the fate of every company which borrowed state bonds, and that not one of them now possesses any corporate property, and some of them, probably, not even a corporate existence. One did not have to be endowed with prescience to foresee such results. The commonest understanding could not fail to see they were possible, and even probable. To suppose the legislature did not apprehend these results, or that, apprehending them, it made no provision to protect the state from loss, in such a contingency, is to impute to that body a want of common understanding, or a flagrant disregard of the plainest dictates of duty. Neither of these imputations is well founded.

Was this lien prior in point of time and superior to the mortgage under which the defendant claims? The award of state aid was made on the twenty-eighth of April, 1869, and the mortgage, under which defendants claim, was executed December 22, 1869, and recorded

February 7, 1870. The first issue of state bonds to the company was on the twenty-fifth day of March, 1870, and the last on the twenty-first day of February, 1873.

The rules applicable to mortgages for future advances furnish the correct solution to this question. One of these rules now firmly established is that where the mortgagee has the option to make the advances or not, each advance is as upon a new mortgage; but where the mortgagee is bound to make the advances, the lien relates back to the date of the mortgage, and is superior to any subsequent lien or conveyance. *Ackerman* v. *Hunsucker*, 21 Hun, (N. Y.) 53; *Brinkmeyer* v. *Browneller*, 55 Ind. 487; S. C. 4 Cent. Law J. 370; *Bissell* v. *Gowdy*, 31 Conn. 47; S. C. 3 Amer. Law Reg. (N. S.) 79; *Nelson* v. *Iowa Eastern R. Co.* 8 Amer. Ry. Rep. 82. 1 Jones, Mortg. §§ 370, 373, 378.

When, then, did the state become bound to issue its bonds to the railroad company? The act is very explicit on this point. After prescribing the mode in which application for state aid shall be made, the fourth section declares that if the "board of railroad commissioners shall consent to approve and grant such application, then and thereafter the said railroad company or corporation shall be entitled to, and have a right to ask for, demand, and receive the bonds of the state hereinbefore declared to be pledged and granted, upon complying with and fulfilling the terms and conditions hereinafter set forth."

And the next section enacts "that any railroad company or corporation which shall have acquired the right to demand and receive state aid, by virtue of the official certificate in the preceding section specified, and claiming an issue of bonds in its behalf, shall first file in the office of secretary of state the following papers." Here follows an enumeration of the papers to be filed, and which only could be filed after the award had been made.

And when these papers are filed the sixth section declares "that thereupon the governor, or the person filling for the time being the executive office, shall issue to the president of said company the bonds of the state of Arkansas, bearing the seal of the state, attested by the secretary of state, as provided in section 1 hereof, upon the completion and preparation for the iron rails of each succeeding 10 miles or more, until the entire line or lines of road of said railroad corporation shall be completed." And, by the terms of the first section of the act, "the faith and credit o. the state of Arkansas is hereby irrevocably pledged, and the proper authorities of the state

will and shall issue to each railroad company or corporation, which shall become entitled thereto, the bonds" of the state.

These provisions of the act are conclusive upon this question. Under them the moment the award was made by the commissioners it amounted to a concluded and irrevocable contract on the part of the state to issue the bonds of the state to the company upon its filing the required vouchers. The award was made on the application of the company, by the board of railroad commissioners, who alone had the power and authority to award the aid. When, as in this case, the application of the company asked an award of aid for the whole line of the company's road, and it was awarded, their powers and duties, so far forth as related to that road, were at an end. The process did not have to be repeated upon the completion of every 10 miles of road. The act did not contemplate the issue of any bonds at the time the aid was awarded; they were to be issued, the first installment, when 10 miles of the road had been constructed, and a like installment upon the completion of each 10 miles thereafter.

What the company was required to do after the award of the aid, and before it received the bonds from the governor, was to file certain papers and vouchers which could only be filed after the award. There was no further contract to be made between the company and the state. And upon filing the requisite vouchers it was made the duty of the governor to issue and deliver to the company the bonds of the state, according to the terms of the award. No discretion was vested in the governor. His power and duty to issue the bonds was found in the award of the commissioners, and not in any new contract. There was no convention between him and the company. He had no power to enter into any contract with the company. After the company had qualified itself to receive the bonds, his duty was merely ministerial, and was enjoined upon him in the most peremptory terms by the sixth section of the act. A ministerial act is well defined to be "one which a person performs in a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the act being done." *Flournoy* v. *City of Jeffersonville*, 17 Ind. 169. The duties devolved upon the governor fall exactly within this definition.

The proceeds of the bonds were to be used in building the roads, and by the third section of the act it was made the duty of the board

of railroad commissioners to inspect the roads and see that the state aid was being applied in the manner required by the act; and if any road was not so applying it the board was required to indicate that fact to the governor, whose duty it then was to suspend the further issue of bonds to such company until the next meeting of the legislature, when the facts were to be reported to that body for its consideration. This provision shows, quite conclusively, that the board had no power to revoke or suspend an award of aid once made, and that the governor not only had no power to refuse, at his discretion, to issue bonds after the award of aid, but that he could not, on his own motion, suspend the issue of bonds for the misuse of the bonds previously issued. The act embodied a policy, carefully matured by the legislature, for developing the resources of the state, by promoting the construction of important lines of railroad by the loan of the state's credit, and it was contemplated that it should receive the sanction of the people of the state at the ballot-box.

It would be singular indeed if, after such a measure had received the sanction of the legislature and the approval of the people at the ballot-box, the act had put it in the power of a single officer of the state to defeat both the legislative and the popular will at his discretion. A careful reading of the act gives evidence of a settled intention on the part of the legislature not to invest the governor with any discretion in the premises.

The amount for which the state might acquire a lien, under the award, was fixed and definite; it was for the sum of $10,000 per mile for 150 miles.

The validity of a mortgage or lien, for advances to be made to the mortgagor, was never doubted merely because it contained no covenant making it obligatory on the mortgagor to apply for and receive the maximum sum agreed to be advanced, by the mortgagee. Whether the company might have declined to file the requisite papers and take the bonds, after applying for and receiving the award, is an immaterial question. The essential question is, whether, by the award of the commisioners, the company had in its power to compel the state to make the loan; or, in other words, whether the company could, without further negotiations with the state, make it the legal duty of the governor to issue the bonds. It not only could do this, but it actually did do it. It does not, therefore, affect the validity of such a lien or mortgage, or in any manner impair its efficacy as against subsequent incumbrances, that the mortgagor is required to show in

some proper mode, before he receives each installment, that he has complied with the conditions of the mortgage that entitles him thereto; as, for instance, that all prior installments have been expended in the mode agreed upon; or, as in the case at bar, that 10 additional miles of railroad have been graded and put in readiness for the iron rails.

Whenever the mortgagee is bound to make the advances upon compliance with those and like conditions on the part of the mortgagor, the mortgage creates a binding contract between the mortgagor and the mortgagee, and a valid lien, as of its date, for all advances which are made in conformity to its provisions; and subsequent mortgagees, and those claiming under them, are bound to regard such a mortgage as a valid lien for the utmost amount that the mortgagor has a right to demand shall be advanced to him under it. If less is advanced it is their good fortune. If the full sum is advanced they cannot complain. They had notice and took the risk.

It was implied, in the application of the company for state aid, that it was qualified and entitled to receive the same, and would produce the requisite vouchers and papers to authorize the governor to issue the bonds, and that it would apply the proceeds of the bonds as required by the act. The moment the award was made, on the application of the company, every requirement of the statute, relating to the issue of the bonds, assumed the shape of a statutory contract, binding alike upon the state and the company, and no third party will be heard to complain that the state and the company complied strictly with their express and implied obligations to each other.

In *Ketchum* v. *St. Louis*, *supra*, the lien was an equitable one, created by a statute, which antedated the creation of the debt 10 years; but when the debt was created by the issue of the bonds, it had relation back to the date of the contract under the statute authorizing their issue, and cut out all intervening liens. So familiar is this principle that it was not even adverted to in the opinion of the court, and it is only by reference to the facts, as given in the opinion, (pages 310, 311,) that we discover that it was applied in that case.

These were public acts, and all persons are bound to take notice of any lien, charge, or security reserved to the state by them. *Memphis & L. R. R. Co.* v. *State*, 37 Ark. 642; *Ketchum* v. *St. Louis*, *supra*.

It is alleged in the bill, and admitted by the demurrer, that the promoters, owners, and officers of the defendant company, at its cre-

ation and organization, were the stock and bond holders of the old company, and that the defendant acquired the property with the full notice, in fact, of the whole transaction between the latter company and the state, and took it, therefore, charged with all the equities and liens in favor of the state or the holders of the state bonds, to which it was subject in the hands of the old company. The award of state aid was made, and the acts of 1868 and 1869 were both in force before the execution of the mortgage under which the defendant claims.

The state issued the bonds and delivered them to the company, in accordance with the statutory contract, to an amount aggregating $1,000,000. These bonds were put upon the market and sold by the company for money, which was used to build its road as contemplated by the act. Afterwards, and in 1877, the supreme court of the state decided that the provisions of the act of 1868, providing for holding an election to take the sense of the people on the question of loaning the credit of the state as therein provided, were not in force when the election was held, and that the consent of the people to such loan not having been "expressed through the ballot-box," as required by section 6, art. 10, of the constitution, at an election held in pursuance of law, the bonds were void and imposed no obligation upon the state. *State* v. *Little Rock, M. R. & T. Ry. Co.* 31 Ark. 701.

Assuming, but not deciding, that the ruling of the supreme court of the state, in the case last cited, is a sound exposition of the law, or that, whether so or not, it is binding upon this court, we will proceed to inquire, in the light of that decision, into the relative rights and obligations of the holders of the state bonds and the railroad companies. The holders of the bonds were not before the court in that case, and the question of their rights, and the effect of the decision upon the statutory lien, for the payment of the bonds, was not decided. The court, at the conclusion of the opinion in that case, are careful to say: "The question of lien upon the road, and its effects, need not be considered."

We are spared the necessity of extended discussion, or, indeed, of any discussion at all, of the remaining questions in this case. They have all been decided by the supreme court of the United States in *Railroad Cos.* v. *Schutte,* 103 U. S. 118.

The state of Florida, like the state of Arkansas, adopted the policy of aiding in the construction of railroads within the state by loaning its negotiable bonds to railroad companies. In the Florida case, as in the case at bar, the railroad companies were to pay the interest and the principal of the state bonds according to their terms, and

performance of this obligation was secured by statutory liens on the roads. After the bonds had been issued and negotiated by the companies receiving them, the supreme court of that state decided they were unconstitutional and void, and imposed no obligation on the state; but the court also decided that this did not relieve the railroad companies from their obligations to pay the bonds, and that the statutory lien was good, and could be enforced against the company by the *bona fide* holders of the state bonds. *State* v. *Florida Cent. R. Co.* 15 Fla. 690; *Trustees of Impr. Fund* v. *Jacksonville, P. & M. R. Co.* 16 Fla. 708.

Subsequently, a suit brought by the holders of state bonds against the railroad companies, to compel payment of the bonds and foreclose the statutory lien created to secure the payment, came before the supreme court of the United States, (*Railroad Cos.* v. *Schutte, supra,*) and that court held that the *bona fide* holders of the state bonds could recover the amount of the same from the railroad companies which negotiated them, and were entitled to have enforced in their favor the statutory lien given for their security. Before quoting from the opinion of the court, attention will be called to the only particulars in which the facts in that case vary from the case at bar.

(1) In the Florida case the act provided that the railroad companies should execute to the state their non-negotiable bonds, payable to the state at the same time and place and for like amounts as the state bonds. These bonds were secured by a statutory lien, and were executed in pursuance of the act requiring the issue of the state bonds, and were given by the companies in exchange for the bonds of the state. When the companies paid their bonds to the state, the state was to apply the money to the payment of her bonds issued and loaned to the companies. In that case, as in this, the object of the statutory lien was to compel the companies to provide the state with funds to pay the principal and interest of her bonds, loaned to the companies, as the same fell due.

It is not contended that the execution by the company of these non-negotiable bonds, payable to the state, can either add to or diminish the effect of the statutory mortgage, or the rights of the holders of the state bonds thereunder.

(2) The bonds in that case were not payable to the companies to which they were issued, but to "bearer," and they did not disclose, on their face, under what act or for what purpose they were issued, but the governor put an extraofficial certificate on them to this effect:

"This bond is one of a series, issued in aid of the Jacksonville, Pensacola & Mobile Railroad Company, to the extent of $16,000 per mile upon completed road; the state of Florida holding the first-mortgage bonds of said railroad company for a like amount, as further security to the holder hereof."

In the case at bar the bonds are payable to "the Little Rock & Fort Smith Railroad Company, or bearer," and they contain on their face this recital:

"Issued in pursuance of an act of the general assembly of the state of Arkansas, approved July 21, 1868, entitled 'An act to aid in the construction of railroads,' the said act having been submitted to and duly ratified by the people of the state at the general election held November 3, 1868."

In the Florida case the supreme court said (page 139) that "the certificate of the governor, as to the security held by the state, is, in legal effect, the certificate of the company itself, and is equivalent to an engagement on the part of the company that the bond, so far as the security is concerned, is the valid obligation of the state. The case is clearly within the reason of the rule which makes every indorser of commercial paper the guarantor of the genuineness of the instrument he indorses. We cannot doubt that, under these circumstances, the company is estopped, so far as its own liabilities are concerned, from denying the validity of the bonds. Having negotiated them on the faith of such a certificate, the company must be held to have agreed, as part of its own contract, whatever that was, that the bonds were obligatory." These observations of the court are applicable to the case at bar. If the recitals in the bonds in the one case, and the governor's certificate in the other, are contrasted, the superior force and strength of the former, for the purpose of creating an estoppel against the company, cannot escape attention.

By negotiating bonds payable to itself with this recital, the company must be held to have represented that they were issued under a valid act of the general assembly, and that the proposition contained in the act to loan the credit of the state to the railroad companies had "been submitted to and duly ratified by the people of the state." The recital, in legal effect, makes the act a part of the bond. The extract from the opinion of the supreme court on this point is an answer to the argument of the learned counsel for the defendant that the purchasers of the bonds had no right to rely on the recitals they contained, as against the company, and that the latter was not estopped to deny their truth.

The authorities cited by counsel to support his contention are the familiar ones that neither the state nor any other *public* corporation

is bound by false recitals as to the existence of its *power* to issue negotiable bonds. The soundness of that proposition is not questioned. Undoubtedly, as respects the power of a public corporation to issue bonds, recitals in the bonds themselves cannot operate by way of estoppel as the equivalent of a statute conferring the power.

But this principle has no application to the case at bar. This is not a suit against the state. It is a suit against the payee and transferrer of state bonds, containing recitals which, if true, made the bonds what they purported on their face to be, legal and binding obligations of the state.

And the rule is that the payee of negotiable paper, who transfers it for value, thereby guaranties the genuineness of the paper, and the truth of every recital on its face material to its validity and value. Byles, Bills, [157;] 2 Pars. Notes & Bills, 39.

The railroad company had the power to negotiate the state bonds, and to incur all the obligations implied by that act. It received them for that purpose, and is as completely estopped to deny the truth of its representations, made by recitals in the bonds, as a natural person would be under like circumstances. The recitals do not bind the state, but, as between the company and those who purchased the bonds from it, they do bind the company. The distinction here adverted to is so well understood that in the Florida case it went without the saying.

Every purchaser of a bond from the railroad company had the right, therefore, to assume that these recitals, which the company indorsed as true by putting the bonds on the market, were true in fact. And, as between the purchaser of the bond and the railroad company, the former was not required to look or inquire further.

The purchaser, by reference to the act referred to in the recital in the bonds, would see that while the bond was the bond of the state, the debt was in fact the debt of the railroad company, which was bound to provide the state with funds to pay it, and that the payment of this debt was secured by a statutory lien on the railroad, and its income and earnings. And knowing these facts, the purchaser would also know that, if for any reason the state declined to pay the bonds, he would be entitled to be subrogated to the rights of the state, under the statutory lien, to secure payment of the debt represented by the bonds. This is no new doctrine. It is founded on principles of reason and justice, as old as equity jurisprudence itself. Mr. Sheldon, in his work on Subrogation, says:

"The broad doctrine has also been often asserted that equity will regard security, given by a principal debtor to his surety, though merely for the surety's indemnity, as a trust created for the payment of the debt, and will see that it is applied for that purpose, by substituting, if necessary, the creditor to its benefit." Section 163. "The security for the debt, in whosesoever hands it may be, is treated as a fund held in trust for the payment of the debt; if it is in the hands of the creditor, the surety, upon paying the debt, will be subrogated to it for indemnity; if it is in the hands of a surety, the creditor may resort to it to secure the payment of his demand." Section 155.

The authorities cited by the learned author support the text.

In *Rice's Appeal*, 79 Pa. St. 206, the court says:

"The principle is well settled that where a surety, or a person standing in the position of a surety, for the payment of a debt, receives security for his indemnity, and to discharge such indebtedness, the principal creditor is in equity entitled to the benefit of that security, and it makes no difference that the principal creditor did not know of this at the time, or give credit on the faith of it."

The case of *Hand* v. *S. & C. R. R.* 12 S. C. 314, was in some of its features not unlike the case at bar, and the court said: "A provision for the payment of the bonds is primarily a security for those holding the bonds. It is always so in equity and at law when its forms permit."

There is, however, no occasion to invoke the doctrine of subrogation. The very object of the statutory mortgage was to secure the payment of the state bonds by the company. In the Florida case the supreme court say: "In our opinion there is no occasion for applying here the doctrines of subrogation, because in unmistakable language the statute has made the mortgage of the company security for the payment of the obligations of the state." By the provisions of the seventh section of the act of 1868, the road was not to be discharged from the claim or liens on the part of the state until "the amount of bonds issued to such company, with the interest thereon, shall have been paid *by said company.*" The company was to pay the bonds, and the statutory mortgage was taken to secure that result, and stands as a security for that purpose to every bondholder.

It is contended that if the provision of the act of 1868 in relation to the issue of the state bonds is void, the one in relation to the statutory lien is void also. This was the contention before the supreme court in the Florida case, and was thus answered by the court: "It is contended, however, that as the provision of the act in respect to the execution and exchange of the state bonds is unconstitutional, the one in relation to the statutory lien on the property of the com-

pany is void also, and must fall. We do not so understand the law. Undoubtedly a constitutional part of a statute may be so connected with that which is unconstitutional as to make it impossible, if the unconstitutional part is stricken out, to give effect to what, taking the whole together, appears to have been the legislative will. In such a case the whole statute is void; but in this, as in every other statutory construction, all depends upon the intention of the legislature, as shown by the general scope of the law. To our minds it is clear, in the present case, that the object of the legislature was not to create a debt which the state was expected to pay, but to aid the company in borrowing money upon the credit of the state. As between the state and the company the debt for the money borrowed was to be the debt of the company. If the state paid its bonds from its own funds, the mortgage could be enforced to compel the company to make the state good for all such payments. If the state did not pay, then the creditors had their own recourse upon the mortgage. The state credit, so far as the state and the company were concerned, was only to aid the company in borrowing money on its own bonds. In any event, the company was to be bound for the payment of the entire debt when it matured, and its property was to be given as security. Under these circumstances, it seems to us that the unconstitutional part of the statute may be stricken out, and the obligation of the company, including its statutory mortgage in favor of the state bondholders, left in full force. The striking out is not necessarily by erasing words, but it may be by disregarding the unconstitutional provision, and reading the statute as if that provision was not there. These bonds, as state obligations, were void, but as against the company, which had actually put them out, they were good." This judgment of the supreme court, in a case on all fours with the case at bar, concludes the question. And see *Johnson* v. *Griswold*, 2 Mo. Ct. App. 150.

A single question remains. The act of 1869 was repealed by the act of May 29, 1874. This repeal does not affect the rights of the parties to this suit. All contracts made under the act, or of which it constituted a part, and the rights acquired by such contracts, are unaffected by the repeal. The obligations of the railroad company to the holders of the state bonds, and the rights acquired by the latter, whatever they may have been, under and by virtue of that act, remain to be enforced the same as if no repeal had taken place. If this were otherwise, the act of 1868 would still remain, which contains all the essential provisions embraced in the act of 1869.

It is believed the conclusion reached is in accordance with well-settled principles of law, and the authority of adjudged cases binding on this court; and it unquestionably is in harmony with the plainest principles of justice. The company borrowed these bonds and put them in circulation upon a distinct engagement that it would provide the funds to pay them, and it gave its assent to the statutory lien on its road to secure this result. It sold them to innocent parties for money to build its road. It has received all the benefits that were expected to accrue to it under the contract, and the road and its earnings remain bound for the performance of the contract by the company. There is no principle upon which this obligation can be avoided, either by the company or subsequent purchasers with notice of the equities of the state bondholders. It would be a reproach to the law if there was.

The demurrer to the bill is overruled.

McCRARY, J., concurs.

TRAVER and others *v.* TRIBOU.

SAME *v.* BROOKS and others.

(*Circuit Court, D. Oregon.* February 12, 1883.)

1. DIVISION OF DONATION BETWEEN SETTLER AND WIFE.

   The division of a donation to a married man, under section 4 of the donation act of September 27, 1850, (9 St. 497,) between the settler and his wife, is committed by the act to the discretion of the surveyor general, and in contemplation of law is made when the settler proves to the satisfaction of said officer that he has complied with the provisions of the act, and the latter issues the certificate containing the facts constituting such compliance, and specifying the portion of the donation set apart to the husband and that to the wife, as provided in section 7 of said act; and no valid objection thereto is found by the commissioner of the general land-office, which is shown by the subsequent issue of a patent thereon.

2. SUIT FOR PARTITION—STATUTE OF LIMITATIONS.

   The wife of a married settler, under section 4 of the donation act, died after final proof by the settler of compliance with the act, and before the issue of the patent. *Held*, (1) that the half of the donation to which she was or would have been entitled, was thereupon granted, by the act, to her surviving husband and children in equal parts as the direct donees of the United States; and (2) the statute of limitations did not commence to run against the right of the heirs of said husband to maintain a suit against his vendees of certain distinct portions thereof, for a partition of their interests in said half of said donation, until the same was formally and finally divided by the surveyor general as aforesaid.

Suit for Partition.

George H. Durham and *H. Y. Thompson*, for plaintiffs.

W. F. Trimble and *Benton Killin*, for defendants.

DEADY, J. These cases were both heard and submitted on the plea of the statute of limitations to the bill, and will be considered together. The plaintiffs George W. Traver and Emma S., his wife, are citizens of the state of California, and George A. Graham and Ida M., his wife, are citizens of the state of Ohio. They bring these suits for the partition of lots 5 and 6, in block 254, of the city of Portland. The bills were filed on October 16, 1879, and allege that the defendant George F. Tribou is the owner of an undivided one-fifth of the W. $\frac{1}{2}$ of said lots, and the defendants Amasa Brooks, John E. Brooks, and Julia A. Brooks are the owners of a similar fifth of the E. $\frac{1}{2}$ thereof, and that the plaintiffs George W. and Emma S. Traver and Ida M. Graham are the owners of the remaining four-fifths of both lots, in the following proportions: the first of the undivided 82-125 and the last two of 9-125 each. The pleas allege that the defendants and those under whom they claim have been in the open, actual, and adverse possession of their respective portions of the premises, as the exclusive owners thereof, for more than 20 years before the commencement of these suits. The pleas are accompanied by answers. Disregarding the averments of the pleadings, which are mere conclusions of law, the admitted and material facts of the case, as they appear therefrom, are these:

On June 25, 1850, Daniel H. Lownsdale, Stephen Coffin, and W. W. Chapman were in the joint occupation of that portion of the public domain upon which the city of Portland was then partially laid out and has since been built, without any other right thereto than the possession under the laws of the provisional government, when Lownsdale released and quitclaimed to Chapman certain blocks or parcels therein, including block 254, with a covenant of warranty against all persons, the United States excepted, and another, that if Lownsdale should thereafter acquire title to the premises from the United States, he would convey the same to Chapman; and the defendants and those under whom they claim have occupied said lots as the owners thereof under said deed to Chapman and successive conveyances thereunder ever since.

On July 6, 1850, Lownsdale married Nancy Gillihan, a widow with two children, namely, William T. and Isabella E. Gillihan.

On March 11, 1852, Lownsdale filed his notification in the office of the surveyor general upon a certain portion of said public domain, including block 254, as a settler thereon, under the act of September 27, 1850, (9 St. 497,) commonly called the donation act; and on April 8, 1852, he filed in said office his own affidavit and those of two witnesses, showing his marriage to Nancy

as aforesaid; that he was a qualified settler under said donation act; and that the settlement and cultivation of the premises required by the act were commenced by him on September 22, 1848, and continued to that date; whereupon, as it is averred in the pleas, the surveyor general set apart the east half of said tract to Lownsdale, and the west half, including block 254, to his wife Nancy; and that on September 29, 1853, Lownsdale made his final proof to the satisfaction of the surveyor general of four years' residence on and cultivation of the land described in his notification, and of his compliance with the donation act, so as to entitle him and his wife Nancy to a patent therefor.

On April 15, 1854, Nancy died, leaving her husband and four children, namely, Millard O. and Ruth A. Lownsdale, and William T. and Isabella E. Gillihan, aforesaid; and on January 17, 1860, Lownsdale purchased the interest of said Isabella E. in the donation of her mother, and on February 14, 1860, conveyed an undivided two-fifths of the same to Hannah M. Smith.

On October 17, 1860, a patent certificate was duly issued for the donation, wherein the east half thereof was designated as the part inuring to Lownsdale, and the west half as the part inuring to his wife Nancy.

On May 4, 1862, Lownsdale died, leaving James P. O. and Mary, his children by a former wife and the plaintiff, Emma S. Traver, and Ida M. Squires, the children of Sarah Squires, a deceased daughter by said former wife, and Millard O. and Ruth A., his children by Nancy; and on June 6, 1865, a patent was issued by the United States for the donation to the heirs of Lownsdale and his wife—the east half to the heirs of the former, and the west half to those of the latter.

On April 28, 1864, William T. Gillihan brought a suit in the state circuit court for the partition of the west half of the donation, in which the other children of Nancy, and the heirs of Lownsdale, together with many other persons claiming divers blocks and lots therein as the vendees of Lownsdale, were made defendants, including W. W. Chapman, the defendant Tribou, and the immediate grantor of the defendant Amasa Brooks, from whom his co-defendants, John E. and Julia A. Brooks, have long since — November 22, 1877—derived whatever interest they have or claim in the premises; that on May 22, 1865, said court decided that Lownsdale, as the survivor of Nancy and the grantee of her child, Isabella E., was the owner, in his life-time, of an undivided two-fifths of the west half of said donation, and that said William T., Millard O., and Ruth A., as the children of Nancy, were then each the owners of an undivided one-fifth of said half; that on August 12, 1865, said court set apart and allotted to said three children, in severalty, certain portions thereof, and the remainder to the heirs, vendees, or claimants under Lownsdale according to their respective interests, without determining what they were; and because said partition was unequal, it was further adjudged that the children of Nancy should be paid the sum of $39,156.02, to be apportioned among the several parcels of land set apart to the heirs, vendees, or claimants under Lownsdale, as aforesaid—the same to be a lien thereon; that $355.90 of said sum was so apportioned upon said lots 5 and 6; and that thereafter the defendants Tribou and Amasa Brooks paid said owelty.

On February 23, 1869, James P. O. purchased the undivided two-fifths of one-fifth of the west half of the donation from Hannah M. Smith, it being the same two-fifths she had purchased from Lownsdale in his life-time; and afterwards and before the commencement of these suits, all the heirs of Lownsdale, except the plaintiffs Emma S. and Ida M., conveyed their interests in the premises to the plaintiff George W. Traver.

Since September 29, 1849, under the laws of Oregon, an adverse possession of 20 years was sufficient to bar an action by the owner for the possession, until the passage of the act of October 17, 1878, (Sess. Laws, 21,) which limited the time to 10 years; but in all cases where a cause of action had then accrued, and this period had expired or would expire within one year from the passage of the act, an action might be brought within such year.

These suits were brought on the last day of the year following the passage of the act of October 17, 1878, and if they were not barred by lapse of time at the date of such passage—if 20 years had not then elapsed since the plaintiffs' right of suit accrued—it is admitted they were brought within the time allowed by law.

But upon the letter of the statute it appears that even if the right of suit was barred at the date of its passage, it was thereby revived and extended one year therefrom. But I do not understand that the plaintiffs rest their right to sue upon this ground, and the cases will therefore be considered upon the assumption that if on October 17, 1878, the period of 20 years had elapsed from the time the right of suit accrued, the suits are barred.

In the consideration of purely equitable rights and titles a court of equity is not governed by the statute of limitations. But these suits are brought upon the legal title of the plaintiffs, and in the determination of them the limitation applicable to an action at law thereon will be followed. *Hall* v. *Russell*, 3 Sawy. 514; *Manning* v. *Hayden*, 5 Sawy. 379.

When, then, did the plaintiffs' right of suit accrue and when did the statute of limitations commence to run against it? Manifestly the cause of suit must have accrued whenever the plaintiffs, or those under whom they claim, were entitled to the possession of the premises, and to maintain a suit for partition against any person who owned an undivided interest therein; and under the facts as to the possession of the defendants and those under whom they claim, the statute commenced to run against such right as soon as it accrued.

The plaintiffs contend that the right of suit accrued upon the giving of the decree in the partition suit in 1865, under which they claim

to derive title; that the legal operation of the partition was to effect an exchange of distinct parcels of land between the heirs of Lownsdale and the children of Nancy; and that the former took as purchasers from said children and not by descent from their ancestor, and therefore the statute of limitations had not run on October 17, 1878.

At most, the heirs of Lownsdale could only have received three-fifths of block 254 from the children of Nancy by this exchange, for that was all they ever had in it. But I am still satisfied with the ruling upon this point in *Fields* v. *Squires*, 1 Deady, 391. In that case I held that this partition divided the land between the children of Nancy on the one hand and the heirs and vendees of Lownsdale on the other, according to the respective interests of the latter, without attempting to determine what they were, giving to the children in land and owelty what was deemed the equivalent of three-fifths of the premises, and to the heirs and vendees in land charged with the payment of this owelty what was deemed equivalent to two-fifths of the same. To the same effect see *Davenport* v. *Lamb*, 13 Wall. 428. The portions or parcels then ascertained and set apart in severalty to the children of Nancy were in contemplation of law the very three-fifths which they took from the United States under the donation act after the death of their mother, and in like contemplation the remaining two-fifths were the very portion of the premises which the heirs of Lownsdale inherited from him, subject, however, to the legal effect of the acts done and suffered by him concerning the same. Nor was the character or origin of the estate or title of these parties changed or affected by this decree and partition. The heirs of Lownsdale took the two-fifth tract by descent from him, as his heirs, and as such were and are so far bound by his acts and conduct relating to the same, as he would be himself, if living. This was not an exchange of distinct parcels of land owned in entirety by either party, but a separation of undivided interests in a tract theretofore owned by them in common.

The plaintiffs also contend that their right to the possession, and to maintain this suit for partition, did not accrue until the half of the donation inuring to the wife was finally designated in and by the patent issued on June 6, 1865—a little over 14 years before the commencement of these suits. On the contrary, the defendants insist that the right of possession accrued to the plaintiffs, or those under whom they claim, on April 8, 1852, when Lownsdale made the proof, under section 7 of the donation act, of the commencement

of his residence and cultivation, because, as they allege, the surveyor general then divided the donation between the husband and the wife, as required by section 4 of said act, and thereupon the statute of limitations commenced to run against the wife in favor of the defendants' grantors then in the adverse possession of block 254.

The plea and argument of the defendants assume that the children and survivor of Nancy took the west half of the donation as her heirs, and are therefore in privity with her, and bound by her acts or conduct while living, and the wife of the settler, Lownsdale. But the law, so far as this court is concerned, is held otherwise. Upon the death of Nancy, her "share or interest" in the donation was given by section 4 of the act to her husband and children in equal parts, and they took under the donation act as the direct donees of the United States, and not as the heirs of Nancy, whose interest in the premises, whatever it was, terminated with her death. *Fields* v. *Squires*, 1 Deady, 382.

But even if they took as the heirs of Nancy, or in any sense, by, through, or under her, the result, so far as this plea is concerned, must be the same. She was a married woman when the donation act passed, and continued to be one up to the time of her death. All the statutes of limitation ever in force in Oregon, from that contained in the "Steam-boat Act" of September 29, 1849, and taken from the Revised Statutes of Iowa (p. 384) of 1843 down to the present one, have provided that the statute should not commence to run against a married woman during her marriage. It may, then, be taken for granted that whether Nancy's husband and children took the western half of the donation as the direct donees of the United States or as her successors in interest, or that whatever possession those under whom the defendants claim may have had of this property before the death of Nancy, the statute of limitations did not commence to run in their favor until the death of Nancy—April 15, 1854.

Did it commence to run then, and if not, when? On September 29, 1853, the settler, Lownsdale, made his final proof of the residence and cultivation required by the act, and had otherwise conformed thereto, so that according to the construction given to the donation act by the supreme court in *Hall* v. *Russell*, 101 U. S. 503, as soon thereafter as it was ascertained by the proper authority that this proof was sufficient, he became a qualified grantee thereunder, and the right to the one-half of the donation was then vested in him. And, for the same reason, Nancy also became a grantee and entitled to one-half of the donation, provided she did not die before the pat-

ent issued. But she did so die, and thereupon her husband and children became entitled in her place to one-half of the donation. But to what half? and was there yet any division of the donation or official designation of the half inuring to the settler and the one to the wife? The defendants allege in their pleas that this designation was made by the surveyor general on April 8, 1852, when Lownsdale made his preliminary proof or proof of settlement. But, however this may be as a matter of fact, as a matter of law I do not think the division could be formally and finally made before the full compliance with the act by the settler, and proof thereof to the satisfaction of the surveyor-general, as provided in section 7 of the act. Until this was done, the settler had only a possessory right in the land—the right of occupation—and there was no grant or donation to divide between him and his wife. *Hall* v. *Russell, supra*, 503. And any entry or action by the surveyor general on the subject at this time must in the nature of things have been merely provisional, and subject to correction and modification in his final action upon the case, when he came to consider the final proofs, and make up and issue the patent certificate.

Upon the final proof being made, if it was satisfactory, the surveyor general was authorized to issue a certificate, under rules and regulations to be prescribed by the general land-office, "setting forth the facts in the case, and specifying the land to which the parties are entitled." It is understood to have been the practice of the land-office to make this division of the donation upon the issue of the certificates, and then enter the same on the records or plats of the survey in the office, or *vice versa*. It is also understood that the commissioner of the general land-office has, in some cases, exercised the right to alter the division, but probably only with the consent of the parties interested. And upon the assumption that the commissioner was authorized in all cases to review and modify the division made in the local land-office, the plaintiffs base their claim that there was no absolute and final division of the donation until the patent was issued. But I doubt if the commissioner is authorized to set aside the division made by the surveyor general and substitute one made by himself. The authority given him by the act is to issue a patent according to the facts stated in the certificate, one of which is, in case the settler is a married man, the division of the donation between him and his wife, and the designation of the part inuring to each. True, if there is a valid objection to the issue of a patent upon the case made in the certificate he may refuse to do so. But I

think his power is then exhausted, and he must return the certificate to the local office for further proceedings in accordance with his decision. At least, the power to partition the donation between the settler and his wife seems committed to the judgment of the surveyor general, and although he may be required by the direction of the commissioner to exercise this power in a particular case, and to correct errors committed in the exercise of it, as that the donation was not divided into two equal parts, I do not think he could be required to divide it in a particular manner, as by an east and west line rather than a north and south one, or to assign the north or east half to the wife rather than the south or west one. So far as the partition and allotment of the donation between the settler and his wife rests in the discretion of the officer, I think the act commits the matter wholly to his judgment.

Assuming as I do, and as seems to be admitted by the defendants' plea, that a suit for partition could not have been maintained by the plaintiffs' ancestor, Lownsdale, against the defendants for partition of the premises until, by the formal division of the donation, it was ascertained and determined in which half of the same they would be included, it follows that the statute of limitations did not commence to run against the suit until such division was made. When, then, for the purposes of this case, was this division made? On September 29, 1853, when the settler made his final proof, and the matter was submitted to the surveyor general for examination and determination; or on October 17, 1860, the date of the certificate in and by which the division, so far as appears, is first formally made and announced?

In the one case the limitation of 20 years, counting from the filing of the proof, or the death of Nancy on April 15, 1854, had elapsed before the passage of the act of October 17, 1878, and the plaintiffs' right of suit was barred, and in the other the limitation would not have expired until October 17, 1880, and therefore the right of suit was not barred at the passage of said act.

Taking the facts as stated, and the construction of the donation act as announced by Mr. Chief Justice WAITE in *Hall* v. *Russell*, *supra*, my conclusion is that the share or interest of Nancy in this donation was not ascertained or set apart during her life-time, nor until the patent certificate was issued on October 17, 1860, when and whereby the division was made giving the settler the east half, and the west half to the wife, nominally, but in effect to those whom the act gave it upon her death; and upon this certificate and in accordance therewith the patent subsequently issued.

The right to the patent, as was said by Mr. Justice FIELD in *Starrs* v. *Stark*, 6 Wall. 413, became perfect when the certificate of the surveyor general was received by the commissioner of the general land-office, and he found no valid objection thereto, and that none was so found is shown by the subsequent issue of the patent thereon. *Barney* v. *Dolph*, 97 U. S. 656. In the division of the donation it appears that the west half was set apart to Nancy, although she was then dead; but such division, being the basis of the patent, would, I suppose, by analogy, inure, under the act of May 20, 1836, (5 St. 31,) to the benefit of the persons to whom the act gave the land in such contingency. See *Starrs* v. *Stark*, *supra*, 427.

Upon the argument counsel for the defendant also insisted that these suits could not be maintained because the plaintiffs were not in the actual possession of the premises, and suggested that the suits ought to be stayed, at least until the plaintiffs tried their right to the possession by an action at law. It is not apparent how this question can arise on the consideration of these pleas of the statute of limitations. But if it can the answer is very plain. And, *first*, the pleas admit, in effect, that the title to two-fifths of the western half of the donation was in Lownsdale,—one-fifth as the donee of the United States, upon the death of Nancy, and the other fifth as the grantee of her daughter, Isabella E.; that by the partition of the tract in 1865 the whole of block 254 was set apart to the heirs of Lownsdale, subject to the effect of his deed of quitclaim to Chapman of June 25, 1850. And as to that it was held in *Fields* v. *Squires*, 1 Deady, 379, that this deed only passed the bare possession, the title being still in the United States, but that by virtue of the covenant therein for further assurance, in case Lownsdale obtained title from the United States, his heirs were estopped to claim against the grantee in said deed, or those claiming under him, the one-fifth interest therein which he took from the United States on the death of Nancy, but as to the fifth purchased from Isabella E. he was not so estopped; and that Lownsdale's grantee in the deed of June 25, 1850, nor those claiming under him, neither lost nor gained by the partition, and that, consequently, the defendants' interest in the premises is an undivided one-fifth. See *Davenport* v. *Lamb*, 13 Wall. 429.

From this it is plain that the legal title to the undivided four-fifths of these premises is in the plaintiffs, and that they are entitled to maintain these suits for partition unless they are barred by lapse of time.

As was said by this court in *Lamb* v. *Starr*, 1 Deady, 364,—

"The jurisdiction of a court of equity over a suit for partition, so far as I have been able to ascertain, never did depend upon the possession by the complainant. Where the title of the complainant, whether it be legal or equitable, is not doubtful or suspicious, equity will take jurisdiction and decree partition, without reference to the question of possession. But in the case of an alleged legal title, when either of these objections appear, it is usual, first, to send the complainant to a court of law to try his title, and in the mean time retain the bill to await the result. In the case of an equitable title, the court of equity first ascertains the title, and, if found for the complainant, proceeds to make partition." *Wilkin* v. *Wilkin*, 1 Johns. Ch. 117; *Cox* v. *Smith*, 4 Johns. Ch. 276; *Matthewson* v. *Johnson*, Hoff. Ch. 562; 4 Kent, Comm. 364; *Phelps* v. *Green*, 3 Johns. Ch. 304.

In this case the title is neither doubtful nor suspicious. The facts constituting the plaintiff's right are admitted, as are also the facts which it is claimed constitute an adverse possession, sufficient in duration to bar the assertion of such right, and in effect to constitute a title in the defendants.

The only question to be determined—when did the statute commence to run?—is one of law, and may as well be decided in a court of equity as a court of law, for in either case the court must decide it. On the contrary, if the question was one of fact,—as, for instance, the duration or character of the defendant's possession,—and there appeared to be any doubt about it on the evidence, the plaintiff might very properly be directed to try that question in a court of law with a jury. But there can be no good reason for sending a plaintiff in a suit in equity for partition to a court of law to try a mere question of law involved in his claim or the defense thereto, particularly in modern times, when the two courts are composed of the same judges, and former rivalry and jealousy between them has become a thing of the past.

The adverse possession of the defendants not having continued 20 years after the statute of limitations commenced to run against the plaintiffs or their ancestor, and before these suits were commenced, the pleas to the bills are considered insufficient and therefore overruled.

IRELAND *v.* GERAGHTY and others. (Bill.)

GERAGHTY *v.* IRELAND and others. (Cross-bill.)

(*Circuit Court, N. D. Illinois.* January 8, 1883.)

1. TRUST—CREATION OF—SUBSEQUENT DESIGNATION.
   If a conveyance is made to a trustee upon trusts thereafter to be declared or designated by the grantor, and the trustee accepts the designation so made, the trustee is bound by such declaration and designation as completely as if the deed and declaration of trust were simultaneous, and part of one and the same transaction.
2. CONVEYANCE TO INFANT—DELIVERY, WHEN INOPERATIVE.
   Where a deed in fee-simple was made by parents to their child, who was but little more than four months old, conveying to such child certain town lots, which was never delivered to the grantee, and, considering the immature age of the grantee, it was perhaps impossible to have made such a delivery and unnecessary that it should be made, *held*, that the grantors in such deed should do some act manifesting an intention to deliver the deed and make it effective: and where such a deed was never recorded or published, or in any way, by either of the parents, or ever after, alluded to in such way as to show that they or either of them considered it a consummated transaction, the deed is an inoperative conveyance.
3. DEED OF TRUST—UNDUE INFLUENCE.
   The allegation that a conveyance of real and personal property was obtained by undue influence of the grantee upon the mind of the grantor, must be established by evidence or it will not be considered.
4. SAME—CERTAINTY IN TERMS.
   Where there is sufficient certainty in the terms of the declaration of a trust for charitable uses to enable a court of equity to take possession through its own trustee or receiver and execute the trust, and carry out the wishes and intentions of the donor, it is sufficient when made to an express trustee.
5. SAME—WHEN DEEMED EXECUTED.
   Where a party made a deed of trust to a trustee of all his property, real and personal, and delivered to such trustee all his credits and securities, so indorsed and transferred to such trustee as to enable him, if he had chosen to do so, to exercise absolute control and ownership over them, the fact that the trustee returned them to the *cestui que trust*, who collected and reinvested and expended a portion of them in the exercise of his own judgment, and to some extent in accordance with the arrangements he had previously made, is not sufficient to show that the trust never became executed, notwithstanding the deed of trust was not recorded during the life of the *cestui que trust*.

In Equity.

Hoyne, Horton & Hoyne and *John J. Jewett*, for complainant.

W. W. Farwell and *Robert Hervey*, for defendant.

BLODGETT, J. The original bill in this case is filed by complainant to obtain a judicial construction of the trusts under which complainant claims to hold certain real and personal estate, conveyed to

him in his life-time by Michael R. Keegan, now deceased, and the cross-bill is filed by Peter Geraghty, who claims said property as the sole heir at law of Mary Gertrude Keegan, the only child of said Michael R. Keegan, and seeks to have the alleged trusts declared void and set aside, and the property in question awarded to the complainant in the cross-bill. The material facts in the case, as they appear from the record, are briefly these: Michael R. Keegan, who had been a resident of the city of Chicago for 10 or 12 years, died in said city on November 15, 1879, leaving no widow, and but one child, Mary Gertrude Keegan, and she died on the twenty-sixth of December, 1879, aged a little over four years, leaving as her next of kin and sole heir at law the complainant in the cross-bill, who is her maternal grandfather. In the month of August, 1874, Keegan married Bidelia M. Geraghty, the mother of the child Mary Gertrude, and the wife died in the latter days of July, 1879. For some time prior to his death Keegan had expressed the intention of leaving his property in the hands of the Rt. Rev. John Ireland, then and now coadjutor Catholic bishop of the diocese of Minnesota, in some form of trust for the benefit of this child, Mary Gertrude, and, in the event of her death, for some charity; and on or about the first day of January, 1879, he forwarded to Bishop Ireland a tin box containing all or nearly all the notes, bonds, and other securities for the payment of money which he, Keegan, then held; and on the fourth day of February, 1879, Keegan executed an unconditional deed in fee-simple to Bishop Ireland, conveying to him all the real estate he, Keegan, then owned. No consideration was paid by Bishop Ireland for this conveyance, and there is no doubt from the proof that this conveyance was made upon such trusts as Keegan should direct or create; that is, it was not a gift to the bishop individually, but a conveyance to him in trust for such purposes as the grantor in the deed should appoint.

At about the same time, perhaps simultaneously with the execution of this deed, but probably some months later, and on or about the eighteenth of April, 1879, Keegan executed and delivered to Bishop Ireland a written paper in the following words:

"*To the Right Reverend John Ireland, Coadjutor Bishop of St. Paul, Minnesota:*

"RIGHT REVEREND SIR—The real and personal property which I have heretofore and may hereafter convey to you are for the benefit of my infant child, Mary Gertrude Keegan, born November 15, A. D. 1875, to be delivered to her, with its accrued profits, rents, and interest, when she shall become of age. Should she die before coming of age, and leave no issue, then to your-

self, for the purpose of providing an agricultural home for poor boys, in connection with an industrial school.

"Witness my hand and seal this fourth day of February, A. D. 1879.

[Signed] "MICHAEL KEEGAN. [Seal.]"

And underneath this instrument is written an acceptance by Bishop Ireland, of the following tenor:

"I hereby accept the above trusts for the purposes above specified.

[Signed] "JOHN IRELAND."

Upon the back of this instrument is written the following letter from Keegan to Bishop Ireland:

"*Right Reverend John Ireland, D. D., Coadjutor Bishop of St. Paul, Minnesota:*

"RIGHT REVEREND SIR—To what is written on the other I add further that if my child should refuse to comply with your orders and wishes, and go from under your control, then while she so remains she is not to receive a dollar from you, either towards her support or education; but in case of her sickness do as your heart suggests. If she should become a religious, which God grant, before coming of age, place $10,000 at her disposal when fully professed, and the balance when she is 21 years old. Should she marry before becoming of age, she can have $5,000 on her marriage, to be placed at interest, and have the yearly interest of it until she is of age; the yearly interest or rent is to be put in staple coupon stocks, and as it falls due. But 10 per cent. of the interest or rent is to be regularly deducted from the income and devoted to such charities as your lordship thinks proper; but one-third of this 10 per cent. is to be given for masses for my soul, in union with the souls in purgatory, and the masses are to be said by priests in poor missions, or who need a little help. Regarding my wife, I will hereafter make a separate statement, which must be satisfactory to your approval. But if I should die suddenly, then let her have a decent support while she remains unmarried. These conditions are to apply to my property in your hands at the time and after my death.

"I remain, my lord, most respectfully, your most obedient servant,

"MICHAEL R. KEEGAN."

The proof shows that the deed to Bishop Ireland, and the declaration of the trusts upon which the deed was made and the personal property delivered to him, were both prepared at the same time by the same attorney, and after consultation between Keegan and his attorney as to the best mode of creating the trust, so as to probably cause the least trouble to the bishop, and, if possible, to avoid litigation with any prospect of success; and whether the declaration or statement of the trusts was signed and delivered simultaneously with the deed, or at a subsequent date, in my estimation is of but little consequence. It may be, as I have already suggested, that the

statement of the trusts was not signed and delivered to the bishop until the bishop was in Chicago, some time in the month of April, and possibly the letter upon the back of the declaration of the trusts was written thereon at or before the time it was delivered to the bishop. This, however, seems to me to be of little consequence, as there can be no doubt of the proposition that if a conveyance is made to a trustee upon trusts thereafter to be declared or designated by the grantor, and the trustee accepts the designation of uses so made by the grantor, the trustee is bound by such declaration and designation as completely as if the deed and declaration of trust were simultaneous, and part of one and the same transaction. There can be no doubt of the fact that by the conveyance of the property in question to the bishop he became a trustee, and until the objects of the trust were designated he was a mere naked trustee; but as soon as the grantor had in writing indicated the uses to which the property was to be applied, and the trustee had accepted the terms of the trust so indicated, the transaction was complete; so that even if we assume or admit that the letter on the back of the declaration of trust was written there before the delivery of the instrument and the acceptance of the trusts, then the written declaration of trust, dated February 4th, must undoubtedly be considered as modified by the letter of April 18th; but the modifications so made are of no importance at this time, as they only related to the management of the estate during the life and minority of the child, and during the life of the wife after her husband's death and while she remained a widow. If this child or the widow of Keegan were yet alive, important questions might arise as to the support of the child during her minority, and the support of the widow; but the particulars in which the letter modifies the declaration of trust in no way affect the questions as to the disposition to be made of the estate in case of the death of the child without issue.

The child, Mary Gertrude Keegan, was born November 15, 1875, and on the seventh day of February, 1876, when the child was but little more than four months old, a deed in fee-simple was made by Keegan and his wife, conveying to this child two lots then owned by Keegan, described as No. 425 May street and 457 West Twelfth street, in this city, and being part of the property conveyed to Bishop Ireland by the deed of February 4, 1879. At the time this deed was executed and acknowledged Keegan remarked to the notary, pointing to the child, who was held in her mother's arms, "She is early in acquiring property," and he handed the deed towards the child, but did

not give it into her hands, but kept it himself. This deed was never recorded, and was found among Keegan's papers after his death.

The questions raised upon these leading facts are these:

(1) Geraghty, the cross-complainant, insists that the deed from Keegan and wife to the infant child, made in February, 1876, is an operative conveyance, and vested the fee-simple to the lands therein described in the child, and that he, as the sole heir at law of the child, is entitled to hold the property, and to have the conveyance from Keegan to Bishop Ireland set aside as a cloud upon his title to the property covered by the deed to the child. (2) That the conveyance of the real and personal property to Bishop Ireland was obtained by reason of the undue influence of Bishop Ireland upon the mind of Keegan. (3) That the object of the trust in Bishop Ireland is left so obscure, uncertain, and ill-defined as to render such trust void and inoperative, and make it impossible to uphold or execute it as a trust to a charitable use. (4) It is insisted that the trust was never so far completed as to make it a valid trust in Bishop Ireland for the purposes designated in the declaration of trust of February 4, 1879.

As to the deed from Keegan and wife to the child, the only question is whether it can be treated as ever having become an operative deed. It never was delivered to the grantee, and, considering the immature age of the grantee, it was, perhaps, impossible to have made such a delivery, and unnecessary that it should have been so made; but there is no doubt that the grantor in such a deed should do some act manifesting an intention to deliver the deed and make it effective. The testimony does not disclose the motives which led these parents, so soon after the birth of this child, to unite in a conveyance of this character. We only know from the proof that such a paper was signed and acknowledged by them. It was never recorded or published, in any way, by either of the parents, or ever after, alluded to in such way as to show that they, or either of them, considered it a consummated transaction. Whether the deed was made at the instance or request of the mother, and to please her, or whether it was a part of some inchoate plan or purpose of one or both of these parents, which was subsequently abandoned, we do not know. We do know this, however, that Keegan was a man of affairs, well acquainted with the forms of procedure requisite to make a valid conveyance of real estate; that he prepared most of his own deeds and business papers; and this fact, coupled with his retention of the deed without recording it, is quite conclusive evidence, to my mind, that he never intended it to become operative, especially when you supplement this fact with the manner in which he subsequently dealt with this property, and the disposition which he subsequently made of all his prop-

erty for the benefit of this child. I therefore feel impelled to the conclusion, from the testimony in this case, that the deed was never delivered, and has never become an operative grant to this child; and therefore that no title to the lands mentioned in this deed was cast upon the cross-complainant, Peter Geraghty, by descent as the sole heir at law of the child.

As to the allegation of undue influence, I can find no evidence in the record that Bishop Ireland ever exerted, or attempted to exert, any influence to induce Mr. Keegan to convey his property to him, or make him a trustee. On the contrary, whatever evidence there is bearing on that question tends to show that Bishop Ireland accepted this trust reluctantly, and only out of consideration for his long friendship towards Mr. Keegan, and at Mr. Keegan's earnest and pressing instance and request. That Keegan was an earnest and zealous Catholic, and that his relations to Bishop Ireland for many years had been especially friendly and confidential, are facts amply shown from the proofs in the case. But it nowhere appears that the bishop advised this disposition of Keegan's property, or sought the office of trustee.

As to the objection to the validity of the trust upon the ground that it is not so sufficiently defined that it can be executed with certainty, it seems to me very clear that Keegan's first and leading purpose was to make provision for his child. He had, by his industry and close economy, accumulated quite an estate for a man in his position of life, valued, as he deemed it, about the time this transaction took place, at from $75,000 to $80,000. He had unfortunate differences with his wife. He felt that his health was rapidly declining, and was anxious to make some sure disposition of the property by which it could be preserved for the benefit of his child; this seems to have been his first and controlling thought. Running throughout the whole web of this record is the constant expression of his anxiety to secure his property for the benefit of this child. At times, he seems to have made some provision for his wife; but the papers making such provision were destroyed, and whatever arrangement of that kind was contemplated was never completed, so that finally, when, after consultation with his attorney, he came to a definite conclusion, it was to convey all his real and personal property to the bishop, in trust for the child; and the document which, undoubtedly, was intended to define that trust clearly, as the guide for the trustee in the subsequent disposition of the estate, was the paper prepared simultaneously with the deed by the attorney, and dated February 4, 1879. The subsequent letter of April 18th, indorsed upon the back of this

paper, may be taken, in some respects, to be a letter of more minute direction as to the manner in which the bishop was to execute the trust for the benefit of the child, and, in a certain contingency, for his wife. He goes more into the details of how he would have the trust executed. What should be done with the estate in the event of the death of the child was a matter which he seems to have fully settled from the time the declaration of trust was signed, and is nowhere changed, nor is any intent to change it manifested. What he directed was that, in the event of the death of the child leaving no issue, the property was to be held by Bishop Ireland "for the purpose of providing an agricultural home for poor boys, in connection with an industrial school." This seems to me as definite as most donors, contemplating the founding of a charity, would consider necessary, and as definite and explicit as is necessary to point out the charitable use to which the property is to be applied by the trustee. It seems to me that a fair test as to whether this trust is stated with sufficient certainty or not is to inquire whether, if Bishop Ireland should neglect or refuse to execute this trust in accordance with the directions of the grantor, there is sufficient certainty in the terms of the declaration of trust to enable a court of equity to take possession of the trust through its own trustee, or receiver, and execute the trust and carry out the wishes and intentions of the donor. The direction is to provide an agricultural home for poor boys. It seems to me that such a direction would be clearly understood by any court of equity having jurisdiction of such matters; that such court could, without difficulty, see to it that the trustee which it should appoint should carry out the purpose thus clearly manifested. I am, therefore; of opinion that this trust cannot be defeated by reason of any uncertainty as to its object, or the purposes of the donor.

But it is urged that this trust never became fully created, because the deed to Bishop Ireland was not recorded during Keegan's life, and very shortly after the securities were forwarded to the bishop, he returned a portion of them to Keegan, who collected and reinvested and expended a portion of them in the exercise of his own judgment, and to some extent in accordance with the arrangements he had previously made; and that, shortly after the death of Mrs. Keegan, Bishop Ireland returned to Keegan, at his request, at Chicago, the box of securities, and that Keegan retained possession of those securities from that time until his death, thereby depriving the transaction of the character of a donation *inter vivos*, or a completed gift during the life

of the donor. The proof shows that at the time these securities were sent to Bishop Ireland, they were all so indorsed and transferred as to enable him, if he had chosen to do so, to exercise absolute control and ownership over them. Some of the securities, however, as the proof shows, were in such a condition that they needed constant attention. Bishop Ireland had reluctantly accepted the sole trust and care of these securities, and undoubtedly expected that during the life of Keegan he would have the benefit of Keegan's experience and ability in caring for, reinvesting, and otherwise looking after the property. It is hardly to be supposed, from what the testimony discloses in regard to this matter, that Keegan, with his habits and his methods of business, expected or intended to lose all interest in the property the moment he had made such change as to vest the legal title in Bishop Ireland, his trustee. His affection for his child, which seems to have continued warm and active to the last, would alone have prompted him to take a continued interest in the management of his estate. It is, therefore, only natural, it seems to me, that he should have continued to exercise such supervision over and interest in the property as he thought would best secure its preservation and further accumulation.

The proof discloses the fact, that for some real or imaginary reason, Keegan, in the latter part of the year 1878, or forepart of the year 1879, was fearful that his wife and some of her friends would take measures to deprive him of the control of his property, —to bring a charge of insanity, or incompetency to manage his property, before some of the courts in Chicago, so as to secure the appointment of a conservator, or put his property in the hands of some other person to manage. He therefore, somewhat hurriedly, in view of such a contingency, sent the personal estate to the bishop at St. Paul, perhaps earlier than he intended; but when any of the papers were returned to him he assumed always to be acting, in whatever he did about it, in the interest and as the agent of Bishop Ireland; stated frankly to his acquaintances the property belonged to Bishop Ireland, and did not claim to be the absolute owner of it. It is also true that Bishop Ireland sometimes, in his communications to Keegan in reference to investments to be made from the estate, treated Keegan as having some control or management of the property, or as being entitled to be consulted, or to have the management of it; but this does not militate against the relation of trust which the bishop had assumed, nor, it seems to me, can it be held to defeat the bishop's title.

Much stress is laid upon the fact, as disclosed in the testimony of Mr. Comisky, one of the witnesses, that the morning after the death of his wife, Keegan informed him of the fact of Mrs. Keegan's death, and in the same connection said he was going now to send to the bishop for his box; but in the light of the relations which had existed for some months previously between Keegan and his wife, and the fears which he had expressed of her initiating steps to deprive him of the control of his estate, it is very likely that he did not dare to ask that the securities be returned to him, even that he might perform some necessary work in regard to them, while his wife was living, for fear of such proceedings, and that as soon as she was dead he felt relieved in that regard, and at liberty to do, in reference to the property, whatever he felt, as a business man, was necessary to be done in order to properly conserve and care for it. Undoubtedly the almost positive refusal and objections of Bishop Ireland to take upon himself the responsibility of this trust, had the effect to induce Keegan to either expressly or impliedly promise that the bishop should be relieved of all trouble in regard to the estate so long as he, Keegan, was able to attend to it. This is natural and probable. It is not likely, from the proof, that Keegan felt any special sorrow or grief over the death of his wife, and such was the organization of the man's mind that he perhaps felt a sense of relief when he knew that she could no longer annoy him, or interfere with his plans. These arrangements in regard to the property for the primary benefit of his child, and the provision as to its future disposition in case of the death of the child, would and could no longer be thwarted and embarrassed by the interposition of his wife, and he therefore felt free to aid the bishop by such attention as he could give the property. The proof is ample throughout the record that after the securities were returned to Keegan he industriously, and, as far as his health would permit, continuously applied himself to the arrangement and attention which the business connected with the securities demanded, but in all his dealings he constantly stated that what he was doing was for the bishop, and more fully to consummate the arrangement he had made for giving the bishop complete control of his estate. In April, 1879, he told John Adams, an intelligent business man in this city, that he had "fixed everything relating to his affairs; that he had left everything to his child, and in case of her death the whole property was to go to Bishop Ireland, to build an institution for destitute boys in the diocese of Minnesota. * * *" The term he used was "agricultural college for destitute boys." So, too, just be-

fore he was stricken down with his last illness, he told his housekeeper that, in the event of his sudden death, the tin box containing the securities was to be sent to Bishop Ireland, and during his illness his frequently-expressed wish and direction was that the securities should be placed at once in the hands of Bishop Ireland. At this time he had no fear of family complications. His wife was dead, no relative of hers, no relative of his own, no person, was seeking to control or interfere with the control of this property, so as to make him anxious to evade any judicial or other proceedings, because none were threatened or impending.

It seems, therefore, very clear to me from the proof that whatever was done by Keegan, after the delivery of the securities to Bishop Ireland, was done in consummation and furtherance of the trust which he had created, instead of being intended to operate against or defeat it; and that nothing was done indicating an intention on the part of the donor or his trustee to cancel or abandon the trust. The child was living when Keegan died, and I have no doubt he remained entirely satisfied with the disposition he had made of his estate.

The will he made during his nearly-last rational moments does not, to my mind, seem intended to cancel or set aside this trust. The main purpose of the will appears to me to have been to appoint the bishop the guardian of the child. Making her his sole devisee would only operate to vest in her any property he owned which he had not conveyed to the bishop, but it could not divest the bishop of any title he had already obtained, and in regard to which the trust had been declared in writing.

I therefore come to the conclusion that the estate in the hands and control of the administrator, appointed by the probate court of Cook county, should be delivered to Bishop Ireland; that the cross-bill of Peter Geraghty should be dismissed for want of equity; and that Bishop Ireland should be left, so far as this court is concerned, to execute the trusts created by the conveyance and directions to him of the donor. As it is manifest from the entire tenor of the transaction that it was intended that Bishop Ireland should expend these trust funds in the diocese of Minnesota, it may hereafter devolve upon the courts of that state to see to it that this trust is faithfully administered according to the terms upon which the trust was created and accepted.

There can be no doubt of the proposition that a delivery of a deed is as necessary to the passing of the estate as the signing, and that so long as the grantor retains the legal control of the instrument, the title cannot pass any more than if he had not signed the deed. Shep. Touch. 57; 3 Washb. Real Prop. *577; *Cook* v. *Brown*, 34 N. H. 460, 476; *Johnson* v. *Farley*, 45 N. H. 505; *Overman* v. *Kerr*, 17 Iowa, 490; *Fisher* v. *Hall*, 41 N. Y. 421; *Duer* v. *James*, 42 Md. 492; *Younge* v. *Guilbeau*, 3 Wall. 641. Thus, where a deed was placed in the hands of a depositary, to be delivered to the grantee upon the death of the grantor, provided it was not previously recalled, but the grantor reserved the right and power to recall it at any time, this was held not to be a good delivery. *Cook* v. *Brown*, *supra*; *Stinson* v. *Anderson*, 96 Ill. 373: *Prestman* v. *Baker*, 30 Wis. 644; *Baker* v. *Haskell*, 47 N. H. 479; *Brown* v. *Brown*, 66 Me. 316.

To constitute delivery of a deed the grantor must, as a rule, part with the possession of it, or, at least, with the right to retain possession. *Younge* v. *Guilbeau*, *supra*; *Johnson* v. *Farley*, *supra*. Even the registry of the deed by the grantor, though entitled to great consideration upon this point, and sufficient, perhaps, in the absence of opposing evidence, to justify a presumption of delivery, is not conclusive, and the presumption may be repelled by the attendant and subsequent circumstances. *Younge* v. *Guilbeau*, *supra*; *Mitchell* v. *Ryan*, 3 Ohio St. 377. See, also, *Masterton* v. *Cheek*, 23 Ill. 72.

Although, as a rule, the grantor parts with the possession of the deed, a formal delivery to the grantee in person is not necessary. A delivery may be by acts without words, or by words without acts, or by both. Anything which clearly manifests the intention of the grantor, and the person to whom it is delivered, that the deed shall presently become operative and effectual; that the grantor loses all control over it; and that by it the grantee is to become possessed of the estate,—constitutes a sufficient delivery. The very essence of the delivery is the intention of the party; (*Bryan* v. *Wash*, 2 Gilm. 557, 565; *Walker* v. *Walker*, 42 Ill. 311; *Masterton* v. *Cheek*, 23 Ill. 72; *Duer* v. *James*, 42 Md. 492; *Ruckman* v. *Ruckman*, 32 N. J. Eq. 259; *Nichol* v. *Davidson Co.* 3 Tenn. Ch. 547; *Thatcher* v. *St. Andrew's Church*, 37 Mich. 264; *Gregory* v. *Walker*, 38 Ala. 26; *Dearmond* v. *Dearmond*, 10 Ind. 191; *Somers* v. *Pumphrey*, 24 Ind. 231; *Burkolder* v. *Casad*, 47 Ind. 418; *Rogers* v. *Cary*, 47 Mo. 235; Shep. Touch. 57, 58;) and the intent of either or both the parties may be implied from subsequent admissions, conduct, or circumstances; *Nichol* v. *Davidson Co.*, *supra*. Where the circumstances show, unmistakably, that one party intended to divest himself of title, and to invest the other with it, delivery will be complete, though the instrument still remains in the hands of the grantor. *Ruckman* v. *Ruckman*, *supra*. Thus, where a father voluntarily made a deed to his son and did not deliver it, but their subsequent conduct was such as to show that both of them considered the deed as having been effectually executed for the purpose of passing title, it was held that no actual delivery was necessary. *Walker* v. *Walker*, *supra*.

The law presumes much more in favor of the delivery of deeds in cases of voluntary settlements, especially when made to infants, than it does in ordinary cases of bargain and sale. The same degree of formality is never required, on account of the great degree of confidence which the parties are presumed

to have in each other, and the inability of the grantee, frequently, to take care of his own interests. The presumption of law is, in such cases, said to be in favor of the delivery, and the burden of proof is on the grantor to show clearly that there was none. *Bryan* v. *Wash*, *supra*. See, also, *Walker* v. *Walker*, *supra*. It is a general rule that acceptance by the grantee is necessary to constitute a good delivery. But where a grant is plainly beneficial to the grantee, his acceptance of it will, it is said, be presumed, in the absence of proof to the contrary. *Mitchell* v. *Ryan*, 3 Ohio St. 377; *Rogers* v. *Cary*, 47 Mo. 235; *Dikes* v. *Miller*, 24 Tex. 417; *Dale* v. *Lincoln*, 62 Ill. 22. See, however, *Com.* v. *Jackson*, 10 Bush, 424. An infant of any age can be the grantee of land. *Masterton* v. *Cheek*, 23 Ill. 72; *Rivard* v. *Walker*, 39 Ill. 413. And, in such case, an actual delivery being useless and an acceptance impossible in many cases, the intention of the grantor is the controlling element, the acceptance of the grantee of a beneficial conveyance being presumed: *Masterton* v. *Cheek*, *supra*; *Rivard* v. *Walker*, 39 Ill. 413; *Cecil* v. *Beaver*, 28 Iowa, 241; *Spencer* v. *Carr*, 45 N. Y. 410. In such case it is said that a greater presumption of acceptance is indulged in their behalf than as to adults from the fact of their incapacity to manifest directly their acceptance of the deed. *Rivard* v. *Walker*, 39 Ill. 413.

An attentive consideration of the above cases will, it is believed, lead the reader to the conclusion that the decision of the learned judge, in the principal case upon the point in question, is entirely correct. Actual delivery being useless, and the conveyance clearly beneficial to the infant, in the absence of evidence showing a contrary intention on the part of the grantor the court would have been warranted in finding that the title passed by the deed. But the circumstances, as it seems to the writer, show that such was not the intention of the grantor, which, according to the authorities above cited, constitutes the controlling element in the case. Indeed, the retention of control of the deed, and his subsequent dealings with the same property, seem clearly inconsistent with an intention on his part that the conveyance in question should operate to pass the title. Upon the whole, the whole case seems well decided.

MARSHALL D. EWELL.

Chicago, February 15, 1883.

CREDIT COMPANY (Limited) OF LONDON, ENGLAND, *v.* ARKANSAS CENT. R. Co. and others.

(*Circuit Court, E. D. Arkansas.* October Term, 1882.)

1. RAILROADS—RECEIVER—CERTIFICATES OF INDEBTEDNESS—REPAIR OF ROAD.

A court of equity may authorize the receiver of a railroad to issue certificates of indebtedness and make them a first lien upon the road, for the purpose of raising funds to make necessary repairs and improvements, but it is a power to be sparingly exercised; and when the road cannot be kept running without its exercise, except to a very limited extent, the sound practice is to discharge the receiver or stop running the road and speed the foreclosure.

2. SAME—DUTY TO BUILD ROAD.

It is not a judicial duty to build railroads, and the assent of all the parties interested in the property cannot make it one, and there is no difference in principle between a court building a railroad by the issue of receiver's certificates, and making extensive and general repairs and betterments, approximating the original cost of construction by like means.

3. RAILWAY MORTGAGE—BENEFICIARIES BOUND.

In the absence of fraud the beneficiaries in railway mortgages are bound by what is done by their trustee.

4. RAILROAD BONDS—FORECLOSURE.

Where a holder of railroad bonds alleged the trustee had filed a bill and obtained a decree of foreclosure for the principal of the bonds not due, as well as for the interest which was due, without the written request of the holders of one-third in amount of the bonds, which it was claimed was a necessary prerequisite by the terms of the mortgage to the exercise of the power to declare the principal debt due, and sought for this reason to avoid the foreclosure proceedings, *held*, (1) that it was competent for the trustee to file a bill to foreclose for the interest due; (2) that the plaintiff ratified the action of its trustee by filing and proving in the master's office, in the foreclosure proceedings, more than one-third in amount of all the bonds issued; and (3) that the absence of such a requisition did not affect the jurisdiction of the court, and a decree for a larger sum than was due was error merely, to be corrected on appeal, and that as the error was one of which the trustee could not complain, and there was no fraud, the bondholders were as much bound as the trustee, and could not avoid the decree, on this ground, in any form of proceeding.

5. SAME—EFFECT OF LACHES.

The effect of laches is not avoided by a general averment that the plaintiff was ignorant of the facts until a short time before the bill was filed. A general allegation of ignorance at one time and knowledge at another is of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner.

6. SAME—FORECLOSURE—SALE UNDER.

When the property of a railroad company is sold under a decree of foreclosure, at which all persons are authorized to bid, the fact that it is purchased by the president of the company in his individual right will not in itself raise a trust relation between him and a holder of the bonds of the company which will entitle the latter to treat him as a trustee of the property so purchased.

7. SAME—PURCHASER AS TRUSTEE.

One claiming the right to avoid a purchase made by another at a judicial sale, or of treating the purchaser as a trustee, and availing himself of the purchaser's bid, cannot delay the assertion of this right to enable him to decide in the light of subsequent events whether he would or not be profited by its assertion.

8. PLEADING—LACHES NEED NOT BE PLEADED.

Laches need not be pleaded. If the cause as it appears on the hearing is liable to the objection, the court will refuse relief without inquiring whether there is a demurrer, plea, or answer setting it up

In Equity.

N. & J. Erb, for plaintiffs.

U. M. and *G. B. Rose*, and *C. C. Waters*, for defendants.

CALDWELL, J. The Arkansas Central Railroad Company was formed for the purpose of constructing a railroad from Helena to Little Rock, with a branch to Pine Bluff. The chief ultimate promoters of this enterprise were Stephen W. Dorsey and J. E. Gregg. Dorsey was the president of the company, and its financial agent and manager, and generally controlled and conducted all the affairs of the corporation.

What is commonly called an exhaustive contract was entered into between the company and J. E. Gregg & Co. for the construction of the road, by the terms of which Gregg & Co. were to build the road for all its stock subscriptions and other assets, and a majority of its stock.

The directors of the railroad company and all its officers, except the president, seem never to have had more than a mere nominal existence after the making of this contract. From that time Gregg & Co. were regarded as owners of the road, and its assets in hand, as well as all that might thereafter be acquired.

Dorsey was a member of this firm also, and in the double capacity of president of the railroad company and a member of the firm of Gregg & Co. he seems to have managed the financial affairs of both.

The company executed a mortgage to secure its first-mortgage bonds, which were put upon the market and sold to the amount of $720,000. The defendant, the Union Trust Company of New York, was the trustee in this mortgage. Dorsey went abroad to effect a sale of the bonds, and succeeded in placing most of them in London and Amsterdam.

By the fall of 1872, 48 miles of the road, which was a narrow gauge, had been completed in an imperfect manner. The work of construction was never resumed after that date. About this time Dorsey engaged actively in politics, and having been elected to the United States senate in the early part of 1873, and the assets and resources of the railroad company having been exhausted, he and the firm of J. E. Gregg & Co. soon ceased to take any further interest in the enterprise; and the defendant Johnson, who had at the solicitation of Dorsey invested some money in the concern of J. E. Gregg & Co., was elected president, and had the control and management of the road and the affairs of the company from that time until the commencement of proceedings to foreclose. The company had neither resources nor credit, and the earnings of the road were barely sufficient to keep it running, without making needed repairs and improve-

ments. The construction of the 48 miles of road seems to have absorbed the proceeds of the $720,000 first-mortgage bonds of the company, and of state aid and state levee bonds, and county and municipal subscriptions, amounting in the aggregate to some $2,000,000. The company was hopelessly insolvent. No interest was paid on its first-mortgage bonds, and on the twentieth day of September, 1876, the trustee filed a bill in the United States district court at Helena, then in the western district, to foreclose the mortgage. The bill alleged that the holders of one-third in amount of the bonds had requested the trustee to foreclose. A receiver was appointed, upon whose application Judge PARKER authorized the issue of receiver's certificates to the amount of $75,000, to make necessary repairs and improvements on the road. Between the date of this order and the next term of the court, Helena was transferred to this district, and the judge of this district rescinded the order authorizing the receiver to issue certificates. The rescinding order was not made because the road did not stand in need of repairs. It was notoriously true that its condition was such as to make it dangerous to life and property to run cars over it; ties were rotten, iron worn out, rolling stock in bad condition, bridges insecure, culverts washed out, and the road-bed in many places too low, resulting in overflows of the track and stoppage of trains. No repairs nor betterments had been put upon the road since it had been built.

It seems to be settled that a court of equity has the power in this class of cases to authorize its receiver to issue certificates of indebtedness, and make them a first lien upon the road, for the purpose of raising funds to make necessary repairs and improvements. *Wallace* v. *Loomis*, 97 U. S. 146, 162; S. C. 2 Woods, 506, under title, *Stanton* v. *Alabama & C. R. Co.*

But it is a power to be sparingly exercised. It is liable to great abuse, and while it is usually resorted to under the pretext that it will enhance the security of the bondholders; it not unfrequently results in taking from them the security they already have, and appropriating it to pay debts contracted by the court. The history of *Wallace* v. *Loomis, supra,* furnishes an instructive lesson on this subject.

This court has uniformly refused to arm its receivers with such a dangerous power. When the road cannot be kept running without its exercise, except to a very limited extent, the safe and sound practice is to discharge the receiver or stop running the road, and speed the foreclosure.

In the case of *Paine* v. *Little Rock & Ft. S. R. Co.*, April term, 1874, application was made to this court to authorize a receiver to issue certificates, which were to be a first lien, to build 60 miles of road, in order to earn a large and valuable land grant, which would lapse in a short time unless the road was completed. A majority in value of the first-mortgage bondholders concurred in the application; and the orders of the court in the case of *Stanton* v. *Alabama & C. R. Co.* 2 Woods, 506, (the case was not then reported,) and the case of *Kennedy* v. *St. Paul & Pac. R. Co.* 2 Dill. 448, were pressed upon the attention of the court. But the order was refused upon the ground that it was no part of the duty of a court of chancery to build railroads, and that the assent of all the parties interested in the property could not make it such. And there is no difference, so far as relates to this question, between building a railroad and making extensive and general repairs and betterments, the cost of which sometimes approximates the cost of original construction. In the case referred to, of the Fort Smith Railroad, the proceedings to foreclose were speeded, and a decree rendered to meet the exigencies of the case, which the supreme court approved, and said "was a much more desirable plan" than to issue receiver's certificates. *Shaw* v. *Railroad Co.* 100 U. S. 612.

Before the order authorizing the receiver to incur debts for repairs and other purposes was rescinded, he had incurred debts to the amount of some $22,000, chiefly for ties and a machine-shop. The ties were indispensable if trains were to be kept running, and the machine-shop was a necessary and valuable property to the road, and its use a necessity, though that could probably have been had without purchasing the property. A final decree of foreclosure was rendered on the seventeenth day of March, 1877. By the terms of the decree the purchaser was required to pay $40,000 in cash. This sum was required to pay the receiver's certificates, and other costs and expenses of foreclosure. Any amount bid in excess of the $40,000 could be paid in first-mortgage bonds. Unusual pains were taken to convey to the bondholders actual notice of the foreclosure proceedings, and holders of $661,000, out of a total of $720,000, of the first-mortgage bonds had actual notice of the foreclosure proceedings, and the time and place of sale. The present plaintiffs had opened negotiations looking to a foreclosure of the mortgage before the bill for that purpose was filed by the trustee; and before the sale under the decree it filed and proved in the master's office bonds to the amount of $461,000, being the very bonds on which this suit is bottomed. The road

was sold at the master's sale for $40,000, to S. H. Horner, as trustee for A. H. Johnson, the then president of the railroad company, and superintendent of the road under the receiver.

The plaintiff, by its agent, had notice of this sale, and appeared, by its attorney, in court and moved to open the biddings for the road, and the court passed an order that the biddings would be opened if the present plaintiff or any person should advance the bid $5,000 during a period of 10 days allowed for that purpose. The plaintiff, or its agent, declined to open the biddings. In the mean time Johnson had grown sick of his bargain, and made application to the court to set aside the sale and permit him to withdraw the purchase money. This was refused, and the sale confirmed. Johnson then offered to turn the road over to the plaintiff, or any holders of the first-mortgage bonds who would pay him the amount of his bid within a period of some 50 days. This offer was communicated to the plaintiff by its agent, Sully, and declined.

It is clear, from the evidence, that the defendants Johnson and Horner and the citizens of Helena wished to have the bondholders purchase the road. They were extremely anxious that the road should be completed, and believed that its purchase by the bondholders would insure that result, and that nothing else would. After the plaintiff and other bondholders declined to take Johnson's purchase off his hands, he proceeded, as fast as he could raise means for that purpose, to put the necessary repairs and improvements upon the road, which embraced 50,000 new ties, 5 miles of new iron, the rebuilding of nearly all the bridges and culverts, raising the road-bed in many places, and extensive repairs of the rolling stock. He afterwards sold a half interest in the property to his co-defendant, John J. Horner. Not long after the purchase, railroad securities and property in the south appreciated very much, and, although the road in question was but a fragment, its value was enhanced by the general and unprecedented increase in the value of all railroad property. Its value was further enhanced by the construction of a trunk line—not projected when Johnson purchased—from Missouri to Texas, which connects with its western terminus at Clarendon, and by the extensive repairs and improvements put upon the road, which altogether made it worth from $100,000 to $200,000 at the time this suit was commenced, supposing it to be free from incumbrances prior in time to the mortgage under which defendants claim.

The bill, which was filed five years after the sale, seeks to charge Johnson as a trustee for the bondholders on general charges of fraud

against him, the Union Trust Company, and others, relating to the foreclosure and sale, and for alleged inadequacy of price. The latter charge was abandoned at the hearing, the counsel for the plaintiff conceding on the argument that the road sold for all it was worth in its then condition, and in view of the question of the lien for the state aid bonds.

The rule is well settled that in the absence of fraud the beneficiaries in railway mortgages are bound by what is done by their trustee.

"In such cases the trustee is in court for and on behalf of the beneficiaries; and they, though not parties, are bound by the judgment, unless it is impeached for fraud or collusion between him and the adverse party. The principle which underlies this rule has always been applied in proceedings relating to railway mortgages where a trustee holds the security for the benefit of the bondholders." *Kerrison* v. *Stewart*, 93 U. S. 155, 160. "The trustee of a railroad mortgage represents the bondholders in all legal proceedings carried on by him affecting his trust, to which they are not actual parties, and whatever binds him, if he acts in good faith, binds them. If a bondholder not a party to the suit can under any circumstances bring a bill of review, he can only have such relief as the trustee would be entitled to in the same form of proceeding." *Shaw* v. *Railroad Co.* 100 U. S. 605, 611. Although the bill charges fraud in general terms upon the trustee, in connection with the foreclosure suit, there is not a syllable of evidence to support the charge.

One point much relied on at the hearing to support the bill was that the bill to foreclose was filed by the trustee without the written request of the holders of one-third in amount of the bonds then outstanding, as required by the twelfth article of the mortgage; and that the decree requiring the payment of the principal sum of the mortgage debt was therefore erroneous. The late cases of the *Chicago, D. & V. R. Co.* v. *Fosdick*, 1 Sup. Ct. Rep. 10, United States supreme court, are cited in support of this contention. The ruling in those cases does not aid the plaintiff's case, for several reasons: (1) The mortgage in the case at bar contains an important provision on the subject which was not contained in the mortgage under consideration in the cases cited, and which would seem to authorize all that was done by the trustee, and the decree of the court for the whole debt. (2) It was undoubtedly competent for the trustee to file a bill to foreclose for the interest actually due, and that largely exceeded in amount the value of the road. (3) The railroad company does not complain of

the decree, and the plaintiff is estopped to do so by reason of having filed and proved in the master's office more than one-third in amount of all the bonds issued, with full knowledge of all the facts. This was a ratification of the action of the trustee. (4) If it be conceded that the requisition of the holders of one-third in amount of the bonds was indispensable to authorize a decree for the full sum of the mortgage debt, that fact would not affect the jurisdiction of the court or the validity of its decree when collaterally attacked. The jurisdiction of the court to pronounce a decree in the case is not contested, and if it rendered a decree for more than was due it was error merely, which might have been corrected on appeal by the proper party in apt time. But if it be conceded that it was an error, it was one of which the trustee could not complain; and there being no fraud on the part of the trustee the bondholders are as much bound as the trustee, and cannot avoid the decree in any form of proceedings. *Shaw* v. *Railroad Co. supra.*

It is needless to discuss in detail the charges of fraud contained in the bill. The plaintiff has lost all right to be heard by its own gross laches. In excuse for the long delay, the bill alleges the plaintiff was ignorant of the facts until recently. This allegation is not true. The plaintiff's agent had notice of all the facts, and testifies he communicated them to the plaintiff immediately after the sale. But the bill itself does not state a case that will excuse the delay. "A general allegation of ignorance at one time and knowledge at another is of no effect. If the plaintiff made any particular discovery it should be stated when it was made, what it was, how it was made, and why it was not made sooner. * * * There must be reasonable diligence, and the means of knowledge are the same, then, in effect as knowledge itself." *Wood* v. *Carpenter*, 101 U. S. 135, 140; *Harwood* v. *Railroad Co.* 17 Wall. 78; *Badger* v. *Badger*, 2 Wall. 87.

In *Harwood* v. *Railroad Co. supra*, there was a delay of five years, and in *Twin-lick Oil Co.* v. *Marbury*, 91 U. S. 587, there was a delay of four years, and the court denied relief in both cases on the ground of laches. In the case last cited, the defendant, at the time he purchased the corporate property, was a stockholder and director in the company, and the bill, which sought to charge him as a trustee, was filed by the company, and not, as in the case at bar, by a bondholder. All parties in this case were authorized to bid at the sale, and the fact that Johnson was president of the railroad company and the plaintiff a holder of bonds of the company did not in itself raise a trust relation between them which would entitle the latter to charge

the former as a trustee, and at its election treat his purchase as though made in trust for its benefit. It could only avail itself of Johnson's purchase by virtue of some agreement or fraudulent act on his part. The plaintiff does not rely upon any agreement, and if the conduct of Johnson was such as to entitle the plaintiff to avoid his purchase or avail itself of his bid, it ought to have exercised the right within a reasonable period. It could not delay the assertion of this right to enable it to decide, in the light of subsequent events, whether it would or not be profited by its assertion.

In *Twin-lick Oil Co.* v. *Marbury, supra,* Mr. Justice MILLER says: "No delay for the purpose of enabling the defrauded party to speculate upon the chances which the future may give him of deciding profitably to himself whether he will abide by his bargain or rescind it, is allowed it in a court of equity." That is precisely what the plaintiff asks the court to permit it to do in this case. It declined to take the property at the price bid by Johnson, because, as matters then appeared, that seemed to be all or more than the property was worth. It was patent to all at the time of the sale that the alternative would be presented to the purchaser of expending at once a large sum for repairs and improvements on the road, or abandoning its use as a railroad altogether. And after these expenditures had been made it was exceedingly doubtful whether the earnings of the road would equal its running expenses. In view of these facts, and the further fact that it was claimed then that the lien for the $1,350,000 state aid bonds issued to the road was paramount to the lien of the mortgage under which the road was sold, (which is still an open question so far as relates to this road,) it is not surprising that it was difficult to find a bidder for the property at the minimum price fixed in the decree, or that the plaintiff declined to take it at that price. Years afterwards, and when the property had greatly increased in value from causes not then foreseen, and from extensive repairs and improvements put upon it, and after other interests had intervened, and the plaintiff erroneously supposed the question of the lien for the amount of the state aid bonds was out of the way, it files this bill, and asks that it be permitted to do now what it declined to do then, take the property at Johnson's bid, and that he be decreed to be a trustee and required to account.

A more inequitable demand, considering the facts of the case, was probably never addressed to a court of equity. If it was settled that there was no lien on the road to secure the state aid bonds, the case would not be any more favorable for the plaintiff. Having declined

to take the risk of purchasing the property when it was doubtful whether the investment would entail a loss or yield a profit, it should not be permitted at this late day and in the light of subsequent events to reconsider that resolution. The profits, if in the end there are any, justly belong to the purchaser, who took the risk, and whose labor and capital have added largely to the value of the property. As was said by the court in *Wood* v. *Carpenter, supra*, it is impossible "to avoid the conviction that the plaintiff's conduct marks the difference between forethought in one condition of things and afterthought in another."

Laches need not be pleaded. If the objection is apparent on the bill itself, it may be taken by demurrer. *Maxwell* v. *Kennedy*, 8 How. 222; *Lansdale* v. *Smith*, 16 Cent. Law J. 28; [S. C. 1 Sup. Ct. Rep. 350.] And if the cause, as it appears on the hearing, is liable to the objection, the court will refuse relief, without inquiring whether there is a demurrer, plea, or answer setting it up. *Sullivan* v. *Portland R. Co.* 94 U. S. 811; *Badger* v. *Badger*, 2 Wall. 95.

The plaintiff and all other purchasers of the first-mortgage bonds have undoubtedly lost the money invested in them. But they did not lose it by the foreclosure proceedings. It was lost from the instant it was invested in bonds secured by a mortgage on a road which had an existence only in name. If they have any just ground of complaint, it would seem to be against those whose representations induced them to purchase the bonds, and who probably used the proceeds for purposes other than building the road.

Let a decree be entered dismissing the bill for want of equity, at plaintiff's costs.

MORGAN *v.* KANSAS PAC. RY. CO. and others.

(Circuit Court, S. D. New York. September 11, 1882.)

1. SUIT BY BONDHOLDER OF RAILROAD—WHAT MUST BE ALLEGED AND PROVED.
   Where an action is brought by a bondholder of a corporation for an accounting and an injunction against a railroad company, wherein he makes the trustee under an income mortgage defendant, it must be alleged and proved that such trustee has been requested to bring such action, and that he neglected and failed to do so, and that he is, therefore, made a defendant in the action.

2. SAME—NECESSARY PARTY.
   A party who is a sole trustee under an income mortgage of a railroad corporation, is a necessary party to a suit against such corporation for an accounting and an injunction, and on failure to join him as such the bill will be dismissed,

although it is shown that he was not and could not be found within the district to be served with process, where the issue is as to whether he was requested and refused to sue.

In Equity.

Bill in equity by the holder of certain coupons attached to income bonds of the Kansas Pacific Railway Company, for an accounting and a decree of payment. The plaintiff sues "on behalf of himself and all other holders of income bonds who may show themselves entitled to relief, and who shall in due time come in and ask relief by and contribute to the expenses of this suit." Lewis, the trustee of the bonds, was named as defendant to the bill, but was not served with process, and did not appear in the cause. The bill averred a request upon Lewis to bring this suit, but no proof of the averment was offered at the hearing.

G. H. Forster, for plaintiff.

J. F. Dillon and *A. H. Holmes*, for defendants.

BLATCHFORD, Justice. Benjamin W. Lewis is named in the bill as a defendant. Process of subpœna is prayed against him in the bill. The bill avers that "during the several years last past the defendant Benjamin W. Lewis has duly become sole trustee under said income mortgage," and "has been requested to bring an action for the accounting and injunction asked by the plaintiff herein, but he has neglected and failed to bring such action or comply with said request, and he is, therefore, made a defendant in this action." The answer of the Kansas Pacific Railway Company admits that "during several years last past Benjamin W. Lewis has been the sole trustee under said income mortgage, but it has no knowledge or information sufficient to form a belief as to whether or not he has been requested by complainant to bring an action for the accounting and injunction asked by complainant herein." This raises an issue as to the request to Lewis.

Lewis, being the trustee under the mortgage, is the proper party plaintiff in a suit of this character, and some good reason must appear of record why he does not sue as plaintiff; and, in such case, he must be made defendant. The bill recognizes this necessity, and hence makes the averments referred to. The averment as to the request to Lewis is controverted, but it is not proved on the part of the plaintiff. It would be necessary to prove it, even though Lewis were served with process or appeared. It is not alleged in the bill that he is beyond the jurisdiction of the court, nor is that fact proved. The bill, it is true, describes Lewis as "of the city of St. Louis," and

as "a citizen of the state of Missouri." But that is not sufficient. And even if it were shown that Lewis was not and could not be found within this district, to be served with process, there is nothing in section 737 of the Revised Statutes which makes it proper for the court to adjudicate the suit without the presence of Lewis, because the issue as to whether Lewis refused to sue, as stated, is one on which Lewis must be heard, and under section 737 he cannot be concluded or prejudiced by a decree rendered in his absence. The statute cannot be construed so as to convert real parties and necessary parties into no parties at all. There is, in this case, no suit to adjudicate unless Lewis be plaintiff, or unless, if he be defendant, he be served or appear. Rule 47 in equity is to the same purport. It makes it discretionary with the court to proceed, as does section 737.

For the foregoing reason, and without deciding expressly or impliedly any other question raised in the case, the only disposition that can now be made of the suit is to dismiss the bill, with costs, but without prejudice to any other suit in any court.

HALL v. MEMPHIS & CHARLESTON R. Co.

(*Circuit Court, W. D. Tennessee.* October 2, 1882.)

1. ACTIONS IN TORT AND EX CONTRACTU—TENN. CODE, § 2746 ET SEQ.
   The plaintiff, on the facts stated and proven may, in Tennessee, recover whatever damages he may be entitled to, whether his action sounds in tort or *ex contractu*, all forms of action having been abolished by the Code.
2. CARRIER OF PASSENGERS—LIMITED TICKET—EJECTION—MEASURE OF DAMAGES.
   A passenger holding a ticket, the limitation of which has expired, cannot insist that the conductor shall take it, in violation of a regulation of the company requiring the conductor to demand train fare of persons without tickets, although he may have an understanding or contract with the station agent of whom the ticket was purchased that it would be received after the time limited on the face of it; and on the refusal to pay the fare ejection from the train was not wrongful. And the measure of damages in a suit for a breach of the alleged contract is, in the absence of proof of any special damage by delay, only the price of the extra fare demanded and paid for transportation to the place of destination.
3. SAME—WRONGFUL EJECTION—RESISTANCE BY PASSENGER.
   While resistance to the authority of a conductor does not preclude a passenger from recovering reasonable damages for a wrongful ejection from the train, it is his duty, certainly where he is in the wrong, to submit without resistance, except in defense against impending bodily injury; and, right or wrong, unnecessary resistance will excuse the use of force and mitigate the damages for any injury received.

4. SAME—CONTRACT OF CARRIAGE—MISTAKES ABOUT TICKETS.

A contract of carriage is made with reference to the reasonable regulations of the carrier for the intercommunication between the agents of the carrier in the transaction of its business; and mistakes should be treated, as in other business transactions, as matters for adjustment between the passenger and the proper agents of the carrier. *Held*, therefore, that where there is a dispute arising on the train about the ticket it is the duty of the passenger, if able to do so, to pay the extra fare and rely on his remedy to recover it back, rather than to force the conductor to expel him, with a view to suing for damages for a wrongful ejection. And, if he insists on expulsion, he can recover no other damages than he could have recovered if he had paid the extra fare or quietly left the train and sued for a breach of the contract.

5. SAME—PLACE OF EXPULSION—REGULAR STATION.

A regular station is not an improper place to eject a passenger, although there may not be a hotel for public accommodation at that place.

Motion for New Trial.

The plaintiff, who is about 85 years of age, purchased tickets at reduced rates for himself, his wife, about 76 years of age, and his daughter and her child, from Town Creek, a station on defendant's road, to Memphis and return, upon which a limitation was printed, "Not good after 30 days." They were persons of the highest respectability. Going to Texas, they returned after the limitation expired, and the conductor refused to receive the tickets, demanding train fare. This being refused, they were ejected at the next station, as required by a regulation requiring the conductor to demand certain prescribed rates for passengers not holding tickets. The plaintiff insisted that he had purchased the tickets as unlimited tickets, and that the station agent had assured him that, notwithstanding the limitation, he could be carried on them at any time. This was denied by the agent, and there was great conflict of proof on the subject of what transpired at the time of the purchase. The plaintiff offered to pay the difference between the price of the tickets and the regular unlimited tickets, and between the price of the tickets and the train fare, which was refused. He then offered to pay this difference to Collierville, a station further on, where he had friends. This was refused, and he was advised by the conductor to pay train fare to that station. He told the conductor that he would only leave by force, and laying hold of the seat refused to leave it. The conductor forced him out of it, and led or dragged him from the train, and the others were conducted to the platform. There was no hotel there, but a small station-house, in which there was a room in which the parties passed the night, under circumstances of great discomfort. His wrist was somewhat strained, and his wife strained her ankle on the platform.

There was much dispute as to the exact occurrences, the inadequacy of light furnished, and assistance to the platform; the plaintiff complaining that they were hurried off and left in the dark, to find their way as best they could, in unpleasantly damp and cool weather for people of their age, while the conductor insisted that he acted with all the courtesy and gentleness possible under the circumstances, and with more attention than usual in like cases, because of the age of the parties.

It was not disputed that the business was disagreeable to the conductor, and that he was at much pains to persuade the plaintiff and other parties to pay the small sum demanded for fare to Collierville, at least, but that the plaintiff insisted on being put off with force unless his offers to pay only the difference between the price of the expired tickets and the train fare were complied with. The train fare to Collierville for the whole party was between three and four dollars. The plaintiff had ample means to pay train fare to either Collierville or Town Creek. The court directed a verdict for the defendant company, with a stipulation, however, to submit to a verdict for the extra fare paid by the plaintiff on the next day for tickets to his destination, if the court should conclude the company was liable for it. Subsequently a verdict was entered for the plaintiff according to the stipulation, and he moved for a new trial.

Wright & Folkes, for plaintiff.

Humes & Poston, for defendant.

HAMMOND, J. It was much argued at the trial and on this motion for a new trial whether, under this declaration, there could be any recovery *ex contractu* at all, and whether the action did not sound so entirely in damages that the plaintiff could not recover for any mere breach of the contract, irrespective of the question whether the plaintiff had been rightfully or wrongfully ejected from the train. The court was of opinion then, and now is, that this was an immaterial question, since, under our Code, abolishing all forms of action, a plaintiff may recover by a simple statement of the facts, be they what they may, if these facts entitle him to recover in any form. Tenn. Code, §§ 2746–2748, 2896, 2975; *Jerman* v. *Stewart*, 12 FED. REP. 266, 267; *Angus* v. *Dickinson*, Meigs, 459; 5 Am. Law Rev. 205, 225. The court, therefore, put the defendant under a stipulation to submit to a verdict for the price of the tickets, not because the ejection of the plaintiff was adjudged wrongful, but because the facts showed that the defendant had refused to carry out its contract, and

had incurred whatever liability attached for that breach. A verdict and judgment were subsequently directed, under the stipulation, for the plaintiff for the amount he paid for the tickets, which settled the right to recover on the facts, but limited the measure of damages to the price of the tickets. This action of the court assumed that the jury would have found the much-disputed facts in regard to the contract in favor of the plaintiff, and proceeded on the theory that he was entitled to be carried on the expired tickets from Town Creek to Memphis and back, and that the defendant company was guilty of a breach of its contract and liable for refusing to carry him. The case was treated as if the plaintiff had paid the extra fair demanded, as he did the next day, when he purchased new tickets and proceeded on his journey, and then sued for a refusal to carry him on the original contract.

It is now argued that, this being so, the plaintiff was wrongfully ejected, and the case should have gone to the jury under proper instructions as to the measure of damages. If the defendant company were complaining and demanding a new trial, I should not refuse it; for, clearly, the fact whether it made any contract other than that expressed on the limited tickets was much disputed, and the jury might have found the verdict either way, and the action of the court was wrongful as to the defendant company in depriving it of a jury trial on that question. But the stipulation was put upon the defendant to compel it to submit to a verdict on that question against itself, and disembarrass the case of all other considerations, except the one whether the plaintiff was entitled to recover for putting him off the train anything more than the price of the tickets. The proper direction would have been to find for the plaintiff the amount paid for the new tickets and interest, or not, in the discretion of the jury, instead of a direction to find for the defendant company. But I had not then fully made up my mind that the plaintiff was entitled to recover anything *ex contractu*, and sought to reserve that question by the stipulation. The real question in the case is one of the proper measure of damages. When the court directed a verdict for the defendant corporation, with the stipulation above mentioned, it determined that the price of the extra tickets was the proper measure of damages, and, taking the subsequent action of the court under the stipulation into view, the case stands in the attitude of a direction by the court, on all the facts, assuming conclusively in favor of the plaintiff that he had a contract entitling him to carriage, that the

jury should find a verdict for the plaintiff for the price of the extra tickets, and he is entitled to a new trial if under any proper view of the facts or law he could have recovered more.

It is proper to remark that the court laid out of the case all questions of unnecessary force, for, on the plaintiff's own proof, and paying no attention to the conflict as to what was actually done, as appears by defendant's proof, he resisted the conductor, and not only provoked, but invited, force to eject him; no doubt under the mistaken view of the law, as he himself expressed it, that "he had a right to vindicate his constitutional and legal rights as a free American citizen;" that it was his duty to do so; and further, that resistance was necessary to secure his right of action against the company. He admits that much, and I do not doubt he felt that he was building up a more substantial claim for large damages by resistance. It is a common mistake, but where the conductor is acting lawfully, and doing what he has a right to do, the passenger must submit to his authority, and resistance is wholly unlawful. The courts will not, where a passenger is in the wrong, tolerate any nice discriminations about the force necessary to secure submission to the conductor's lawful authority and overcome the resistance, unless it may be where the conductor departs from the exercise of lawful force, and beats, wounds, or maltreats the resisting passenger in the ill-temper of belligerency, and thereby becomes an aggressor on his own personal account. Even here it would be remembered that the conductor is likewise human; while he should do his duty without unnecessary violence, and in the best of temper, a resisting passenger cannot expect the courts to erect delicate scales on which to weigh with exact nicety the force used to overcome his resistance. The conductor is somewhat like the master of a ship. He has police powers and disciplinary control over the train, and the quiet and comfort of the passengers and their safety are under his protection. He should be obeyed by the passengers, and the common notion that force must be invited to secure legal demands against his unlawful exactions is, in my judgment, erroneous and vicious. All the passenger need do is to express his dissent to the demand made upon him, and he need not require force to be exerted to secure his rights, certainly not to increase his damages. I have held in another case that even where the passenger is right and the conductor wrong, it is contributory negligence to resist him by engaging in an unnecessary trial of strength with superior force. Absolute submission may not be a duty where the conduct of the conductor is wrongful, and resistance does not pre-

clude the right to recover all reasonable damages for the wrong done; but unreasonable resistance should be considered in mitigation of damages; resistance should not, at all events, be allowed to aggravate the damages. *Brown* v. *Memphis & C. R. Co.* 7 FED. REP. 51, 65.

I fully recognize the feeling of "a free American citizen" in the face of threatened wrong or insult, but the safety of the ship forbids that he should fight with the master, and imperil the ship and the lives and property she carries. Better that he should suffer the wrong than to endanger or discomfort his fellow-passengers. The conductor of a railroad train is not altogether as supreme, perhaps, as the master of a ship; but on analogous principles, that seem to me obvious, it is, I think, the duty of a passenger to avoid resistance beyond mere dissent, and submit to his authority without more than mere protest, unless resistance is necessary to defend himself against impending personal injury. In this case, therefore, it not appearing that the conductor was guilty of any attempted violence in overcoming the resistance of the plaintiff, and that he was as considerate of his age and obstinacy as possible, taking all the plaintiff said to be true, I do not feel authorized on the proof to submit to the jury whether or not the plaintiff's resistance might not have been overcome with something less of force than the conductor used. The plaintiff said he did the best he could to retain his seat in the train by holding on and refusing to leave it.

The same considerations, growing out of the mistaken notion of the plaintiff that he was only vindicating his rights, that to do this he must invite force, and his obstinacy in refusing to pay the additional fare demanded while he had abundance of money with him to do so, convinced me that he was intent on making a case against this railroad company by compelling the conductor to eject him or recognize his tickets, and induced me to withdraw all the circumstances connected with his ejection from the consideration of the jury in aggravation of damages. In my judgment passengers cannot be allowed to build up cases for damages. Admit that the company should have carried this plaintiff notwithstanding the expiration of the limited ticket, and notwithstanding the regulations forbidding the conductor to recognize a ticket after it had expired, and it does not follow that the plaintiff is entitled to recover damages for the injuries, real or imaginary, to his person or his feelings for his *ejection* from the train. He may be entitled to the damages for a breach of the contract, which he has, by the judgment, received; and if, by the delay or refusal to carry him, he had suffered in his

business or been put to expense, these might have been added. But there was no proof of such damages in this case. It was claimed that damages should be awarded for indignity to these old people; for injury to them in their persons and feelings by putting them out in the night under circumstances of discomfort. The conductor should probably have carried these aged people, their daughter and child, to Collierville, some 15 miles further on, where they were willing to stop, and had ample time to adjust their trouble about the tickets. This, in consideration of their extreme age, and the great indulgence due to even the exactions, the whims, and the obduracy sometimes found in extreme old age, and abundantly manifested by this —as the proof shows—very excellent gentleman. All the jury, no doubt, would have advised this, and all the learned counsel, particularly those of the defendant. But this is mere sentimentalism. The conductor was not bound to do it, nor to risk expulsion by doing it, and the conduct of the plaintiff was not of that character to incline him to it. Here was an aged gentleman with an aged wife, their daughter and her child, found upon a train with expired tickets, which the conductor was forbidden to receive. There was a dispute about the obligation of the company to receive them. The fact appeared on their face that the contract of the company had expired, and this was all the conductor knew, or could know of his own knowledge. All else about them he must take from the plaintiff.

The plaintiff's claim rested upon complicated transactions, understandings, inferences, and a contract, if you please, resting in parol, with two or more station agents, more than 100 miles away. How could the conductor act on such a contract? How could he take these expired tickets, and obey the rules of his company prescribed for his guidance? But here was the plaintiff insisting unreasonably that he should. Their negotiations came to the point that by paying less than five dollars the party would be carried to Colliersville, where they had friends and were willing to stop until the trouble could be arranged; and yet this obdurate passenger refused to pay it, with ample funds in hand, and insisted on a forcible ejection of himself and the aged wife, their daughter and her child. If wrongly demanded it could have been recovered back, with costs, and all damages satisfied. Why should he not have taken that course? It is not the case of a man with a clear right and a clean ticket entitled to ride on that trip and train wrongfully ejected, but of one with a disputed right, a ticket void on its face, and which required further attention from the passenger to make it available, as he was informed

then and there by the conductor. Under such circumstances, to insist on the conductor taking his word about what he had been told by the station agents as to the capacity of the ticket to take him along after its plain terms had stamped it with uselessness, rather than pay the fare demanded, was his own folly; and this was the cause of his ejection and his damage, and it was not the proximate or remote result of a breach of the contract.

Here we are met with an argument that this was all for the jury and not the court. I think not. The court determines the measure of damages as a question of law, by fixing the principle by which the jury measures the quantity. Outside of that it is for the court to adjudicate on the facts as found by the jury, and in reaching my conclusions I assume all the plaintiff's case to be just as he himself makes it, and base my judgment solely on his proof. Numerous cases can be cited in opposition to these views, but none of them are from the supreme court, and I prefer to follow those that may be cited to support this judgment. The fact is that this class of cases is not satisfactory as furnishing precedents for any judgment. The facts are so differential, the oscillation and vacillation so great, that any hope of reconciling the conflict is visionary. The most that can be done is to trace out some principle of judgment that meets the general approval. That which I seek to follow here is this: While the law holds carriers to a rigid responsibility to the public, and will enforce it by awarding damages, sometimes more than have been actually sustained, it does not require of them unreasonable acquiescence in every demand made by a customer to waive their ordinary business rules of conduct in favor of his convenience or even in favor of his contract. I tried to illustrate this at the trial by putting the case of a passenger being furnished through accident or mistake with a ticket to another place than that to which he wished to go. He has paid his money and there is a valid contract to carry him to his destination, but it can hardly be that he can require the conductor to stop the train till he can rectify the mistake, or take the ticket on his assurance of the real contract, or to abandon the ticket system and disregard the regulations made for the general public and the carrier's mutual convenience. What is to be done? Clearly, it seems to me, the passenger should pay his fare—if able—and settle the difference with the company by returning the ticket and adjusting the balance. Men do this in ordinary business intercourse in other branches of trade or commerce, and there is no reason why they should not in this.

The law recognizes that these carriers find it necessary in their business to have their checks and balances in the intercommunication of their agents, and they require in its conduct elaborate systems of rules to prevent loss to them and to the public. Mistakes will occur with railroads as with others, and the same rules should be applied. It seems to me that a passenger, finding himself without a ticket or other evidence of his contract which will be recognized under these regulations, cannot plant himself on his contract right and force the railroad, outside and against the regulations, to a specific performance then and there by compelling the conductor to eject him as a foundation for more damages than he would receive if he should comply with the regulations, and sue for a breach of the contract. There is no other just way to manage these mistakes. Those who would defraud the company might pretend to be the victims of mistakes or the beneficiaries of contracts outside the regulations. We took much time, examined many witnesses, and heard much argument on the issue whether the station agent did or did not make the alleged contract to carry the plaintiff on tickets expired on their face, and I doubt if, in the conflict of proof, the jury could have reached a satisfactory verdict on that issue. How, then, could the conductor have tried it successfully in the brief time allowed him in collecting tickets? It was impossible. He had either to take the plaintiff's word for it or enforce his regulations. The plaintiff's word was, and has been all along, disputed; and, giving him the benefit of all the credence his character and life entitles him to, the fact remains that the conductor had no means of knowing the weight to be attached to his word, and a common impostor could have told the story as well as the best of men.

It is in my judgment the duty of a passenger to see to it, before he takes a train, that his ticket will carry him on that train, and where it is on its face expired he should have it renewed or otherwise made good at the proper place, and by inquiry before taking the train be sure that it is a proper thing for him to take that train. The business could not be done with tickets on any other principle. Admit all that may be demanded by a theory that it is the duty of the carrier to inform its agents of anomalous contracts and the result is the same. They do this by giving the passenger evidences of his contract, called tickets, or sometimes special passes, and it is likewise the duty of the passenger to see that he has these necessary tokens of his right to travel on a train. If there be mutual mistakes

and mutual neglect, or even a mistake by the carrier alone, it does not follow that the passenger can demand that all the regulations shall be set aside to cure the mistake, but only that it must be by conference with the proper officers (and the conductor on a moving train is not in a case like this one of these) adjusted, and if this be refused, proper damages may be recovered. But the proper damages are not such as the unfortunate passenger may receive by absolutely insisting on a violation of the ordinary regulations, by subordinate officials for whose guidance the regulations are a necessity, to cover a case clearly outside of them. If the plaintiff had been penniless, I need not say whether the principle would be changed. Perhaps not. But here there was money sufficient to have paid the extra fare, as it was afterwards paid, and the plaintiff's duty was to have paid it that night and sue for a breach of his alleged contract, and not to force an ejection and lay the foundation for larger damages than a suit on the contract would have given him. Suppose he had continuously refused to pay further fare and remained continuously at the place where he was ejected, can it be said he could have recovered for all that delay in reaching his destination? Why, then, should he not pay at once and go on, as to pay later and go on, to avoid contributory negligence? It is argued that petty suits like that suggested by the court would be expensive and useless as a means of compelling great corporations to discharge their contracts, and the lawyers would not take them. Great corporations are no more liable for great damages for small injuries than other people, and the plaintiff, before a justice of the peace at his own home where the witnesses all resided, by an ordinary suit, could have recovered back all the extra fare, if he were entitled to it, with as little expense as in other cases.

Some argument has been made that the conductor demanded more fare than under the regulations he should have done. I think the regulations, as explained by the several conductors' books put in proof, and the explanations of the dates when they were in force, and the explanations as to the meaning of the terms "straight fare," "train rates," "conductors' rates," etc., as given by the witnesses, will show that this is not the fact. But I do not go into that, because the principle of this judgment is the same, whether the conductor demanded too much or not. A moving train is no place to wrangle with the conductor about rates. His demand for fare should be complied with, or the passenger peaceably and quietly leave the train

and seek his remedy at law. He cannot compel ejection with force and increase his damages because the conductor asks too much. If he tenders the proper fare and it is refused, the law will compensate him in damages, but he cannot force himself on the conductor in a dispute about rates, any more than in a dispute about tickets. It is not like the class of cases where the passenger is ejected for refusing to comply with unreasonable regulations in the matter of the manner and mode of carrying him, or like violation of the contract. There the public policy which requires carriers to respect the rights of people to accommodation according to contract, to protection to life and limb, etc., authorizes the courts and juries to enforce that policy by damages which are not altogether, perhaps,—at least where there is personal indignity or violence,—measured by the nicest scales of exact injury so much as by the force of example required to compel the carrier to do his duty to the public. *Railroad Co.* v. *Brown*, 17 Wall. 445; *Pennsylvania Co.* v. *Roy*, 101 U. S. 451; *Gallina* v. *Hot Springs R. Co.* 13 FED. REP. 116. These overcharges in rates for transportation can be compensated by the money overpaid and interest, and I do not see that the public policy referred to here requires that in the multitude of business a carrier shall be held never to make mistakes, or always to be exactly right in all disputes about contracts under the penalty of punitive damages. The argument that the case is governed by the strict law of contract which is so urgently pressed by general analogies of a contract to do a thing, and a neglect or refusal to do it, is met by the judgment in favor of the plaintiff for the full amount of the loss he sustained by the breach, and there is a misapplication of these analogies when we overlook the fact that the passenger makes his contract with reference to all the reasonable rules prescribed by the company for the useful conduct of its business, not only for its own convenience and profit, but also for that of the public as well.

A very vigorous protest is made by the argument against the doctrine of contributory negligence, as applicable to a case like this, but it is only at last a controversy about terms. Perhaps it is more technically correct to say that the conduct of the conductor of the train being unobjectionable, the injury complained of was not the direct result of any fault of his or the defendant corporation which he represented, and it is not, therefore, liable to the plaintiff, but it could have been prevented if the plaintiff had chosen to pay the fare demanded, and in that sense it was the result of his own negligence, rather than anything the conductor did.

It is further argued that the conductor put the plaintiff off at an improper place. It was a regular station, and his regulations required him to evict a passenger refusing to pay fare at the next station. There was no hotel at the place, but there were houses of citizens close by, and there was at the station a room, not very elegant to be sure, but all that the railroad could be required to furnish at such a place for waiting passengers. I know of no rule of law which requires a railroad company to furnish recalcitrant passengers with accommodations of any kind when put off the train for refusing to pay fare, or to put them off only at stations having hotels. They might not be allowed to put them off between stations, where they cannot see agents or procure tickets without extraordinary trouble, or in a wilderness or a desert, to suffer by starvation or for want of lodgings, but this station afforded as much as the company could be required to provide in such cases.

On the whole case, it seems to me now, as at the trial, that the plaintiff's suit must be treated as if he had quietly left the train and sued for a breach of his alleged parol contract to be carried at the reduced rate of limited tickets after the limitation had expired, and that inasmuch as he shows no special damage to his business or otherwise, resulting from the delay, his recovery must be limited to the extra fare paid, the other injuries complained of being the cause of his mistaken notions about his right to be carried on the expired tickets, and his resistance to the proper demand of the conductor that he should, in the absence of any evidence of his contract, pay train fare.

As before remarked, there are cases which do not, in the text of the opinions and perhaps as adjudications, justify this judgment, but it finds support in others which seem to me more sound. Remarking that the case of *Louisville R. Co.* v. *Garrett*, 8 Lea, 438, does not, in my judgment, in the least contravene the views here expressed, and that the case of *Walker* v. *Langford*, 1 Sneed, 514, fully sustains them, although that was a contract of a wholly different nature, when it rules that a plaintiff cannot increase his damages for a breach of contract by neglecting, or refusing at his own expense, to do that which would lessen them, I close this opinion with a citation of the principal and most pertinent cases cited on either side, without attempting to review or reconcile them: *Frederick* v. *Marquette R. Co.* 37 Mich. 342; *Chicago R. Co.* v. *Griffin*, 68 Ill. 499; *Pullman Car Co.* v. *Reed*, 75 Ill. 125; *Ill. Cent. R. Co.* v. *Johnson*, 67 Ill. 312; *Cincinnati R. Co.* v. *Cole*, 29 Ohio St. 126; *Townsend* v.

N. Y. Cent. R. R. 56 N. Y. 295; S. C. 4 Hun, 217; *Cox* v. *N. Y. Cent. R. R.* 4 Hun, 176, 182; *English* v. *Delaware & H. Canal Co.* 66 N. Y. 454; S. C. 4 Hun, 683; *O'Brien* v. *N. Y. Cent. R. Co.* 80 N. Y. 236; *Hamilton* v. *Third Ave. R. Co.* 53 N. Y. 25; *Jackson* v. *Second Ave. R. Co.* 47 N. Y. 274; *Jeffersonville R. Co.* v. *Rogers*, 38 Ind. 116; *Pittsburgh, etc., R. Co.* v. *Hennigh*, 39 Ind. 509; *Palmer* v. *Railroad*, 3 Rich. (N. S.) 580; *Maples* v. *N. Y., etc., R. Co.* 38 Conn. 557; *Burnham* v. *Grand Trunk R. R.* 63 Me. 298; Thomp. Carr. 337; Hutch. Carr. §§ 570, 575; 5 South. Law Rev. 770.

Motion overruled.

See S. C. 9 FED. REP. 585; *Gray* v. *Cincinnati South. R. Co.* 11 FED. REP 683; *Maskos* v. *Amer. Steam-ship Co.* 11 FED. REP. 698; *Brown* v. *Memphis, etc., R. Co.* 7 FED. REP. 51; S. C. 5 FED. REP. 489.

Recent Decisions on the Rights of Passengers.

§ 1. PRELIMINARY. The principal case was reported in 9 FED. REP. 585, where the learned judge, in charging the jury, ruled substantially the same question which is again ruled as above, that, although a passenger may have a right to be carried under a special contract, if he be not provided with a ticket which the conductor can recognize, he must pay the fare demanded by the conductor, under a reasonable regulation requiring him to demand fare of persons without tickets, and cannot insist on being expelled by force, as a foundation for a suit for damages for wrongful expulsion. By this conduct he contributes to his injuries, which are the direct result of his own conduct, and not the breach of any special contract he may have for his carriage.(*a*)

A case involving the same facts as the above case was tried in December in the circuit court of Shelby county, Tennessee, before the Hon. JAMES O. PIERCE, who is well known to the profession as a judge of exceptional culture and ability. Mrs. Clendenin was traveling with Mr. and Mrs. Hall, her parents, on the same kind of a ticket, bought at the same time and under the same circumstances, and expiring at the same time. They went to Texas, and, on their return, reached Memphis on the very day their tickets were to expire. The time when they expired was midnight. They got on board a train which left Memphis at 11:59 P. M. The conductor refused to recognize their tickets, claiming that they had expired, and demanded what is known as "conductor's fare" from Memphis to Town Creek. They declined to give this, and offered to pay "agent's fare," which is somewhat less; whereupon the conductor put them off at White's station, which is 10 miles out, where they remained all night, without any place to sleep, and exposed to the weather. Mr. and Mrs. Hall brought the above suit for damages in the United States circuit court claiming $20,000, and recovered the amount of the extra fare which Mr. Hall was obliged to pay in order to reach home. Clendenin and

(*a*) Hall v. Memphis, etc., R. Co. 9 Fed. Rep. 585.

wife, suing in the state court, had better luck; they had a verdict for $2,500. At the trial, Judge PIERCE charged the jury as follows:

"*Gentlemen of the Jury:*

"Two principal questions are presented in this case for your determination.

"*First.* Did the plaintiff, at the time she was ejected from the defendant's train, have a valid contract, then in force, for carriage from Memphis to Town Creek.

"*Second.* If she did not have such a contract, and refused to pay the regular fare therefor, at the defendant's established rates, when demanded by the conductor, in which case she had no right to remain on the train, then did the conductor put her off at any place other than a regular station, or did he in ejecting her use any more force or violence than was necessary?

"It is admitted that when plaintiff's agent, Hall, purchased the ticket in question, nothing was said by him concerning the 30-days' limitation upon the ticket. You are instructed that if this were all, the plaintiff could not claim the right to use the ticket after the 30 days expired; and if she endeavored thereafter to ride on defendant's train upon that ticket alone, and refused to pay the regular fare established by the company's regulations, she was wrong in so doing, and the defendant had the right to eject her from the train.

"The rule on this point would be the same if plaintiff's agent, Hall, purchased the ticket by mistake, and afterwards asked the ticket agent to take it back and give him his money or another ticket, or to exchange tickets, and the ticket agent refused.

"Whatever claim or demand, if any, the plaintiff may have had upon the defendant by reason of such refusal, she had, under the circumstances stated, no right to ride upon defendant's train in defiance of its regulations, and without paying the fare as provided by those regulations.

"The rule would be the same if you find that defendant's ticket agent might have exchanged the ticket in case he desired to, but refused to do so, no matter from what motive.

"Again, if you find that, after so purchasing the ticket, plaintiff's agent, Hall, in endeavoring to get an exchange of tickets, asked the ticket agent who sold him the ticket whether plaintiff could not ride on the ticket after the 30 days had expired, and that the said ticket agent told Hall she could not do so, or that he did not know, or that he did not assure him she could do so, the rule would be the same as above stated, and plaintiff would have no right to carriage upon that ticket after the 30 days expired.

"If, without the right to do so, she endeavored to ride upon the expired ticket, and the conductor refused to permit her to do so, and demanded her fare, it was her duty either to pay the fare or leave the train. Her fare would be the regular rate, according to the defendant's established regulations; and an offer to pay the difference between such fare and the sum that had been paid, either in whole or in part, for the expired ticket, would not be an offer to pay fare.

"If, however, you find that Hall, the plaintiff's agent, on the same day applied to the ticket agent for an exchange of tickets, and stated that the tick-

ets he had purchased were not what he wanted, and had been purchased by mistake, and the ticket agent told him that the 30-days' limitation would not be enforced by the defendant, but that the ticket in question would serve plaintiff's purpose for longer than 30 days, and assured him that she could use the ticket for carriage after the 30 days expired, and that Hall relied on those representations, and for this reason did not purchase other tickets, and that plaintiff was relying thereon when endeavoring to ride from Memphis to Town Creek at the time she was ejected, then you will inquire and determine from the evidence whether such assurances by the ticket agent were within the actual or apparent scope of his authority.

"In considering these questions you will observe that Hazlewood was the regular ticket agent of the defendant at Town Creek, and you are instructed that Hazlewood's private clerk, Houston, became ticket agent only as he exercised Hazlewood's power in selling tickets, and for such act only, and for the time only when engaged in selling a ticket or tickets, and was not such ticket agent when not so engaged, and his authority in regard to selling any particular ticket or tickets terminated when that ticket or those tickets had been sold and delivered. Daniel's power or agency to sell tickets for Hazlewood was limited in like manner.

"If you find that Houston alone was engaged in selling the tickets in question, and Daniel took no part therein, then Houston, and not Daniel, was the ticket agent in this transaction; and if you find this to be so, then any remark, statement, or assurance made at the time by Daniel as to a waiver by the defendant of the 30-days' limitation would not be the act of the ticket agent, and would not bind the defendant.

"But if you find that, in connection with the sale of the tickets in question, Houston made any statement or assurance concerning the 30-days' limitation, you will then inquire and determine from the evidence whether it was within either the actual or the apparent scope of the ticket agent's authority to give such statement or assurance.

"In considering what was the actual scope of the ticket agent's authority, you will look to all the evidence in the case, including the instruction to agents given by the defendant, the practice as to printing, preparing, and issuing tickets, the form of the tickets and the limitations or stipulations on their face, and the manner in which they were sold by ticket agents.

"If you find that it was not within the actual authority of the agent to waive the limitation to 30 days, expressed on the face of the ticket, then you will determine whether it was within the apparent scope of his authority.

"If you find that it was part of the business of the agent at Town Creek to attend to all the business of the defendant at that place in the way of selling tickets, then you will determine, from the evidence, whether the defendant authorized or allowed such agent to transact the business in such a way as to make it appear that he had authority to waive the limitation to 30 days on the face of these tickets, or whether the defendant held him out to the public as having such authority, or knowingly allowed him to exercise or acquiesced in his exercise of such authority; and, further, whether Hall, the plaintiff's agent, was ignorant of the actual scope of the ticket agent's authority, and relied on the appearances so indicated. In determining this question you will

consider the manner in which the tickets are usually prepared and issued, and put in the hands of agents for sale, so far as appears from the face of the tickets; the manner in which they are sold, and anything else that is known about the matter by the traveling public generally.

"If it was not within the actual scope of the ticket agent's authority to waive the 30-days' limitation, and Hall knew it was not, then he had no right to rely on the ticket agent's waiver of the limitation, and the plaintiff cannot base her contract on it, and cannot claim to ride upon the ticket in question. Or, if you find under the instruction above given that it was not within either the actual or apparent scope of the ticket agent's authority to waive that limitation, then Hall had no right to rely on such a waiver, even if you find that the ticket agent waived, or attempted to waive, that limitation, and that Hall relied on it; for if the act of the ticket agent in making such waiver was not within either the actual or the apparent scope of his authority, it did not bind the defendant, and the contract remained as it appeared to be on the face of the ticket; and if you so find, your verdict on this point will be in favor of the defendant.

"But if the act of the ticket agent in waving the 30-days' limitation was within the scope of his authority, as it appeared to be from the usual and customary way in which he transacted the defendant's business, with the knowledge and approval or acquiescence of the defendant, and if you find that he did waive that limitation, and that Hall relied on such waiver, and the plaintiff undertook to use her ticket accordingly, this was a contract between the parties, and your verdict will be for the plaintiff; and, in considering whether Hall relied on such waiver, you may consider any assurances in regard to the same subject which were previously given by Hazlewood, and which were in like manner within the apparent scope of the ticket agent's authority, if you find from the evidence that any such assurances were given by him.

'If the plaintiff was on the train upon a ticket unlimited in time either by the express terms of said ticket, or by a valid verbal contract or understanding with the station agent at Town Creek, who sold the ticket, then the railroad is liable for damages, if the conductor ejected her from the train, notwithstanding the fact that a strict construction of the rules laid down by the company for the guidance of the conductor made it his duty towards the company to expel her.

"If you find from the proof and from the charges given that the plaintiff was rightfully on the cars, and that she should not have been put off, then the touching of plaintiff, however gently, in the effort to put her off by the conductor, was an assault upon her, for which the defendants are liable.

"If you should be of opinion that the violence, if you find any, used by the conductor in expelling plaintiff was not greater than he was compelled to use, and for which the company would not be liable if the expulsion had been lawful, yet if you find that the expulsion was unlawful, then any violence or laying-on of hands upon the plaintiff by the conductor was excessive and unwarranted, and constituted an assault upon the plaintiff, for which the defendants are liable.

"If, however, you find under the foregoing instructions that the plaintiff had no valid contract with the defendant for carriage after the 30 days ex-

pired, then the plaintiff had no right to ride on the train without paying the fare required by the regulations, and if she refused to do so the defendant's agents had a right to eject her from the train.

"But this must be done at a regular station, and with the use of no more force or violence than is necessary for the purpose.

"A regular station is one at which the passenger trains on the road, or the majority of them, regularly and customarily stop to put off and take on passengers.

"If you find that defendant's agents put the plaintiff off at such a station, using no more force or violence than was necessary, then your verdict on this point will be for the defendant. If you find that they put her off at some place not a regular station, or if you find that they used more force or violence than was necessary, then, in either case, this was a wrong on the part of defendant, and your verdict on this point will be for the plaintiff.

"But if the plaintiff had no right to ride on the train without paying fare, and refused to pay fare, it was her duty to leave the train when so required by the conductor; and if no more force or violence was used than was made necessary by her own resistance to the demand of the conductor that she leave the train, this was not a wrong on the part of the defendant, and your verdict in this respect will be for the defendant.

"If you find against the plaintiff on all the points stated in the foregoing instructions, then your verdict will be for the defendant.

"But if you find in favor of the plaintiff on any one of those points, then you will proceed to estimate her damages under the following instructions, and you will return the same in your verdict.

"If, under the instructions given, you should find a verdict in favor of the plaintiff, the court instructs you that, in estimating damages to be awarded the plaintiff, you will allow the losses and expenses actually incurred by her, and include compensation for physical suffering and inconvenience, if any, and for mental suffering and any sense of mortification, humiliation, and degradation suffered by the plaintiff by reason of such expulsion in the presence of her family and in the presence of other passengers, and including compensation for pain and inconvenience and expenses experienced while waiting at the place where she was put off, until she could obtain another train; and for any injury to her health by reason of exposure to the weather, under the circumstances, if you find that she was so exposed.

"But if you find from the evidence that plaintiff and her mother and father were evicted at the same time and place from defendant's train because their tickets were all alike upon their face,—expired limited tickets,—and all three refused to pay the fare demanded by the conductor, and you should find for the plaintiff, you can allow no damages in this case because of the eviction of the father and mother of plaintiff, nor because of any hurts or injuries or discomforts sustained by them, nor because of any suffering or misery or mental anxiety of plaintiff at witnessing their expulsion or hurts, injuries or discomforts."

It will be seen, by comparing the foregoing cases, that both of these able judges agree upon the question that the ticket agent of a railway company may

have power to make representations respecting the tickets which he sells, which will bind the company and form a part of the contract between the carrier and the passenger; but they differ upon the question of damages,—Judge HAMMOND holding, as I understand him, that the measure of damages is the unearned passage money; that the passenger cannot insist upon the conductor recognizing an oral engagement, made by a ticket agent of the company, which is in violation of the regulations of the company, and of which the conductor has no knowledge, except through the representations of the passenger, and make his refusal to do so a ground of expulsion in order to recover enhanced damages; and Judge PIERCE holding, as I understand him, that the passenger has a right to stand upon the contract as made; to insist upon its performance, and, if expelled from the carrier's vehicle, to recover the same damages which he would be entitled to recover if expelled at the same time and place, under the same circumstances and in the same manner, for any other wrongful cause.

The proof before Judge PIERCE presented a question not presented in the other case. At the station where the travelers were ejected there were no lights, no station agent, no one to sell tickets, and they tried in vain to procure tickets, so as to proceed on the same train. The conductor who had refused "ticket fare" when tendered, and demanded "conductors' fare," knew when he put them out that there was no agent there to sell tickets. What was, then, his duty towards them, and were they entitled to ride on "ticket fare," as *bona fide* passengers who were not permitted to purchase tickets?

It is not proposed in this note to *review*, much less to criticise, the decision of the learned judge in the principal case, nor the charge of Judge PIERCE above set out. It is thought that the needs of the readers of the FEDERAL REPORTER will be better subserved by reviewing all the decisions of the English and American courts relating to the rights of passengers and carriers of passengers under the various contracts of carriage, which have been rendered during the last two years, or since the publication of any edition of any general work on the subject; referring to prior decisions only so far as necessary to a discussion of the recent cases examined. Such being the purpose of this note, the reader will not expect a connected discussion of any one topic. On the contrary, a great many topics will be touched upon which have not been suggested by anything decided in the principal case. One feature of the principal case has, however, been examined, in the light of some recent decisions, in section 7, *infra*.

I. As to Certain Regulations of Carriers.

§ 2. REASONABLENESS OF CARRIER'S REGULATION—WHETHER A QUESTION OF LAW OR FACT. It has been held by one court that the reasonableness of a regulation of a carrier of passengers is a question of fact for the jury.(*a*) Other courts regard it as a mixed question of law and fact, and say that it is always proper to submit it to the jury under proper instructions.(*b*)

(*a*) State v. Overton, 24 N. J. L. 435, 441; Morris R. Co. v. Ayres, 29 N. J. L. 393.

(*b*) Bass v. Chicago, etc., R. Co. 36 Wis. 450; S. C. Thomp. Car. Pass. 311; Day v. Owen, 5 Mich. 520; Brown v. Memphis, etc., R. Co. 4 Fed. Rep. 37.

Hence, this question cannot be determined on demurrer.(c) But this does not apply to all regulations. There are certain regulations, the reasonableness of which is so obvious that they may be held reasonable as matter of law. Indeed, there are regulations, the reasonableness of which is settled by a line of adjudications. Of this nature may be named the regulation of railway companies requiring passengers to purchase tickets before taking seats in their cars, or, in default of this, to pay extra fare.(d) The reasonableness of such a regulation is found in the fact that, without it, carriers could not protect themselves from being defrauded at will by train agents. So a regulation of a railway company prohibiting persons from riding on its freight trains unless they previously purchase tickets at a station, is held reasonable as matter of law.(e)

§ 3. EXCLUDING PERSONS OF EVIL REPUTE. In a recent decision of the learned and accomplished judge who wrote the opinion in the principal case, this question is considered with reference to the right of a carrier to exclude from his vehicles unchaste women. The learned judge charged the jury that, in determining whether the expulsion was lawful or not, the same principles were to be applied to women as to men; that the social penalties of excluding unchaste women from hotels, theaters, and other public places could not be imported into the law of common carriers; that the carrier is bound to carry the good, the bad, and the indifferent, and has nothing to do with the morals of his passengers, if their behavior be proper while traveling. Neither can he use the character for chastity of his female passengers as a basis for classification, so as to put all chaste women, or women who have the reputation of being chaste, into one car, and all unchaste women, or women who have the reputation of being unchaste, into another car. Such a regulation would be contrary to public policy, and unreasonable. It would put every woman purchasing a railroad ticket on trial before the conductor as her judge, and, in case of mistake, it would lead to breaches of the peace. It would practically exclude all sensible and sensitive women from traveling at all, no matter how virtuous, for fear they might be put into, or occasionally occupy, the wrong car. The police power of the carrier, continued the learned judge, is a sufficient protection to the other passengers, and he can remove all persons, men or women, whose conduct at the time is annoying, or whose reputation for misbehavior and indecent demeanor in public is so notoriously bad that it furnishes a reasonable ground to believe that the person will be offensive or annoying to others traveling in the same car; and this is as far as a carrier has any right to go. He can no more classify women according to their reputation for chastity, or want of it, than he can so grade men. He accordingly charged the jury, in substance, that a female passenger traveling alone is entitled to ride in the ladies' car, notwithstanding an alleged want of chastity, if her behavior is ladylike and proper; and she cannot be compelled to accept a seat in another car offensive to her because of smoking and bad ventilation.(a)

(c) Brown v. Memphis, etc., R. Co. supra.
(d) In Iowa this regulation is allowed by statute. Hoffbauer v. Railroad Co. 52 Iowa, 342.
(e) Lane v. Railroad Co. 69 Tenn. (5 Lea,) 124; infra, § 4.
(a) Brown v. Memphis, etc., R. Co. 5 Fed. Rep. 499, 500.

There is no doubt of the propriety of these views. It is equally free from doubt that, within certain limits, it is within the power of the carrier to exclude from his vehicle persons of notoriously bad repute, who seek to go on board in an indecent condition, or for the purpose of plying some vocation injurious to the welfare of the other passengers. For instance, if a person were to present himself for carriage dressed in such a manner as to make an indecent exposure of his person, no court would hold the carrier liable in damages for refusing to carry him. Accordingly, it has been held that the conductor of a street-railway car may expel therefrom a person who, by reason of intoxication or otherwise, is in such a condition as to render it reasonably certain that by act or speech he will become offensive or annoying to other passengers, although he has not committed any act of offense or annoyance.(*b*) Railway carriers may, in like manner, exclude from their trains gamblers or monte men, whose evident purpose in taking passage is to ply their vocations; though, if such persons have purchased their tickets, they cannot thereafter be refused passage without a return of the passage-money which they have paid.(*c*) On the other hand, if the carrier knowingly permit such persons to take passage on his vehicle, and if a minor is swindled out of money by their gambling devices, through the negligence or indifference of the carrier's servants, the carrier will be liable for the money so lost.(*d*) So, if his servants have power to prevent it, but, neglecting their duty in this respect, they permit drunken or disorderly persons to come on board his vehicle and injure a passenger, he will be liable; but here, as in other cases, his liability is based on the principle of negligence; he is not an insurer of the passenger, and liable at all events.(*e*) So a railway conductor may eject from a coach a passenger who uses grossly profane and obscene language in the presence of ladies; for such conduct, although provoked to it, works a forfeiture of his right to be carried.(*f*)

§ 4. Regulation that Passengers on Freight Trains must Procure Tickets. A regulation allowing persons to ride upon freight trains, provided they will procure tickets before entering the cars, is a reasonable regulation;(*a*) and where opportunity is afforded for the procuring of such tickets, and the passenger does not avail himself of it, or make a reasonable attempt to do so, and, in consequence thereof, is expelled from the train, he cannot recover damages.(*bb*) But where the company has been in the habit of allowing its conductors of freight trains to receive money from passengers, and has changed the rule, the public are entitled to notice of the change; and a passenger who has been in the habit of riding on the company's freight

(*b*) Vinton v. Middlesex R. Co. 11 Allen, 304; S. C. Thomp. Car. Pass. 6; Murphy v. Union R. Co. 118 Mass. 228; Pittsburgh, etc., R. Co. v. Vandyne, 57 Ind. 576. See, also, State v. Ross, 26 N. J. L. 224.

(*c*) Thurston v. Union Pacific R. Co. 4 Dill. 321. Compare Coppin v. Braithwaite, 8 Jur. 875.

(*d*) Smith v. Wilson, 31 How. Pr. 272.

(*e*) Pittsburgh, etc., R. Co. v. Hinds, 53 Pa. St. 512; S. C. Thomp. Car. Pass. 295.

(*f*) Chicago, etc., R. Co. v. Griffin, 68 Ill. 499.

(*a*) Lane v. Railroad Co. 69 Tenn. (5 Lea,) 124. A regulation refusing to carry passengers on freight trains altogether, is also reasonable. Illinois, etc., R. Co. v. Johnson, 67 Ill. 312, 314; Chicago, etc., R. Co. v. Randolph, 53 Ill. 510; Railway Co. v. Moore, 49 Tex. 31; Hazard v. Chicago, etc., R. Co. 1 Biss. 503; Mobile, etc., R. Co. v. McArthur, 43 Miss. 180. A regulation is also reasonable which provides that only those passengers shall be carried on freight trains who are provided with tickets of a particular description; as, for instance, a round-trip ticket, a thousand-mile ticket, or a pass. Faulkner v. Ohio, etc., R. Co. 55 Ind. 369.

(*bb*) Indianapolis, etc., R. Co. v. Kennedy, 3 Amer. & Eng. R. Cas. 467, (Sup. Ct. Ind.)

trains, and paying his fare in this way, who has not been fairly notified of the change, and who does not, in fact, know of it, cannot be expelled for non-compliance with it without subjecting the company to liability for damages.(*c*) Under the circumstances of one case, it was held that putting up a notice of this change of rule at the station house was not sufficient.(*d*) And if a railway company, after having carried passengers upon its freight cars, adopt a regulation excluding them altogether, and a person, not knowing of such regulation, purchases a ticket of a station agent, and receives from such agent an assurance that the ticket will entitle him to ride on a freight train, but, attempting to ride on the ticket, is nevertheless expelled from the train by the conductor in consequence of such regulation, the passenger may, it has been held, recover exemplary damages from the company.(*e*) But where a railroad company enforces such a rule, it is under an obligation to the public to furnish facilities for the purchase of such tickets, and, to this end, it must have an agent to sell them at its regular station, and such agent must keep his office open for a reasonable time prior to the regulation time for the departure of such trains. It will not be permitted to complain of a violation of its rules caused by the negligence of its own agents. If, therefore, a passenger is prevented from purchasing such a ticket by the absence of the agent from the station, he may rightfully take passage on such a train without a ticket, on tendering the regular fare to the conductor, and his expulsion will be unlawful.(*f*)

§ 5. PENALTY FOR RIDING WITHOUT PAYING FARE. The English railway clauses consolidation act imposes a penalty upon any person who shall travel in any carriage of a railway company without having previously paid the fare, and with intent to avoid the payment thereof;(*a*) which penalty is recoverable in a summary proceeding before two justices of the peace,(*b*) and enforced by distress warrant.(*cc*) By other sections of the same act, railway companies have, it seems, power to make by-laws to prevent persons from riding on their cars without paying fare, and from riding on cars of a class superior to that called for by their ticket.(*dd*)

§ 6. STATUTORY REGULATIONS WITHOUT EXTRATERRITORIAL FORCE. A statute of a state which attempts to prescribe a regulation for a railway company extending into another state, is inoperative beyond the limits of the state whose legislature has passed the act. The obvious reason is that the police regulations of the states have no extraterritorial force. But there is a further reason. Congress alone has power to regulate commerce between the states and with foreign countries; and such an act would, therefore, in so far as it operates beyond the limits of the particular state, be in contravention of the federal constitution.(*aa*) It was therefore held, under the statute of

(*c*) Lane v. Railroad Co. 69 Tenn. (5 Lea.) 124 Lake Shore, etc., R. Co. v. Greenwood, 79 Pa. St. 373.

(*d*) Lake Shore, etc., R. Co. v. Greenwood, supra.

(*e*) Kansas Pacific R. Co. v. Kessler, 18 Kan. 523.

(*f*) Chicago, etc., R. Co. v. Flagg, 43 Ill. 364; Illinois Cent. R. Co. v. Johnson, 67 Ill. 312; St. Louis, etc. R. Co. v. Myrtle, 51 Ind. 566.

(*a*) Act 8 Vict. c. 20, § 103. See Reg. v. Pigot, 8 Q. B. Div. 151.

(*b*) Id. § 145.

(*cc*) Id. § 146.

(*dd*) Id. §§ 103, 109. See Dyson v. London, etc., R. Co. 7 Q. B. Div. 32; Saunders v. Southeastern R. Co. 5 Q. B. Div. 456; Watson v. London, etc., R. Co. 4 C. P. Div. 118.

(*aa*) Hall v. De Cuir, 95 U. S. 485.

Maine,(b) which declares that the holder of a railroad ticket shall have the right to stop over at any of the stations along the line of the road, and that it shall be good for a passage for six years from the time it was first used, that where the plaintiff, who had bought a ticket from Portland to Montreal which contained the words "good only for a continuous trip within two days from this date," was put off the train in Canada more than two days after the date of the ticket, he could not recover damages.(c)

II. As to the Contract of Carriage.

§ 7. EFFECT OF DECLARATIONS OF THE COMPANY'S AGENT TO PASSENGER. There are cases where the declarations of the station agent of the company, or of its train conductor, are held admissible, although contrary to the rules of the company, or to what appears upon the face of the ticket which the passenger has purchased. Indeed, the contrary rule has so little practical sense to support it, and proceeds in such obvious disregard of the rights of the traveling public, that it is a wonder how any court ever came to accede to it. The ticket agent of a railway company is appointed to give information to the traveling public about the rates and conditions of travel. To say that the traveling public are to be bound, in all cases, by what appears on the face of a ticket which is purchased, is unreasonable. The mass of the traveling public are ignorant persons. Many of them are women, and even children, without discretion enough to judge in such matters. Many of them cannot read the language. Most of them would confide in a statement deliberately made by a station agent as to what the train conductors of the company would do in case a particular ticket were purchased and presented to them. Now, suppose such a person presents himself at a railway ticket office and asks for a ticket to a distant place, and tells the agent that he wishes to stop over at an intermediate place, and the agent sells him a ticket on which is the recital, "Good for this day only." The passenger, acting on the promise of the agent, stops off, and, when he undertakes to resume his journey, is informed that he must pay the additional fare or leave the train. Will any fair-minded person say that a fraud has not been perpetrated upon him? Ordinary persons are bound by the acts of their agents in waiving the written conditions in contracts. Why is it that a railroad company should receive special favors at the hands of the law in this particular? Why should a doubtful point of law be so construed as to work a forfeiture of the rights of the traveler, and to permit the carrier to retain his money without giving him an equivalent therefor?

On this subject the supreme judicial court of Maine has made the following judicious observations: "Upon the plaintiff's ticket we find the indorsement 'good for this day only.' The fact that he accepted and produced it as proof of his right to a passage would certainly be *prima facie* evidence of his right to a passage on the day of its date alone, and possibly he would not be permitted to deny that he was bound by that indorsement, unless he could show that his assent had been withheld with the knowledge and consent of the company. This he attempts to do by showing just what contract was made with the ticket agent at South Paris. But it is said that this agent had no authority to change any of the rules of the company, and therefore his acts

(b) Me. St. 1871, c. 223.

(c) Carpenter v. Grand Trunk R. Co. 72 Me. 388.

or statements upon this point are not admissible. It may oe conceded that this or any other agent had no authority to change or abrogate any rule established by the company; but the consequences claimed will by no means follow. He was placed there for the purpose of selling tickets, and, it may be admitted, such tickets as will secure a passage in accordance with the rules of the company. The plaintiff desired to purchase just such a ticket. He was ignorant of the rules of the company, but wished to go over one portion of the road one day and another portion the next day. The rules make a part of the contract. It seems that before this the conductor had been permitted to give 'stop-over checks.' This custom had been abrogated but a few days previous, of which, so far as appears, no notice had been given. This is the very point upon which the plaintiff desires information. To whom shall he go to obtain it? To whom can he go but to the person appointed by the company for the purpose of giving such information, and selling the proper tickets? To that person he does go, and is informed that the custom of giving stop-over checks still continues, and that it is necessary to purchase but one ticket. Relying upon this information, as he was justified in doing, he purchased his ticket and paid the fare demanded for the whole distance. The real contract between the plaintiff and the ticket agent was made before the ticket was seen. The plaintiff paid his money upon the statement of the agent, and not upon any indorsement upon the ticket. He took the ticket, not as expressing a contract, but as proof of the contract he had already made with the agent. He had neither seen nor assented to the indorsement, nor was he asked to assent to it. As between the plaintiff and agent the contract was definite, with no misunderstanding or suggestion of it. Under that contract the plaintiff commences his journey, and, on the first day asks for his 'stop-over check,' and is informed by the conductor, not that his ticket is not sufficient, or in any way different from those previously issued, but that his orders were not to give out any more 'stop-over checks.' Still he was permitted to retain his ticket, encouraged to expect that he would be permitted to complete his passage according to his understanding of the contract. On the next day, however, his ticket was refused, and, upon demand being made, he refused to pay a second fare, whereupon he was expelled from the cars. The conductor acted in obedience to orders from his superiors; the plaintiff, in obedience to information he had received from the ticket agent and upon which he had paid his money; surely, then, he was not in the wrong. But it is said the company were not bound by the contracts of its agent. Admit it. The conductor had proof from the ticket that the fare had been paid for the whole distance, and, from the statements of the plaintiff, which he had no reason to doubt, and which were confirmed by the custom so lately abrogated, that he had paid it upon the representations of the agent that the ticket would carry him through. If, under these circumstances, the company, through the conductor, would repudiate or deny the contract, the least they could do would be to pay back the surplus money that they had received, or deduct it from the fare claimed, neither of which was done, or offered to be done; and this they were legally bound to do before refusing to execute the contract made by their agent, even if they were not bound by it."(*a*)

(*a*) Burnham v. G. T. Ry. Co. 63 Me. 298, 302.

In like manner, where a person purchased of the agent of a railway company a ticket sold at reduced rates to persons intending to purchase lands of the company, called "a land-exploring ticket," which ticket embodied the terms of a special contract to be signed by the purchaser of the ticket, the fact that the purchaser had not signed the ticket would not authorize an agent of the company to refuse to honor the ticket; since it was the duty of the agent selling the ticket to require the signature of the purchaser. The holder of the ticket could not be affected by the neglect of the company's agent in this particular, nor could the company plead his default, when sued for a breach of the contract named in the ticket.(*b*)

So, a steam-ship company forwarded passengers from Hamburg to America, partly by connecting lines. Its passenger agent at Hamburg, who was also agent for other lines of steamers, made verbal representations to the plaintiff that the company would be responsible for his baggage in the hands of connecting lines, as well as in its own hands. The plaintiff purchased a passage ticket on the faith of these representations. His trunk was lost by one of the connecting lines. It was held that the company selling the ticket was liable for the loss, and that it was no defense to show that the agent, in making such representations, exceeded his instructions.(*c*)

But it has been held, in accordance with the view of the learned judge in the principal case, that while the company may be liable for a breach of the contract embodied in the agent's representations, on the faith of which the passenger has paid his money, yet this will not justify the passenger, on learning that the agent exceeded his instructions, in insisting upon being expelled from the train, in order to make his expulsion a ground for recovering enhanced damages. Thus, in the view of the supreme court of Michigan, passengers may rightfully rely upon information given by station agents of the company as to the particular trains on which they will be allowed to travel on a coupon ticket; but if the information thus given is erroneous, so that the passenger finds himself on a train which does not stop at the desired point, he must, upon being advised of that fact by the conductor, get off at the preceding station; he cannot remain upon the train if it has gone beyond the point where he desired to get off, and to which his ticket entitled him to ride, provided he had got upon the train which, according to its schedule, stopped at that point, and refuse to pay fare, and compel the conductor, acting under the rules of the company, to put him off, and then seek redress in damages. The safety of the public requires that railway trains should be run according to fixed regulations and schedules, and when the passenger discovers that the agent at the station has given him erroneous information, he must act reasonably; he cannot compel the conductor to depart from the schedule upon which he is required to run his train, merely by informing him that the station agent has said that the train would stop at a particular place; but he must either get off before the train reaches the station in question, or go on to a succeeding station, paying the additional fare, and then seek his redress in damages for the failure of the company to transport him according to the representations of its agent. He cannot recover for the additional damages which

(*b*) Gregory v. Railroad Co. 10 Neb. 250.

(*c*) Maskos v. American Steam-ship Co. 11 Fed. Rep. 698.

he causes to himself by his own voluntary act; he cannot, by insisting upon remaining upon the train without paying fare, in violation of what he learns is the rule upon which the conductor is required to run his train, subject himself to forcible expulsion from the train, and then recover damages for the force used.(*d*)

A case in New York proceeds on substantially the same grounds. A passenger having purchased a ticket for L., told the ticket agent what train he wished to take, and was directed to take a particular train. He followed this direction; but the train which he took, after running 150 miles, deflected to a branch road, which did not pass through, but was followed an hour later by a train which did pass through, that place. It was held that if, on the arrival of the train at the point of deflection, notice was given that the passengers for L. must change cars, in such a way that passengers of ordinary intelligence and understanding, making proper use of their faculties, could hear it and understand it, the plaintiff was wrongfully on the cars after they left that point; and if he was carried past the point of divergence without fault on his part, but was apprised of his error, and requested to take a return train, upon which he would have been carried back free in season to have reached the train which would have carried him to L. without delay, his refusal to do so, and his persisting in remaining on the wrong train, rendered him liable to expulsion as a trespasser.(*e*)

On the contrary, it has been held in New Jersey that a passenger cannot rightfully rely upon the assurance given him by a train conductor, contrary to the purport of his ticket, that it will entitle him to stop over and resume his journey, although the conductor, in earnest of what he says, puts his initials upon the ticket; and where, in such a case, it appeared that only train agents had the power to modify the statements made on the tickets themselves, it was held that the passenger who had received and acted upon such information, and had subsequently been put off the train by a subsequent conductor, had no cause of action against the company.(*f*)

§ 8. CARRIER, HOW FAR BOUND BY STATEMENTS OF TICKET. On the other hand, the carrier is bound to make good what the ticket imports on its face, and the passenger is not bound by any rule or usage of the company not so expressed, limiting the ticket, unless he has notice of the same. Thus, in a recent case, it appeared that the plaintiff, having paid for his passage over the defendant's route of street railway, was given, at an intermediate point therein, in return for an additional sum paid by him, a ticket on which were these words: "Third-avenue Railroad Company. Good only from Sixty-fifth street up to Yorkville and Harlem for a continuous ride. By order of the President." The ticket was indorsed, "Ticket check, July 6th, 1878." The plaintiff did not then use the ticket, but afterwards, on the same day, he entered one of the defendant's cars below and paid fare to such intermediate point, and, at a place above said point, tendered the conductor the ticket, which

(*d*) Lake Shore, etc., R. Co. v. Pierce, 47 Mich. 277; S. C. 3 Amer. & Eng. R. Cas. 340.

(*e*) Barker v. New York Central R. Co. 24 N. Y. 509.

(*f*) Petrie v. Pa. R. Co. 42 N. J. L. 449; S. C. 1 Amer. & Eng. R. Cas. 258.

was not accepted, and, on his refusal again to pay fare, was ejected from the car. It was held that, in the absence of knowledge by the plaintiff of any rule limiting his rights under said ticket, the company was liable for the above act of its servant.(*a*) So, where a railway company had a rule which restricted to certain special trains the holders of a particular class of tickets, which tickets, nevertheless, purported to entitle the holder to passage on any regular train, it was held that the company could not rightfully expel from a regular train the holder of a ticket taking passage thereon, unless he had notice of the rule; and, upon the question whether he had such notice, evidence was admissible that the person of whom he bought the ticket told him that it would entitle him to ride on the train from which he was expelled, although the seller was not the agent of the corporation.(*b*)

Of course, this applies only in cases where the statements of the ticket are explicit. A railway ticket is ordinarily a mere token of the fact that the holder or some other person has paid to the company issuing it the sum of money which entitles the holder to ride from a point named to a point named within the dates named.* There may be outside of the ticket, in particular cases, an arrangement advertised by the company, under which the ticket is issued, which will limit the terms of the ticket itself. Thus, a railroad company got up a cheap excursion over its road from Dexter to Belfast. It hired a band of music to accompany it, paying each member thereof $25, and agreeing to give him a ticket for a lady free of charge. One member of the band did not bring a lady, but brought his brother, a minor. The boy somehow got one of these tickets intended for the ladies who should thus accompany the members of the band. This ticket did not specify that it was for a lady, but simply read: "Maine Central R. R., July 30, 1877. Dexter." It was held that this ticket did not entitle the boy to ride to Belfast without paying fare.(*c*)

§ 9. ASSIGNABILITY OF RAILROAD TICKETS. As stated above, a railroad ticket is not ordinarily a complete contract to carry; it is looked upon either as a receipt for passage money, or as a token which, when presented by the buyer to the proper agent of the company over whose road it is issued, indicates to the latter that the person presenting it is entitled to be carried from and to the places named therein.(*aa*) This ticket is ordinarily assignable by delivery, so as to pass to another holder the rights of the original purchaser, as against the company issuing it, or against the company on whose authority it may have been issued by another company. If such a ticket is dishonored, one who has purchased it of a passenger has the same right of action against the company, by or for whom it was thus issued, which the original purchaser would have had. Thus, where tickets were issued by the authority of the defendant company, over its line and a connecting line, to a point beyond its own terminus, for the purpose of promoting travel over its own line, and the

(*a*) McMahon v. Third Ave. R. Co. 47 N. Y. Sup. (Jones & S.) 282.

(*b*) Maroney v. Old Colony, etc., R. Co. 106 Mass. 153.

*See next section.

(*c*) Crosby v. Maine Central R. Co. 69 Me. 418.

(*aa*) Quimby v. Vanderbilt, 17 N. Y. 306; Henderson v. Stevenson, L. R. 2 Scotch App. 470, per Ld. Hatherley; Rawson v. Pa. R. Co. 48 N. Y. 212; Elmore v. Sands, 55 N. Y. 512, 515; Johnson v. Concord R. Co. 46 N. Y. 213; Gordon v. Manchester, etc., R. Co. 52 N. H. 596; State v. Overton, 21 N. J. L. 435, 438; Barker v. Coffin, 31 Barb, 550.

connecting line refused to honor them, it was held that a "ticket broker" who had purchased them from the passengers who could not use them for the reason named, could maintain an action against the company by whose authority they were thus issued, for the proportion of the passage money which they represented.(*b*)

§ 10. COMMUTATION TICKETS ISSUED TO PARTICULAR PERSONS. Railroad companies frequently issue tickets at reduced rates to persons living on the line of their roads, in the vicinity of cities, in which such persons transact their business, good for a prescribed period of time. These tickets are issued to the particular person, and embody the terms of a special contract with him, to the effect that the ticket shall be forfeited if found in the hands of any other person. Where such a ticket contained the stipulation, "If found in the hands of any one but the party in whose name it is issued, this ticket will be forfeited and taken up," it was held that it might be taken up by the conductor of the company issuing it, even when tendered by the party to whom it had been issued, if, in fact, it had been used by some other person.(*a*) But the holder of such a ticket is not, it seems, bound at his peril to see that no other person gets it and uses it. "There are," says the Maryland court, "circumstances under which the use of the ticket by another than the person to whom it was issued would not have the effect of its forfeiture,—where, for example, it had been taken from him by force or violence, and some means against which he could not have reasonably guarded; but he cannot be excused if he has been guilty of negligence or a want of due care. From the character of the ticket, and its liability to be used by another in fraud of the agreement that it is to be used only by the person to whom issued, the implied obligation rested upon him when he accepted it from the company to keep it with due and proper care. If, from his negligence, it came into the hands of another, and was fraudulently used upon the company's road, he is just as amenable to its forfeiture as if it had been used with his assent."(*bb*)

In England, railroad companies sometimes exact a deposit from persons purchasing such tickets, to be forfeited on certain conditions. The courts of that country seem disposed to construe the contract embraced in such ticket strictly, and not to relieve against the forfeiture; for they regard a strict compliance with the conditions as being of very great importance to the railway companies in the transaction of their business, and of little importance to each particular passenger,—the deposit being generally small, say 10 shillings. Hence, where one of the conditions of such a ticket was that it should be delivered up to the company "on the day after expiry," the court refused to extend this language so as to make it mean that the ticket should be delivered up within a reasonable time after expiry.(*c*)

§ 11. SPECIAL TICKET OBTAINED THROUGH FRAUD OF PASSENGER. The rule that a person who has been induced through fraud to enter into a contract cannot rescind the contract and at the same time keep the consideration,

(*b*) Hudson v. Kansas Pacific R. Co. 9 Fed. Rep. 879. The assignability of the ticket turned on the provisions of a statute relating to the assignment of choses in action, which, it is presumed has a counterpart in most of the states.

(*a*) Freidenrich v. Baltimore, etc., R. Co. 53 Md. 201.

(*bb*) Id.

(*c*) Cooper v. London, etc., R. Co. 4 Exch. Div. 88.

is a familiar one. The application of this rule to contracts made by agents is also well settled. Such a contract is not void, but voidable at the election of the principal, provided the election is made within a reasonable time after the discovery of the fraud. He may reject or ratify it, but he cannot ratify it in part and reject it in part. He cannot ratify it in so far as it is beneficial to him and reject it in so far as it is prejudicial to him. He cannot reject it and, at the same time, keep the consideration. This rule, of course, applies to the case where a person, through a fraud practiced upon the agent of a railway company, procures from the agent of the company a special ticket sold by the company at a reduced rate. Another agent of the company, on presentation of the ticket, cannot, on discovery of the fraud, refuse to honor the ticket without tendering to the holder the purchase money, or so much of the same as is unearned. Such a refusal will give the holder of the ticket a cause of action against the company.(*d.*)

§ 12. TICKETS ISSUED BY AGENTS OF OTHER COMPANIES. There seems to be a custom among connecting railroad companies in the United States to issue what are termed "coupon tickets" over each other's roads. Such a custom has been proved in cases which have come under the writer's cognizance, one of which is a recent case in Texas.(*a*) What the rights of the holder of a ticket issued in accordance with such a custom would be, it is not proposed now to discuss. It is supposed that if the custom had come to be a matter of public knowledge, and well recognized, a company refusing to honor a ticket, one of the coupons of which called for a passage over its road, would subject itself to an action. But if the ticket is not issued in accordance with the custom, clearly the holder of it has no action against a company, other than the one whose agent issued it, for refusing to honor it, unless it is shown that the agent had express authority from such company to issue it. It is said, in substance, that the agent of one railroad company thus issuing tickets over other roads, in accordance with such a custom, would, at most, stand in the position of a *special* agent for the other companies. He would not be their *general* agent in the sense which would make them liable for his representations and for his acts, done within the apparent scope of his authority. The person purchasing the ticket of him would act at his peril. The scope of his agency would be limited by the custom; and if the ticket did not conform to the custom, no action would lie against another company for refusing to honor it.(*b*)

§ 13. "NOT GOOD IF DETACHED." Coupon tickets, issued for a continuous passage over connecting lines, generally, if not universally, contain upon each coupon the legend, "Not good if detached." No action lies against a railroad company for refusing to honor a coupon ticket which contains this recital, and which, when presented to the conductor, is detached from its stub; and this is so, although the coupon may have been sold to the holder, thus detached, by the agent of a connecting company.(*c*)

§ 14. RIGHTS OF PASSENGER ON TRAIN WHICH DOES NOT STOP AT THE STATION CALLED FOR BY HIS TICKET. In the absence of a statutory provis-

(*d*) Gregory v. Railroad Co. 10 Neb. 250.
(*a*) Houston, etc., R. Co. v. Ford, 53 Tex. 364.
(*b*) Id.
(*c*) Houston, etc., R. Co. v. Ford, 53 Tex. 364.

ion to the contrary, a railway company may, for the benefit of its through travelers, and for the purpose of attaining speed in the conveying of mails and express matter, adopt a regulation that a certain train or trains of passenger cars running regularly on its road shall not stop at designated stations or places; and one traveling as a passenger on such road is bound to inquire whether the train upon which he takes passage stops at the station or place to which he is going.(*a*) And, in the absence of such a statutory provision, where the conductor of a road which has made such a regulation finds, after the train has started, a passenger who holds a ticket for a station at which the train does not stop, and the passenger is unwilling to go to a station at which the train does stop, he may, in a proper manner, be removed from the train.(*b*) But the power of a railroad company to adopt or enforce such a regulation is subject to legislative control.(*c*) And where there is a statute requiring *all* passenger trains to stop on arrival at any municipal corporation on the line of the railway, having a given population, any person may purchase a ticket for such a city or town, and may claim the right to ride thereto and be put off thereat, on any passenger train which the company may run. A notice printed on a ticket so purchased that particular trains do not stop at such a place, is of no binding force as against the passenger.(*d*) It could not possibly impose upon him a greater obligation than would be imposed upon him by a special contract entered into between him and the company, that he should not be entitled to ride upon a particular train; and such a contract would be of no binding force, because it would be in contravention of a statute passed on considerations of the public good, and hence illegal.(*e*) So far as a ticket containing such a notice may be held to embody the terms of a contract, it is subject to the rule that where a contract contains several covenants, some of which are in contravention of law, those which are lawful will be held valid, and those which are unlawful may be disregarded.(*f*)

III. As to the Expulsion and Detention of Passengers.

§ 15. UNDER WHAT CIRCUMSTANCES THE CARRIER WILL BE LIABLE FOR THE ACT OF HIS SERVANT IN WRONGFULLY EXPELLING PASSENGER. In one of the most recent contributions to the law on this subject, the following propositions are said to have been finally and firmly established: (1) That whether a wrongful act done by a servant of a railway company, not entirely inconsistent with the nature of his employment, was done by him in pursuance of his employment, and to serve the interest of his employer, or wickedly and maliciously, out of his own personal spite, is always a question for the jury. (2) That where the jury find such an act to have been done in pursu-

(*a*) Pa. R. Co. v. Wentz, 37 Ohio St. 333, 337; Pittsburgh, etc., R. Co. v. Nuzum, 60 Ind. 141; Ohio, etc., R. Co. v. Applewhite, 52 Ind. 540; Ohio, etc., R. Co. v. Swarthout, 67 Ind. 567.

(*b*) Pa. R. Co. v. Wentz, 37 Ohio St. 333, 337.

(*c*) Id.; citing Com. v. Eastern R. Co. 103 Mass. 254; Shields v. State, 26 Ohio St. 86; S. C. 95 U. S. 319; State v. New Haven, etc. R. Co. 43 Conn. 351; New Haven, etc., R. Co. v. State, 44 Conn. 376; Pierce, Railr. (Ed. 1881,) 460; Const. Ohio, art. 13, § 2.

(*d*) Railroad Co. v. Campbell, 36 Ohio St. 647.

(*e*) Pa. R. Co. v. Wentz, 37 Ohio St. 333, 338. See Leake, Cont. 723; Spurgeon v. McElwain, 6 Ohio, 442; State v. Findley, 10 Ohio, 51; Bloom v. Richards, 2 Ohio St. 287; Huber v. German Con. 16 Ohio St. 371; Delaware Co. v. Andrews, 18 Ohio St. 49; Hooker v. De Palos, 23 Ohio St. 251.

(*f*) Railroad Co. v. Wentz, 37 Ohio St. 333, 339; citing Pigot's Case, 11 Coke, 27b; Pollock, Cont. (Wald's Ed.) *c.* 6.

ance of the servant's employment, and to serve the interests of his employer, the employer is liable.(a) In affirming this judgment, the rule is perhaps more clearly stated by the New York court of appeals. A boy eight years of age, attempting to steal a ride upon the platform of the defendant's car, had been kicked off by the conductor or, by a brakeman, as some of the evidence tended to show; and the question was whether, if this evidence were correct, the conductor or brakeman acted within the scope of his authority, so as to bind the company. It was held that he did, the court saying: "It is conceded that authority in a conductor to remove a trespasser in a lawful manner, whether conferred by the rules or not, is implied, and is incident to his position. We think the same concession must be made in respect to the authority of the brakeman who finds a trespasser on the platform of a car. His duties do not primarily pertain to the protection of the cars against intruders; but he is a servant of the company on the train, concerned in its management, and fully cognizant of the obvious fact that intruders, who jump upon the train for a ride, without intention of becoming passengers, are wrongfully there. Suppose a train was standing still, and a trespasser was put off by force by a brakeman, using no unnecessary violence, would it not be a good defense to an action against him for the assault that he was brakeman, and did the act complained of in that capacity, although without express authority? The implied authority in such a case is an inference from the nature of the business, and its actual daily exercise, according to common observation and experience. But, assuming authority in the conductor or brakeman to remove a trespasser in a lawful manner, the question remains whether, when a conductor or brakeman, without warning or notice of any kind, kicks a boy of eight years from the platform of a car, while the train is running at a speed of 10 miles an hour, he can be said to be acting within the scope of his employment, so as to make the company liable for the act. Assuming the case made by the plaintiff, the act was flagrant, reckless, and illegal; but the point is, was the act within the scope of the employment and authority? If it was, and the servant, in doing what he did, undertook to act for the company, and not for himself or his own ends, the company is not exonerated, although the servant may have deviated from the instructions in executing the authority, or may have acted without judgment, or even brutally. The removal of trespassers from the cars was, as we hold, within the implied authority of the defendant's servants on the train. The fact that they acted illegally in removing the plaintiff while the train was in motion, does not exonerate the defendant. In some cases, where the existence of an authority in the servant to do a particular act is in controversy, and the authority is sought to be established by inferences and implications, it may be a material circumstance, bearing upon the non-existence of the authority sought to be implied,

(a) Hoffman v. N. Y. Cent. R. Co. 46 N. Y. Sup. (J. & S.) 526, 528; S. C. 44 N. Y. Sup. (J. & S.) 1. See Rounds v. Delaware, etc., R. Co. 64 N. Y. 129. Isaacs v. Third Ave., etc., R. Co. 47 N. Y. 122; Cohen v. Dry Dock, etc., R. Co. 40 N. Y. Sup. (8 J. & S.) 368; S. C. affirmed, 69 N. Y. 170; Jackson v. Second Ave. R. Co. 47 N. Y. 274; Mott v. Consumers' Ice Co. 73 N. Y. 543; Feck v. N. Y. Cent. R. Co. 70 N. Y. 587; Garretzen v. Duenckel, 50 Mo. 104; Bayley v. M., etc., R. Co. L. R. 8 C. P. 148; S. C. in court below, L. R. 7 C. P. 415; Poulton v. London, etc., R. Co. L. R. 2 Q. B. 534; Oliver v. Northern Transp. Co. 3 Or. 84; Garrett v Louisville, etc., R. Co. 3 Am. & Eng. R. Cas. 416, (Sup. Ct. Tenn. 1881.)

that the act was one which the master could not do himself without a violation of law. But this fact would not be decisive. No doubt the kicking of the boy off the car was not only a wrong to the plaintiff, but was a violation of the duty which the train servants owed to the defendant, to exercise proper care in executing the authority confided to them; but in most cases, where the master has been held liable for the acts of a servant, the tortious act was a breach of the servant's duty. In this case, the authority to remove the plaintiff from the car was vested in the defendant's servants. The wrong consisted in the time and mode of exercising it. For this the defendant is responsible, unless the brakeman used his authority as a mere cover for accomplishing an independent and wrongful purpose of his own. The general subject has been recently considered in this court, and it is unnecessary further to elaborate it.(*b*) We think the court would not have been justified in taking the case from the jury."(*c*)

Accordingly, where a boy sued for injuries alleged to have been received by being thrown from a street railway car by the conductor, the following charge was held proper: If the conductor "acted neither maliciously nor with a view to effect some purpose of his own, but within the general scope of his employment, while engaged in defendant's business, and with a view to the furtherance of that business and the defendant's interest, believing from the appearances before him, and upon which he had to exercise his judgment, that his duty to the defendant required him to act, then the defendant is responsible for the manner in which he acted, and the consequences of his act, though he may have acted in excess of his real authority."(*d*)

In a late case in the appellate court of Illinois it is laid down that, while it is a general rule that where an employe goes outside the line of his employment, and, for purposes of his own, inflicts an injury upon the person of one who has no claim upon the employer, arising from any special relation existing between them, the employer is not liable; yet, when applied to the treatment by a common carrier of its passengers, the rule does not apply. The reason of this is said to be that a common carrier owes a duty to passengers that they shall be protected from all danger, so far as the efforts of the carrier and its servants can be made available. The grounds on which the court proceed are thus well expressed by PILLSBURY, J.: "It is impossible for a railroad company, as such, to perform the contract upon its part, as it can act only through its agents and servants. The performance of its contract is intrusted to agents and servants selected by its authority, for their known or presumed fitness to perform the duties assigned to them. The passenger has no voice in the selection of the employes charged with the fulfilling of the company's contract with him; but, relying upon the reasonable presumption that the company has selected competent, faithful, and humane servants, he confidently submits himself to their control and direction until the completion of the contract. The employes of the company have exclusive control of the train. In its operation and management, and in the performance of the company's contract with the passenger, they are the representatives of the company, and as to

(*b*) Citing Higgins v. Watervliet Turnpike Co. 46 N. Y. 23; Rounds v. Delaware, etc., R. Co. 64 N. Y. 129.

(*c*) Hoffman v. N. Y., etc., R. Co. 87 N. Y. 25, 30.

(*d*) Schultz v. Third Ave. R. Co. 46 N. Y. Sup. (14 J. & S.) 211.

such passenger they stand in the place of the company, and all their acts, so far as they have a direct connection with the performance or non-performance of the contract, must be held to be acts of the company itself. The company, knowing at the time of entering into the contract for carriage that its servants in charge of the train are the only instrumentalities through and by which it can perform its contract, must be considered as having agreed that such servants should not, either willfully or negligently, violate such contract to the injury of its patron. If the company has stipulated that the passenger shall, during his transit, receive kind treatment at the hands of its servants, appointed by itself to fulfill its agreements in that regard, we fail to perceive why it should not be held liable for a breach of its contract in that respect, as well as in any other. Neither can we fully appreciate the argument that a *negligent* violation of such contract is a breach thereof, while a *willful* one is not. The wrongful act of the employe violates his own contract with his employer at the same time that it violates that of the employer with the passenger. And it seems to us to be more in accord with the reason and philosophy of the law, as well as with a sound public policy, that the master should be held to a reasonably strict accountability for such acts of the servant; and if any one is to look to the servant for indemnity, let it be the employer who has selected such servant, and intrusted him with the fulfilling of the master's duty to the passenger, rather than apply a principle that would confine the remedy of the passenger to an action against a servant, who in many cases might be insolvent, and for whose appointment the injured one is not in any manner responsible. The fact that the servant is liable in tort for his wrongful act, does not lessen the liability of the master, where such act is also a breach of the master's contract. In such case the injured party has his election to sue in *assumpsit* for a breach of contract duty, or in tort for the wrongful injury."(*e*)

The supreme court of Pennsylvania appears still to adhere to the old idea that if the act of the servant of a railway company in expelling a passenger was "malicious," the company will not be liable. Thus, it is said by that court in a late case: "If the conductor was at the time acting in the line of his duty and within the scope of his employment in putting Toomey off, under the existing circumstances, the company is liable for the act of the conductor, although he may have done it in a careless, negligent, or reckless manner; but for his unauthorized, willful, and wanton or malicious trespass, the company is not liable."(*f*) In the case in which this language was applied there was evidence tending to show that a person who had no right to ride upon a particular train was pushed off by the conductor while the train was going at the rate of eight miles an hour, in consequence of which he sustained severe injuries. It is obvious that not only the doctrine laid down, but the application in the particular case, is not in accordance with the best modern authorities. It is well settled that a railway company is liable for the unauthorized acts of its employes, as well as for those which are authorized. The words "willful, wanton, and malicious" are little more than epithets referring to

(*e*) Railroad Co. v. Flexman, 9 Bradwell, 250, 254.

(*f*) Pa. R. Co. v. Toomey, 91 Pa. St. 256, 259; citing Phila., etc., R. Co. v. Wilt, 4 Whart. 143; Passenger R. Co. v. Donahue, 70 Pa. St. 119.

the psychological condition of the actor, and conveying no meaning which can be the foundation of a sound juridical distinction. In another case that court has gone even further, and held that, to maintain an action of trespass *vi et armis* against a railway company for the wrongful act of its train-conductor in ejecting a passenger, it must appear that the act was done by the command or with the assent of the company. When, therefore, a passenger presented a ticket to the conductor, and the conductor refused to honor it, but expelled him from the train, and the only question was whether the ticket was one which entitled him to ride on the particular train, the conclusion was reached that, if the ticket was *not* one which entitled him to ride on the particular train, the passenger could not maintain an action, because the conductor had a right to put him off; and if the ticket *was* one which entitled him to ride on the particular train, the passenger could not recover damages, because, in putting him off, the conductor acted without the authority or assent of the company. The remedy of the passenger in such a case was said to be against the conductor, whose trespass it was.(*g*) It is hard to believe that the highest court in the second state of the American Union administers justice—if that word can be so abused—under such a worn-out rule of law,—a rule which, in such an application, ignores the plainest principles of public right. We seek curiously for the causes which could have led to the preservation of such a rule in that state.

§ 16. DISTINCTION AS TO THE KIND OR GRADE OF SERVANT WHO DID THE ACT. Within the meaning of the above rule, there seems to be no just distinction with reference to the grade or office of the servant who did the act. It will be for the jury to say, in each case, whether the servant who did the act was, in a general sense, acting within the scope of his employment, and in furtherance of his master's business. Thus, in order that a person may recover damages from a railway company for being improperly expelled from its train, or for being expelled therefrom at an improper place, or in an improper manner, it is not necessary that the expulsion should have been done by the *conductor* of the train; he will be entitled to recover if it was done by some other servant of the company acting in the manner above stated.(*a*) Accordingly, damages have been recovered against railroad companies for trespasses committed by their servants, where the wrongful act was done by a porter,(*b*) by a servant employed to clean the cars,(*c*) and, in cases of street railroads, by the driver.(*d*)

§ 17. RIGHT OF PASSENGER TO RESIST UNLAWFUL EXPULSION. It seems that passengers have a right to resist unlawful expulsion, but that they have no right to carry resistance to an extreme point. On the one hand, they have no right to resist for the mere purpose of bringing upon themselves violence, in order to make such violence ground of recovering enhanced damages.* The

(*g*) Allegheny Valley R. Co. v. McLain, 91 Pa. St. 442; citing Phila., etc., R. Co. v. Wilt, 4 Whart. 142; Yerger v. Warren, 7 Casey, 319.

(*a*) Hoffman v. N. Y. Cent. R. Co. 46 N. Y. Sup. (14 J. & S.) 526.

(*b*) Bayley v. Manchester, etc., R. Co. L. R. 8 C. P. 148; S. C. in court below, L. R. 7 C. P. 145.

(*c*) Northwestern, etc., R. Co. v. Hack, 66 Ill. 238.

(*d*) Lovett v. Salem R. Co. 9 Allen, 557; Cohen v. Dry Dock, etc., R. Co. 40 N. Y. Sup. (8 J. & S.) 368.

*Ante, § 7.

law will not encourage such a degree of resistance, for the further reason that it would lead to breaches of the peace. On the other hand, they are not bound to submit to the indignity and wrong of being expelled from a public conveyance where they rightfully are, without making any resistance whatever. They will in all cases be justified in making sufficient resistance to show that they do not acquiesce in the command to leave the vehicle, and that they leave it under physical compulsion. Now, it is a well-settled principle of law, founded in considerations of obvious justice, that a party who is subjected to an injury must use such means as he reasonably may to prevent an enhancement of the damages which will naturally flow from the injury. It seems to follow that, where a passenger is expelled from a carrier's vehicle, although the expulsion be unlawful or unjustifiable, yet if the passenger resists to an unreasonable extent, such fact may be considered by the jury in mitigation of damages.(*a*)

In one case, however, the right of the passenger is more strongly put: "When a conductor is in the wrong, the passenger has a right to protect himself against any attempt to remove him, and resistance can lawfully be made to such an extent as may be essential to maintain such a right. Cases occur where circumstances may imperatively require that the passenger should remain on the train on account of others who may be there in his charge, or where it is indispensable that he should hasten on his journey without delay; and if, by reason of the mistaken judgment or willfulness of the conductor, he should be expelled when lawfully there, serious injury might follow. The law does not, under such circumstances, place the passenger within the power of the conductor; and, when lawfully in the cars, he is authorized to vindicate such right to the full extent which might be required for his protection."(*b*) "But," it has been well observed, "if the conductor has the right to eject the passenger, and is proceeding to do so in a lawful manner, the latter has no right to resist; and if in doing so he receive injury, he will have no one to blame but himself."(*c*)

§ 18. Expelling Passenger at Place Other than Regular Stopping-Place. A statute of Texas provides that "if any passenger shall refuse to pay his fare or toll, it shall be lawful for the conductor of the train, and the servants of the corporation, to put him out of the cars, at any usual stopping-place which the conductor may select."(*d*) The words "usual stopping-place," as above used, are held to mean a regular station or any other place which the company, expressly or impliedly, by use for such purposes, had designated as a proper place for passengers to get on or off its trains, and where they would, in consequence thereof, have the right to demand the exercise of this privilege. A place where trains stop for the purpose of taking on wood and water only, is not a "usual stopping-place" within the meaning of the above statute.(*e*)

A similar statute exists in Illinois. The term "usual stopping-place," employed therein, means a regular station, at which passengers get on and off

(*a*) Brown v. Memphis, etc., R. Co. 7 Fed. Rep. 51, 65.

(*b*) English v. Delaware, etc., Canal Co. 66 N. Y. 454.

(*c*) Hutch. Car. § 593.

(*d*) Pasch. Dig. Tex. St. art. 4892.

(*e*) Texas, etc., R. Co. v. Casey, 52 Tex. 112, 122.

the company's trains.(*f*) Under it, where the passenger is rightfully put off, the only wrong being the wrong of putting him off at a place not a regular stopping-place, the supreme court has shown a disposition not to allow large damages. They have set aside verdicts for $1,000,(*g*) for $450,(*h*) and for $500.(*i*) But they have affirmed judgments for $100(*j*) and for $200.(*k*) Nor does the court favor the giving of exemplary damages in such cases. The damages are limited to compensation for the actual injury, unless circumstances of aggravation be shown.(*l*) Where the train from which the passenger is expelled is a freight train, this rule does not require the conductor to cause the train to be drawn up to the platform before expelling the recusant passenger. The passenger may, although a woman, be put off on a side track, unless it is customary for freight trains to land their passengers at the platform.(*m*)

§ 19. WHETHER CONDUCTOR BOUND TO RECEIVE FARE TENDERED AFTER HE HAS COMMENCED TO PUT PASSENGER OFF. Where a person is upon a train under circumstances which entitle the conductor to demand payment of fare of him, and he fractiously refuses to pay fare, and the conductor thereupon, as he may rightfully do, signals the train to stop and commences to put him off, if the passenger then changes his mind and offers to pay fare, or if some one offers to pay it for him, the conductor is nevertheless not bound to desist from putting him off.(*a*) But where the passenger has acted in good faith, if, before the work of putting him off is complete, another passenger tenders his fare for him, the conductor, it has been held, is bound to accept it and desist from putting him off.(*b*) But the refusal to pay fare does not work a forfeiture of the right of the passenger to ride, under reasonable conditions, upon the payment of his fare; the company cannot visit upon him the punishment of refusing to serve him, upon tendering the price, as it is bound to serve any other member of the public. While, therefore, the passenger cannot be allowed to experiment with the conductor, who has been compelled to commence stopping his train on account of the former's contumacy, yet if he commences to put him off for refusing to pay his fare at a regular station, at which the train would have stopped in any event, there seems to be no good reason why the conductor should be upheld in refusing to allow him to ride upon tendering the proper amount of fare; and it has been held that such a refusal cannot be justified.(*c*) But even here, it has been held, he is not entitled to resume his journey unless he pays fare for a passage from the station where he first entered the train.(*d*)

(*f*) Chicago, etc., R. Co. v. Flagg, 43 Ill. 364; Chicago, etc., R. Co. v. Parks, 18 Ill. 465; Terre Haute, etc., R. Co. v. Vanatta, 21 Ill. 188.

(*g*) Terre Haute, etc., R. Co. v. Vanatta, 21 Ill. 188; Chicago, etc., R. Co. v. Peacock, 48 Ill. 253.

(*h*) Chicago, etc., R. Co. v. Roberts, 40 Ill. 503.

(*i*) Illinois, etc., R. Co. v. Cunningham, 67 Ill. 316.

(*j*) Chicago, etc., R. Co. v. Flagg, 43 Ill. 364.

(*k*) Illinois, etc., R. Co. v. Johnson, 67 Ill. 312.

(*l*) Toledo, etc., R. Co. v. Patterson, 63 Ill. 304.

(*m*) Illinois Cent. R. Co. v. Nelson. 59 Ill. 110.

(*a*) O'Brien v. N. Y., etc., R. Co. 80 N. Y. 236; S. C. 1 Amer. & Eng. R. Cas. 259; Hoffbauer v. Railroad Co. 52 Iowa, 342; Stone v. Chicago, etc., R. Co. 47 Iowa, 82; O'Brien v. Boston, etc., R. Co. 15 Gray, 20; Hibbard v. N. Y. Cent. R. Co. 15 N. Y. 455; People v. Jillson, 3 Park. Cr. R. 234, 239; Stone v. Chicago, etc., R. Co. 47 Iowa, 89; State v. Campbell, 32 N. J. L. 309.

(*b*) Garrett v. Louisville, etc., R. Co. 3 Amer. & Eng. R. Cas. 416, (Sup. Ct. Tenn. 1881;) S. C. 72 Tenn. (8 Lea,) 438.

(*c*) O'Brien v. N. Y., etc., R. Co. 80 N. Y. 236; S. C. 1 Amer. & Eng. R. Cas. 259.

(*d*) Stone v. Chicago, etc., R. Co. 47 Iowa, 82; S. C. 10 Chi. Leg News, 78; 6 Reporter, 489.

The reason of this rule and of the exception to it seems to be that the passenger, having first broken the contract, cannot afterwards tender performance of it and insist that it shall be reinstated by the carrier; but as the carrier is bound to receive at any regular station any person (with certain exceptions not necessary to notice) who purchases a ticket or tenders fare, it is bound, the train being at a regular station, to make a new contract with the obstinate passenger, the same as it is bound to do so with any other proper person; and it cannot take it upon itself to punish his obstinacy by denying to him the rights which it is bound to extend to the public generally.

The reason of the rule was quite forcibly expressed by DENIO, J.: "Railroad trains are now run according to a scheme in which the time required in passing from one point to another and the time required for the necessary stoppages is accurately calculated. Any disarrangement or departure from the time fixed is exceedingly hazardous to the safety of the company's property and the persons employed in running the train. The most horrible calamities have often been the result of such disarrangements. And if one passenger can by his unjustifiable humor cause the cars to stop, another may do the same thing, and the utmost irregularity may be brought about. The rule, therefore, was, in my judgment, plainly reasonable, which imposed a forfeiture of his right to proceed further on the cars upon a person who should refuse to show his ticket to the conductor when requested. If he forfeited his right by his improper conduct, it was for the company or its agents to say whether he should be retained after having occasioned the inconvenience of the stoppage by his pertinacity."(*e*) In addition to this, it is said that "if the rule were otherwise it would enable a passenger so disposed to pay his fare only on compulsion and after the train had stopped, repeating the operation between all stopping points along the route of the road. The passenger must, therefore, stand or fall by the right of the company to expel him. If he incur the exercise of this power, he is at the mercy of the company. If they are wrong, they must respond. If he is in error, he must bear the burden of his folly. He cannot, as suggested, create the facts and circumstances out of his own wrong; he must take the consequences, which are expulsion at the will of the company expressed through its agent, the conductor, and the inconvenience resulting from that incident."(*f*)

So, where a passenger had exhibited a spent ticket, and insisted on his right to ride upon it, until the conductor stopped the train to put him off, it was held that he could not, on producing a regular ticket, claim the right to be allowed to remain on the train. "In my opinion," said BEASLEY, C. J., "such a doctrine is not consistent with either law or good sense. Its establishment would practically annul the power of a railroad company to require passengers to show their tickets; for it is obvious that, if the only penalty on a refractory passenger is a momentary expulsion, he will be enabled, at a small sacrifice, by repeated refusals, to compel an abandonment of the demand upon him. A passenger takes his ticket subject to the reasonable regulations of the company; it is an implied condition in his contract that he will submit to such regulations; and if he willfully refuses to be bound by them,

(*e*) Hibbard v. N. Y., etc., R. Co. 15 N. Y. 455. (*f*) Nelson v. Long Island R. Co. 7 Hun, 140, 145, per Brady, J.

by so doing he repudiates his contract, and, after such repudiation, cannot claim any right under it. In this case, the passenger, with full knowledge of the regulation in question, refused to show his ticket, which alone gave him a right to a seat in the cars. The exhibition of the spent ticket did not help the matter; he stands, therefore, on the same footing as any other passenger who, when properly applied to, will not exhibit the evidence of his rightful presence in the car. If this particular passenger had the legal right to re-enter the cars after his tortious refusal, so, on all similar occasions, will all other passengers be entitled to the same right. We come thus to the result that railroad passengers may violate, with full knowledge, a legal regulation of a company in whose cars they are carried; they may resist, short of a breach of the peace, all attempts to expel them; they may, by this means, at a loss to the company, and to the peril of the public, disarrange the order of successive trains upon the road with regard to each other; they may occasion a tumult and disorder in the car in which they may happen to be; and, after being expelled, they may immediately return to repeat, if so inclined, the same misconduct. I must think it requires no argument to show that such a license to do evil as this does not exist."(*g*)

In like manner the supreme court of Iowa hold that if a passenger refuses to pay his fare when demanded, the conductor may rightfully put him off, although he offers to pay it before he is actually expelled. "The rule," says ADAMS, J, "that a passenger may contest the regulations of the company and the firmness of the conductor by refusing to pay full fare, and still save himself from expulsion by tendering full fare after expulsion has commenced, is not only uncalled for for the just protection of the recusant passenger, but would tend to encourage a practice, which, if indulged in, would interfere with the convenience of the company, and the dispatch and quiet to which other passengers are entitled."(*h*)

§ 20. WHETHER THE COMPANY, BEFORE EXPELLING THE PASSENGER, MUST REFUND THE UNEARNED PASSAGE MONEY. Where a traveler, on the faith of representations made to him by the company's agent, stops over on his ticket and attempts to resume his journey on the same ticket after it has, by its terms, expired, the conductor cannot lawfully expel him from the train without first restoring to him that portion of the passage money which is represented by that part of the transit called for by the ticket which has not yet been made, or deducting it from the fare claimed for the rest of the journey. The ticket is evidence that the fare has been paid for the entire transit, and there is no rule, founded in sense or justice, which will allow the company to keep the passenger's money, where he has acted in good faith, without transporting him over the route for which he has paid.(*a*)

In a late case the plaintiff entered the defendant's cars without procuring a ticket, and handed to the conductor the ticket fare. The conductor afterwards demanded of the plaintiff the additional amount required by the rules of the company to be paid by persons who had not purchased tickets before entering the train. This the plaintiff refused to pay. The conductor thereupon, without first offering to return the amount which the plaintiff had paid

(*g*) State v. Campbell, 32 N. J. L. 309, 312.
(*h*) Hoffbauer v. Railroad Co. 52 Iowa, 342.
(*a*) Burnham v. Grand Trunk R. Co. 63 Me. 298, 303.

him, stopped the train. As soon as he had signaled to stop the train, the plaintiff offered to pay the rest of the sum demanded, but the conductor, carrying out a rule of the company not to accept fare after the train had been signaled to stop in order to put a passenger off for non-payment of fare, refused this, laid hold of the passenger, dragged him out of the car, and, as the plaintiff was in the act of leaving the car, handed to him the money which he had paid. It was held that the company was liable to pay damages. If the conductor accepted, without objection, the money tendered by the passenger as payment of full fare, he could not thereafter change his mind and demand the extra fare; nor could he commence proceedings to put the plaintiff off, without first returning to him the money which he had paid.(*bb*)

§ 21. DETAINING PASSENGERS FOR NON-PAYMENT OF FARE. Where a railroad company had a regulation that passengers on leaving its trains must exhibit their tickets to the gateman at the company's station, and a passenger tried to pass out without exhibiting his ticket, alleging that he had lost it, and the gateman thereupon detained him, and caused him to be arrested and confined in the police station over night, on the charge of disorderly conduct, and he was discharged by the police justice the next morning, it was held that he could maintain an action against the company for false imprisonment. The power which the company sought to exercise was not like the power to expel a passenger from its cars for non-payment of fare, but it was the power to imprison for debt.(*a*)

IV. As to Damages.

§ 22. MEASURE OF DAMAGES FOR EXPULSION OF PASSENGER. In an action for damages for refusing to carry the plaintiff in defendant's cars, the following facts appeared. The plaintiff, a colored woman, the wife of a colored preacher, having purchased a first-class ticket, applied for admission into a first-class car and was refused, and directed to go into the smoking car, where there were none but men, and some of them smoking. This she refused to do, and left the cars. She was lady-like in appearance, and at the time carried a sick child in her arms. The court instructed the jury that she was entitled to such damages as would make her whole; and that, in estimating such damages, the jury should consider the loss of time, the inconvenience she had been put to, and the probable amount of expenses incurred in the vindication of her rights. The jury returned a verdict for $1,000.(*b*)

The rule thus laid down that the jury, in estimating the plaintiff's damages, may take into consideration the expenses incurred by him in the litigation, has been held allowable in courts of law, where the case is a proper one for exemplary damages.(*c*) Such expenses are allowed by statute in Georgia, "when the defendant has acted in bad faith, and been stubbornly litigious, or

(*bb*) Bland v. Southern Pac. R. Co. 55 Cal. 570; S. C. 3 Amer. & Eng. R. Cas. 285.

(*a*) Lynch v. Metropolitan, etc., R. Co. 24 Hun, 506. See Chilton v. London, etc., R. Co. 16 Mees. & W. 212.

(*b*) Gray v. Cincinnati Southern R. Co. 11 Fed. Rep. 683, before Swing, J.

(*c*) Beecher v. Derby Bridge Co. 24 Conn. 496; Lindsley v. Bushnell, 15 Conn. 235; Welch v. Durand, 36 Conn. 182; Dalton v. Beers, 38 Conn. 429; New Orleans, etc., R. Co. v. Allbritton, 38 Miss. 242; Landa v. Obert, 45 Tex. 539; Finney v. Smith, 31 Ohio St. 529.

has caused the plaintiff unnecessary trouble and expense."(*d*) In admiralty, where, as is well known, the rules as to the measure of damages are not the same as in courts of law, such expenses have been likewise allowed in the case of an injury to a passenger at sea.(*e*) But the propriety of allowing counsel fees to be taken into consideration in estimating exemplary damages has been denied by some of the best courts.(*f*)

§ 23. EXEMPLARY DAMAGES IN SUCH CASES. It has been well said that "there is no class of cases where the doctrine of exemplary damages can be more beneficially applied than in the case of railroad corporations in their capacity of common carriers of passengers;"(*a*) and the courts are in the constant habit of upholding the giving of exemplary damages in the case of the wrongful expulsion of passengers from railway trains.(*b*) The grounds on which these damages have been generally given are gross misconduct towards the passenger on the part of the company's servants;(*c*) but they have also been given where the agent acted without unnecessary violence and upon conscientious views of his duty. The injury which will entitle a passenger to such damages may consist in the act of the conductor in executing a rule of the company, as where, without malice on the part of the conductor, a well-behaved woman is expelled from a first-class car on account of her color.(*dd*) Here it will be no reason for instructing the jury that they should not give exemplary damages that the conductor acted without malice; for, in such cases, punitive damages may be inflicted for the purpose of enforcing upon the corporation obedience to the duties required of it as a common carrier.(*ee*)

"The only way carriers of passengers can be held to reasonable regulations, is by allowing juries to inflict punitive damages for a violation of the rights of the public; and the establishment of unreasonable regulations is the *gravamen* of the offense, that being a disregard of the rights of the public for which the carrier is punished. The mere price of a ticket or refunding of the money will not answer the purpose in all cases; that would be simply to permit the carrier to enforce the unreasonable regulation, because he would never claim to keep the money while refusing to render the service. He would take no money, or refund all received, and go on with his business in his own way, and the plaintiff or the public would be no better off. This rule of damages

(*d*) Code Ga. (Ed. of 1873) § 2942. See Savannah v. Waldner, 49 Ga. 316; Gurnsey v. Shellman, 59 Ga. 797.

(*e*) The Oriflamme, 3 Sawy. 397, 401.

(*f*) Day v. Woodworth, 13 How. 363; Oelrichs v. Spain, 15 Wall. 211; Fairbanks v. Witter, 18 Wis. 287; Earl v. Tupper, 45 Vt. 275; Hoadley v. Watson, Id. 289; Kelly v. Rogers, 21 Minn. 148; Howell v. Scoggins, 48 Cal. 355; Falk v Waterman, 49 Cal. 224. And see Lincoln v. Schenectady, etc., R. Co. 23 Wend. 425. The costs of prior litigation are recoverable as damages on the principle of compensation, where they have flowed as the necessary or proximate result of the wrong done the plaintiff,—as in actions for malicious prosecution or false imprisonment. Pritchet v. Doevey, 1 Cro. & M. 775; Bonesteel v. Bonesteel, 30 Wis. 511; Blythe v. Thompkins, 2 Abb. Pr. 468; Foxall v. Barnett, 22 Eng. Law & Eq. 179; Parsons v. Harper, 16 Grat. 64. But see Strang v. Whitehead, 12 Wend. 64; Bradlaugh v. Edwards, 11 C. B. (N. S.) 377.

(*a*) Goddard v. Grand Trunk R. Co. 57 Me. 202; S. C. 2 Amer. Rep. 39; Haley v. Mobile, etc., R. Co. 7 Baxt. 243; Garrett v. Louisville, etc., R. Co. 3 Amer. & Eng. R. Cas. 416, (Sup. Ct. Tenn. 1881.)

(*b*) Brown v. Memphis, etc., R. Co. 7 Fed. Rep. 51; Evans v. St. Louis, etc., R. Co. 11 Mo. App.

(*c*) See the discussion of this question in Milwaukee, etc., R. Co. v. Armstrong, 91 U. S. 489; also Ackerson v. Erie R. Co. 32 N. J. L. 254, 260.

(*dd*) Railroad v. Brown, 17 Wall. 446; Brown v. Memphis, etc., R. Co. 7 Fed. Rep. 51, 63.

(*ee*) Brown v. Memphis, etc., R. Co. supra.

would be simply rescinding the contract to carry, which is all the carrier demands, and sufficient for his purpose."(*f*)

§ 24. INSTANCES OF THE AMOUNT OF DAMAGES. A boy eight years old jumped upon a street-railway car, having money in his pocket to pay his fare. After the car had proceeded about a block, the conductor came from inside the car, when another boy, who had got upon the car, put his hand to his nose and jumped off. Thereupon the conductor, without asking the former boy for his fare, or giving him an opportunity to pay it, and without stopping the car, threw him off from it. He fell on the defendant's other track, about four feet distant, and another of the defendant's cars, which had this moment come up the track, ran over him. His collar-bone was broken, so that it protruded from the skin. His second and third ribs were also broken. His right arm was broken near the shoulder in four or five pieces. The small bone of his left arm was broken near the wrist, and so was his thigh joint between the middle and upper third. There were great contusions and abrasions, and the boy was permanently injured and deformed. The court could not say that $15,000 were an excessive award of damages for such injuries.(*a*)

Where a person purchased a collector's certificate of the payment of a certain sum as railroad taxes, which was more than the amount of fare, according to the company's regular schedule of fare, for the distance which he desired to travel, and got upon the train in good faith, supposing that this would pay his fare, there being no agent at the station where he got upon the train to inform him of his error, and presented such certificate to the conductor when his fare was demanded, who refused to receive it, and demanded the payment of the fare in money, which the plaintiff was unable to pay, and thereupon the conductor took hold of him to put him off the train, when a fellow-passenger, out of motives of humanity, offered to pay the fare demanded, which the conductor refused, but put the plaintiff off the train, it was held that the company was liable, that it was a case for exemplary damages, and that $2,000 damages were not excessive.(*b*)

A well-dressed colored woman was put out of the lady's car because of her color, and also because of a claim, on the part of the conductor, that she was known to him to be a woman of lewd character. She resisted, and a good deal of force had to be used in expelling her. Her testimony showed that her thumb was dislocated, and that she was severely choked, while other testimony tended to show that no unnecessary violence was used. It was held that an award of $3,000 was not so gross as to authorize the court to set aside the verdict, though the learned judge would have been better satisfied if it had been smaller.(*c*)

The wife of an employe of a railroad company got upon the train without a pass, having been told that she would be allowed to ride free without a pass being required of her. The conductor ordered her to leave the train, not at a station, but at a water-tank where the train had stopped. Her petition al-

(*f*) Id., per Hammond, J.

(*a*) Schultz v. Third Ave. R. Co. 46 N. Y. Sup. (14 J. & S.) 211.

(*b*) Garrett v. Louisville, etc., R. Co. 3 Amer. & Eng. R. Cas. 416, (Sup. Ct. Tenn. 1881.)

(*c*) Brown v. Memphis, etc., R. Co. 7 Fed. Rep. 51, 62.

leged that she offered to explain to the conductor why she had no written pass, but he refused to receive her explanation, and put her off the train in the presence of a large number of passengers, in a "rude, wanton, and malicious manner." She claimed that, in consequence of being so put off, she was greatly mortified, frightened, had to walk with her infant child in her arms, two or three miles, and, in consequence thereof, suffered a miscarriage. The jury were instructed that, under the pleadings, they could not give exemplary damages; but that they must confine their verdict to "such actual damages" as the evidence should satisfy them were suffered "pecuniarily, and in feelings, injuries, and sufferings resulting from an unlawful act." The evidence is not set out, but, in the opinion of the court, it is said to have preponderated in favor of the defendant. The jury, under the instructions, returned a general verdict for $2,500, and the supreme court refused to set it aside.(*d*)

Where a passenger, after having been carried but a few miles, was put off from a railway train, was detained but a few hours, and suffered no special damage from inconvenience and loss of time, a verdict for $750 was held excessive.(*e*)

SEYMOUR D. THOMPSON.

St. Louis, Missouri.

(*d*) Texas, etc., R. Co. v. Casey, 52 Tex. 112.

(*e*) Houston, etc., R. Co. v. Ford, 53 Tex. 364.

JOHNSON and others *v.* HANOVER FIRE INS. CO.

(*Circuit Court, N. D. Illinois.* January 15, 1883.)

1. FOREIGN CORPORATIONS—SERVICE OF SUMMONS ON.
   An insurance company existing under the laws of one state and doing business in another, may be served with a summons by service upon any one of its agents appointed to transact its business in such other state.
2. SAME—APPOINTMENT OF AGENT OR ATTORNEY.
   Where, by the statutes of the state where suit is brought, no insurance company existing under the laws of another state is allowed to transact business in the state until such company shall first duly appoint an attorney in said state on whom process of law can be served, it was *held* that such statute did not preclude the service of such process upon any other agent of such foreign corporation transacting the business of the company in that state, and that the provisions of the statute of Illinois, regulating the service of legal process upon corporations, was not confined to domestic corporations, but applied alike to all foreign corporations having agents for the transaction of its business in that state.

B. D. Magruder, for plaintiffs.

W. I. Culver, for defendant.

BLODGETT, J. This is a suit on a policy of insurance alleged to have been issued by defendant to plaintiffs. The defendant is a cor-

poration created and existing under the laws of the state of New York. The return of the marshal shows service of the summons "by delivering a copy thereof, and also by reading the same, to Carl A. F. Henicke and Joseph Schoeniger, agents of said defendant." The defendant has entered a special appearance, and moved to quash and set aside service of summons, because Henicke and Sheoeniger, on whom process was served, were not the agents of the defendant for that purpose; but that defendant, when it began the transaction of insurance business in the state of Illinois, in compliance with the statute of this state, duly appointed one George D. Gould, who was then and now is a resident of Moline, in the county of Rock Island, in this state, its attorney in this state on whom process of law could be served, a copy of which appointment was duly filed, and still remains in the office of the auditor of public accounts in this state; and that such attorneyship and agency still remains in full force, and no other attorney for such purpose has been appointed; therefore, defendant insists that it could only be served with process in said cause by service on the said Gould.

By the twenty-second section of chapter 73 of the Revised Statutes of this state, entitled "Insurance," it is provided that—

"It shall not be lawful for any insurance company, association, or partnership, incorporated by or organized under the laws of any other state of the United States, or any foreign government, * * * to take risks or transact any business of insurance in this state * * * unless such company, desiring to transact any such business, as aforesaid, by any agent or agents in this state, shall first appoint an attorney in this state on whom process of law can be served, and file in the office of the auditor of public accounts a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney is substituted, and any process issued by any court of record in this state, and served upon such attorney by the proper officers of the county in which such attorney may reside or be found, shall be deemed a sufficient service of process upon such company, but service of process upon such company may also be made in any other manner provided by law."

Under section 5, *c.* 110, of the Revised Statutes of this state, entitled "Practice," as amended by the act approved March 29, 1877, it is provided that—

"An incorporated company may be served with process by leaving a copy thereof with its president, if he can be found in the county in which the suit is brought; if he shall not be found in the county, then by leaving a copy of the process with any clerk, secretary, superintendent, general agent, cashier, principal, director, engineer, conductor, station agent, or any agent of said company found in the county."

It was admitted on the argument, and it also appears by proof from affidavits on file, that Henicke and Shoeniger, on whom the summons in this case was served, were at the time of such service the local agents of the defendant in the city of Chicago; that they, as such agents, issued to plaintiffs the policy of insurance declared upon, and countersigned the same; that after the loss by fire of the property claimed to have been covered by the policy, said Henicke and Schoeniger accepted and transmitted to defendant the proofs of loss required by the policy, and conducted negotiations looking to the settlement of plaintiffs' claim for such loss. The service of the summons in this case having been made upon the agents of the defendant, with whom the plaintiffs dealt, the single question raised by this motion is whether a foreign insurance company doing business in this state can only be served with process by service on the agent appointed for that purpose by the company in pursuance of the provisions of section 22, *c.* 73, above quoted.

Section 5 of the chapter regulating practice, as it appears in the Revised Statutes of 1874, is a substantial re-enactment of the act of February 8, 1873, in regard to the service of process on corporations; and section 22 of the insurance chapter is one of the provisions of the insurance law, approved March 11, 1869; and at the time the act of 1869 was adopted, the supreme court of this state had decided in *Mineral Point R. Co.* v. *Keep*, 22 Ill. 9, that the provisions of the act of 1853 were not confined to domestic corporations created and doing business under the laws of this state, but were equally applicable to foreign corporations doing business in this state, who had agents or property here; and the supreme court of this state had also held in *Peoria Ins. Co.* v. *Warner*, 28 Ill. 429, that this act of February, 1853, was a remedial act and to be liberally construed.

It will, therefore, be seen that at the time the clause requiring foreign insurance companies doing an insurance business in this state to appoint an agent on whom process of law could be served was passed, there was already ample provision for service of process on such corporation, and the act of 1869 expressly states that the service on the agent so to be appointed was not the only mode of obtaining service on such company. I therefore think that the natural and reasonable inference as to the legislative intent is that the purpose of the act of 1869 was to compel foreign insurance companies, who entered upon an insurance business in this state, so to authenticate the agency of some person on whom process could be served, that such company would be concluded by service on such agent or person. If process

was served on any other person under the assumption that he was the agent of such company, the company could dispute such agency, probably, even after judgment, if judgment was taken by default. *Keep* v. *Mineral Point R. Co.* 22 Ill. 16; *Seibert* v. *Thorpe*, 77 Ill. 43; *Protection Life Ins. Co.* v. *Palmer*, 81 Ill. 90. And therefore citizens of this state, having a right of action against such foreign companies, might be put to much trouble in proving the agency of the person on whom the process was served

It was, therefore, as I think, to save this annoyance and trouble to persons bringing suit in this state against such companies that the act of 1869 was passed. But I do not think the legislature intended to enact that process can only be served on an agent appointed under section 22 of the insurance law. To hold that service can only be made on the agent appointed under the insurance law, practically annuls the last clause of the section, which declares that the service may also be made in any other manner provided by law.

There was another manner provided by law at the time the act of 1869 was passed, and it has not been repealed, but remains in full force, and the supreme court of this state, in *H. & St. J. R. Co.* v. *Crane*, 102 Ill. 249, has recently reaffirmed the principle of *Keep* v. *Mineral Point R. Co.*, and said:

"It does not require a liberal construction to bring foreign corporations within the act. The provision is that in all cases where suit has been or may hereafter be brought against an incorporated company, process shall be served.

"Language more comprehensive could scarcely have been employed. It says any corporation, without the slightest reservation or limitation. A thing may be embraced in the provisions of a statute by being specifically named; * * * it would have been no more comprehensive had it said, all corporations of every kind, whether domestic or foreign, doing business in this state."

Although the suit in which the opinion, from which the last citation was made, was against a railroad company, there is nothing, either in the law itself or in the comments of the court, indicating that insurance corporations are any exception to the rule there laid down. The construction contended for by the defendant would give foreign insurance companies an advantage in this state over home or domestic corporations by requiring that service of process could only be made upon a single individual representing the foreign company, while the domestic company could be reached by service "upon any agent" found within the county or district, in the absence of the president or other superior officers. I cannot believe that the legislature

intended to give foreign companies any such advantage, but rather intended that the company should be required to appoint an agent in such manner as to estop it from denying or questioning the validity of a service when made on him, leaving it for suitors to make their election whether they would serve the agent thus appointed, or take the risk of proving the agency of any other agent upon whom service might be obtained.

The only remaining question, then, is, were Henicke and Schoeniger such agents of the defendant as to make the service on them effectual to bring the defendant into court? As already stated, they were the defendant's agents with whom the plaintiffs dealt in regard to the subject-matter of this suit. They issued the policy which forms the basis of complainants' claim, and have acted in the premises since the alleged liability is said to have accrued. If they were the agents of the defendant for the purpose of making this contract, it seems to me they are sufficiently so to be served with process to enforce it.

The return in this case does not show affirmatively that the president of the corporation was not found in this district, and is therefore, perhaps, technically defective under some of the decisions in this state. I do not, however, understand that the defendants attached any importance to this point, and if they do it can probably be avoided by the marshal taking leave to amend his return, as, I presume, it is not contended that service could have been made upon the president of the defendant company within this district.

GILDERSLEEVE and others *v.* GAYNOR, Assignee, and others.

(*Circuit Court, S. D. Alabama.* December Term, 1882.)

DEMURRER—LIMITATIONS IN BANKRUPTCY—SECTION 5057, REV. ST., CONSTRUED.

The defendants in a suit in equity for the foreclosure of a purchase-money mortgage executed to the complainants by the mortgagor, a bankrupt, who, together with his assignee, are joined as defendants, demurred to the complaint on the ground that the cause falls within section 5057 of the Revised Statutes, and that it could not be maintained because more than two years had elapsed from the date of the appointment of the assignee of the estate and effects of the bankrupt to the commencement of the suit.

Held, that the bar of the statute applies, not to every suit at law or in equity between an assignee in bankruptcy and another person, but to suits between an assignee in bankruptcy and a person claiming any *adverse interest* to any property or rights of property transferable to or vested in such assignee, and

that the action at bar does not fall within the statute; since the fact of the mortgage being admitted, the suit for the foreclosure of it is not the claim of an adverse interest in the property, within the meaning of the statute. The suit of one party against another in reference to property rights does not necessarily imply the existence of adverse interests to such property.

In Bankruptcy. Heard upon demurrer to bill.

BRUCE, J. This is a suit in equity for the foreclosure of a mortgage executed to the complainants by the mortgagor, Nelson W. Perry, a bankrupt, upon the property described in the bill, for the purchase money, to which Gaynor, the assignee of the bankrupt, Perry, and others are made parties defendant. The bill alleges that Nelson W. Perry was adjudged a bankrupt August 20, 1878; that the defendant Gaynor was appointed assignee of the estate of the bankrupt, Perry, on the fifth day of December, 1878, and the bill in this case was filed on the seventeenth day of November, 1882. The demurrant claims, therefore, that this cause falls within section 5057 of the Revised Statutes of the United States, and that it cannot be maintained, because more than two years had elapsed from the date of the appointment of Gaynor as the assignee of the estate and effects of the bankrupt to the commencement of this suit.

Section 5057 provides:

"No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. * * *"

The question, then, to be determined is whether the suit, the character and purpose of which is shown by the allegations of the bill, falls within this statute; for if so, the bar of the statute applies, and the question being properly raised by the demurrer, it would have to be sustained. The question is not, whether the action at bar falls within any exception to the statute, but does it fall within the statute at all? The bar of the statute applies, not to every suit at law or in equity between an assignee in bankruptcy and another person, but to suits between an assignee in bankruptcy and a person claiming an *adverse interest* touching any property or rights of property transferable to or vested in such assignee. The assignee succeeds to the property and rights of property of the bankrupt; so that the assignee, Gaynor, succeeded to the property and rights of property of the bankrupt, Perry, which were under the bankrupt law transferred to and vested in the assignee.

The assignee took no other or greater interest in the property than the bankrupt had in it at the date of his bankruptcy. He stands in the shoes of the bankrupt, and takes the property in the same plight and condition in which the bankrupt held it. *Yeatman* v. *Savings Institute*, 95 U. S. 766.

The title to the property had passed to the mortgagee under the mortgage, and the bankrupt had the right to redeem, to which right the assignee succeeded; that is, to the equity of redemption. He might redeem the property or sell it subject to the mortgage, or he may do neither the one nor the other; and the mortgagee may not come into the court of bankruptcy preferring to rely solely upon his security, which he has the right to do. *Wicks* v. *Perkins*, 1 Woods, 383.

The proposition of the demurrant is that if the mortgagee does not begin his suit to foreclose his mortgage within two years from the date of the appointment of the assignee, his suit is barred under section 5057 of the Revised Statutes of the United States. The proposition is almost startling to one who has regarded the provisions of the bankrupt law as protecting rather than imperiling *bona fide* liens upon property of a bankrupt.

But to the question: Can the suit for the foreclosure of the mortgage be held to be a claim of an adverse interest touching the property or right of property transferable to and vested in the assignee? What do the words "adverse interest," as used in the statute, mean? It is too narrow to say that it applies to property only held by adverse possession, and under claim of title hostile to every other.

In *Bailey* v. *Glover*, 21 Wall. 346, the supreme court of the United States says:

> "This is a statute of limitations; it is precisely like other statutes of limitations, and applies to all judicial contests between the assignee and other persons touching the property or rights of property of the bankrupt transferable to or vested in the assignee, where the interests are adverse, and have so existed for more than two years from the time the cause of action accrued for or against the assignee."

See, also, *Gifford* v. *Helms*, 98 U. S. 248.

The statute, then, applies not only to suits where there is a contest as to the right of property *in specie*, but to suits where there are adverse interests; that is, claims on the one hand which are denied on the other, the determination of which will affect the *quantum* of the bankrupt's estate and the distributive share of the creditors. To cases of this class the statute applies, the object of it being, as the courts have said, to speed the settlement of the estate of the bankrupt.

The question, then, is, does the case at bar for the foreclosure of a mortgage fall within this class? And is the suit a claim of an interest adverse to the estate of the bankrupt, which would diminish it in the hands of the assignee and thus affect the rights of the creditors? The complainants do not claim any other or greater right in the property covered by the mortgage, than that granted by the mortgagor in his deed of mortgage, and the relief prayed is no other than the legal effect of the mortgage, which is the act and deed of the grantor therein.

The demurrants' proposition rests upon the assumption that the mortgagee and his grantor held interests in the property covered by the mortgage adverse and hostile to each other; that there is a claim on the one hand that is denied on the other. Such may be the fact, and the mortgagor may challenge the validity of the mortgage, and contest the alleged lien upon the property, and in such a case it is apprehended that the assignee of the mortgagor in bankruptcy would be compelled to move within two years to make such an attack upon the mortgage to relieve the property of an unfounded claim, so that it might go into the bankruptcy and be distributed to the creditors of the bankrupt. But that is not the case here, and the demurrant does not and cannot make such a question here, for the allegations of the bill make a case of a *bona fide* deed of mortgage, and, for the purpose of this demurrer, these allegations must be taken as true. The fact of the mortgage being admitted, the suit for the foreclosure of it is not the claim of an adverse interest in the property within the meaning of section 5057 of the Revised Statutes of the United States. It does not follow that because one party brings a suit *versus* another party in reference to property rights, that they necessarily bear adverse interests to property, or rights of property; for the object of the suit may be, not to contest rights of property, but to determine judicially the respective interests which such party has to the property.

The right to an equity of redemption is not inconsistent with the rights of a mortgagee under his mortgage, unless there is a disclaimer of the mortgage and an assertion of title hostile to it. *Ellsberry* v. *Boykin*, 65 Ala. 342, and cases there cited.

The cases cited in support of the demurrer do not sustain it, for they are not cases where the relation between the parties was that of mortgagee and the assignee in bankruptcy of the mortgagor, unless it be the case of *Phelan* v. *O'Brien*, 12 FED. REP. 428, where there had been a sale of the property covered by the deed of trust, and the

suit to set the sale aside was instituted more than two years after the date of the sale. The court held the statute of two years to apply to a suit of that kind, and it is manifest that the relation between the parties, after a sale of the property, was a different relation from that the parties occupied to each other before the sale. After the sale the relation was not only one of adverse interest, but it was one, also, of adverse holding by the purchaser claiming absolute title.

The case *In re Churchman*, 5 FED. REP. 181, was a case to ascertain and establish a lien on a vessel for supplies and repairs furnished, and it was there held that the statute of two years did apply; but the point in that case seems rather to have been that the statute did not apply, because it was a maritime lien that was sought to be established, against which the claim was that no statute of limitations runs. But the court held otherwise. The case, however, is not the case at bar, for it is a case to ascertain and establish a lien, not to foreclose a mortgage.

It is claimed that this court—the circuit court of the United States—has no jurisdiction of this suit if the interest of the mortgagee and the assignee is not adverse, because the language used in section 4979 of the Revised Statutes, conferring jurisdiction on the circuit courts in each district concurrent with the district courts of all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest, or by such person against an assignee touching any property or rights of property transferable to or vested in such assignee, is in substance used in the section now under consideration.

Where there is a claim of such adverse interest, section 4979 gives jurisdiction to the circuit court. But admit that the section does not cover this case, does it follow that there is no jurisdiction in the circuit court of the United States to entertain a bill to foreclose a mortgage where the conditions as to citizenship and amount involved exist? I think not. The jurisdiction of the court does not depend upon section 4979 of the Revised Statutes.

The result of these views is that the demurrer is overruled, and it is so ordered.

HARRIS and others *v.* ALLEN and others.

(*Circuit Court, N. D. Illinois.* January 15, 1883.)

PATENT LAW—INFRINGEMENT—SPECIFICATIONS.

A patent, like a contract, must be so construed as to effectuate the intention of the parties. So, where, in the specifications for a patent "bed bottom," the patentee describes the frame-work as "wooden," it was *held* that the intention of the patentee was to claim a "wooden frame" to the exclusion of other material, and that the use of an iron frame for the same purpose is not an infringement.

In Equity.

Jesse Cox, Jr., for complainants.

H. Harrison, for defendants.

BLODGETT, J. This is a bill to restrain the infringement, by defendant, of patent No. 125,250, dated April 2, 1872, issued to Sidney B. Andrews, for an "improvement in spring bed bottoms." Complainants claim title by mesne assignments from Andrews, and no question is made as to their title. The bed bottom in question is described by Andrews as a "suspension spiral spring bed bottom," and is said in the specifications to consist of a number of spiral wire springs connected together by links, and suspended within a rectangular frame by means of suspension wires, passing around the bars which form the frame, and attached to the rows of springs and rings next the frame bars. The patentee says: "My invention consists of five different parts—*First*, the wooden frame; *second*, spiral springs; *third*, rings; *fourth*, hook links; and, *fifth*, suspension wires." The claim is: "The combination of the several parts of my invention, namely, the springs, B, rings, C, and links, D, with the suspension wire, E, and frame, A, so as to form a suspension bed bottom, substantially as and for the purpose set forth." The novelty of the invention is not denied, and the only question raised is, does the bed bottom made by defendant, as shown in the proof, infringe the Andrews patent? The defendants' bed bottom is constructed with an iron frame, made of gas-pipe of about three-fourths of an inch external diameter, and has no rings, but is made up wholly of a congeries of spiral wire springs connected together by hook links, so as to form a web or surface for the mattress to rest upon, and suspension wires which suspend or hold within the frame the fabric made by the springs and hooks. It appears from the proof that in a portion of the beds made by the defendant the suspension wires simply

pass around the outside of the frame bars or rails, so as to hook onto the top and bottom of the external rows of springs; but in most of the defendants' beds the suspension wires were coiled loosely around the rod or pipe forming the frame, so that the two ends of the suspension wires are spiral springs acting from the central coil around the frame. Defendants claim (1) that they do not infringe, because they do not use a "wooden frame;" (2) that they do not use rings; (3) that they do not use the suspension wires shown by the complainants' patent.

I think there can be no doubt that Andrews has limited himself to the use of a wooden frame as an essential element of his combination. In the language already quoted he says: "My invention consists of five different parts: *First*, a *wooden frame*." Again he says:

"A is a *wooden* frame within which my invention is constructed and suspended. This *wooden frame* should be made of strips of hard, stiff wood, about three inches wide and one and one-half inches thick. * * * The suspension wires, E, are held in their proper places on the frame by means of the small wire staples, F, which are sunk into the frame, A, so as to include the suspension wires between the legs or prongs of the staples. This is only intended to prevent the suspension wires from moving laterally on the frame, not to fasten them, as they are intended to have a free perpendicular action at right angles to the frame.'

It is true, there is no reason given by the inventor for using wood instead of any other material for the frame, but he provides that the suspension wire shall be held in place by wire staples which are sunk into the frame, A. The obvious meaning of this direction is that small wire staples are to be driven into this wooden frame as a cheap and easy mode of holding the extension wires laterally in place on the frame, as he evidently assumes that it was necessary to fasten the extension wires so that they could have no lateral motion on the frame; and if an iron frame was contemplated or intended, he would have provided some other mode of fastening these wires, as the expense of drilling holes for the two legs of these staples into the iron rail or rod of the frame would increase the cost of the work to an impracticable extent.

As to the second point made by the defendant, plaintiff insists that the top and bottom of each spring is a "ring," within the meaning and spirit of his invention. It is evident that Andrews thought a practicable bed bottom could be made upon the idea or principle shown in his device, without as many springs as the defendants or complainants now use in practice, and that rings could be used be-

tween the springs to fill up and complete the fabric, taking the place of half or less than half of the springs, so as to make a surface for the mattress to rest upon; but he provides in his specifications that "any number of the springs may be removed, and rings put in their places," and I think the words "any number," as there used, may be held to include all. The suspension wires used by defendants undoubtedly perform the same function as in the complainants' bed, but Andrews evidently intended that his suspension wire should have some motion vertically on the frame, and if the defendants had used only the suspension wires coiled around the bar on the frame, so as to form a spring, I should doubt the identity of the defendants' suspension wires with those of the complainants; but the proof shows that in making part of their bed bottoms, at least, the defendants used the suspension wires in exactly the same form and place and for the same purpose as shown in the complainants' patent, and so far as they used them in that form they undoubtedly infringed this patent.

I do not think it necessary, however, to pass definitely upon the question as to whether these coiled suspension wires used by the defendants are the same as those described as forming part of the complainants' combination, as, in my opinion, Andrews' patent is limited to a "*wooden frame.*" That is, I think, he intended to use only a wooden frame, and to claim that only as a part of his combination. This may be a narrow construction of this patent, but it seems to me the only one allowable under the specifications and claims. If Andrews had intended to include a frame of any other material than wood, he, it seems to me, would have said a frame of any material, but preferably of wood, or in some way indicated that he did not intend to limit himself in regard to the material of which his frame was to be made. At least, if he had not intended to restrict himself to a wooden frame, he would not have described a wooden frame so minutely and used the terms so frequently as he has done. The fair inference is that he thought the frame must be of wood in order to fully represent his invention.

It was earnestly urged by complainants' counsel, on the hearing, that to hold this iron frame no infringement, virtually destroys this patent,—a prophecy which may, to some extent, prove true; but a patent, like a contract, must be so construed as to effectuate the intention of the parties, and I must say that it seems palpable to me that Andrews did not intend to claim anything but a wooden frame, and the United States did not intend to grant him anything else.

I will say further, in regard to this patent, that I deem it more than probable that a patent could never have been obtained for this device except for the specification and claim of the *five* parts of the combination, which Andrews said made his invention. So many patents for bed bottoms had been issued long prior to Andrews' application that, to my mind, it is extremely doubtful whether he could have had a patent for this combination of spiral springs, hooks, and suspension wires, and the frame; but when he introduced the further element of rings, which, probably, no one else had thought of or suggested within the knowledge of the patent-office, he was allowed a claim for this invention made up of five elements. This, however, is only my supposition, and is outside the evidence in the case; but it certainly appears, on the face of the patent itself, that Andrews intended to limit his invention to a combination of the five parts which he specially decribes.

This bill is dismissed for want of equity.

ANDREWS and others *v.* EAMES.

(*Circuit Court, D. Connecticut.* February 8, 1883.)

1. PATENT LAW—INFRINGEMENT.

   The questions which arise in this case are the same as those in the earlier cases of *Andrews* v. *Carman*, reported in 13 Blatchf. C. C. 307, and *Andrews* v. *Cross*, reported in 8 FED. REP. 269, in which the same party is plaintiff, and the opinions of Judge BENEDICT and BLATCHFORD in those cases are followed by this court without discussion.

2. DRIVEN WELL—INFRINGEMENT—BORING THROUGH HARD SOIL.

   It is no argument against infringement on the "driven-well" patented process of well-driving, that in certain soils it is necessary to bore or dig through the hard soil which lies over the sources of water-supply, provided, before a supply of water is reached, the patented process is threafter used.

In Equity.

E. H. Hyde, Jr., J. C. Clayton, and *A. Q. Keasbey,* for plaintiffs

C. S. Hamilton and *Charles R. Ingersoll,* for defendant.

SHIPMAN, J. This is a bill in equity to restrain the defendant from the infringement of reissued letters patent to Nelson W. Green, dated May 9, 1871, and commonly known as the "Driven-well Patent." The original patent was issued January 14, 1868. The litigation upon the construction and validity of this patent began in the United States circuit court for the eastern district of New York.

Judge BENEDICT's opinion, sustaining the patent, (*Andrews* v. *Carman*, 13 Blatchf. C. C. 307,) has been followed by Judge BLATCHFORD, (*Andrews* v. *Cross*, 8 FED. REP. 269,) and by the circuit courts in other districts, wherever the question has been tried. The decision of Judge GRESHAM in *Hine* v. *Wahl*, also sustaining the patent, has recently been affirmed by an equally-divided supreme court. In this state of the litigation the construction which was given to the patent by Judges BENEDICT and BLATCHFORD will be followed without discussion. The defendant relied upon the invalidity of the reissued patent, its want of novelty, and upon non-infringement.

The first defense presents a question upon which I much desired to read the views of the supreme court in *Hine* v. *Wahl*, where the question was directly made; but, in view of the fact that the court did not declare the reissue invalid, it is not improper to regard the patent as sustained. I may add that my own opinion tends in favor of the validity of the reissue.

Upon the question of novelty, the Goode patent and the other printed exhibits have reference to an artesian well made by boring, and not to a well made by driving and without moving the earth upward.

The remaining question is that of infringement. The defendant's two wells were made by Frederick B. Platt and Daniel Clark. Platt's testimony is as follows:

Question 6. State fully and particularly the process used by you in constructing these wells? *Answer*. We had a hollow auger that bored a hole about three inches in diameter, with which we bored the hole till we struck water; then we coupled the pipe together, and either drove or pressed the pipe into the water below the strainer. *Q.* 7. What do you mean by driving or pressing the pipe into the water below the strainer. *A.* I mean by driving the pipe, striking it on top with a maul; and by pressing it, we put a chain on the pipe above, and used a lever with a purchase to push it down; this was done after the hole was bored. *Q.* 10. How far did you ordinarily drive or press the pipe? *A.* From three to five feet. *Q.* 11. Into what did you drive or press the pipe? *A.* Into the wet sand. *Q.* 20. Describe fully and particularly the process used by you in constructing these [the defendant's] wells, specifying what difference there was, if any, between them? *A.* I don't know as there was any diffierence from what I have described; we bored a hole, as I said before, in the ground to the water, inserted the pipe, and either drove or pressed the pipe into the water from three to six feet, and attached a pump to the top; a pump constructed for a driven well, I believe. *Q.* 21 What do you mean by into the water? *A.* The water in the ground. *Q.* 22. You did not strike a solid body of water, did you? *A.* I struck water enough to supply the pump; that was all we was after, generally. *Q.* 23. Do you mean by into the water, into the water-bearing stratum of the earth?

A. I suppose so. *Q.* 24. What was your object in driving or pressing the pipe in the manner which you have testified? *A.* To get a supply of water for the pump. *Q.* 25. State whether or not a supply of water was furnished for the pump before the pressing or driving took place. *A.* It was not. *Q.* 29. State whether or not, after driving or pressing the pipes, as you have testified to, you removed any earth upward in constructing these wells? *A.* No sir.

The testimony of Clark is more brief, but to the same effect.

The defendant's counsel strenuously urge that these wells were constructed by boring; that the wells were bored until water was struck—that is, until a supply of water was obtained; and that the wells were finished by pressing the pipe more deeply into the source of supply which had been reached when the workmen "struck water." In other words, the defendant seeks to bring the case within the decision of Judge McCRARY in *Andrews* v. *Long*, 12 FED. REP. 871. In this case, however, the witnesses, when they used the common expression "struck water," did not mean that they had reached an adequate source of supply for a well, but that they had reached a place where the presence of water manifested itself, and where by continuous excavation an adequate supply would be attained. The wet sand or wet clay upon the auger showed that water was at hand. The well was then finished, and a supply of water was obtained by pressing or driving a tube into the ground, without removing the earth upward, and attaching thereto a pump. When this was done, there was put "to practical use the new principle of forcing the water in the water-bearing strata of the earth from the earth into a well-pit by the use of artificial power applied to create a vacuum in the water-bearing strata of the earth and at the same time in the well-pit." *Andrews* v. *Cross*, 8 FED. REP. 269.

A workman in our New England soil would not ordinarily be able to drive or press a tube into the stony or tough crust which must be penetrated before water-bearing strata are reached. But it is no adequate argument against infringement that it is necessary to bore or dig into the rough and hard soil, or the mass of tough clay which lies over the sources of water supply, provided, before a supply of water is reached, the patented process is thereafter used for the purpose of obtaining an adequate flow of water upon the surface of the ground.

Let there be the usual decree for an injunction and an accounting.

EVORY and others *v.* BURT and others.

(*Circuit Court, D. Massachusetts.* February 3, 1883.)

PATENTS FOR INVENTIONS—IMPROVEMENT IN SHOES.

Where an improvement on a shoe effects the same results in substantially the same way, it is an infringement on plaintiff's patent, although it presents great simplicity and cheapness as compared to complainant's patent.

In Equity.

F. H. Betts, for complainants.

Geo. D. Noyes, for defendants.

LOWELL, J. The plaintiffs are the owners of patent No. 59,375, issued to two of them in 1866. The specification describes the invention as consisting of "a novel mode of constructing shoes and gaiters, whereby the ordinary elastic goring at the sides, and the tedious lacing up in front, are both dispensed with, while, at the same time, the tops will expand to receive the foot, and fit neatly and closely around the ankle when the shoe is on, being also water-tight to the extreme top of the shoe."

The mode of obtaining these advantages is by inserting at the rear of the front or vamp of the shoe a triangular flap, or gore, and a similar gore at the front of the back part, or quarter. These flaps, or gores, are sewed together at their edges, and when the shoe is to be put on, they open and admit the foot, and then are closed again and folded outside the shoe, and tied or buckled "forward over the instep." The patentees say: "We do not claim, broadly, for an extension gore flap, inserted in the ankle of gaiter shoes, for this is fully covered by the broad claim of Samuel Babbett's patent, issued March 7, 1865, * * *" and set out the advantages of their mode of construction. Babbett's patent was for a flap inserted in the heel, and carried round the foot and fastened at the heel again. Another patent, issued to Brown & Wootin, was for flaps inserted in the heel and brought round on each side of the foot. The English patent of Norris, of 1856, shows a gore flap like the plaintiffs', except that it folds inside the shoe; but such a flap would be uncomfortable, and the shoe containing it would not be likely to obtain a market.

The claim of the plaintiffs' patent is: "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 ar-

ranged for use, substantially in the manner and for the purpose set forth."

The defendants make shoes under the patent granted to F. Packard, one of the defendants, No. 205,129, dated June 18, 1878, for an improvement in that class of shoes and gaiters known as the Alexis gaiter, and represented in this case by the Exhibit Packard. It is a shoe with a tongue, or instep piece, provided with side wings, or flaps, between the tongue and the quarter, which fold over when the shoe is fastened. The patentee says: "The following are the advantages I claim for my improvement over the ordinary Alexis gaiter, viz: It will not gape open, after a little wear. It will prevent sand and dirt from working its way into the shoe, and effectually excludes snow and water, and will not tear down at the side like a shoe of ordinary construction, as the strain is much less. Its chief point of superiority, however, is the facility with which the shoe having this construction may be put on the foot, as it opens much wider in front than the ordinary pattern, which is always difficult to put on."

This shoe of the defendants has the advantages of the plaintiffs' shoe to a greater or less extent, and they are obtained by means of a gore or flap. As a witness, Packard denies that his shoe has the advantage which his specification says is its chief merit, that of opening more widely than the ordinary pattern. He and his expert say that his gore, or flap, is a stay-piece, which limits the opening of the shoe, and that its only advantage is that it makes the shoe more water-proof. The propositions that it is more water-proof, and opens more widely, are identical. It is more fully water-proof, simply because it opens and closes again by virtue of the gore, or flap. It is more fully water-proof than a shoe with an equal opening without a gore; and it opens wider than an equally water-proof shoe without a gore.

The Evory & Heston patent was held valid in *Evory* v. *Candee*, 2 FED. REP. 542, and its validity is not now assailed, unless a wide construction is given to the claim. And this, as is most usual, is the difficult point. The defendants' shoe has a single and not a double flap, or gore. The quarter, or an extension of it, comes forward and contains the eyelets, or buckle and strap necessary for fastening the shoe over the instep, and so takes the place of one-half of the double gore. This is an old form of fastening. But a gore between the vamp and the quarter, in a shoe which can be comfortably worn, appears to be new; and, though the Packard shoe pre-

sents a very great simplicity and cheapness, as compared with the Evory & Heston, yet it effects the same results in substantially the same way.

Decree for the complainants.

NYE *v.* ALLEN.

(*Circuit Court, D. Massachusetts.* February 9, 1883.)

PATENTS FOR INVENTIONS—REISSUE—VALIDITY.

The unwarrantable expansion of the claims in a reissue defeats its validity.

In Equity.

Carroll D. Wright, for complainant.

Thomas H. Dodge, for defendant.

LOWELL, J. This case brings up again the constantly-recurring question of the validity of a reissued patent. The plaintiff's patent, No. 105,833, for an improvement in horse hay-rakes, granted July 26, 1870, was reissued in 1875, and again in 1881, and this reissue, No. 9,731, is now sued on. The first reissue is not in evidence, and the comparison is between the original patent and the second reissue. The description and drawing are alike, so far as I can see, but the first and fifth claims are much larger than any which were granted in 1870. If they are construed broadly they can hardly be sustained, in view of the Drake and Ryder patents, especially the latter, and the defendant contends that even though they should be narrowed somewhat to correspond with the difference between the plaintiff's improvements and those of Drake and of Ryder, they will embrace his machine, while no claim of the original patent would reach it.

The improvement in horse rakes, which is the subject of the plaintiff's patent, consists in making each tooth independent of every other, by providing it with a drum, a holder, and a spiral spring, so combined and operating that the tooth shall yield when it meets an obstruction, and be brought down again by force of the spring when the inequality of ground is passed. In the specifications and drawings, the upper end of the spring is pivoted to the drum, and moves with it; but it was soon discovered that it is not necessary to have a movable drum, because, by hooking the end of the spring to the tooth itself, the necessary motion is imparted to it. The plaintiff himself dis-

covered this, and made his rakes in the modified form. I do not mean that he was the first or only person who discovered it. Whether this change and simplification of parts was patentable or not,—and I am inclined to think it may have been,—it was a change, and in reissuing his patent the plaintiff omits all mention of the drum in his first and fifth claims, which are those now said to be infringed.

The plaintiff seeks to avoid the effect of the apparent expansion by arguing that a drum is found in the defendant's machine, and that a drum may be construed into the first and fifth claims of the reissue. Neither of these positions can be sustained. The defendant has no drum, and the plaintiff evidently omitted the drum from the claims of his reissue on purpose to cover such machines as the defendant's; and it cannot be fairly construed into them again. The first claim is: "The combination of a rake-tooth, a holder therefor in which the tooth is pivoted by a horizontal axis, and a spiral spring encircling said holder and axis, and having its ends secured relatively to the tooth to exert a downward yielding pressure upon the tooth, substantially as described." The fifth, though somewhat different from the first, is even more general in its phraseology, and has no reference to the drum. No claim of the original patent covers a machine like that of the defendant.

Under the recent and well-known decisions of the supreme court, this expansion of the claims was unwarrantable. Bill dismissed.

KNAPP and others *v.* SHAW and others

(*Circuit Court, D. Massachussetts.* January 31, 1883.)

PATENTS FOR INVENTIONS—SHADE-ROLLERS—COMBINATIONS—INFRINGEMENT.

Defendants may read the original patent in evidence at the trial, though not put in before the examiner, in order to show that the reissue is for a different invention, in fact, from the original, if the evidence cannot surprise the plaintiff.

In Equity.

John L. S. Roberts, for complainants.

James E. Maynadier, for defendants.

LOWELL, J. The bill alleges the infringement of four letters patent relating to shade-rollers for curtains or shades. The first is reissue No. 6,925, and the question arises as to this: whether the defendants can read the original patent in order to show that the re-

issue is for a different invention, in fact, from the original. That defense is taken in the answer, but by some slip the patent was not offered in evidence. The case was, apparently, tried as cheaply as possible, and the four patents and the assignments were introduced by stipulation. Looking at the original, I find that the subject of the third clause, said to be infringed here, is not mentioned or referred to, or shown or described in any way. I do not see how there can be any surprise to the plaintiffs in permitting this patent to be treated as if it had been formally introduced. I can see no possible question, except such as arises on reading the two papers. I think I ought to receive this evidence, and, of course, it disposes of this part of the case in favor of the defendants. This decree is interlocutory, and if the plaintiffs can show that, by sending the case back for further testimony, they can modify or control the effect of these papers, they may move for such action.

The second patent is reissue No. 7,182, and the defendants do not deny that it was rightly granted. The second claim is: "In combination with the spring of a spring-actuated curtain-roller, a clutch which, upon the removal of the spindle from its bracket, is caused by centrifugal force to engage with the roller so as to prevent further unwinding of the spring, substantially as herein specified." The contrivance here claimed is ingenious and new, and the defense is that the defendants' clutch does not operate by centrifugal force. The expert testifies that it does operate in that way; and, upon the best examination I can give the model, I find that it does so operate, at least in part.

Patent No. 183,809, claim 1, is for a combination in such curtain-rollers as are described in the other patents, of a projection on the spindle, and a projection or stop on the adjacent bracket, arranged and co-operating in such a manner that the spindle will descend into the notch of the bracket only when turned into the proper position to cause the pawl to gravitate away from the stops, or ratchet, projecting on the roller. This claim appears to me to be valid, and to have been infringed.

The remaining patent is No. 154,400, and only the fifth claim is in controversy, which is for a notched pivot shaft, in combination with the bracket. The notching is to prevent endwise thrust. Considering the state of the art, as explained in the evidence, there seems to be nothing new in this claim, and I hold it to be invalid.

Interlocutory decree for complainants upon two of their patents.

WHIPPLE *v.* MINER and others.

(*Circuit Court, D. Massachusetts.* February 2, 1883.)

1. PATENTS FOR INVENTIONS—RESTRAINING ISSUE OF PATENT.
   The decision of the commissioner of patents is not final on a question of the priority of invention, but the successful applicant will not be enjoined from receiving his patent upon the mere suggestion that the commissioner was mistaken.
2. SAME—JURISDICTION—APPEAL FROM DECISION OF COMMISSIONER.
   The jurisdiction of the circuit courts to grant a patent, notwithstanding an adverse decision of the commissioner of patents, is an independent original jurisdiction, and it is not within the mere discretion of the defeated party when and under what circumstances the action of the office shall be suspended.

In Equity.

Browne, Holmes & Browne, for complainant.

George L. Roberts & Bros., for defendants.

LOWELL, J. The complainant alleges that he was the first inventor of a certain improvement in horseshoe nails; that he applied for a patent for the improvement, and, pending his application, the defendant Miner made a similar application, and, upon an interference, the office decided in favor of Miner, and is about to issue to him a patent. The bill prays that the complainant "may be adjudged to be entitled, according to law, to receive a patent for his invention," as provided by Rev. St. § 4915, and that the defendant Miner may be restrained in the mean time from receiving his patent.

I adhere to the opinion given in *Union Paper Bag Co.* v. *Crane*, 1 Holmes, 429, in which I sat with Mr. Justice CLIFFORD, that the decision of the commissioner of patents is not final on a question of priority of invention, even between those who were fully heard in the interference; but his decision has great weight, and it would be highly improper to enjoin the successful applicant from receiving his patent upon the mere suggestion that the commissioner was mistaken.

The bill contains no allegation of fraud, undue influence, or even of mistake, excepting a mistaken judgment, and the case is put on the simple legal proposition that the statute above cited is intended to give the courts a purely and strictly appellate jurisdiction in cases of interference, and that the appeal suspends the original judgment.

I do not find the law to be so. The statute applies primarily to ordinary cases which are heard *ex parte* in the patent-office, and though the language is broad enough to include a case where there

has been a contest, yet it is, plainly, an independent, original jurisdiction which is given to the courts. If it were not so, the mode of appeal, and the security to be given the adverse party, would undoubtedly be provided for, but especially the time within which the appeal should be taken, so that the commissioner might know whether he could issue the patent or not. Upon the theory of the bill it is left to the mere discretion of the defeated party when, and under what circumstances, the action of the office shall be suspended. This cannot be the law. Injunction refused.

MARGOT *v.* SCHNETZER and others.

(*Circuit Court, D. Massachusetts.* February 5, 1883.)

PATENTS FOR INVENTIONS—DOUBT AS TO NOVELTY—INJUNCTION NISI.

In Equity. On motion for preliminary injunction.

James E. Maynadier, for complainant.

Avery & Hobbs, for defendants.

LOWELL, J. This is a motion for a preliminary injunction. The suit is upon patent No. 12,775, dated February 21, 1882, for a design for watch-cases. The defendants copied the plaintiff's design before it was patented, and without knowing that a patent was to be applied for, and they are ready to stop infringing. The damages must be small, and I should wish to end the case here, if that were possible; but a serious doubt is raised as to the novelty of the design, by the affidavit of one Smith, and by the admissions of the plaintiff in his affidavit in reply to Smith, so that I think an injunction *nisi* is all that I ought to grant.

Injunction *nisi*.

THE CHEROKEE.*

(District Court, S. D. Ohio, W. D. January 30, 1883.)

1. COLLISION—ENTERING NARROW CHANNEL—PILOT RULE 3.
   The question of negligence, where a vessel enters a narrow channel while another is aground on its banks, depends on the apparent situation and circumstances of the vessel aground, making proper allowances for a change in the relative situation of the vessel aground; but unexpected changes, not brought about by the vessel attempting to pass, should not be considered in determining whether there has been any blame. Where, *therefore*, pilot rule No. 3 requires an ascending vessel, about to enter a narrow channel at the same time with a descending vessel, to lie below the channel until the descending vessel has passed through, she may, without negligence, enter the channel, if the descending vessel, being a tow-boat with barges in tow, has grounded one of the barges, and is not coming on, and there be room to pass without collision: and the unexpected drifting of one of the barges, by which a collision occurs, is an inevitable accident, for which the ascending vessel is not liable.
2. SAME—TUG AND TOW.
   A tow-boat working at one of its barges aground should, if possible, make way by temporarily suspending work to permit another vessel to pass, where that is necessary to prevent delay.
3. SAME—BARGE ADRIFT.
   Where a barge, constituting part of a tow, is adrift in a narrow channel, a passing steam-boat owes the duty of doing all that is possible to prevent collision with it; but if she reverses her engines as speedily as possible, and otherwise does all she can, there can be no blame, because she is in a narrow channel, where the tug and tow would have had the right of way if it had not been partially aground.

In Admiralty.

Lincoln, Stevens & Slattery, for libelants.

Hoadly, Johnson & Colston, for claimants.

HAMMOND, J., *(sitting by designation.)* Notwithstanding the voluminous testimony in this case the essential facts lie within a small compass. There is opposite Rising Sun, on the Ohio river, a very narrow channel, caused by the encroachment of a bar, making out from the Kentucky shore, and at the stage of water existing at the time of the collision sued for, navigation at the place was difficult. It is conceded that this place comes within the application of the following rule, prescribed for the government of pilots:

"Rule 3. Where two boats are about to enter a narrow channel at the same time, the ascending boat shall be stopped below such channel until the descending boat shall have passed through it; but should two boats unavoidably meet in such channel, then it shall be the duty of the pilot of the descending boat to make the proper signals, and, when answered, the ascend-

*Reported by J. C. Harper, Esq., of the Cincinnati bar.

ing boat shall lie as close as possible to the side of the channel the exchange of signals may have determined, as allowed by rule 1, and either stop the engines or move them so as only to give the boat steerage way, and the pilot of the descending boat shall cause his boat to be worked slowly until he has passed the ascending boat."

The tow-boat Lane, while descending the river with barges in tow, four heavily laden, and one, a fuel supply barge, was endeavoring to enter this narrow channel, and when about the head of it one of the barges in the lead grounded on the edge of the bar. She at first attempted to force the tow forward, but not succeeding began to swing with the barges still afloat down stream, but out of the channel and over the bar, loosening the lashings of the three rear barges, until she and they became detached from the other two. Fearing that the force of the current would tear out the head-pieces of the other two barges, the captain of the Lane directed the ratchets, fastening the grounded barge and its companion leader to the starboard, to be knocked off, supposing that the lashings of the cable would hold it fast, but give sufficient play to prevent the tearing out of the head-pieces. These cable lashings parted—according to the testimony of the people on the Lane—by force of the strain of the current, and the starboard leader barge left the grounded barge and started down this narrow channel, coming in collision with the steam-boat Cherokee, by which it and its cargo of coal became a total loss, for which loss this suit is brought by the owners respectively of the barge and coal against the Cherokee. The negligence imputed by the libel is a violation of the above-quoted pilot rule, and the customs of navigation, by being in the channel at all, and a want of proper care in avoiding the collision after the barge was adrift.

The proof establishes, in my judgment, in regard to the movements of the Cherokee, these facts: The Cherokee, ascending the river, was at the foot of the channel about the time the barge of the Lane grounded, and, observing the Lane, blew one whistle, as the rule then required, to know of the Lane by her answering signal on which side of the channel she would come out, to which signal there was no response. She also stopped, except for steerage way, close in under the bar and at the foot of the channel, as required by the above-mentioned rule, for a space of about five minutes. Hearing no response to her signal, and observing that the Lane made no progress, the conclusion was that she was aground; and it appearing that there was room to pass through the channel the Cherokee proceeded up the river, had passed the stern of the Lane, and was about mid-

ship of that vessel, when she came in violent collision with the barge that was adrift as before mentioned. There was in fact room between the shore and the grounded barge, and would have been room between the shore and both the grounded barge and its mate, if the latter had remained fastened to the grounded barge, for the Cherokee to pass them, narrow as the channel was at that place. There is a good deal of conflict as to the distance, and the capacity of the Cherokee to have avoided the barge adrift by retreating; but taking the situation of the witnesses, and their means of observation into consideration, it must be determined, I think, that the Cherokee acted as promptly as she could in that respect; she was going slowly and cautiously, and all agree she had reversed her engines, and her wheel was moving back at the moment of the collision. The libelant's witnesses think she did not move back soon enough, and had not conquered her headway when the collision occurred, nor made more than one or two revolutions backward, while her own people say she had not only stopped her headway, but was actually moving back when the collision occurred. Her own officers were in the best position to know this fact, and, other things being equal, their testimony is to prevail over that of observers from the shore or on the Lane and her barges. *The Milwaukee*, Brown, Adm. 313. Besides, the burden of proof is on the libelant, and when there is a reasonable doubt of any blame the loss must be sustained where it has fallen. *The Grace Girdler*, 7 Wall. 196; *The City of London*, Swab. 300, 302.

It does not seem to me that the proof makes out any negligence on the part of the Cherokee as far as relates to her efforts to avoid a collision after the barge was adrift. The difference between the witnesses on this point arose out of a divergence of estimates of time and distance, and, I think, all things considered, the very decided preponderance of the known facts is in favor of the shortest time and the shortest distance between the breaking loose of the barge and the collision; and this fact, also, makes it clear to my mind that the Cherokee was proceeding very slowly and cautiously, for if she had not been, she could not have checked her speed and reversed her engines, as even the libelant's witnesses describe, in so short a time as there must have been between the breaking loose of the barge and the actual contact with the steam-boat.

Was the Cherokee negligent, and is she to be blamed for being in the channel? I think not. I do not see how she can be benefited by the circumstance that there was no response to her signal, except that it may have confirmed, however unreasonably, her pilot's judg-

ment that the Lane was aground. If the Lane had not been aground, as a fact, a want of response would not have justified the Cherokee in proceeding, because rule 2 clearly required her to give several short, quick sounds of the whistle, lest her other signal had not been heard or had been misunderstood, and if the Lane had been coming down and this collision occurred with her or her barges attached, I do not see how the Cherokee could be released from blame. But no matter upon what erroneous inferences the pilot of the Cherokee acted in coming to a conclusion that the Lane was aground, she was aground, as a fact, or one of her barges was, and she engaged in the business of overcoming that difficulty, which is the same thing, and there was apparently room for the Cherokee to pass through the channel. Indeed, it was not obstructed, for the Lane and her other barges were over the bar, and quite, if not entirely, out of the channel, while the grounded barge and its mate were lying on the extreme edge of the channel,—one on the bar and the other not obstructing the channel, if in it at all. Under these circumstances I cannot think the Cherokee was compelled to lie by at the foot of the channel until the Lane could gather up her tow and pass down the channel. It took her all day to lighten off the grounded barge, get her tow in hand, and proceed on her voyage. It is true, she gathered up her barges still afloat and passed them down this channel very soon after the Cherokee went up, but she was not executing that maneuver at the time the Cherokee entered the channel, and was in no condition to do it; she was somewhat helpless and was detaching her tow, or it was being broken up by the force of the current and was floating over the bar and out of the channel.

The question of fault where a vessel enters a narrow channel, while another is aground on its banks depends upon the apparent situation and circumstances of the vessel aground, making proper allowances for a change in the relative situation of the vessel aground. If it seems reasonably safe to attempt the passage, the then situation only is to be taken into account, and not the unexpected changes which occur while making the attempt. *The Thomas A. Scott*, Brown, Adm. 503. Now, the Lane's own people expected the cable lashings to hold the barge that went adrift fast to the grounded barge. According to their own theory, they loosed the iron ratchets to prevent pulling out the head-pieces, and expected the ropes to hold this barge fast to the grounded barge until the Lane could manage to do whatever was required to get out of the difficulty. If they relied on this, it was not unreasonable for the Cherokee to rely on it; and if both

had not been disappointed no accident would have occurred, for there would have been ample room for the Cherokee to pass. The Cherokee's witnesses say the lashings were imprudently cut with an ax, but the Lane's people deny this, and they knew most about it. But it is wholly immaterial how it was done; there was no intention to set the barge adrift, and it was this unexpected incident that caused the collision. The barge, unattached, had no right of way to the channel. It was only the Lane and her tow in navigable condition, already in the channel, that had the right of way.

The drifting of the barge changed the situation, and it is not with reference to that change the Cherokee must be judged. If the situation had remained as it was when she entered the channel, she could have passed, and had a right to pass. She did not change the attitude of the barge, nor contribute to any change. She had no right to run down the barge, or collide with it, if she could avoid it; and, if the barge had been coming through the channel before the Cherokee entered it, with not sufficient room for both, she would have been compelled to wait till the barge came through. But that was not the case. The barge was supposed by all hands to be securely attached to the grounded barge, and in that condition there was no danger of collision, and it is by that situation the conduct of the Cherokee is to be tested. If she had remained out of the channel a few minutes longer, there might have been no accident, and the floating barge might have acquired a right of way to the channel; but that is not, obviously, the true criterion of her conduct. With relation to the Lane, the Cherokee had no duty she did not perform. She gave the proper signals, and although she had no right to proceed, if the Lane had been coming on, without invoking a response by compliance with rule 2, and sounding several whistles, it is sufficient to say the Lane was not coming on, and at the time the Cherokee entered the channel had no intention of coming on. Indeed, if the Lane may be treated as a vessel working at another vessel aground—and I do not see why she may not be so treated—it was her duty, where that was possible, to have made way, if necessary, for the Cherokee; to temporarily have suspended her work and cleared the channel, that she might pass. *The Napoleon*, Brown, Adm. 32; *The Thomas A. Scott, supra.*

In any view that it is proper to take, it seems to have been an inevitable accident, for which the Cherokee, certainly, was not to blame, unless she was compelled to await all the delay incident to the trouble in which the Lane found herself. The Cherokee did not

run down or impede a crippled vessel; she simply tried to pass her, under circumstances supposed to be safe, and which were safe but for an unexpected change in the situation, for which she was not responsible.

Dismiss the libel.

THE RIALTO.*

NEW YORK HARBOR & TOW-BOAT CO. *v.* GRAIN ELEVATORS AMERICA AND EGYPT, AND STEAM-SHIP RIALTO. (Three Cases.)*

(*District Court, E. D. New York.* December 30, 1882.)

1. SALVAGE — PROXIMITY TO BURNING PIER — GRAIN ELEVATORS — EXTENT OF PERIL.

   A salvage service rendered by a tug to two grain elevators, worth $12,000 to $15,000 each, which consisted in towing them out into the stream from a pier on fire, where their peril was not great, was rewarded by $500, half to be paid by each elevator.

2. SAME—ELEVATORS ADRIFT.

   The service of a tug which took hold of the same elevators adrift in the stream and took them to a pier, their peril being slight and the labor small, was rewarded by $50.

3. SAME—STEAM-SHIP ON FIRE IN PROXIMITY TO BURNING PIER—PUMPING.

   At the time of this fire the steam-ship R., valued with cargo at $378,000, lay along-side the pier, and caught fire in many places from the pier: and cotton in her between-decks also caught fire. The tug M. made a line fast to her and attempted to haul her out; the line broke and the tug engaged in efforts to get a second line to her, but she was finally moved from the pier by a hawser attached to another tug, the Y. A. Afterwards, the tugs S. and F. rendered service in throwing water on the steam-ship by means of their steam-pumps. The tug Y. A. was compensated for her service, and no claim in her behalf was before the court. *Held*, that the M. contributed in some degree to the success of the tug Y. A., and she was allowed $500; that the pumping service of the S. and the F. was an undoubted salvage service, and they were awarded $2,000.

4. SAME—COSTS.

   As no tender of any sum had been made, costs were allowed in all three cases.

In Admiralty.

Beebe, Wilcox & Hobbs, for libelant.

Goodrich, Deady & Platt, for the elevators.

Foster & Thomson, for the steam-ship.

BENEDICT, J. These actions have arisen out of the burning of the Eagle pier, at Hoboken, on the sixth day of November, 1881, by

*Reported by R. D. & Wyllys Benedict.

which fire the grain elevator Egypt, the grain elevator America, and the steam-ship Rialto were placed in peril of being destroyed by fire.

The first action is brought to recover for salvage services rendered on that occasion by the steam-tug Virginia Seymour and the steam-tug E. M. Millard to the grain elevator Egypt. The second-mentioned suit is to recover for salvage services rendered on that occasion by the same tugs to the grain elevator America. The third-mentioned suit is to recover for salvage services rendered on that occasion by the steam-tug E. M. Millard, the steam-tug Virginia Seymour, and the steam-tug William Fletcher to the steam-ship Rialto. The volume of testimony introduced in support of and in opposition to these demands is large, and, in some particulars, conflicting. But no critical discussion of it in the various aspects presented by the advocates will be attempted. All that time permits is a statement of the conclusions arrived at after a careful consideration of all that has been said. The rule of law by which the court is to be guided in a case like this may be stated by quoting the language of Mr. Justice BRADLEY in the case of the *The Suliote*, 5 FED. REP. 99, where some $20,000 was awarded for services rendered by tugs in pumping water into a ship valued at about $250,000, on fire at a pier. In deciding that case it was said:

"Salvage should be regarded in the light of compensation and reward, and not in the light of prize. The latter is more like a gift of fortune conferred without regard to the loss or sufferings of the owner, who is a public enemy; while salvage is the reward granted for saving the property of the unfortunate, and should not exceed what is *necessary to insure the most prompt, energetic, and daring effort of those who have it in their power to furnish aid and succor*. Anything beyond this would be foreign to the principles and purposes of salvage; anything short of this would not secure its objects. The courts should be liberal, but not extravagant; otherwise, that which is intended as an encouragement to rescue property from destruction may become a temptation to subject it to peril."

In the light of this admirable statement of the law, I proceed, in the first place, to pass upon the claim made against the two elevators for the services of the tug Virginia Seymour. The service to each elevator was the same, as it was rendered at one and the same time, as both elevators were in equal peril, and they were about of equal value, say from $12,000 to $15,000 each. This service consisted in going to the elevators, while in the slip and in danger of being burned up, and towing them out into the stream, where they were left secure from all danger from the fire. That this was a salvage service has been conceded in behalf of the elevators. The only controversy

is in respect to the extent of the award. On this point the difference between the parties is extreme, owing not to any dispute as to the labor performed, but to a great difference of opinion in regard to the extent of the peril to which the elevators were exposed at the time the service was performed. My conclusion, after a careful examination of the proofs, is that while the burning of the Eagle pier caused a hot and dangerous fire, which to some extent imperiled all the vessels in the adjoining slip, including these elevators, still the peril of these elevators was not great. For this reason, I give to the Virginia Seymour a reward moderate in amount, considering the value of the property saved, but at the same time more than a *quantum meruit* for the service performed. I fix her reward at $500, to be paid by the two elevators in equal proportion.

Next to be disposed of is the claim for the services rendered to these same elevators by the tug E. M. Millard. The service of the E. M. Millard consisted in taking hold of the elevators after the Virginia Seymour had left them in the stream to go to the aid of the steamer, and in taking them to a pier where they could be safely moored. This also was a salvage service, for the elevators were adrift in the stream without motive power of their own or means of controlling their movements, and therefore in some slight peril, from which they were released by the voluntary efforts of the Millard. But the peril was so slight and the labor so small, that $50 will be salvage compensation therefor.

There remains to consider the claims of the E. M. Millard, the Virginia Seymour, and the William Fletcher, for services rendered on the same occasion to the steam-ship Rialto, valued, with the cargo on board, at $378,000. At the time the Eagle pier caught fire, the steamer Rialto lay moored along-side that pier, laden with cargo, consisting in part of cotton and hemp. If she had not been promptly removed from the pier, her total destruction by fire would have been certain. She was removed from the pier into the stream and sustained but little injury. This was accomplished by the efforts of the three tugs above-mentioned, and the tug Young America. The Young America has been compensated for her services, and no claim on her behalf is before the court. The other tugs each claim to have assisted in saving the steamer, and to be entitled to salvage compensation for their services rendered in her behalf.

Here, too, the difference between the parties is extreme,—the libelants contending with zeal and ability for a very large reward; the

claimants denying that the service rendered by the tugs, in whose behalf suit is brought, is entitled to any reward as for a salvage service.

The service performed by the Millard, on the occasion in question, consisted in hastening to the assistance of the steamer as soon as the fire was observed, making a line fast to her, and attempting to haul her away from the burning pier, she being then on fire in many places above deck, and the cotton in her between-decks being also on fire.

It has been contended that the efforts of the Millard must be held to have failed of success, and her claim for salvage wholly rejected for that reason. But I cannot agree to this. On the contrary, I am of the opinion that although the hawser by which the steamer was finally moved from the pier was attached to the Young America and not the Millard, yet the Millard was at that moment engaged in efforts to get a second line to the steamer, and that she contributed in some degree to the success of the Young America. She is, therefore, entitled to salvage compensation for what she did. Her services did not, however, involve any great amount of time, or require any extraordinary labor, nor were they accompanied by any peril to her. Taking into consideration all the circumstances as described by the testimony, I conclude that $500 will be a liberal reward to the Millard. If she had not broken her first line, and had at her first effort succeeded in taking the steam-ship out into the stream, I should have considered her entitled to a much larger compensation than the sum I have named.

The main services performed by the Virginia Seymour and the William Fletcher in behalf of the steamer were rendered after the steamer had been towed out into the stream and beyond danger from the burning pier, and consisted in throwing water on the fire by means of their steam-pumps. At this time the upper works of the steamer were burning, and also some bales of cotton in her between-decks. While it is not improbable that the fire then burning on her upper works and in the between-decks might have been extinguished by those on board, still the steamer was in danger, and the services of the Virginia Seymour and the William Fletcher were properly desired and promptly rendered. In regard to these services it has been contended in behalf of the steamer that, as they consisted in mere pumping, without risk, they afford no ground for a salvage reward. My opinion, however, is that an undoubted salvage service was performed by these two tugs. In the case of *The Suliote*, already referred to, a

salvage reward of $2,000 was given by Mr. Justice BRADLEY to the tug Maud Wilmot for mere pumping during a few minutes, and staying in the vicinity until the fire in the ship was extinguished by another boat. The present case differs from the case of *The Suliote* in this, among other things: that there the fire originated within the ship, and its extent could not be known until it was extinguished. Here the steam-ship was an iron vessel, the fire was communicated to her by the burning pier, and although some bales of cotton in the between-decks were on fire, it was manifest at the time the Virginia Seymour and the William Fletcher began to play water upon her that the fire in her would be extinguished without difficulty. In this case, too, the powerful public fire-boat Havemeyer was at hand and able to extinguish the fire, if requested so to do. While, therefore, I consider the case of *The Suliote* as furnishing authority for a decision that the service performed by the Virginia Seymour and the William Fletcher was a salvage service, I do not consider the case an authority for awarding the sum, or any thing near the sum, that has been suggested in behalf of the libelants as proper to be awarded to these tugs.

In view of all the circumstances described by the evidence, my opinion is that the sum of $2,000 will be a liberal reward for the service rendered the steamer by the Virginia Seymour and the William Fletcher. This sum I do not at this time apportion between these two tugs, because they belong to one owner, and, I suppose, an apportionment will not be necessary. Neither is any apportionment of any of the sums awarded between the owners, masters, and crews of the respective salving vessels made at this time, because all are represented by one proctor, and they may agree upon an apportionment that will be satisfactory. If no agreement in regard to the respective shares can be reached, application for an apportionment may be made hereafter.

In regard to costs, inasmuch as no tender of any sum was at any time made, the libelants are entitled to recover the costs of the various actions, and such costs must be borne by the respective claimants in proportion to the amounts awarded against them.

CITY OF CHICAGO *v.* HUTCHINSON and others.

(*Circuit Court, N. D. Illinois.* January 26, 1882.)

1. REMOVAL OF CAUSE—SEPARATE CONTROVERSY.
   In a suit brought by a city against known and unknown owners, for the condemnation of land for the opening of a street, where the only controversy is as to the value of the land, where a non-resident voluntarily appears as one of the unknown owners, *held*, that as to him it is a controversy wholly between himself and the city, and that he has the right to remove the cause as to himself into the federal court, and that the cause may proceed as to the other defendants in the state court.
2. SAME—APPLICATION IN TIME.
   Where a party never was in court in person in the case until he voluntarily came in by petition, and the day following his appearance made application for removal of the cause into the federal court, and the hearing of the cause had not commenced, *held*, that the application was in time.

Frank Adams, City Atty., *Mr. Coburn*, *Mr. High*, and *Mr. Winston*, for plaintiff.

Edsall & Hawley, for defendants.

DRUMMOND, J. By an ordinance of the city council of Chicago, passed March 16, 1882, Dearborn street was directed to be opened from the south line of Jackson street to the north line of Taylor street, to the width of 80 feet, and on the twenty-fourth of March, 1882, a petition was filed in the superior court of Cook county, by the city attorney, for the condemnation of the land and lots necessary to be taken in order to have the street opened as provided by the ordinance. The petition required about 200 lots, or parts of lots, to be condemned, and comprehended, of course, a very large number of owners, about 40 of whom were named, the remainder being described as "unknown;" and in conformity with the statute provided in such cases, this fact was shown, and publication of the application was made, and all parties in interest required to come into court and be heard as to their claims. A summons issued to the persons named, returnable on the first Monday of May then next ensuing, and was returned served on many of them, who appeared in answer to the same.

It is claimed on the part of the city that by the service of the summons thus issued and served, and by the publication made in conformity with the statute as to unknown owners, all the defendants who were the owners of the property were in court and subject to its action at the June term, 1882. But nothing seems to have been done towards an immediate hearing of the case until the seventh

day of December, 1882, when, on the application of the city attorney, the court ordered that "this cause be and the same is hereby set down for trial for Monday next." On the second day of January, 1883, before the trial of the cause, Jane E. Martin, a citizen of Berrien county, in the state of Michigan, filed an affidavit, stating that she was the owner of part of one of the lots sought to be condemned, and prayed to be made a party to the suit, stating that she had no knowledge of the application until that time. With the consent of the city attorney, and by the order of the state court, she was then made a party defendant. On the third day of January, she filed a petition in the court for the removal of the cause to this court, under the act of congress of 1875, and filed the requisite bond. On the 6th the court refused the application for the removal of the case, for the reason that the proceeding connected with the extension and opening of Dearborn street did not present, as to her, a controversy wholly between citizens of different states, and which could be fully determined as between them; and for the further reason that the application for removal came too late, as not being filed before or at the term at which the cause or proceeding could be first tried. Under these circumstances she asks leave to file a transcript of the case in this court and to have it docketed. This application is opposed by the city because the case is not within the terms of the act of congress authorizing the removal of cases from the state to the federal court.

The petitioner, in her application for removal of the cause, stated that she was then, and had been from a time prior to the commencement of the proceedings in the state court, continuously a citizen of the state of Michigan. She did not then state, nor does it appear, when she became the owner of the part of the lot which is sought to be condemned, further than at the time she applied to become a party defendant, she says "that she is the owner of the south 24 7-10 feet of lot 16 of block 133 of school-section addition to Chicago." Her application was made to the court to become a party as one of the numerous defendants called "unknown" in the petition and other proceedings in the cause. The statute of the state under which the application was made by the city for the condemnation of the property in this case, requires that a jury shall be impaneled to ascertain the compensation to be paid to the owners, and declares: "If any defendant or party in interest shall demand, or the court shall deem it proper, separate juries may be impaneled as to the compensation or damages to be paid to any one or more of such defendants or parties

in interest." In this case the ordinance directing the opening of the street provided that the cost thereof should be paid by special assessment levied upon the property benefited thereby, to the amount that the same might be legally assessed therefor, and that the remainder of the cost should be paid by general taxation. Chapter 24 of the Revised Statutes, art. 9, § 133, and the following sections, declare how the special assessment shall be made under such circumstances, and how the money shall be raised and paid; and section 167 provides for a supplemental petition to be filed to assess the benefits to the owners by the proposed improvements in condemnation cases.

It will be seen, from the foregoing statement of facts, that there was but one petition filed by the city, which covered a series of lots lying upon one street. It, of course, affected the interest of every separate owner of the property to be condemned, and, in one aspect of the case, the controversy which he might have with the city was one in which the other owners were not directly interested. The question as to him was what was the value of his property which was to be appropriated for the use of the street. At the same time, in another aspect of the case, it is said the proceedings were more or less united, and in making the special assessments which might be necessary to pay in part for the opening of the street, the interests of adjoining lots were more or less connected together. It is in this view of the case that it is contended, on the part of the city, that it is not such a suit or such a controversy as is referred to in the second section of the act of 1875.

In *Boom Co.* v. *Patterson*, 98 U. S. 403, the supreme court of the United States held, where an application was made by the company to condemn the land of Patterson for its uses under the law of Minnesota, the case was subject to removal from the state to the federal court under the act of 1875. In that case, commissioners in the first instance appraised the value of the land, there being only *one* owner. Under the law the case then went to the district court of the state, and the owner of the land, as a citizen of another state, made the application for removal, which was sustained by the supreme court of the United States. This case, of course, decides the general question in favor of the jurisdiction of the federal court on an application for removal in a condemnation proceeding. In other words, that it is the kind of controversy referred to in the act of 1875, which, under the circumstances therein named, will authorize the removal of the cause; and, if this case is in principle like that as to the subject-matter of the controversy, then it is, under that decision, removable.

The language of the second section of that statute is "that one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit to the circuit court of the United States for the proper district." A condemnation proceeding, as such, is, under the decision just referred to, such a suit as can be removed. Is this such a suit?

We have seen that it is commenced by a petition of the city. The city, a corporation of Illinois, is the sole plaintiff and actor in the case. All the property-owners of different lots, or those interested therein, are defendants—expressly so called in the statute. A summons is to issue and be served upon them "as in cases in chancery." As to the unknown defendants, publication is to be made containing a notice of the pendency of the "proceeding," the parties thereto, and the title of the court; and then the statute declares that such notices so given by publication shall be sufficient to authorize the court to hear and determine the "suit." And upon the return of the summons, and at the time fixed by the court, a jury is to be impaneled as already stated. Now, the question is, whether, as this is an application for the condemnation of the property of different owners, it is a suit within the meaning of the act of congress, and as such is removable, notwithstanding the interests of the respective owners named as defendants are all distinct as to the several parcels of land which they own. There can be no doubt it is a suit of some kind, known as such in law.

This being an application made by one of the numerous defendants, who, as known or unknown, were named in the summons, and some of whom afterwards appeared in the case by being made parties, the question arises whether, within the meaning of the second section of the act of 1875, there was a controversy which was wholly between the applicant and the city, which could be fully determined as between them. If that were so, then, within the express terms of the statute, she had the right to have the controversy and her suit removed. No question is made about her interest in the property. The only controversy between the city and herself is as to the value of the land, and it follows that it is a controversy wholly between them, and when the value of the land is ascertained by a jury, and then followed by proper action on the part of the court making the verdict of the jury effective, it has been fully determined as between them. It is difficult to imagine a case where different controversies may be brought into a cause and become the matter of judicial investigation and determination, where the interest which a particular

person may have in one of the controversies is more clearly ascertainable and separable than in this case.

But it is insisted on the part of the city, and such was the opinion of the state court, that the application was made too late. Under the third section of the act of 1875 a petition for removal must be filed in the state court before or at the term at which the case could be first tried, and before the trial thereof, and it is claimed that the cause could have been tried as early as June, 1882, and it is not controverted but that there were several terms of the state court intervening between the return of the summons and the time when the application was made for removal, although the case was not set down for hearing by the court until December, 1882. If she had been named as a defendant in the summons, and had been served with process, and brought into court the requisite time before the June term, then, perhaps, if she had not made her application at that term, it might, as to her, have been too late. But she never was in court in her own person until she voluntarily came by petition and asked to be made a defendant, on the second day of January. On the following day she filed her application for removal. She states, and no controversy is made upon that point, that she had no knowledge of the institution of the proceeding for condemnation until the time that she filed her petition to be made a party. If, therefore, she is precluded from exercising the right of removal under the facts stated, she is deprived of a right which was clearly intended to be conferred upon her by the act of 1875. If, while she was an unknown defendant, the cause had proceeded to trial before a jury to ascertain the compensation which should be paid to the respective owners, possibly it would have been too late. But it is not necessary in this case to decide that question, because the hearing had not commenced before the state court when the application for removal was made; and the view taken by the federal courts has been that a party ought not to be deprived of the right given by the law before he has had an opportunity or the power of presenting his petition for removal; and it is clear, from the facts already stated, that she made her application with reasonable diligence as soon as she appeared in court.

In *Harter* v. *Kernochan*, 103 U. S. 562, a decree had been rendered by the state court against a party as an unknown defendant under the statute of the state, who, exercising the right given by the law, came in and had the decree opened, which being done, he made an application for the removal of the cause to the federal court, and the supreme court of the United States decided, on the ground that this was the

first time he could apply for removal, that it was properly transferred to the federal court.

In *Wehl* v. *Wald*, 17 Blatchf. 342, a suit was brought in September, 1878, in a state court of New York, against the defendant. In April, 1879, the plaintiff amended his complaint and demanded judgment against another defendant not originally named in the case. This defendant put in an answer in May, 1879, and afterwards presented a petition to the state court for the removal of the cause, and that was held no valid objection to the application.

In *Burdick* v. *Peterson*, 2 McCrary, 135, [S. C. 6 FED. REP. 480,] an ejectment was brought in February, 1876, these being the only parties. The case was continued by the state court at several terms, and in October, 1877, one Tollman intervened in the case by petition as the owner in fee-simple of the land in controversy, and was made defendant in place of the original defendant, and at the same time he filed a petition for the removal of the cause; and it was considered no valid objection, the application being made the first time that it could be made by him.

Undoubtedly this is a proceeding *in rem*, but one in which the owners of the *res* are interested and have the right to be heard, both as to the condemnation itself and as to the compensation which shall be paid if the land is condemned; and when the owner of the *res* appears in court, having been sued as a person unknown, then it becomes like other controversies between parties, the questions being whether the property can be taken for public use, and if so, for how much. And if when he thus appears in court, and at once makes application for the removal of the suit under the act of congress, the right to removal is denied, then he is deprived of the privilege which law intended to confer on him.

I cannot doubt that under the facts and circumstances of this case the applicant had the right to remove the cause; and I therefore think the petition was filed in proper time, within the meaning of the third section of the act of 1875.

(January 29, 1883.)

The point whether or not, under the ruling which the court made the other day, the transfer of the controversy between the city and Jane E. Martin would bring here all the other controversies between the city and the various defendants and owners of the different lots

sought to be condemned, was argued by the counsel of the respective parties before the district and circuit judge, and that question is now to be decided. In the course of the argument, however, upon that question, the other points which were decided by the court were to some extent reargued, and it seems to be the desire of the counsel for the city that those points should be reconsidered by the court. They have been, and a consultation has taken place between the district judge and myself upon those two questions, and I may say that we neither of us have any doubt upon this: That the application was made by Jane E. Martin for the removal of the cause in time. We think that under the rulings of the supreme court of the United States no other conclusion can be reached. She appeared before there was any trial or hearing of the cause, for the first time, having been before an unknown defendant. As soon as she appeared and was made a party, she made her application for removal, and I can only repeat that to deprive her of the right of removal, provided it is a cause that can be removed, simply because she then for the first time made her application, would be in effect to render nugatory the provision of the act of congress, and subject it to the legislation of the states.

Upon the other point the same degree of confidence has not been felt, but our conclusion is the same as that announced by the circuit judge last week: that this is a suit, as between the city and Jane E. Martin, which could be removed. The principal argument of the counsel of the city is that after the verdict of the jury and the decision of the court as to the compensation which is to be paid, other questions may arise in the cause; that the statute provides for an application by supplemental petition in the same cause upon which action can be taken; but it will be recollected that at the time she made her application there was no question of that kind made in the state court. The only controversy—if we concede, as we must, I suppose, that this property was subject to condemnation—was as to the compensation which was to be paid to her. That was the only question which could come before the jury, and the only one on which the court could be called upon to render a judgment or decree. It might be, as between her and the city, no other controversy would ever arise. She might agree, perhaps, to the amount of the assessment and benefits that should be set off, so far as she was concerned, for the opening of the street. That was matter remaining in the future, and whether there would ever be a controversy or not we cannot absolutely say. We have no judicial notice of the fact that

there is to be any controversy beyond the controversy as to the compensation that should be paid.

If it be admitted there are difficulties connected with the decision of the case either way,—the removal of the case or refusing it,—we cannot see how, consistently with the decision of the supreme court of the United States in *Boom Co.* v. *Patterson*, if this is one single controversy between her and the city, which can be fully determined as between them, how we can deny the right of removal. It was conceded by the counsel of the city that if this were only one lot, or one block, or howsoever large a piece of property it might be, which was owned by a single individual, or owned jointly by several, there could be no question of the right of removal under the decision of the supreme court. That being so, we do not see how the fact that two or more lots being joined in the application for condemnation can make any difference in the principle. So that those two questions remain as previously decided.

I come now to the effect of the removal of the case or suit as between her and the city. Does it bring with it all the other different controversies in the case? We have to concede that in one sense this is a suit between the city and all the different defendants, known and unknown, named. But one petition is filed; but one summons is issued. That summons is served upon all who can be reached. There is but one publication, and, when this is accomplished, it is conceded that the court is empowered to act. It is, then, in one sense, a suit between the city and all those different defendants, both known and unknown; that is to say, it is nominally a suit, but in fact and in substance, as to the question which was at that time to be decided by the court, there was a series of suits and a separate and distinct suit between the city and each owner of the lots sought to be condemned. As a matter of convenience and practice, but one petition and one summons are issued, but the controversies between the city and the various parties are distinct and separate.

The verdict of the jury was to be separate and distinct in each case. The judgment of the court was to be separate and distinct in each case. As I stated before, as to Jane E. Martin, she had no controversy with the other parties. Her controversy was alone with the city; and whatever might be the result as between them, it did not so affect the controversy between her and the city as to make it joint in any legal sense; no further than that the parties have been brought into court by one petition, and one summons has issued upon it.

In taking this view of the case I concede we have, to some extent, to qualify the general principle laid down by the supreme court of the United States in the case that went up from Minnesota, and which has been so fully argued by the counsel. *Barney* v. *Latham*, 103 U. S. 205. In that case there were several controversies between the parties, and the supreme court of the United States held that did not deprive the court of jurisdiction, and did not prevent the various controversies in the case from being brought into the federal court, when application was made for removal by one of the parties to a separate controversy. All I can say about that is, that to some extent the various questions in that case were blended together, although separate and distinct. But it is clear, I think, that this kind of a case was not in the mind of the supreme court when it made that decision, and if it had been, it would have modified the language, or the principle would not have been stated in such broad terms as are contained in the opinion of the court.

The condemnation proceeding by the city is something unique and unlike an ordinary case at law or in equity, and resting wholly on the authority of the statute of the state, which describes the mode of proceeding.

The conclusion is that this, so far as the question of removal is concerned, is a separate suit between the city and Jane E. Martin. In form the whole is one suit, in which there are many defendants; but in substance and reality one suit, in which each defendant who owns a particular lot is a party, and the controversy between the city and him or her, is sole.

Perhaps I ought to make a remark as to the effect of any subsequent action that may be taken on the part of the city for the purpose of raising the money necessary to pay for the compensation which may be awarded the owners of the different lots. It is not necessary now to decide what may be the effect of this ruling upon an application of that kind—whether it may be made here or in the state court; but, wherever made, it seems to me that there will still remain but one controversy between the city and Jane E. Martin, namely, what shall be the assessment and benefits as to her lot, which should be deducted from the amount of compensation which is awarded to her by the jury.

The result is that this court will take jurisdiction of the suit and controversy between the city and Jane E. Martin, and leave the other suits and controversies between the city and different owners of the property sought to be condemned, to be determined by the state court.

UNITED STATES *v.* JENSON.

(*District Court, D. Iowa.* January 7, 1883.)

1. STATUTORY OFFENSE—INDICTMENT.

Where sections 5485 and 4785 of the Revised Statutes must be construed together in order to constitute the offense charged in the indictment, and section 4785 has been repealed before the commission of the offense alleged, by a subsequent amendment thereto, it is wholly inadmissible, in dealing with the criminal provisions of section 5485, to extend them by construction to the future acts of congress, when, by the express words of the section, its provisions are confined to the then existing pension law, of which the amended section was a part.

2. VERDICT—SUSTAINED BY ONE GOOD COUNT.

Where the verdict in a criminal case is general, if any one count in the indictment is good, the judgment cannot be arrested.

Motion in Arrest of Judgment.

J. S. Runnells and *W. T. Rankin*, for the United States.

James T. Lane, for defendant.

LOVE, J. The prisoner in this case stands convicted by the jury upon an indictment containing nine counts, in each of which he is charged with taking a compensation for prosecuting a pension claim in excess of the sum allowed by the pension laws. He now moves in arrest of judgment upon two grounds: *First*, because of duplicity in the various counts in the indictment; *second*, because section 4785 of the Revised Statutes, which is essential to his conviction, was repealed before the commission of the offenses as alleged in the indictment. These grounds will be disposed of in their reverse order.

As to one of the principal questions involved in this motion there is a direct conflict between two eminent federal judges in the respective districts of Ohio and Indiana, as will be seen by reference to the cases of the *U. S.* v. *Mason*, 8 FED. REP. 412, and *U. S.* v. *Dowdell*, Id. 881.

I shall, therefore, be compelled to resolve this question by considering rather the reason of the law itself than the authority of these adjudged cases. And in this view it is my opinion that the prosecution cannot be sustained upon the first, second, third, fourth, and eighth counts of the indictment. In each of these counts it is alleged that the offense was committed at a time which was prior to March 3, 1881. These counts are based mainly, though not entirely, upon section 5485 of the Revised Statutes of the United States. In that section it is provided that "any agent or attorney, or any other

person instrumental in prosecuting any claim for pensions or bounty land, who shall directly or indirectly contract for, demand or receive, or retain any greater compensation for his services or instrumentality in prosecuting a claim for pension or bounty land than is provided in the title pertaining to pensions, shall be deemed guilty of a high misdemeanor," etc.

It is clear that the counts referred to could not be maintained upon this section alone, for it contains no complete definition of the alleged offense. It provides that the offender shall be liable to prosecution when he demands or receives a greater compensation for his services in procuring a pension than is allowed in the title of the Revised Statutes pertaining to pensions.

It is evident, therefore, that we must look to that title for one of the essential elements of the offense, and we find that element in section 4785 of the Revised Statutes. That section is as follows:

"Sec. 4785. No agent, attorney, or other person shall demand or receive any other compensation for his services in prosecuting a claim for a pension or bounty land than such as the commissioner of pensions shall direct to be paid to him; not exceeding $25."

Taking sections 5485 and 4785 together, the offense plainly consists in the agent or attorney demanding or receiving any other compensation for his services than such as the commissioner of pensions directs to be paid to him, not exceeding $25. If section 4785 did not exist there would be no completely-defined offense, and the offender could not be prosecuted by virtue of the provisions of section 5485 alone. Now section 4785 did not exist in force when the offenses as alleged in the several counts in question were committed; for section 4785 was expressly repealed by the act approved June 20, 1878, "relating to claim agents and attorneys in pension cases." This act declared that it should be unlawful for any agent or attorney to charge for his services in a single case more than $10; and it in express terms repealed section 4785.

Section 4785 being thus repealed, section 5485 stood alone as a basis of the prosecution at the time when, according to the allegations of the several counts referred to, the prisoner's offenses were committed. It was not provided by 5485 that the offender should be liable generally for taking illegal compensation, or for taking compensation in excess of the amount allowed by any and every act of congress, present or future. It was expressly provided in that section that the offender should be liable to prosecution for taking compensation in excess of the amount provided by a particular act of

congress then in existence and expressly mentioned. No mention or reference whatever is made in section 5485 to any future act that congress might pass. So in the act of 1878 no reference whatever is made to section 5485. That act simply provides that no agent or attorney shall in a single case charge for his services more than $10, and that section 4785 should be repealed. It would, I think, be wholly inadmissible, in dealing with the criminal provisions of section 5485, to extend them by construction to future acts of congress, when by the express words of the section its provisions are confined to the then existing pension law. Suppose congress had seen fit by the act of 1878 to repeal the whole title upon pensions referred to in section 5485, and had made a new pension law, would the penal clause in section 5485 have been continued in force by the terms of the act of 1878?

Let us pass next to the consideration of the fourth, fifth, sixth, and ninth counts of the indictment. In each of these counts it is alleged that the offenses were committed at various times, which were subsequent to the third day of March, 1881. Now, on the third day of March, 1881, congress, in the general appropriation bill, provided that the "provisions of section 5485 of the Revised Statutes should be applicable to any person who should violate the provisions of an act entitled an act relating to claim agents and attorneys in pension cases, approved June 20, 1878." We have seen that this act of 1878 provided that it should be unlawful for any agent or attorney to charge for his services in a single pension case more than $10; and, for a violation of this act, it was provided, in the act of March 3, 1881, that the offender should be liable to prosecution under the provisions of section 5485. Now, in the fourth, fifth, sixth, and ninth counts it is charged that the prisoner at the bar, at times which were subsequent to the third of March, 1881, received from the several parties therein mentioned sums greatly in excess of the sum of $10 authorized by the act of 1878. It seems clear, therefore, that the prosecution is maintainable under the counts last mentioned by virtue of the provisions of the act of 1881.

The ground of duplicity urged by the prisoner in arrest of judgment is that to demand and receive compensation are distinct and separate offenses under the statute, and that these distinct and separate offenses are united in the several counts of the indictment.

But even if this ground be tenable, it cannot be sustained in opposition to the present indictment, because it is expressly alleged in the fourth count that the prisoner, on the fifteenth day of January, 1882,

received from one Henry Pansean the sum of $200 as compensation for prosecuting Pansean's claim; and if any one count of the indictment be good, the verdict being general, the judgment cannot be arrested.

Motion overruled.

MOORES v. CITIZENS' NATIONAL BANK OF PIQUA, OHIO.*

(Circuit Court, S. D. Ohio, W. D. February 8, 1883.)

1. AGENT ACTING FOR HIS PRINCIPAL AND FOR HIMSELF—NOTICE.
   An agent cannot lawfully act for his principal and for himself, in matters in which they have adverse interests, and every person dealing with an agent who is acting for himself as well as for his principal, in such matters, is put upon inquiry as to the authority and good faith of the agent.
2. SAME—CASE STATED.
   The plaintiff contracted to loan money to M., cashier of the defendant bank, for his individual uses, on his representations that he held a number of shares of stock of said bank, and his agreement to transfer a certain number thereof to the plaintiff as security for the loan. In pursuance of said agreement, M. afterwards produced a certificate of stock bearing the genuine signatures of the president, and of himself as cashier, on the faith of which plaintiff loaned him the money. In fact, M. had previously hypothecated and transferred to others all the stock of said bank which he had held, and the certificate was fraudulently issued, without any transfer of stock, and without any knowledge of any of the officers of the bank except himself, he having used for that purpose a certificate left with him for use as occasion might require, signed by the president in blank. The plaintiff had no knowledge of the fraud, and believed that the certificate had been issued in good faith and by competent authority, but knew that the transaction was for the benefit of M. *Held*, that the knowledge that M. was acting for himself as well as for the bank in issuing the certificate, put the plaintiff upon inquiry as to the authority and good faith of M., and having failed to make it, the bank is not liable on the certificate.

Paxton & Warrington and *Stallo, Kittredge & Shoemaker*, for plaintiff.

Ramsey & Matthews and *Hoadly, Johnson & Colston*, for defendant.

(1) Certificates of stock are non-negotiable instruments. *Lanier* v. *Bank*, 11 Wall. 369; *Mechanics' Bank* v. *Railroad*, 13 N. Y. 599; *Schuyler* v. *Railroad*, 34 N. Y. 30.

(2) The assignee of a non-negotiable instrument takes no better title than his assignor. Where a party *intentionally* issues such a paper, he will be held liable to innocent holders on the ground of estoppel *in*

*Reported by J. C. Harper, Esq. of the Cincinnati bar.

pais. But mere negligence will not create such estoppel. *Mechanics' Bank Case,* and other cases above cited; *Swan* v. *Australasian Co.* 2 Hurl. & C. 175; *Queen* v. *Shropshire Co.* L. R. 7 Eng. & Ir. Ap. 496; *Pollard* v. *Vinton,* 105 U. S. 7; *Walbridge* v. *Bank,* 19 Ohio St. 419.

(3) The act of the cashier in the present case was done upon his own behalf. He was not dealing upon behalf of the bank, and the plaintiff knew that he was acting in his own business. The act, therefore, was not within the scope of his agency, real or apparent. The act of the president in signing in blank was done upon behalf of the bank, but it was, at most, an act of ordinary negligence, and can create no liability, not being the *proximate cause of the injury. The bank did not issue the certificate. Dickson* v. *Reuter,* L. R. 3 C. P. 1; *Lowry* v. *Telegraph Co.* 60 N. Y. 198; *Bank* v. *Telegraph Co.* 30 Ohio St. 554; *Bank* v. *Bank of Columbia,* 5 Wheat. 336; *Bank* v. *Dunn,* 6 Pet. 51; *Bank* v. *City Bank,* 21 How. 356; *Claflin* v. *Bank,* 22 N. Y. 293; *Foster* v. *Essery Bank,* 17 Mass. 478.

BAXTER, J., (*charging the jury.*) This controversy is one in which a loss occasioned by the wrongful act of a third party must be borne either by the plaintiff or defendant to this action. There is no substantial disagreement between opposing counsel as to the facts. Robert B. Moores, at the time the defendant's cashier, desired to borrow money from the plaintiff. She was willing to make a loan upon satisfactory security. Moores represented he owned a considerable amount of the defendant's capital stock, and promised to transfer 91 shares, of $100 each, on the books of the bank to the plaintiff, and issue a certificate to her therefor. He thereupon made out a certificate in the usual form, in which it was certified that the plaintiff was entitled to 91 shares, of $100 each, of the capital stock of said bank, transferable on the books of the bank by the plaintiff in person, or by her attorney, on the surrender of said certificate; and upon the faith of this certificate, which the plaintiff then believed to be a valid evidence of the ownership of the stock called for therein, supplemented by the contract of the fifteenth of July, 1867, which has been read in evidence, the plaintiff loaned or advanced Moores $9,100. It is conceded that this money so advanced belonged to her, and that she did not then possess any personal knowledge of the fraudulent character of said certificate.

But it is now admitted that although the books of the defendant showed Moores was the owner of 275 shares of the capital stock of the defendant at that time, the same had been transferred and hy-

pothecated by him to others, and that in point of fact he did not own any stock. But, in order to supply the security for the loan according to his promise and agreement, he, without authority and without any consideration to the bank, and without any knowledge on the part of any officer or directors thereof, fraudulently made and issued the certificate to the plaintiff, offered in evidence herein, and delivered the same to her; and at the same time, and as a part of the same contract, the parties entered into the aforesaid agreement of the fifteenth of July, 1867, in which it is stipulated that the plaintiff should, upon demand of Robert B. Moores or his assigns, reassign the same to him. And further, if the plaintiff should require it, said Moores agreed to repurchase said stock at its par value, and in the mean time to guaranty an annual dividend thereon of not less than 10 per cent. This certificate is verified by the genuine signatures of the defendant's then president and cashier. It is furthermore conceded that the defendant and all of its officers, except Moores, who withdrew therefrom in July, 1869, were ignorant of the existence of plaintiff's said certificate until June, 1872. When a knowledge thereof was communicated to the defendant's officers, they insisted that it was fraudulent and spurious, and not obligatory upon the bank, and the defendant has hitherto declined to recognize plaintiff as a stockholder, denied to her all the rights pertaining to that relation, and refused to account with or pay her anything therefor. It further appears that no part of the money loaned or advanced by the plaintiff as aforesaid for said certificate has been repaid her. Moores, who perpetrated the wrong, is, it is said, insolvent, and per consequence the loss, as we have already said, must be sustained by either the plaintiff or defendant. It must fall wherever the law upon the foregoing statement of the facts requires it to be placed.

Now, if we accept the plaintiff's theory of the law, to-wit, that a party purchasing or loaning money in good faith upon a certificate of stock, bearing the genuine signatures of the corporate officers authorized and charged with the duty of transferring stock on the books of the company, and issuing certificates of ownership therefor, in the usual form, and regular in all respects upon its face, without any knowledge of its fraudulent or spurious character, is entitled to recover from the corporation the damages sustained by reason of the spurious, fraudulent, and invalid character of such certificate, this court, as at present advised, entertains the opinion, and so instructs you, that no such recovery can be had upon the facts proven in this

case. If a recovery could be had in any case, it could only be had by an innocent holder for value. The plaintiff is, in the ordinary sense, an innocent holder,—that is, she relied on Moores' representations; believed he owned stock in the defendant's corporation; relied, no doubt, in good faith, upon his promise to have 91 shares thereof transferred to her; and accepted the same in the belief that the certificate was issued by authority, in the due course of business, in lieu of stock belonging to him, and which he had surrendered and caused to be canceled.

But it must be borne in mind that Moores, in his efforts and negotiations to borrow, was acting for himself and not as cashier of the bank. His representations that he was the owner of a large amount of defendant's capital stock were not official representations, and cannot, upon any principle of law known to this court, bind the bank. They were but the representations of an individual, contending with pecuniary embarrassments, and if believed to be true and acted upon by the plaintiff, and loss resulted therefrom, the bank is in no way responsible for the same. As cashier, he was but the agent of the defendant, and could only bind it within the scope of his authority, and in the regular course of business. But Moores, when assuming to borrow money, either for himself or his friends, was acting for himself, in a matter in which the bank had no interest, and it therefore cannot be affected by anything that he may have promised or said, as an inducement to make the loan.

If plaintiff relied on such representations, as she evidently did, and the same turned out to be false, the defendant is under no legal obligation to make good the loss. This much will not be seriously questioned by the plaintiff's counsel. But they say that, as cashier, he was intrusted with the custody of the defendant's certificate-book, containing blank certificates signed by the president, and that he was, as cashier, authorized to accept and cancel surrendered certificates, transfer the same, and issue new certificates to transferees, and that such service came within the scope of his agency; that the issuance by him of the certificate held by the plaintiff, and constituting the foundation of this action, was an official act within the scope of his special duties; and that he, having afterwards obtained a loan or advance of money from the plaintiff upon the faith of its regularity and genuineness, and in ignorance of its spurious and fraudulent character, perpetrated a wrong for which the defendant, the bank, who clothed him with the power to inflict the injury, is justly and legally amenable.

It may, as we have already said for the sake of the argument, be conceded that money loaned or advanced by an innocent party, upon the faith of such a certificate, could be recovered from the corporation. But is the plaintiff, in the eye of the law, such an innocent person? These terms have in law a technical meaning. Ignorance of facts, which the law under the circumstances of the particular case requires a party to know, does not excuse the want of diligence or throw around the party the immunity which attaches to persons exempt from all laches or blame. In other words, if there is any fact which, in contemplation of law, puts a party on inquiry, and he fails to make the investigation which, if made, would develop the fraud, he is to be treated in all respects as if he had actual knowledge of the facts. There is another principle of law applicable to this case. An agent cannot lawfully act in the same matter for his principal and for himself, in cases wherein their interests are adverse to each other. To illustrate: If a cashier were to draw a check *in his own favor*, and then, as cashier, certify for the bank that the check was good, and he had funds in the bank to meet it, the bank would be bound to pay it upon proper indorsement and presentation. But if, in point of fact, he had no funds in the bank to check upon, the bank could not be held liable upon his certificate, although made in his capacity of cashier of the bank, notwithstanding the party suing the bank may have, in good faith, bought the check in the belief, predicted on the cashier's certificate, that the check was drawn against a fund in the hands of the bank, and that it was good, and would be paid on proper presentation. Yet, if such check was drawn in favor of a stranger, and certified by the cashier to be good, his bank would be legally bound and liable thereon. The reason why the bank is not liable for a check drawn by a cashier in his own favor and certified to be good, even in the hands of one buying it in good faith and in ignorance of any fraud, has been stated. An agent cannot act for his principal and himself in matters in which they have adverse interests, and every one purchasing such a check is, upon its face, admonished by the law of the necessity of making inquiry into the fairness and good faith of the transaction, and if he does not do this, however honestly he may rely on the integrity of the agent, the loss must be sustained by him.

Now, is this principle applicable to the facts of this case? Keep in mind that the plaintiff was dealing with Moores, the cashier, in his individual capacity. She agreed to loan her money to him on

condition that he would have a certificate issued to her for 91 shares of the defendant's capital stock. He undertook to do this. The undertaking was for his own benefit, in order to enable him to consummate the loan. He had possession of the bank's book of certificates. One of the certificates contained therein was signed by the president in blank, and left with him for use when occasion required it. He took this, and without authority, without consideration, and without the knowledge of any other officer of the bank, filled it up in the plaintiff's name and delivered it to her, with the contract of the fifteenth of July, 1867, as a security for the repayment of the money loaned. This certificate, made by Moores for his own benefit, is filled up in his handwriting and signed by him as cashier. Now, while the plaintiff relied upon his honesty, and believed that the certificate had been issued in good faith and by competent authority, she knew that in issuing it Moores was acting for himself; that the certificate was issued by him for his own benefit, to be used for the purpose and in the manner stated. This knowledge, we think, was enough to put her on inquiry. If she had made the inquiry, which the law as well as prudential reasons required, under the circumstances of this case, Moores' fraudulent action would have been developed, and the loss resulting therefrom avoided.

Agents intrusted with important interests and invested with large powers have many opportunities for an abuse of their trusts. Nevertheless, if their fraudulent acts are within the scope of their agencies, and a loss must result either to their principals or to an innocent person, who relied upon their action in the belief that the same was valid, the law would cast the loss upon the principal who selected and placed the agent in the position to do the wrong, and not on the innocent party. But if the complaining party knows, when accepting a check, certificate of stock, receipt, or other acquittance or obligation, issued or executed by the agent in the name of the principal, that he was acting in regard thereto for himself and in his own interest, such knowledge would put such party on inquiry, and divest him or her of the legal rights and incidents pertaining to that class of persons.

The plaintiff having had knowledge of the fact that Moores, upon whom she relied to have the stock transferred to her, was acting for himself as well as in his capacity of cashier,—that is, acting for the bank upon one side and for himself on the other, in reference to the matter of issuing this certificate,—she is not, in the judgment of this

court, an innocent holder of the stock; and as the certificate was issued without authority and in fraud of the rights of the bank, the court instructs you that the plaintiff is not entitled to recover in this action. Your verdict will therefore be for the defendant.

LARKIN *v.* SAFFARANS and others.

(*Circuit Court, W. D. Tennessee.* February 20, 1883.)

1. JURISDICTION—ENLARGEMENT OF—PENDING CASES—RETROSPECTIVE STATUTES—ACT MARCH 3, 1875.

   Statutes which are remedial will be given a retrospective effect, unless they direct to the contrary. Where, therefore, an act of congress enlarges the jurisdiction of the circuit court, it will be construed to apply to cases pending and undetermined at the passage of the act, unless excluded by its terms or necessary implication from the language of the act.

2. SAME—EJECTMENT—DIRECT TAX SALES—INTERNAL REVENUE—REV. ST. § 629, SUBSEC. 4.

   Whether the circuit court has jurisdiction, under Rev. St. § 629, subsec. 4, of an action of ejectment to enforce possession of a town lot sold by the direct tax commissioners, as provided by the acts of congress on that subject, *quære*; but it has jurisdiction under the act of March 3, 1875, § 1, (18 St. at Large, 470.)

Ejectment.

Only so much of the opinion in this case as relates to the question of jurisdiction is reported here. The remaining portion relates to defenses against the tax title, which are unimportant, since there is no permanent system of direct taxes on real estate, and the questions raised involved only an application of the settled decisions under the tax acts to the special facts of this case.

The plaintiff brought an action of ejectment based on a certificate of sale under the acts of congress for the sale of lands, subject to the direct tax and situated within the insurrectionary districts. The action was commenced on December 31, 1873, the plaintiff and defendants all being citizens of Tennessee. This was the day before the expiration of the seven-years' statute of limitations would have given the defendants an indefeasible title, by lapse of time, as a defense to the action. The declaration originally did not contain any averment that the case was one arising under the internal-revenue laws, or arising under any act of congress, but was subsequently amended to contain the necessary jurisdictional averments. The defendants at first appeared and pleaded the general issue, and certain special pleas set-

ting up their respective defenses, and in 1881, when the declaration was amended, demurred and pleaded want of jurisdiction. There was a trial and verdicts for many of the defendants, but as to some there was a verdict for the plaintiff. These moved for a new trial on several grounds, one of which was error of the court in refusing to dismiss the suit for want of jurisdiction.

W. M. Randolph, for plaintiff.

C. F. Vance and *C. W. Frazer*, for defendants.

HAMMOND, J. * * * The next ground for a new trial is based on the objection to the jurisdiction of the court. Resolving all doubt in favor of the jurisdiction, which seems to be the rule in such cases, I have concluded to adhere to the ruling made at the trial and sustain the jurisdiction. *Smith* v. *People*, 47 N. Y. 330, 341. It is proper to state, however, that any doubt entertained on the subject arises out of the want of conclusive authority for this judgment, rather than any want of conviction of its correctness.

Naturally enough, persons holding title under the United States direct sales supposed that cases arising under the acts of congress authorizing the tax were cognizable in the courts of the United States, whether there were a diverse citizenship or not, and actions of ejectment were brought in this court, as this case was, under that belief.

In the case of *Eaton* v. *Calhoun*, 2 Flippin, 593, which was brought on a title derived through, but not directly from, the direct-tax sales, the action, unlike this, was commenced after the act of March 3, 1875, c. 137, (18 St. at Large, 470;) but originally the declaration claimed jurisdiction under the act of March 3, 1833, (4 St. at Large, 632; Rev. St. § 629, subsec. 4,) historically known as the "Force Bill," passed to meet threatened nullification of the revenue laws of the United States. No suggestion was made in the argument of that case before me of jurisdiction under the act of 1875, and it was not until it came to be heard with the circuit judge on the bench that it was relied upon, the suit being found to have been commenced subsequently to the passage of that act. Of course, the question in this case, where the suit was brought *before* and was pending at the time the act of 1875 was passed, did not arise in that case; but here the plaintiff claims, as did that plaintiff until he was let in under the act of 1875, that we have jurisdiction under the act of 1833, and that question is again presented for decision. This case is somewhat better for jurisdiction under the act of 1833 and its amendments than that, because here the purchaser at the tax sale sues directly on his certificate of sale, and the questions involved are those pertaining to

the legality of the sale, while there it was a remote purchaser, in whose chain of title the tax sale was found to be a link, who was suing. Still, perplexing difficulties as to jurisdiction under those acts are so great that if the jurisdiction depended solely on them, I should perhaps feel constrained, for reasons stated in *Eaton* v. *Calhoun*,* to dismiss this case.

But, under the act of 1875, there can be no doubt of our jurisdiction, if the first section applies to cases pending in the courts at the time of its passage. And why does it not apply? Counsel say it is because it is giving that act a retrospective operation, without any words directing that it shall so operate, and because it interferes with vested rights. The first obvious suggestion here is, can the statute, in conferring jurisdiction over suits then pending, be said to act retrospectively in any proper sense? It acts immediately on a thing then in existence, and from that moment gives the court a power to act on that thing which it did not before have; but the idea that it acts retrospectively is founded on the assumption that the question of jurisdiction is to be determined as of the date when the suit was brought, and not as of the date when the decision is made, it being argued that the proceeding was void in the beginning, and cannot be made valid by subsequent legislation. That congress has the power to bestow jurisdiction over a pending suit there can be no doubt whatever, if the act says so in terms; and, in this connection, it must be remembered that there are no constitutional restrictions upon congress in the matter of retrospective legislation as there are in some of the states. *Satterlee* v. *Matthewson*, 2 Pet. 380; *Sinking Fund Cases*, 99 U. S. 700.

The case of *Sampeyreac* v. *U. S.* 7 Pet. 222; S. C. Hempst. 118, is a direct authority for the power of congress to do what the plaintiff claims has been done here; and it will be found that it has been sometimes ruled in the state courts that such legislation interferes with no vested right, since one can have no vested right to any particular remedy, or to sue or be sued in any particular court, or to a defense growing out of mere remedial legislation. For example, a party cannot complain if the legislature enlarges the statute of limitations, if this be done before the bar actually attaches under the old statute. And it will be found that, both in the civil and common law, the repugnance to retrospective legislation was not understood to extend to remedial legislation of that character. In Tennessee we have a constitutional provision "that no re-

*See *post*, 155.

trospective law, or law impairing the obligation of contracts, shall be made," and yet at a very early day it was construed to apply only to the impairment of contracts, and not prohibitory of the large class of legislation affecting remedies, remitting penalties, etc. "In short," says the supreme court, "so many are the past transactions upon which the public good requires posterior legislation, that no government can preserve order, suppress wrong, and promote the public welfare without the power to make retrospective laws." *Townsend* v. *Townsend*, Peck, 1, 17; 1 Tenn. Code, (T. & S.) 79, and notes; 2 Meigs, Dig. (2d Ed.) § 727, p. 886.

Some statutes do not act retrospectively, "unless, for particular reasons, the new laws indicate expressly that their provisions are to apply to the past; *or unless, without such indication, they must serve as a rule to past things;*" as Domat expresses the exception to that maxim derived by us from the civil law, by which we indicate our hostility to retrospective legislation. Broom, Legal Max. (7th Ed.) 34; *Calder* v. *Bull*, 3 Dall. 386; *Foster* v. *Essex Bank*, 16 Mass. 245, 254, 273; *Simmons* v. *Hanover*, 23 Pick. 188; *Dash* v. *Van Kleeck*, 7 Johns. 501; *Pells* v. *Sup'rs*, 65 N. Y. 300; *Templeton* v. *Kraner*, 24 Ohio St. 554, 563. And the rule is that "where the enactment deals with procedure only, unless the contrary be expressed, the enactment applies to all actions, whether commenced before or after the passing of the act." Broom, Legal Max. 35; *Wright* v. *Hale*, 6 Hurl. & N. 227; *Kimbray* v. *Draper*, L. R. 3 Q. B. 160.

This is only in accordance with the general rule that all remedial legislation shall be liberally construed, and particularly should this be so where new remedies are given, and with reference to the bestowal of jurisdiction on the courts. Strictly speaking, it may be that this statute is not an act relating only to procedure in the purview of the last above cited cases; but it takes away from these defendants no right of action, or defense to this action on its merits, if indeed an objection to the jurisdiction can be called a defense at all. The plea protests against the power of the court to act in the premises; it says this suit should not be entertained here because this court has not been empowered to try it. But the very non-existence of the power to hear it may be the strongest reason why the legislature should determine to confer it, and render this defense, if it may be called so, nugatory. Certainly nothing could be more appropriate than for congress to confer on its own courts power to hear controversies arising out of its own laws as the constitution has expressly authorized it to do; and I cannot see how any citizen can acquire a

vested right in any omission of congress to do this, nor why the rule of construction should not be, by analogy to that above mentioned, to apply the act to pending cases, unless there be an express direction to the contrary, as in *Good* v. *Martin*, 95 U. S. 90, 98, where the question was whether a change in the law of evidence applied to pending cases.

If the defendants had made a motion to dismiss, and this case had been by judgment dismissed before congress had passed the new act, or if the court had refused to dismiss for want of jurisdiction and rendered a judgment against the defendants which was void for want of jurisdiction, the case would have been different; and this distinction will be found running through the cases and is reasonable, because then the matter is ended by judgment, there is no pending suit on which to act, as it is past and gone from the court, and in one sense there then vests a right in the defendant to the judgment; it becomes a sort of property, and should not ordinarily be taken from him, and when there are appropriate restrictions on legislative supremacy, as in many of the states, it cannot be. Whether congress is so restricted may be doubtful; but at all events, in such a case, the rule of construction I am applying here would not operate, and nothing less than a specific direction in the statute would authorize the courts to give it that retrospective effect. But the defendant allowed this case to remain here without dismissing it until the want of power to try it was supplied, and when it was tried the objection was no longer tenable; for I think it will be found generally that such questions as this are to be determined as the law exists at the time they are decided, and not at the time the action was instituted. *Oliver* v. *Moore*, 12 Heisk. 482; *Laughlin* v. *Com.* 13 Bush, 261; *Huff* v. *Cook*, 44 Iowa, 639; *State* v. *Union*, 33 N. J. Law, 350. Why take that time as the one by which to test the jurisdiction? Would it not be as reasonable to confine us to the moment of time when the cause of action *accrued*, or to any subsequent time before the new act is passed, and to say that congress can confer no jurisdiction which shall act retrospectively on existing causes of action or controversies, but only on such as arise afterwards, as to say it cannot or has not conferred jurisdiction over pending suits? The language of the act is that this court shall have jurisdiction over "all suits;" but it clearly does not mean only those controversies which have already taken the form of "a suit," as the word is not used in that narrow sense; but if strict and literal construction is alone to prevail, it might be applied only to pending "suits," while certainly such

a construction would not exclude them. 2 Abb. Dict. "Suit," 518; 2 Bouv. Dict. "Suit."

The argument that the suit was void in the beginning, is, I think, a misapprehenson of that term. It is an indefinite expression that has no fixed meaning, and what is only voidable is often called void. 2 Abb. Dict. "Void;" 2 Bouv. Dict. "Void." It is conclusively established by the case of *Sampeyreac* v. *U. S. supra*, that it was not void in the sense of being incapable of confirmation or ratification; and the only real question is whether it has been validated by the act of 1875 enlarging our jurisdiction. The issuance of the writ was not void, nor the filing of the declaration, nor the service of process. They had, at least, vitality to present the question of jurisdiction itself. Hence, the suit was not void; nor does the fact that a judgment rendered against the defendants would have been a void judgment aid the argument, because one in favor of the defendant that the court had no jurisdiction would have been valid. It comes at last to the point that now, at this time, two citizens stand together in a court and propound their respective allegations of fact, and the question is, has that court the authority to decide between them? It had not when they first came here, but has now, and it seems reasonable that the inquiry as to the past is immaterial, if there be a present authority to try the controversy.

Innumerable cases might be cited on the general subject of retrospective legislation more or less pertinent to our present inquiry, but it would be impossible to review or distinguish them within proper limits for this opinion, and I shall merely cite in a note some that may be useful to those who may be required to pursue the investigation. I have not found a single case of binding authority directly in point, though many which strongly support this judgment in principle if not precedent, and some that seem strongly against it. I think, however, that careful attention will readily distinguish these last from this case. The case of *State* v. *Doherty*, 60 Me. 504, for example, which is strongest against the ruling made here, shows plainly that an indictment of a grand jury could not be supplied by subsequent legislation. A criminal proceeding in a court without jurisdiction is not like a civil suit in a court without jurisdiction for obvious reasons. The interesting case of *Fisher's Negroes* v. *Dabbs*, 6 Yerger, 118, illustrates the prevalence of the beneficent principle upon which I base this judgment, and which I find pervading the authorities everywhere, namely, that statutes are, in the absence of directions to the contrary, retrospective in their operation wherever

they are remedial, as where they create new remedies for existing rights, remove penalties or forfeitures, extenuate or mitigate offenses, supply evidence, make that evidence which was not so before, abolish imprisonment for debt, enlarge exemption laws, enlarge the rights of persons under disability and the like, unless in doing this we violate some contract obligation or devest some vested right. And I cannot see why this principle should not apply to statutes enlarging the jurisdiction of courts so as to embrace suits then pending and not ended. In the case last cited one statute was retrospectively construed in favor of a legislative remedy for establishing the freedom of a slave, and the legislature was not permitted by a subsequent act to forbid that retroactive operation, and thereby jurisdiction over a pending suit was saved.

It is proper that I should refer to a class of cases in the supreme court of the United States which hold that laws repealing those acts of congress which confer jurisdiction on our courts, operate on suits then pending to take away the jurisdiction, and I am unable to see why the same principle should not apply here. These cases show that congress has the power to legislate retroactively in such instances; that there are either no vested rights to interfere with, or the interference is lawful; and that, without special reference to pending suits, they are included in such legislation. Again, the power to so legislate is illustrated in the acts of congress, and cases under them, transferring pending suits in a territorial court to the state and federal courts, respectively, when a new state is admitted. *Railroad Co.* v. *Grant*, 98 U. S. 398; *South Carolina* v. *Gailliard*, 101 U. S. 433; *Ex parte McCardle*, 7 Wall. 514; *Benner* v. *Porter*, 9 How. 235; *McNulty* v. *Batty*, 10 How. 72.

The act of 1875 provides especially that suits then pending in the state courts may be removed to this court under that jurisdiction, and it might seem that the omission to provide for pending suits in conferring the original jurisdiction was intentional. But the subject-matter is so different, and the necessity for being more specific in regulating removals is so plain, that I cannot think this rule of construction should override that already discussed, requiring a retroactive effect, also, for the first section of the act. If this suit had been pending in the state court it could have been removed here, and I see no reason for dismissing it because it is here by original cognizance.

The complaint that the defendants make is that if this suit should be now dismissed for want of jurisdiction, the bar of the statute of limitations would attach, and no suit could be brought here or elsewhere

to which that bar would not be a defense, and this is the "vested right" it is desired to secure. I doubt this, and am inclined to think the one-year's saving clause would give the plaintiff another year within which to bring this suit. Tenn. Code, § 2755. But whether this be so or not, nothing is better settled in the cases examined than that a defendant has no vested right in the statute of limitations until the bar attaches, and it may be enlarged by competent legislation; but certainly the defendant can have no such vested right in other legislation pertaining to the exercise of judicial power, or any omission to legislate, as to favor that defense. It would seem, rather, if it were not for a prejudice against tax titles, and this tax title in particular, a reason for retaining this jurisdiction, and perhaps the force of this argument would be admitted in any other case but one of tax title. But if the plaintiff, being in a court competent to acquire the jurisdiction appropriate to his case, and so appropriate as this manifestly is, but without it for want of legislative grant, should find that his title would fail in another court by lapse of time, he might well appeal for relief to the legislature and ask it to either include him in the saving clause, or to confer the necessary jurisdiction on the court where already, by mistake, he found himself; and I have no doubt that in any but a tax-title case the justice of this appeal would be acknowledged. On the whole, I am satisfied there was no error at the trial, and a new trial should be refused.

Motion overruled.

Consult, Wade, Retroactive Laws, §§ 5, 9, 10, 11, 158, 160, 164, 212, 218; Cooley, Const. Lim. 369; Sedg. St. & Const. Law, 188, 193, 198, 201; Potter's Dwarris, St. 162, note 9; 2 Kent, Comm. (12th Ed.) 455, and notes; *Stewart* v. *Laird*, 1 Cranch, 299; *The Grapeshot*, 7 Wall. 563; S. C. 9 Wall. 129; *Express Co.* v. *Kountze Bros.* 8 Wall. 342; *Drehman* v. *Stifle*, 8 Wall. 595; *Gut* v. *State*, 9 Wall. 35; *Society* v. *Wheeler*, 2 Gall. 104; *Prince* v. *U. S.* 2 Gall. 204; *Albee* v. *May*, 2 Paine, 74; *Manuf'g Co.* v. *Ins. Co.* Id. 501; *Gray* v. *Monroe*, 1 McLean, 528; *Wilber* v. *Ingersoll*, 2 McLean, 322; *U. S.* v. *Hughes*, 8 Blatchf. 29; *Norris* v. *Crocker*, 13 How. 429; *Railway* v. *Twombly*, 100 U. S. 78; *Ins. Co.* v. *Ritchie*, 5 Wall. 541; *Steam-ship Co.* v. *Joliffe*, 2 Wall. 450; *Ins. Co.* v. *Canter*, 1 Pet. 512; *Girdner* v. *Stevens*, 1 Heisk. 280; *Collins* v. *Railroad Co.* 9 Heisk. 841; *People* v. *Carnal*, 6 N. Y. 463; *Dubois* v. *Kingston*, 20 Hun, 500; *Carpenter* v. *Shimer*, 24 Hun, 464; *Caperton* v. *Martin*, 4 W. Va. 138; *Rich* v. *Flanders*, 39 N. H. 304; *McCabe* v. *Emerson*, 6 Harris, (Pa.) 111; *Underwood* v. *Lilly*, 10 Serg. & R. 97; *Hepburn* v. *Curtis*, 7 Watts, 300; *Schaeppe* v. *Com.* 65 Pa. St. 51; *Lane* v. *Nelson*, 79 Pa. St. 407; *Ryan* v. *Jackson*, 11 Tex. 400; *Bowen* v. *Callender*, 6 Mass. 309; *Stevens* v. *Stevens*, 1 Metc. (Mass.) 279; *McMillan* v. *Boyle*, 6 Iowa, 304; *Railroad Co.* v. *County*, 39 Iowa, 124, 150; *Tilton* v. *Swift*, 40 Iowa, 78; *State* v. *Norwood*, 12 Md. 195; *Hoa* v. *Lefranc*, 18 La.

Ann. 393; *Railroad Co.* v. *Woodword*, 4 Cal. 162; *Lunden* v. *Railroad Co.* Id. 433; *Mann* v. *McAtee*, 37 Cal. 11; *People* v. *Mortimer*, 46 Cal. 114; *Dent* v. *Holbrook*, 54 Cal. 145; *Henshall* v. *Schmidt*, 50 Mo. 454; *Ex parte Bethurum*, 66 Mo. 545; *Lee* v. *Buchett*, 49 Wis. 54; *State* v. *Moore*, 42 N. J. Law, 208; *Loweree* v. *Newark*, 38 N. J. Law, 151; *Baldwin* v. *Newark*, Id. 158; *Belfast* v. *Folger*, 71 Me. 403; *Sturgis* v. *Hull*, 48 Vt. 302; *Lee* v. *Cook*, 1 Wy. Ter. 413; *Smith* v. *Van Gilder*, 26 Ark. 527; *McDaniel* v. *Correll*, 19 Ill. 226; *Wallpole* v. *Elliott*, 18 Ind. 259; *Bradford* v. *Barclay*, 42 Ala. 375.

The following is the manuscript opinion of Judge HAMMOND, ordering a reargument in the case of *Eaton* v. *Calhoun*, referred to in the foregoing opinion, and in the note to the report of that case in 2 Flippin, 593:

EATON *v.* CALHOUN.

(*Circuit Court, W. D. Tennessee.* February 25, 1880.)

1. SUBJECT-MATTER—EJECTMENT—JURISDICTION—DIRECT TAX—ACT JUNE 7, 1862—INTERNAL REVENUE—REV. ST. § 629, SUBSEC. 4.

   Whether the circuit court of the United States can acquire jurisdiction of an action of ejectment between citizens of the same state under the act of March 3, 1883, (4 St. at Large, 632; Rev. St. § 629, subsec. 4,) where the land in controversy is claimed by the plaintiff through a sale under the act of congress of June 7, 1862, (12 St. at Large, 422,) for the sale of lands subject to the direct tax within the insurrectionary districts of the United States, it being doubtful if such a suit is one arising under "any law providing internal revenue;" or if, when the plaintiff is a remote purchaser, and the controversy is not with a revenue officer, the suit can be said to be within that act of congress as amended by the Revised Statutes, *quære*.

2. SAME—PRACTICE—JURISDICTION ON THE PROOF.

   Where jurisdiction depends on the subject-matter of the suit, the court may, if necessary, irrespective of the pleadings, retain the case until a trial of the facts before the jury or the court, and then, on the proof, determine the question of jurisdiction.

Ejectment.

This is an action of ejectment for a lot of land claimed by the plaintiff under the direct-tax sales of lands within the insurrectionary districts of the United States, held under authority of the act of June 7, 1862, (12 St. at Large, 422,) he holding a deed from the commissioner of internal revenue, approved by the secretary of the treasury in pursuance of an act of congress of June 8, 1872, (12 St. at Large, 330.)

The plaintiff and defendant are citizens of Tennessee, but the declaration avers "that the plaintiff claims title under the aforesaid acts

of congress of June 7, 1862, and June 8, 1872, and that plaintiff's claim of title under the said acts of congress is the only question in controversy between the plaintiff and the defendant, and plaintiff avers that this is a case arising under the aforesaid acts of congress, and the acts amendatory thereof." To this declaration there was a demurrer for want of jurisdiction, and subsequently a plea setting up the citizenship of the parties and denying the jurisdiction of the court.

L. B. Eaton, for plaintiff.

J. M. Gregory, for defendant.

HAMMOND, J. The case of *Peyton* v. *Bliss*, 1 Woolw. 170, relied on by the plaintiff to support the jurisdiction, was one of removal from the state court under the *third* section of the act of March 3, 1833, (4 St. at Large, 632,) and not of original jurisdiction under the *second* section. Suits may sometimes be removed to, which cannot be originally brought in, the federal court. *Barney* v. *Globe Bank*, 5 Blatchf. 107. If the plaintiff here had been in possession of the land, and been sued by the defendant in the state court, the case of *Peyton* v. *Bliss*, *supra*, would, perhaps, apply, though the question whether it was a proper case to remove under the act of 1833 does not seem to have been directly made, as it was contended that the act of 1833 had been repealed. It seems not to have been denied that if the act of 1833 were in force, the case was properly removed, and it was held that it was in force as to the direct-tax act. The very next case, however, (*Peay* v. *Schenck*, 1 Woolw. 175,) by the same judge, was one of original jurisdiction, in which a cross-bill was filed by a defendant, who was a citizen of the same state as his co-defendant, against such co-defendant and the plaintiff, to litigate precisely the same questions as in *Peyton* v. *Bliss*, *supra*, namely, the validity of sales under the direct-tax act, and it does not seem to have occurred to the court or counsel to support the jurisdiction under the second section of the act of 1833 as one arising under the revenue laws, and the jurisdiction was only retained because the cross-bill was ancillary to the original suit between citizens of different states; and this case is as much against the jurisdiction as the other is in favor of it.

Whether the direct-tax law belongs to the system of excise taxes known as the "Internal-Revenue Laws" or not, (and I do not think it does,) it certainly is a law providing internal revenue, and comes within the very words of section 629 of the Revised Statutes, where the change of phraseology will be noticed; and this section is the law which must govern us. The act of 1833, and subsequent acts affect-

ing it, are carried into the Revision as sections 629, subsec. 4, 643, 645, 646, 751, 752, 753, 934, 3176, 3465, 5446, 5537, and 5538, and it is by these provisions that we must determine the questions now presented for judgment, and not by the act of 1833, which is the only statute cited by counsel.

The different kinds of revenue are stated in *Warren* v. *Fowler*, 4 Blatchf. 311, where it is held that the postal laws were revenue laws under the act of 1833, and I have no doubt the ruling of Mr. Justice MILLER was correct, that the statute repealing the act of 1833 as to the internal-revenue laws, (Rev. St. § 3465,) does not apply to the direct-tax act.

But the question remains whether this suit arises under "any law providing internal revenue," in the sense in which that expression is used in the Revised Statutes, § 629, subsec. 4, to confer jurisdiction. The plaintiff here contends that he is claiming title under a deed made to him by the United States in pursuance of the act of June 8, 1872, (17 St. at Large 330,) the fourth section of which provides that at the expiration of the time allowed by law for redemption, all lands owned by the United States shall be sold at auction. The plaintiff purchased the lot in question at such a sale, and the proper officers of the government have made him a deed conveying the title of the United States, and this is an action of ejectment to recover the land from one in possession, the averment of the declaration being that the defendant denies the validity of the plaintiff's claim of title under the sale for taxes and under the aforesaid acts of congress. The demurrer admits this averment. Is it, then, a case arising under a revenue law? The general intention of the acts seems to have been, manifestly, to protect the revenue officers and agents against suits in the state courts. *Philadelphia* v. *Collector*, 5 Wall. 720; *Hunthall* v. *Collector*, 9 Wall. 565; *Van Zant* v. *Maxwell*, 2 Blatchf. 421; *Benchly* v. *Gilbert*, 8 Blatchf. 147.

The language of section 629, subsec. 4, seems broad enough to cover any case, however remotely connected with the revenue laws; but section 643 seems to indicate the classes of cases thought to come within the designation of cases arising under the revenue laws. In treating of suits about property this section appears to contemplate property held by revenue officers or their agents under seizure, and does not seem to embrace suits arising after the property seized has been sold and passed out of the control of revenue officers or agents. In such cases it would appear that the revenue laws had become *functus officio*, and the suit so brought would stand like any other where

property had been sold by judicial or other legal proceedings. Judge MILLER says, in *Carpenter* v. *Williams*, 9 Wall. 785, that if every case where the title has passed through the United States is to carry with it the right to come into the federal courts, they would absorb jurisdiction of all the land suits. So here, if, because a parcel of realty has been once sold for taxes by the United States all questions thereafter arising in actions of ejectment may be brought here on the theory that the tax sale is a link in the chain of title, the validity of which may be or is questioned, it would bring to this court almost every suit after a sale had once taken place.

Here the title is derived directly from the United States, which became the owner by the execution of its revenue laws. The act of June 8, 1872, is an act for the sale of lands belonging to the United States, and it is under *that act* the plaintiff claims title, and not under any revenue officer *as such*. It is true, the commissioner of internal revenue and the secretary of the treasury are, in one sense, revenue officers; but, acting under this statute of 1872, they are merely agents of the government to sell lands. The direct-tax act was satisfied by the tax sale to the United States. After a purchase or forfeiture the ownership of the government stood like its ownership of other lands. Bankruptcy, patents, judicial sales, and many other subjects of federal power would furnish sources of title to property, and on the same principle, after property had passed by operation of a federal law, jurisdiction over it would continue in every case where the title was involved, if the act of congress were called in question. It may involve a federal question under the twenty-fifth section of the judiciary act, (Rev. St. § 709,) which may be re-examined by the supreme court; but because that question arises on the revenue laws does it give this court original jurisdiction?

I have, so far as I could, examined the cases arising under these laws, and have found none where private citizens, wholly disconnected with the execution of the revenue laws, have litigated their private suits on the theory of this suit, except the case of *Peyton* v. *Bliss*, *supra;* they are all actions against revenue officers or their agents. *Ex parte Smith*, 94 U. S. 455, only decides that the declaration did not aver jurisdiction.

On this subject, an examination of the cases under this and other statutes, where the jurisdiction depends upon subject-matter, will disclose that the practice of the courts is to retain the case until a trial of the facts before the jury or by the court, and on the proof determine the question of jurisdiction without reference to the merely general

averment of the pleadings, if necessary to do so. *Mayor* v. *Cooper*, 6 Wall. 247; *Dennistoun* v. *Draper*, 5 Blatchf. 336; *Murray* v. *Patrie*, Id. 343; *Fiske* v. *Railroad Co.* Id. 362; and many other cases.

I do not doubt that the judicial power of the United States may be extended by congress to all cases involving a federal question, even to the extent of giving their courts original jurisdiction. But heretofore, and until the act of March 3, 1875, except in a few instances, such questions have been left to a final appeal to the supreme court from the state courts. One of these exceptions embraces cases arising under the revenue laws; but I doubt if this is such a suit. All the authorities I have examined were actions directly or indirectly against officers, or substantially against the United States, and concern the revenue. But the case at bar seems to me too remotely connected with the revenue laws to be called a revenue case. It is simply a private suit about property once having passed through the process of sale under a revenue law, and the title may depend on that law; but *quære* whether it is thereby made a case arising under it.

I am unable to reach a satisfactory conclusion, particularly in view of the permanent appropriation to repay to purchasers on eviction the taxes paid, which may continue these cases, in any view, under the protection of the statute. Rev. St. 3689. And, though my impressions are against the jurisdiction, I shall direct a reargument before a full bench, and withhold for the present any judgment.

(March 5, 1880.)

Reargued before BAXTER and HAMMOND, JJ., and taken under advisement. Jurisdiction now claimed under the act of March 3, 1875, (18 St. at Large, 470.)

(April, 1880.)

Opinion of BAXTER, C. J., sustaining jurisdiction under act of March 3, 1875, (18 St. at Large, 470,) reported. *Eaton* v. *Calhoun*, 2 Flippin, 593.

Vide Springer v. *U. S.* 102 U. S. 586, where it was decided that the taxes levied by the internal-revenue acts are not direct taxes under the constitution.

BABCOCK and another *v.* JUDD and another.

(*Circuit Court, D. Connecticut.* February 8, 1883.)

PATENTS FOR INVENTIONS—SUBSTITUTION.

The substitution of a new ingredient in a combination of old ingredients is not an infringement.

Babcock v. *Judd*, 1 FED. REP. 408, followed.

Wm. Edgar Simonds, for plaintiffs.

Chas. E. Mitchell, for defendants.

SHIPMAN, J. This bill in equity is founded upon the alleged infringement by the defendants of Franklin Babcock's reissued patent No. 9,301, dated July 20, 1880, for an improved window-spring catch. The original patent was dated September 29, 1868. A suit upon the original patent between the same parties for the same alleged infringement was tried before me, and was decided in February, 1880. I held that the original patent was not infringed. *Babcock* v. *Judd*, 1 FED. REP. 408. Before a decree in conformity with the opinion was entered in that case the patent was surrendered and the present reissue was obtained. The pending suit was thereupon dismissed by reason of the surrendry of the patent. It is admitted that the first and second claims of the reissue are invalid under the recent decisions of the supreme court. It is said by the plaintiff that the third claim is simply a restatement, and not an enlargement, of the single claim of the original patent. The third claim is:

"In combination, this exteriorly-threaded case, the bolt provided with a locking shoulder and pressure pad, the spring and the stem supporting the spring, all substantially as shown and described."

Admitting that the plaintiffs' construction of this claim is correct, there is no infringement, for the reasons stated in the former case—*Babcock* v. *Judd*, *supra*. The new exhibits which the plaintiffs introduced in evidence in this case have no substantial value upon the point which is in controversy.

Let the bill be dismissed.

THE HARRY.*

(*District Court, E. D. New York.* January 15, 1883.)

COLLISION—CANAL-BOAT AT END OF PIER—PROPELLER.

Where a canal-boat, sound and strong, was lying at the end of a pier, and a propeller, in attempting to get into the adjoining slip, brought up against the canal-boat and injured her, *held*, that if it was necessary for the propeller to come up along-side and against the canal-boat, it was her duty to do so in an easy manner, and the propeller must be held liable for the damage resulting from the blow.

In Admiralty.

W. W. Goodrich, for libelant.

Beebe, Wilcox & Hobbs, for claimant.

BENEDICT, J. This action is to recover for injuries to the canal-boat T. S. Gray, while lying at the end of pier 46 in the North river, occasioned by a collision between the canal-boat and the propeller Harry. At the time of the collision the propeller Harry, having a barge laden with grain in tow along-side, was endeavoring to get into the slip between pier 46 and pier 45. The libelant's boat lay moored at the end of the pier, her bow down stream and projecting beyond the side of the pier. The tide was flood. The method adopted by the propeller was to come head to the tide off the end of pier 46, and then move into the slip. In accomplishing this maneuver she brought up against the canal-boat, that was lying at the end of pier 46, causing the damage sued for.

The proofs show that the canal-boat was a sound boat, able to withstand all ordinary contact with other vessels at the piers, and that she was moored in a proper manner at a place where she had the right to be. The proofs also show that the blow which she received from the Harry was a severe one. If, as contended in behalf of the propeller, it was necessary for the propeller, under the circumstances, to come up along-side and against the canal-boat, it was, nevertheless, the duty of the propeller to do so in an easy manner, without dangerous force. This duty was not discharged. The effect of the blow shows that the blow was severe. I have no doubt that the injury to the libelant's boat resulted from a want of due care on the part of the Harry.

The case differs from the case of *The Charles R. Stone*, 9 Ben. 182, relied on by the claimant. In that case the tug simply sagged in by

*Reported by R. D. & Wyllys Benedict.

the tide so easily that no danger resulted from the contact. Here, a blow was given with force sufficient to break in the side of a strong boat.

There must be a decree for libelant, with an order of reference to ascertain the amount of the damage done.

The Hudson.

(*District Court, S. D. New York.* February 7, 1883.)

1. Collision—Several Vessels—Joinder in One Suit.
   Where several vessels are alleged to be in fault in causing a collision by which the property of a third person is injured, in a libel by the latter to recover his damages, all the vessels in fault should be proceeded against as defendants to avoid multiplicity of suits, and to enable the damages to be justly apportioned among those liable according to the law in admiralty.
2. Same—Vessels Brought into Suit by Further Process.
   If in such a suit the libelant proceeds against one vessel only, it is competent for the district court to award its further process in the cause, upon the petition of the vessel sued, for the arrest of the other vessel to answer for its share of the damage.
3. Same—Apportionment of Damages.
   Under the recent decisions of the supreme court the right to an apportionment of the damages between the vessels liable to third parties, in a case of collision, is a substantial right which cannot be suffered to depend upon the caprice, the mistake, or the collusion of the libelant in suing one vessel only.
4. District Court—Practice and Procedure.
   In cases not provided for by the supreme court rules in admiralty, it is competent for the district court to regulate its own practice, and to allow remedies according to the analogies of admiralty procedure, as new exigencies arise, as the court may deem necessary for the due administration of justice.
5. Same—Bringing in Third Parties.
   Under the English judicature act of 1873 it is the constant practice, at the instance of the defendant, to bring in third persons as parties to be bound by the judgment, where they have a common interest in the subject-matter of the litigation, or in the question of liability to be determined.
6. Same—Application to Collision Cases.
   Collision cases in admiralty present an aggregate of features which make them *sui generis*, and the due administration of justice renders it essential and expedient in this class of cases that the liability of all persons or vessels involved should be determined in a single action, rather than in successive independent suits.

Motion to Bring in Another Vessel as Defendant.

Edward D. McCarthy, for libelant.

Benedict, Taft & Benedict, for the Hudson.

Brown, J. The libel in this case was filed against the steam-tug Hudson to recover damages for an injury by a collision to the

libelant's barge, which was in tow of the steam-tug E. A. Packer. The latter tug not having been joined in the suit, and being alleged by the claimants of the Hudson to be chargeable with fault contributing to the collision, the claimants have filed a petition praying that the E. A. Packer may be brought in as a party to the action, in order that the damages may be apportioned between the two tugs, as would have been done had the E. A. Packer been joined as a party and adjudged in fault.

The motion is opposed by the libelant, not merely on the ground of laches, but upon the broader ground that, if the claimants have any right to contribution it must be sought by their own independent suit against the E. A. Packer after paying the libelants, and that the court cannot compel the libelants to sue parties whom they do not deem in fault, nor bring in another vessel at the instance of the owners of the vessel sued alone.

The question involved is one of great practical importance since the decision in the case of *The Atlas*, 93 U. S. 302. This court has had frequent occasion to regret its own adjudications, imposing upon one vessel alone the whole burden of the damage, where another vessel, not a party, appeared to be equally, and sometimes more, in fault. If applications like this can be granted, then a speedy, convenient, and effectual remedy will be provided, whereby the rule in admiralty in collision cases which apportions the damages between two vessels, which are both in fault, can be applied, and equity will be administered in the sense of the admiralty law. If such applications cannot be granted, then this rule of the admiralty is liable to be defeated, or greatly embarrassed in its effectual and practical application, either through mistake, collusion, or the arbitrary caprice of any libelant who chooses to sue one vessel only, and to insist on recovering his whole damages from that vessel alone. For even if the latter, after being found liable, and after paying the whole loss, would have a legal right to recover contribution by direct action against the other vessel through subrogation to the libelant's lien, still this remedy would in many cases become practically worthless through the intervening delay, the loss of the other vessel, the accumulation of superior intervening liens, or her absence from the jurisdiction; while such a remedy, if still available, would involve a trial by the court of the whole case *de novo*. If, therefore, in collision cases, two vessels liable to a third party have in admiralty any legal right of contribution, *inter sese*, for the payment of the damages, it is manifestly more effectual and more convenient to bring both vessels into the cause at

the outset; and if the libelant does not do that, to permit the vessel sued to cause it to be done, if it be competent for the court to afford that remedy.

In the English practice, the libelant in such cases recovers of the vessel sued alone only half his damages. This rule, first established by Dr. LUSHINGTON in the case of *The Milan*, Lush. 401, has been repeatedly followed since, and has been lately (1878) affirmed in the court of appeal in the case of *The City of Manchester*, L. R. 5 Prob. Div. 221. The same rule was applied in this country in the district and circuit courts, (*The Atlas*, 4 Ben. 27; 10 Blatchf. 459; *The City of Hartford*, 11 Blatchf. 290;) but on appeal to the supreme court in the case of *The Atlas*, 93 U. S. 302, where only one of two vessels liable was sued, the decision of the court below was reversed, and a decree directed in favor of the libelant for his entire damages against the vessel sued, on the ground that each vessel, as a wrongdoer, must be held liable to innocent third parties *in solido* for the whole loss.

This decision, however, was not designed to affect, and does not affect in any degree, the right of the owners of the several vessels liable to have among themselves an apportionment of the damages whenever all the parties are before the court. The rule in the admiralty in cases of negligence, as is well known, is in direct opposition to the rule of the common law. By the latter, if the plaintiff be guilty of negligence, he recovers nothing; while in admiralty the damages, whether to the libelant's vessel or to the claimant's, or to the cargo of either, are apportioned equally between the vessels in fault. And where the innocent owner of the cargo, or of a tow in charge of one vessel, sues and recovers against both vessels, the libelant cannot recover a judgment *in solido* against both for his whole damage, with a right to levy his execution in full against either alone, as at common law, but only a judgment for a moiety of the damages against each vessel, with an alternative right of recourse against either for so much of the moiety adjudged to be paid by the other as he is unable to collect from the latter. This principle, first sanctioned by the judgment of the supreme court in the case of *The Washington and the Gregory*, 9 Wall. 513, 516, was afterwards, upon full deliberation, reaffirmed in the case of *The Alabama and the Gamecock*, 92 U. S. 695, and has been repeatedly asserted in subsequent cases. *The Virginia Ehrman*, 97 U. S. 317; *The City of Hartford*, 97 U. S. 329, 330; *The Atlas*, *supra*; *The Civilta*, 103 U. S. 699.

In the case of *The Alabama and the Gamecock*, *supra*, the district

court had rendered a decree against both vessels for the whole damage *in solido*. The circuit court reversed this, and rendered a decree against each for a moiety only. The supreme court reversed both, and directed a decree for a moiety against each vessel, with an alternative provision to the effect above stated.

No more express affirmance could be made of the legal right of the owners of the several vessels liable for the same collision, to have an apportionment of the loss among themselves whenever both are before the court, even as against a libelant without fault; for the court reversed the decrees below for no other purpose than to give effect to such an apportionment, so far as it could possibly be done consistently with the libelant's right, as against both, to make sure of the recovery of his whole loss.

The same principle was applied in this circuit upon an appeal heard by the chief justice in the case of *The Eleanora*, 17 Blatchf. 88, where two libels were filed against the steam-ship for a collision,—one by the owners of the schooner Transit, the other by the owners of the cargo. The cases were submitted to the court on the same evidence. Both vessels were found to have been in fault, and the damages in the schooner's suit were apportioned, while the owner of the cargo had judgment for his whole damages against the Eleanora, which he had sued alone; but in order to compel the schooner to pay the one-half of the damages in the latter suit, as she was "equitably bound to do," though she was not a party to that suit, the court decreed that the Eleanora should, in the schooner's suit, be credited with the one-half of what in the other suit she was obliged to pay for the loss of the cargo. The court say:

"Having all parties before it, the court may do what it would have done if there had been but one libel; that is to say, divide the damages of the collision throughout between the two colliding vessels. * * * The fund belonging to the Transit growing out of the collision is in court, and no injustice is done by using it to reimburse the Eleanora for what she has paid for the Transit on account of the mutual fault of the two vessels."

These cases show how firmly established in this country, by the highest authority, is the legal right in admiralty of the several vessels, liable for the same collision, to have the entire loss and damages apportioned equally among them, so far as such an apportionment can be made without injury to the libelant, whenever the parties are before the court, or whenever there is any fund which the court can lay hold of and make tributary to such an apportionment. The right of contribution is thus affirmed, it seems to me, as a substantial legal

right, and as such it is entitled to all appropriate and expedient remedies. In effect, while the libelant has a maritime lien upon each vessel *in solido* for his whole damage, so that both are liable jointly and severally as principals, yet, as between themselves, the several vessels liable are virtually in the situation of sureties for each other for the payment by each of one-half the damages; and each vessel, like other sureties in equity, has such a legal interest in the libelant's enforcement of his lien upon the other, that the court must by its decree carefully protect this interest whenever the parties are before it, and on failure to do so its decree will be reversed.

From this well-settled recognition and enforcement of a right of contribution as a substantial legal right, when the parties are before the court, it would seem to result necessarily that if only one vessel is sued, where another is equally liable, either an independent suit for contribution must be allowed to the latter, or else the other vessel must be brought into the original cause, if that can be done without any substantial injury to the libelant. It would be a gross anomaly to say that the court must, by its decree, recognize and enforce a right of apportionment between several vessels defendant, if they all happen to be parties, but yet has no power to bring in one of them if absent, or to afford a several remedy against it. If the right of contribution depended wholly upon the libelant's happening to sue both vessels instead of one, instead of being a legal right it would be but a mere accident in the cause, dependent solely upon the libelant's option. But I cannot for a moment conceive either that the supreme court would guard and enforce with so much care a right which depended upon accident merely, or that so important and valuable an interest as the right of apportionment in collision cases, where the pecuniary interests involved are usually large,—often amounting to tens or even hundreds of thousands of dollars,—can be suffered to depend upon the arbitrary choice of the libelant as to whether he will sue one or both vessels, or upon his mistake or misapprehension of the facts in supposing only one vessel instead of both to have been in fault; and still less, upon his possible collusion with one of the vessels liable to throw the whole burden upon the other.

The due administration of justice and the reasons for the rule of apportionment forbid any such result. "The moiety rule," says BRADLEY, J., in delivering the opinion of the supreme court in the case of *The Alabama*, 92 U. S. 697, "has been adopted for the better distribution of justice among mutual wrong-doers." Judge NELSON, in *The Catharine*, 17 How. 178, says "this rule is most just and

equitable, as best tending to induce care and vigilance in navigation;" and Judge DRUMMOND adds, in the case of *The Swan*, 6 McLean, 295, that under this rule there will be "less effort and less temptation by corrupt and unfair means to misrepresent and distort the facts." The same sense of justice and the same considerations of policy which led to the adoption of this rule, and which carefully enforce it whenever the parties are present, require that if all the necessary parties are not before the court, either a separate suit for contribution should be allowed, or else that the absent party should in some way be brought into the cause, so that this "better distribution of justice" may be effected.

In the case of *The Enterprise and the Napoleon*, 3 Wall. Jr. 58, GRIER, J., says:

> "If, as between the tug and the steam-boat, the latter has been partially or entirely in fault, the owners of the Enterprise may have their remedy (*i. e.*, against the Napoleon) for the half or the whole of the damages recovered by the libelants."

It is objected "that at common law there is no contribution among wrong-doers." But not only is this wholly inapplicable to collision cases in admiralty, as we have seen, but the rule is too broadly stated, and is subject to important qualifications even at common law.

In *Arnold* v. *Clifford*, 2 Sumn. 238, STORY, J., states the rule differently. "Among tort-feasors," he says, "who are knowingly such, there can be no contribution." This rule doubtless applies to persons directly participating in or authorizing any willful trespass, or any known wrongful acts, or acts obviously of an unlawful character, and to actions involving moral turpitude, or incurring statutory penalties. *Merryweather* v. *Nixon*, 8 Term R. 186; *Attorney General* v. *Wilson*, 1 Craig & P. 1, 28; *Miller* v. *Fenton*, 11 Paige, 18; *Peck* v. *Ellis*, 2 Johns. Ch. 131; *Andrews* v. *Murray*, 33 Barb. 354; *Wehle* v. *Harland*, 42 How. (N. Y.) 399, 410. But in *Adamson* v. *Jarvis*, 4 Bing. 66, BEST, C. J., says: "The rule is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act;" and it seems to be the settled law that in cases of *quasi* torts only, not involving any moral turpitude or any personal fault, or where the acts are not obviously unlawful, or the parties are not presumed to have known they were doing any wrong, or where their liability is by implication of law merely, then contribution or indemnity will be enforced. *Thorp* v. *Amos*, 1 Sandf. Ch. 26, 34; *Wooley* v. *Batte*, 2 Car. & P. 417; *Adamson* v. *Jarvis*, 4 Bing. 66; *Pearson* v. *Skelton*, 1 Mees. & W. 504; *Bett* v. *Gibbins*, 2 Adol. & E. 517; *Power*

v. *Hovey*, 19 W. Rep. 916. It is unnecessary to determine here to which of these classes of cases claims for contribution in a common law action, growing out of a collision, should be held to belong; or whether collision cases are materially distinguishable from both classes by reason of the fact that the acts of the two vessels for which they are held liable are not joint, but wholly separate and independent of each other; each vessel being held liable solely on account of its own act of negligence. But it may be remarked that, considering the fact that collisions are seldom the result of any willful wrong, the divergence between the admiralty and the common law is not essentially so great as is sometimes supposed.

It is urged that if the vessel sued alone has any right of contribution, she should be left to her own suit therefor against the other vessel or her owners, after payment of the libelant's damages. But the circumstances attending collision cases, the questions involved in them, and the matters affecting the remedies available upon them, are so peculiar that they constitute, as it seems to me, a class of cases *sui generis*, and require that, so far as possible, the determination of the question of the liability of the vessels concerned, and the relief to which either may be entitled, should be had in a single action, and not by several independent suits.

In the first place, these cases are wholly different from those in which the liability of principals or sureties is acknowledged, or based on express contract. The question of the liability of both, or either, or which one of them, is the principal question to be determined, and in most cases this can only be ascertained after a careful hearing at the trial of all the witnesses from both vessels, as well as such additional testimony as can be found. These trials, from their intricate and complex nature, the character of the witnesses, and the circumstances of doubt usually attending collisions, often in darkness, fog, or storm, are as a class among the most difficult to determine upon the facts. Though the witnesses from both are all heard, yet if but one vessel is a party, the determination reached after great labor would not be binding upon the other vessel in any subsequent suit against it. This would be the case whether such subsequent suit were brought by the libelant, who, if he fail of recovery, or of satisfaction in his suit against the first vessel, (*The Marshall*, 12 FED. REP. 921,) might afterwards sue the other, in which he is again liable to defeat, as in the case of *The Enterprise and the Napoleon*, 3 Wall. Jr. 58, though having a perfect right of recovery against the one or the other, or whether it were brought by the first vessel

sued, after being held in fault, to recover contribution from the other. If such separate suits are allowed, the court might have to decide the same question as to which vessel was in fault, in three independent actions, and each time try the whole case *de novo:* first, in the libelant's suit against the vessel sued; next, if defeated in that, in his suit against the other vessel; and if that were held liable, then, lastly, in a suit for contribution by the latter vessel against the first; and in the last suit the decision might be unavoidably the reverse of the first; for in none of these separate suits would the evidence taken in one be receivable in the other. *The Enterprise,* 3 Wall. Jr. 58, 64.

The court ought not to be liable, as a rule of practice, to be called on to try and determine actions of this character twice or thrice upon the facts, in as many independent suits. The testimony of the witnesses, moreover, whose lives are chiefly upon the sea, is often difficult to be procured. From their roving character, after a short time all trace of them is often lost, and a subsequent suit for contribution involving the trial of the whole question of liability *de novo* would have little chance of justice through the probable loss of material evidence on the one side or the other. A vessel, also, which is within the jurisdiction to-day and available to answer for her liability, may be gone to-morrow and never return; or, if she does return, may be so burdened by later maritime liens having priority, as to be no longer responsible; while, if the liability of her owners *in personam* should be looked to, the act of 1851, limiting liability to the value of the vessel itself, would often, after a short time, render this remedy wholly unavailing for purposes of contribution, through her loss, or the accumulation of liens upon her having priority through her subsequent navigation. And even if the remedy against the other vessel, or her owners, for contribution, were still available, and the same witnesses were still procurable, the liability to perversions of the truth in any subsequent suit after the decision of the court had once been made known upon the facts of the case, would be so great, considering the witnesses in such cases; the difficulties of the trial would be so greatly increased through the varying testimony; and contrary judgments as to the same collision would sometimes be so unavoidable, that the result of the practice of admitting successive independent suits concerning the same collision could hardly fail to discredit the administration of justice.

In these respects, collision cases in admiralty constitute, as it seems to me, a class of cases by themselves, and even if an independent suit for contribution after payment would lie, still the court ought

for the above reasons to encourage, if not absolutely require, any such relief to be sought so as to be heard and decided with the original cause.

In common-law actions, doubtless, a plaintiff cannot ordinarily be compelled to sue a person against his will; and as no relief is given by a common-law judgment between joint defendants, and as a plaintiff may collect his claim in full from either judgment debtor, such a judgment would be of no benefit to a co-defendant, and the introduction of co-defendants when the liability is several, has, therefore, never prevailed. *Sawyer* v. *Chambers*, 11 Abb. 110; *Webster* v. *Bond*, 9 Hun, 437.

But in equity the rule has been otherwise; and that court has always had and often exercised the right to cause all necessary parties to be brought into the cause, at the instance of either party, or of its own motion. In equity, a plaintiff is not allowed to enforce even legal rights to the prejudice, unnecessarily, of the defendant. Where the plaintiff has two funds legally applicable to his demand, the owner of one of them proceeded against may compel a resort first to the other fund for satisfaction, if, as between the two funds, the defendant has an equity to have the other first applied to the debt. *The Sailor Prince*, 1 Ben. 461, 465; 1 Story, Eq. §§ 633, 638; *Ingalls* v. *Morgan*, 10 N. Y. 178, 186, and cases cited.

The general rule as to parties in equity is that all persons interested in the subject-matter of the controversy, between whom there is any recognized right of contribution, are necessary parties. Judge Story, in his work on Equity Pleading, repeatedly states this general rule. In section 162 he says:

"The same principles apply to persons who are affected by a common charge or burden; for, ordinarily, they must all be made parties, not only for the purpose of ascertaining and contesting the right or title to it, but also for the purpose, if it should be established, of a contribution towards its discharge among themselves."

In section 138 he says:

"If the defendants actually before the court may be subjected to undue inconvenience, or to danger of loss or to future litigation, or to a liability under the decree more extensive and direct than if the absent parties were before the court, that of itself will, in many cases, furnish a sufficient ground to enforce the rule of making the absent persons parties."

The language of this section is peculiarly applicable to the class of cases under consideration. In the case of *Caldwell* v. *Taggart*, 4 Pet. 190, 202, the general rule is laid down thus:

"However numerous the persons interested in the subject of a suit, they must all be made parties plaintiffs or defendants, in order that a complete decree may be made, it being the constant aim of a court of equity to do complete justice by embracing the whole subject, deciding upon and settling the rights of all persons interested in the subject."

See, also, *Story* v. *Livingston*, 13 Pet. 359, 375.

And the same rule formerly applied in equity to joint and several contracts. The creditor was required to "bring all the debtors before the court, principals as well as sureties; for no account taken would be binding upon an absent party, and consequently no complete decree could be made. Besides, the debtors are entitled to the assistance of each other in taking the accounts, and when one has paid more than his share of the debt, he is entitled to a contribution from him who has paid nothing, or less than his share; and by making all the debtors parties, the circuity of another suit for contribution is thereby avoided." Pitman, Prin. & Sure. 125; Story, Eq. Pl. § 169; Willard, Eq. 108. This rule, declared by Lord HARDWICKE in *Madox* v. *Jackson*, 3 Atk. 406, and reaffirmed by Lord ELDON in *Cockburn* v. *Thompson*, 16 Ves. 326, remained the practice in chancery until modified by a rule adopted in 1841, (see 1 Craig & P. 377,) and by the supreme court in the same language in 1845, as rule 51 in equity, allowing in these cases a several action. *Angerstein* v. *Clarke*, 3 Swanst. 147; *Haywood* v. *Ovey*, 6 Madd. 78; *Bland* v. *Winter*, 1 Sim. & S. 246; Calvert, Parties, 235.

The general rule in equity, requiring the presence of all parties interested, was established for convenience in the administration of justice, (*Cockburn* v. *Thompson*, 16 Ves. 326; *Wiser* v. *Blackly*, 1 Johns. Ch. 437,) and the modification of it in cases of joint and several contracts was adopted, doubtless, because the reasons for it in these cases were not deemed urgent, and because in such cases the liability of the several obligors, principals or sureties, not being usually in dispute, a separate suit for contribution would not, ordinarily, be attended with any special difficulties. The exception, however, proves the general rule, and in all other cases in equity the rule is that where there is a common burden to which several ought in equity to contribute, all who are within the jurisdiction and solvent must be made parties, for the enforcement of contribution and to avoid circuity of action. Adams, Eq. 270, and cases cited.

The same considerations of convenience which led to the establishment of the general rule in equity, and to its modification in the case of express contracts of joint and several liability, would seem to me

to require this court in collision cases, for the several reasons above stated, to administer relief, so far as possible, in the same action, rather than to entertain separate suits.

In equity new defendants might be introduced by the complainant by an amended or supplemental bill, while the ordinary course of a defendant at law seeking relief as to the same subject-matter against other persons not defendants was by a cross-bill in equity, filed by himself against the plaintiff, with the additional defendants desired. *Mitchell* v. *Lenox*, 2 Paige, 280; *Livingston* v. *Gibbons*, 4 Johns. Ch. 94; *Ensworth* v. *Lambert*, Id. 605; *McGowan* v. *Yorks*, 6 Johns. Ch. 450; *Webster* v. *Bond*, 9 Hun, 437, 440.

A cross-libel, filed by the owners of the vessel sued against the original libelant *in personam*, and the other vessel *in rem*, would be analogous to such a cross-bill in equity. But this would involve an improper joinder of parties, under rule 15 of the supreme court; nor, if such a cross-libel were permissible, do I perceive in it any advantage over a direct introduction of the other vessel into the cause on the petition of the one sued, to which there is no rule opposed; and if there were two such suits by cross-libel they would be heard together and practically consolidated.

It is questionable whether this court could properly compel the libelant, through a stay of proceedings, to add another vessel as defendant, considering the decree in the case of *The Atlas;* since, in that case, the district court gave the libelant time to bring in the other vessel, and only after he had declined to do so gave judgment for half the damages, (4 Ben. 38;) yet, notwithstanding this fact, the supreme court held the libelant entitled to recover his whole damage as above stated. It is possible no ruling was intended in reference to the power to stay proceedings until the libelant should bring in the other vessel. Still there are objections to any such order against the libelant. He is required to verify his libel, and it would be improper to order him to amend it, at the instance of the defendant, by a statement of facts which he does not believe, and the truth of which, as in the present case, he denies. Moreover, as the introduction of the additional party is for the benefit of the defendant vessel, it should be at the trouble and expense of the latter for costs and damages, and upon her stipulations to the libelant and to the other vessel.

The proper remedy, which, as it seems to me, it is entirely competent to the court to afford, is to issue process in the original action for the arrest of the other vessel upon the petition of the owners of the vessel sued, setting forth, with the same particularity as would be required

in the original libel, the facts showing the negligence of the other vessel in causing the collision by which the libelant had sustained the damage claimed in the libel. Such a petition would be, in effect, a supplemental libel, though filed by the claimants; and the claimants of the other vessel arrested would be required to make answer thereto as respects the damages alleged in the libel, and the cause would then proceed to a hearing, and a proper decree be made as respects all parties. In such cases there would be no question of the jurisdiction of the court as respects the other vessel, since that would exist by reason of the maritime lien of the libelant upon her, as set forth in the petition, and of the pendency of the cause claiming the whole damages against the vessel sued alone. The legal interest of the latter, in having the libelant's lien upon the other vessel for the same damages enforced for her own protection and partial indemnity in the pending suit, is a sufficient reason why the court should issue its process to enforce that lien. The question is one of practice merely. In all substantial respects this would conform to the ordinary course of the admiralty, and would differ only in awarding further process upon the petition of a defendant instead of a libelant. There is no question that the court would grant further process for the purpose of bringing in the other vessel at the instance of the libelant, upon an amendment of his libel, showing the fault of the second vessel; and there is no reason, in the nature of things, why it is not equally competent to the court, upon the petition of the defendant, setting forth similar additional facts, to issue similar process, when the defendant has a recognized legal right and a legal interest to be protected. In a pending cause the parties stand equal before the court; each should have as much right as the other to invoke any additional process which may be requisite and expedient for the due administration of justice in the cause, or for the protection of the rights of either.

I find nothing in the opinion of the supreme court in the case of *The Atlas* unfavorable to this application. On the contrary, from one passage in the opinion it would seem that applications of this kind were anticipated as the logical result of that decision, and of the other adjudications of the supreme court there referred to. At page 317 (93 U. S.) CLIFFORD, J., says: "Nor is it a question in this case whether the party served may have process to compel the other wrong-doers to appear and respond to the alleged wrongful act;" from which it may be inferred that the introduction of the other vessel, on the petition of the one sued, was the course of procedure which naturally occurred to the mind of that able and experienced admiralty judge.

Modern practice in other courts furnishes instances of analogous procedure, in introducing new defendants at the instance of the defendant sued. All recent legislative reforms in the practice of the courts are towards simplicity and directness in the modes of relief; and this has always been the special aim of courts of admiralty.

Under the New York Code of Procedure, although a defendant cannot ordinarily bring in another defendant in order to obtain relief against him in a common-law cause, because a legal action cannot, for that purpose, be turned into an equitable one, (*Sawyer* v. *Chambers*, 11 Abb. 110; *Webster* v. *Bond*, 9 Hun, 437;) it is different in equitable actions; and even at law, when an interpleader is desired, and where a separate bill in chancery must formerly have been filed by the defendant for that purpose, the same relief is now obtained by order of the court upon the motion or petition of the defendant sued, and the further process of the court is issued at the defendant's instance, and the third party thereby brought in as a defendant. Code, § 820. That practice existed also under earlier English statutes; and now, under the English judicature act of 1873, it is provided generally (section 24, subd. 3) that her courts, "and every judge thereof, shall have power to grant to any defendant, in respect to any equitable estate or right, or other matter of equity, * * * all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or not, who shall have been duly served with notice in writing of such claim, pursuant to any rule of court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose, and every person served with any such notice shall thenceforth be deemed a party to such cause or matter," etc. 7 Jacob's Fisher's Dig. 10619.

Under this act orders and rules have been framed under which, though they are not as broad as the act authorizes, it is the constant practice to introduce third persons into a cause by notice and order, at the instance of the defendant sued; so that all persons liable for the same matter, in whole or in part, may be bound by the judgment in a single action, and that there may not be independent trials of the same matter and possibly conflicting judgments. "The intention," says BRETT, L. J., in *Turner* v. *Hednesford Gas Co.* L. R. 3 Exch. Div. 145, 151, is "to settle in one litigation all questions arising out of the subject-matter of the dispute." In *Benecke* v. *Frost*, L. R. 1 Q. B. Div. 419, 421, LUSH, J., says: "Undoubtedly one of

the questions is identical as between the plaintiff and defendants, and as between the defendants and Messrs. Thew; that is precisely the case in which third parties are to be cited so that they may be bound by the decision in the action;" and BLACKBURN, J., adds: "The object of the act was not only to prevent the same question being litigated twice, but to obviate the scandal which sometimes arose by the same question being differently decided by different juries." In *Ex parte Smith*, L. R. 2 Ch. Div. 51, 54, MELLISH, L. J., says: "There would be risk of the question being decided in different ways in the two proceedings (if the other party were not brought in) which would produce great injustice."

A case in the admiralty division is reported in 37 Law T. Rep. 505, in the case of *The Sarpendon*. See, also, Wilson's Judicat. Act, 234 to 251, Ord. 16, rule 13–22, Ord. 19; *Bowers* v. *Hartley*, 1 Q. B. Div. 652; *Dear* v. *Sworder*, 4 Ch. Div. 476; *Swansea* v. *Duncan*, 1 Q. B. Div. 644, 649; *Padwick* v. *Scott*, 2 Ch. Div. 736, 742; *Hornby* v. *Cardwell*, 8 Q. B. Div. 329; *Schneider* v. *Batt*, 8 Q. B. Div. 701; *Piller v. Roberts*, 21 Ch. Div. 198. In *Horwell* v. *London Omnibus Co.* 2 Exch. Div. 365, where the defendant was sued at common law for negligence in driving an omnibus, a third party alleged to be also liable was sought to be introduced as a defendant under this practice. A majority of the court on appeal disallowed it, but on the ground that if the third party were found liable along with the defendant, that "would do the defendant no good," because at common law there was no contribution between them. This, as we have seen, has no application in admiralty. In the case of *Hornby* v. *Cardwell*, *supra*, Lord Justice COTTON says, (p. 338:) "The combined effect of these rules and orders is that a third party, when joined as such, becomes a party to the cause, with all the liabilities of a party."

As I have said above, the form in which relief in these cases should be afforded is a question of practice merely. Powers as ample as legislation can give are conferred by law on the district court in cases of admiralty and maritime jurisdiction as to the "forms and modes of proceeding," and "such alterations or additions thereto as the said courts shall in their discretion deem expedient," and "to regulate the practice as shall be fit and necessary for the advancement of justice," subject only to any existing provisions of law or the rules established by the supreme court. Rev. St. §§ 913, 918; 1 St. at Large, 276; Act 1792, *c.* 36, § 2; Id. 335; Act 1793, *c.* 22, § 7; *Steam Stone Cutter* v. *Jones*, 13 FED. REP. 568, 577–581. The words

"modes of proceeding" in these acts, says MARSHALL, C. J., in *Wayman* v. *Southard*, 10 Wheat. 32, "embrace the whole progress of the suit, and every transaction in it." The admiralty rules adopted by the supreme court do not provide for the case here presented; and by rule 46 the pre-existing powers of the court in such cases are expressly recognized and affirmed to regulate its practice in admiralty "in such manner as it shall deem most expedient for the due administration of justice." *The Zenobia*, 1 Abb. Adm. 48, 52–55; *U. S.* v. *Stevenson*, 1 Abb. (U. S.) 495–501; *Louisiana* v. *Nickerson*, 2 Low. 310, 314. See, also, per BRADLEY, J., in *Reynolds* v. *Vanderbilt*, 5 Morr. Trans. 48, 59, 60; *The Monte A.* 12 FED. REP. 331, 336. See, also, *Stoomvart, etc.*, v. *Navigation Co.* L. R. 7 App. Cas. 795, 806, 820.

Holding, therefore, as I feel bound to do, under the decisions of the supreme court, that in this class of cases a vessel sued alone is entitled to contribution or an apportionment of damages as a substantial right as against another vessel equally liable, and to some mode of relief by which that right may be made available and effective, I think relief by further process against the other vessel upon the petition of the one sued, as above stated, is at once the most expedient, the most direct, and the most effectual, while it does not interfere with any substantial rights of the libelant, nor impose upon him any additional burdens, embarrassments, or obligations on the trial of the cause. If the libelant may be subjected to the additional liability of an appeal by two defendants instead of one, this consideration is, it seems to me, quite overborne by the far more urgent considerations which require the rights of the parties, in this class of cases, to be heard and adjudicated in the same cause in accordance with the general rule in equity and the practice approved by modern legislation. The libelant's right is not a right by any express contract, and it should be administered with due regard to the rights of others; and this requires, in the peculiar and exceptional class of cases under consideration, that any other vessel liable for the same damages should be brought into the cause, if application therefor be made. Such application, to avoid embarrassment to the libelant, should, ordinarily, be made before answering, unless the delay be excused.

In the present case, as the question is new, the application will not be denied on the ground of laches; but special terms will be imposed, which may be suggested by the libelant on the settlement, on notice, of an order in conformity with this decision.

BURNS v. MULTNOMAH R. CO.

(*Circuit Court, D. Oregon.* February 23, 1883.)

1. COUNTY ROAD—JURISDICTION TO ESTABLISH.
   The county court has no jurisdiction of an application to establish a county road, except upon the petition of 12 householders of the vicinage, and notice to the persons concerned, as prescribed in sections 2 and 3 of the road law. Oregon Laws, 721.
2. SAME—ORDER ESTABLISHING.
   An order establishing a county road must direct the survey thereof to be recorded; and where the order provided that the survey should be recorded when the petitioners gave a bond to open a portion of the proposed road, which was never done, and the record never made, the road was not established.
3. LEGISLATURE—POWER OF, TO LEGALIZE ACTS OF COUNTY COURT.
   The legislature may legalize the act of a county court in establishing a road without a legal petition, but not without notice to the persons concerned.
4. TAKING PRIVATE PROPERTY FOR PUBLIC USES.
   The legislature being prohibited (Or. Const. art. 1, § 18) from taking private property for public use without just compensation therefor, it is necessarily implied thereby that the owner of the property so taken shall have notice of the proceeding for appropriation, and an opportunity to be heard thereon.
5. FOURTEENTH AMENDMENT—DUE PROCESS OF LAW.
   Under the fourteenth amendment a state cannot appropriate private property for any purpose without due process of law, which includes notice of the proceeding and a prescribed opportunity to be heard upon the question involved.
6. GRANT OF THE USE OF A STREET TO A RAILWAY COMPANY.
   A grant by a county court, under section 26 of the corporation act, (Or. Laws, 530,) of the use of a street to a railway corporation for the purpose of constructing and operating a railway thereon, is a grant of a franchise, and the order or agreement making the same must be construed most strongly against the corporation and in favor of the public, so that nothing shall pass thereby but what clearly appears to have been intended.
7. SAME—CASE IN JUDGMENT.
   Where the agreement authorized a corporation proposing to construct a railway from Albina to Vancouver, to lay its track through the former place upon certain streets therein, "beginning at the ferry landing at the foot of Mitchel street," and it appearing that said ferry landing and Mitchel street were different and not contiguous places, *held*, that the ambiguity must be resolved against the corporation, and the agreement construed as if it read, simply, "at the foot of Mitchel street."
8. APPROPRIATION OF STREET OR HIGHWAY BY RAILWAY.
   A railway corporation cannot be authorized under section 26 of the corporation act aforesaid to appropriate a public street or road to its use, unless such road or street has been legally established according to some mode prescribed by statute.

Suit for an Injunction.

George H. Williams, H. Todd Bingham, and *E. W. Bingham,* for plaintiff.

C. B. Bellinger, for defendant generally; and *Joseph N. Dolph*, as to the right of the county court to appropriate a public road or street for the use of a railway without compensation to the owners of the adjacent property.

DEADY, J. The plaintiff brings this suit to restrain the defendant from obstructing the way to and from the east side of the Wallamet river, at the southern end of river block 19, in the town of Albina, and just north of East Portland. On filing the bill, on January 8, 1883, an order was made that the defendant show cause why a provisional injunction should not issue, and that the defendant be restrained in the mean time, as prayed in the bill. The application for a provisional injunction was heard on the bill and answer, and sundry affidavits and exhibits. From these it appears that the plaintiff is a British subject, and the defendant a corporation organized under the laws of Oregon since May 11, 1882, for the purpose, "in part," of constructing and operating a street railway from or near East Portland or Albina to the Columbia river, opposite the town of Vancouver, Washington territory.

On May 28, 1873, George H. Williams, W. W. Page, and Edwin Russell were the owners as tenants in common of the tract of land on the east side of the river, including the premises now claimed by the plaintiff, upon which they then laid out the town of Albina, and duly platted and recorded the same—the said Russell being then the owner of an undivided one-half of said land.

A street called River street, being 60 feet wide and running from the northern limit of East Portland, northerly, along and parallel with the river and about 180 feet distant therefrom, was duly designated on said plat; and the land between said street and the river, below the ferry landing, was divided thereon into blocks called "River Blocks"—the most southerly one being designated and numbered as "Block 19." But that portion of the tract lying to the southward of block 19, and to the westward of River street, containing about one and a half acres, was not laid off into lots or blocks.

A street called Mitchel street was also designated upon said plat as commencing at and running easterly from River street—its width being 60 feet, and the center line thereof about 80 feet distant to the northward from the southerly side of block 19.

On August 4, 1875, a strip of land about 60 feet in width and adjoining block 19 on the southward, and extending from the water line easterly to River street, was used by the public, with the consent of the proprietors, as a way to and from the ferry which plied between

Albina and North Portland; and on that day Edwin Russell and others, but who or how many others does not appear, petitioned the county court of Multnomah county "to open a county road leading from the ferry landing in the town-site of Albina" in a north-westerly direction along the line of the new graded road to the Vancouver road; thence northerly along the said Vancouver road to the north line of section 27, of township 1 N., of range 1 E.;" thence by course and distance along and through said section 27 and sections 23 and 24 of the same township; and "thence northerly and easterly, following, wherever practicable, what is known as the Payne road, to the Slough road;" whereupon the county court made an order appointing viewers and a surveyor "to view and survey said proposed road."

On September 4, 1875, said viewers filed their report, together with the notes of the survey, reciting therein that they had been appointed "to view and locate a proposed county road, beginning at the ferry landing in Albina and running northerly and easterly to the Slough road, near the residence of Benjamin Sunderland," and recommended "that the prayers of the petitioners be granted, on condition that they shall open that portion of the line between the middle of sections 23 and 24" aforesaid "at their own expense."

On September 13th the county court made an order adopting said report, and declaring "that the proposed road be and the same is hereby declared to be a county road, according to the survey notes thereof on file in this court, upon the condition that the petitioners for the same shall file in this court a bond, to be approved by the court, in the sum of $500; said bond conditioned that said petitioners will open that portion of said road lying between the middle of sections 23 and 24, township 1 N., range 1 E., at their own expense; and that, upon the petitioners complying with the foregoing condition said notes of survey be recorded at length in the record of road surveys, and that said road be declared to be a county road, and that the supervisor of the road district do open and work said road as other roads in his district."

These facts concerning the application for and the view and survey of this proposed road are shown by a certified copy of the entries in the records of the county court; but the petition itself is not found. A paper purporting to be a notice of the application, dated July 6, 1875, is found among the files of the court, with an affidavit of S. S. Douglas indorsed thereon, showing that it was duly posted; but it is not signed by any one, nor does it indicate in any way at whose instance it was posted. Nor does it appear that the petition-

ers ever gave the bond or opened the road, as required by the order of court, or that the said "notes of survey" were ever recorded in the "record of road surveys," as provided thereby.

In the year 1879, J. B. Montgomery became the owner of the undivided interests of George H. Williams and W. W. Page in said tract of land, and prior to January 5, 1883, he became the owner of the whole interest therein, at which date he sold and conveyed to the plaintiff, for the consideration of $16,000, a portion of the premises, about 80 feet wide, lying on the southerly side of block 19 and adjacent thereto, and extending from the water line to River street, together with the vendor's interest in the 80 feet of said street adjacent to the premises, and in the tide and overflowed lands in front thereof; reserving a ferry landing thereon for the ferry licensed by the county court to the vendor and Wilson on the ——— January, 1883, with "egress to and from said landing across the said premises."

On October 5 and December 6, 1882, the county court, upon the application of the defendant, ordered and agreed with it to the effect that it might construct and operate a railway, propelled by steam or horse power, for the transportation of passengers through the town of Albina—"beginning at the ferry landing at the foot of Mitchel street; thence along said street to Loring street;" and thence along sundry named streets and the county road leading to St. John to a "gulch" nearly east of the "coal bunkers," below Albina—upon the conditions following:

(1) The use of steam is confined to dummy engines, such as are commonly in use in eastern cities; (2) the cars are not to be run through Albina faster than six miles an hour; (3) the track is to conform to the grade of the streets of Albina as they are, or may be, provided such grades are practicable.

In the answer of the defendant it is alleged that it has already expended "about $40,000 in making preparations for the construction" of its road, but it does not appear that anything has been done on the ground, towards such construction, but the erection of a trestle-work upon the land conveyed to the plaintiff for the apparent purpose of laying a track thereon as a standing or starting place for the cars, in connection with a waiting-house or station to be constructed at the easterly end and southerly side of the same. This trestle-work is constructed three feet above the grade or ground at the upper or easterly end, and nine and a half feet at the lower or westerly end. It is 60 feet long and five feet in width across the stringers, and eight feet across the caps of the bents. The center of it is 40 feet

from and parallel with the southerly side of block 19, and the upper end is within 20 feet of the westerly side of River street, while the lower end is 100 feet from the water line; and it is understood that the upper end is to be extended to River street, and a waiting-house erected on the southerly side of this 20 feet, and a platform constructed at the lower end with a stairway leading therefrom to the ground, with a view of facilitating the egress of passengers to and from the present ferry landing.

The plaintiff rests his right to the relief sought upon the following grounds:

(1) There is no county road between the ferry landing and River street, because the county court did not acquire jurisdiction to establish one there, for the reasons: (*a*) The notice of the application was anonymous—not signed by any one; (*b*) the petition was not signed by 12 householders of the vicinage, as required by statute. (2) The order actually made by the court was a conditional one, to take effect when the petitioners gave a bond to open a portion of it, which was not done. (3) The notes of the survey were never recorded and therefore the road was not established, even if the court had jurisdiction. (4) Said notes were not recorded, because the court in effect directed that it should not be done until the petitioners filed the bond as required. (5) If there is a legal road between the ferry landing and River street, the defendant is not authorized to occupy or use either, because its license from the county to use the streets of Albina, in legal contemplation, begins at the foot or westerly end of Mitchel street, on the easterly side of River street, and not at the ferry landing. (6) And if the license to defendant authorized it to begin its track at the ferry landing, it is not thereby authorized to occupy or use the road or street with a trestle-work and waiting-house, which not only obstruct the use of them as public highways, but shut off any access to them from the plaintiff's adjoining property. And (7) the county court could not authorize the defendant to appropriate any portion of a public road or street to its use for the purpose of a railway track without first making compensation to the adjacent property holders, including the plaintiff, for the additional burden imposed on such road or street.

The defendant substantially admits that the proceedings had in the county court on the petitions of Edwin Russell, concerning this road, were void, for the want of a legal notice and petition, but maintains its right to the use of the same, notwithstanding, for the reasons following:

(1) There was a dedication of the way to the public use by the proprietors of the property before the application to the county court to establish a road there; (2) Edwin Russell, under whom the plaintiff claims, having instituted the proceeding in the county court for the establishment of this road, is estopped to deny its validity, and therefore the plaintiff is so estopped also; (3) that by the proviso to section 4 of the road law, (Or. Laws, 721,) as amended

by the act of October 24, 1882, (Sess. Laws, 60,) which reads, "that all roads viewed, surveyed, and recorded by order of any county court of this state subsequent to October 29, 1870, and the said road has not been defeated by remonstrance, as now provided by law, or has not been made or declared vacant by existing laws, shall be and the same are hereby" declared public highways,—said road is established as a public highway according to the survey thereof; (4) that by section 26 of the corporation act (Or. Laws, 530) the county court was authorized to agree with the defendant for the use of any public road or street in the county, and not within the limits of any municipal corporation, whereon to locate and construct its railway, and that in pursuance thereof it did authorize the defendant, by the order and agreement above mentioned, to use the road leading from the ferry landing to River street, and said street from there to the foot of Mitchel street, for said purpose; and (5) that the establishment or dedication of a road or street as a common highway, either by public authority or the act of the owner of the property, is, since the passage of the corporation act aforesaid, October 11, 1862, impliedly made subject to the power of the county court under section 26 thereof, aforesaid, to impose upon such road or street a further public use by authorizing the location and operation of a railway thereon, without any compensation therefor being made to the owners of the adjacent property.

The plaintiff, replying to the proposition of the defendant that by the healing operation of the proviso to section 4 of the road law, as above quoted, this way has become a valid county road, says:

(1) This proviso is void, because the subject of it is not expressed in the title of the act in which it is contained, as required by section 20 of article 4 of the constitution of the state; (2) it is not applicable on its face to roads which have been "declared vacated" or void "by existing laws," as this one had in effect then been by the decision of the supreme court of the state in *Minard* v. *Douglas Co.* 9 Or. 206; (3) the proviso as claimed by the defendant is an exercise of judicial power by the legislature contrary to section 1 of article 3 of the constitution of the state, and therefore void; and (4) it is also void because thereby the state undertakes to deprive persons of their property without due process of law, contrary to section 1 of article 14 of the national constitution, which, among other things, provides: "Nor shall any state deprive any person of life, liberty, or property without due process of law."

Having thus stated the case and the grounds of the contention between the parties at some length, as developed on the argument, I will briefly consider the same so far as may be necessary to dispose of the motion for a provisional injunction.

And, *first*, the proviso in the act of 1882 cannot have the effect to validate or legalize the road in question. A road "viewed, surveyed, and recorded" by the order of a county court, without the petition of 12 householders, and due notice of the application to persons interested therein and to be affected thereby,—in other words, upon its

own motion,—is void and illegal. This is plain upon both reason and authority. See *Minard* v. *Douglas Co.* 9 Or. 206.

Can the legislature make it legal by declaring it to be so, notwithstanding? Clearly not, unless it had the power to have established it in that manner in the first place. It may be admitted that the legislature can authorize or provide for the establishment of a highway without a petition from any one, and therefore it may legalize one which has been otherwise duly established by the county court.

But the legislature cannot take private property for public use without "just compensation." Article 1, § 18, Or. Const. And how can it ascertain or make such compensation unless the owner of the property has reasonable notice of the proceeding and an opportunity to be heard upon the question? It is true that when the property is taken by the state, as in this case, the constitution does not require the compensation to be "assessed and tendered" before the property is taken. But, even in that case, the law which provides for the taking must also provide for the assessment and payment of the compensation at some time in the proceeding, and unless this can be done *ex parte*, which I very much doubt, the legislature cannot authorize the appropriation of private property to public uses without notice to the owner, and therefore cannot legalize a proceeding for that purpose when it has been had without such notice. But under the fourteenth amendment it is too plain for argument that the state cannot, by the agency of either its legislative or judicial department, take the property of any person, for the establishment of a highway or other purpose, "without due process of law." And this, it is generally agreed, includes at least legal notice of the proceeding and a prescribed opportunity to be heard upon the question involved therein. *The Railway Tax Cases*, 13 FED. REP., FIELD, J., 748, SAWYER, J., 762; *Stuart* v. *Palmer*, 74 N. Y. 183; *Davidson* v. *New Orleans*, 96 U. S. 99.

This provision of the common constitution of the country was intended, as was said by this court, (*In re Ah Lee*, 6 Sawy. 414,*) as a "bulwark against local tyranny and oppression;" and under its protecting operation, this proviso, as to any road which has been "viewed, surveyed, and recorded" by the order of any county court, without notice to the owner of the property appropriated therefor, is simply void. But, even if this proviso were valid, this road is not within its purview. It was never recorded by order of the county court, or at

*S. C. 5 FED. REP. 899.

all. In fact, its record was postponed by order of the county court until the petitioners should give bond for the opening of a portion of the proposed road, which it seems they never did. And, further, by the very terms of section 5 of the road law, (Or. Laws, 723,) until the report of the viewers, the survey, and plat of the surveyor were recorded by the order of the county court, a proposed road is not considered established as a public highway. Neither was Edwin Russell estopped by his petition for the establishment of this road to deny its legality, or that it ever was established. It is not claimed that any one else was estopped by the proceeding. Certainly the public were not, including his co-tenants, George H. Williams and W. W. Page. Estoppels, to be effectual, must be mutual.

But, so far as appears, Russell declined to accept the road upon the terms proposed in the order of the court, and therefore, it may be, so the matter fell through. Nor is the plaintiff estopped for this reason if Russell is, for he does not appear to claim under Russell for more than an undivided one-half of his property, and he may assert any right pertaining to his ownership of the other half as if that was the whole of his interest. Neither does the evidence show a dedication of the road by the proprietors to the public as a highway. So far as appears, it is not shown or designated on the town plat as a way of any kind; and there is no other evidence of dedication worth mentioning or considering. It is admitted that there has been a user of the premises as a way for seven or eight years with the knowledge and consent of the proprietors. But that is not sufficient to establish an adverse right in the public as against the owner. To have this effect, the use must have the duration and character necessary to establish the bar of the statute of limitations against an action for the possession. It must have been adverse under a claim of right.

The agreement between the defendant and the county court for the use of certain streets in Albina is uncertain and ambiguous as to the point or place where the former is authorized to commence the laying of its track. So far as Albina is concerned, the petition is spoken of in the order as an application for the use of "streets," and the road or way between the ferry landing and River street is not mentioned directly or indirectly. The license is to lay a railway track and "to operate thereon a railway" "through the town of Albina," "beginning at the ferry landing at the foot of Mitchel street." But there is no "ferry landing" at the foot of Mitchel street. The "ferry landing" and "the foot of Mitchel street" are different

places. Neither are they contiguous; and there is no mention of or reference in the agreement to River street, which must be used for about 100 feet to connect the upper end of the ferry landing or road with the foot of Mitchel street. The first call may well include the land from low to high water mark, opposite the landing, and this it is understood will carry it up to River street and beyond. The second one is a more limited and definite point, though there is probably a well-grounded contention as to whether the "foot"—the end—of Mitchel street is at the easterly or westerly line of River street. This agreement is the grant of a franchise or special privilege by the public to the defendant, and must be construed most strongly against it. Any material doubt or ambiguity in it must be resolved in favor of the public.

In *Stourbridge Canal* v. *Wheeley*, 2 Barn. & Adol. 793, the court of king's bench say:

"The canal having been made under an act of parliament, the rights of the plaintiff are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases is now fully established to be this: That any ambiguity in the terms of the contract must operate against the adventurers and in favor of the public, and the plaintiffs can claim nothing that is not clearly given them by the act."

In the *Charles River Bridge Case*, 11 Pet. 544, this language was cited by Mr. Chief Justice TANEY with approbation, and the rule of construction contained therein applied by the court to the case under consideration.

As the agreement is so ambiguous if not contradictory as to the place of beginning, it must stand, if at all, as a license for the lesser privilege and more particular designation rather than the greater and more general one—as if it read, "Beginning at the ferry landing, to-wit, at the foot of Mitchel street." And this, I think, was what the court contemplated in making the grant; for it is not reasonable to suppose that in granting a request to lay a track through the "streets" of Albina in the construction of a railway from that place easterly to Vancouver, that the court ever thought of authorizing a track to be laid upon the "road" leading down from River street westerly to the river. Neither do I think that the license of the defendant authorizes it to construct such trestle-work as this, or platforms for the use of cars or waiting-houses for the convenience of passengers, on any road or street. If it wants property for any such exclusive use or purpose as that, it must obtain it elsewhere than on

a public road or street, and by purchase from those to whom it belongs. Its license is to lay a track on the grade of the streets as they are or may be, so that it will not materially interfere with their use for the purposes of ordinary travel. The erection of a warehouse or a roundhouse upon this ground would not more materially interfere with this use than the trestle-work and waiting-house which the defendant is engaged in constructing.

Upon this view of the matter a provisional injunction must issue. Therefore it is unnecessary to decide whether the defendant can be authorized by the county court to appropriate a public road or street for the construction and operation of a railway without compensation to the owners of the adjacent property for the new and additional burden thus imposed on the land.

The question has been thoroughly argued by counsel and I have a decided impression upon it. But it is one upon which I prefer not to anticipate the decision of the supreme court of the state if I can avoid it. However, there is one suggestion which may not be amiss here, and that is, that the provision of the corporation act, authorizing the county court to allow the use of a "public road or street" for "the location and construction" of a railway or other road, only applies to a road or street legally established according to some mode prescribed by statute, and not to one that exists merely as a matter of fact and by sufferance of the owner of the property, or by mere parol dedication or public use.

Let the provisional injunction issue, on the plaintiff's giving bond, to the approval of the master of this court, in the sum of $10,000, restraining the defendant as prayed for in the bill until the finding or further order of this court.

TRAVER and others *v.* BAKER.

(*Circuit Court, D. Oregon.* February 16, 1883.)

1. PARTITION OF LANDS.

A partition of a tract of land, by a judicial decree, between part owners of the whole tract, does not change the character or origin of the title of any of the parties, but the portion which each takes in severalty under the decree is, in contemplation of law, the very portion which belonged to him as tenant in common, and he holds it thereafter under the same title and subject to the same obligations, covenants, and contracts as before.

2. QUITCLAIM DEED—COVENANT THEREIN.
   A quitclaim deed to a "piece or parcel of land," describing it, only operates as a conveyance to pass the grantor's present interest therein: but if such deed also contain a covenant warranting the "possession" of said land against any claim "by" or "through" the grantor, it will estop him and his heirs and subsequent grantees from maintaining any suit to effect such possession.
3. UNRECORDED DEED—WHEN VOID.
   A conveyance made in 1861, and not recorded within 30 days from its execution, is void as against a subsequent conveyance, first recorded, to a purchaser in good faith and for a valuable consideration.

Suit for Partition.

George H. Williams and *George H. Durham*, for plaintiffs.

Benton Killin, for defendant.

DEADY, J. This suit is brought by the plaintiffs, George W. and Emma S. Traver, citizens of the state of California, and George A. and Ida M. Graham, citizens of the state of Ohio, for the partition of lots 1 and 2 of block 256, of the city of Portland. The suit was commenced on October 16, 1879, and the case heard on the amended bill, answer thereto, and replication, together with the exhibits and testimony. The principal questions in the case are questions of law, and the facts material to their determination are substantially admitted. On February 22, 1861, Daniel H. Lownsdale executed a deed to John R. Wilkinson for the three-fourths of block 256 of the city of Portland, the same being lots 1, 2, 3, 4, 5, and 6 of said block, describing the premises therein by metes and bounds coincident with the bordering lines of the adjacent streets, and the east and south lines of the north-west corner of the block, consisting of lots 7 and 8, then, as appears from the deed, in the possession of "Mrs. Adaline Wilkinson," which deed was acknowledged and filed for record on March 11, 1861. The operative words of this deed are contained in this clause: "The party of the first part, in and for the consideration of $600 to him in hand paid by the party of the second part, has bargained and sold, and by these presents does bargain, sell, release, convey, and quitclaim, unto the party of the second part all that piece or parcel of land situate within the corporate limits of the city of Portland," and described as above. After the *habendum*, "to the use and benefit of the party of the second part, his heirs and assigns, forever," the deed proceeds:

"The party of the first part covenants to and with the party of the second part that he will warrant and defend the party of the second part in the possession of the same, against all claims against the same, either through or by the party of the first part; and that said land is parcel of the claim of land awarded to the party of the first part, and as affirmed to him by the secretary

of the interior of the United States on the thirteenth of July, 1860, and ordered patent to issue to the party of the first part; and that if patent issue to the party of the first part, this shall be his deed to the party of the second part, in general warranty."

It is admitted that the defendant has succeeded, by a regular chain of conveyances, to the rights and interest of Wilkinson, under this deed, to lots 1 and 2 of block 256.

Prior to and at the passage of the donation act, on September 27, 1850, (9 St. 497,) the grantor in this deed was a married man, and an occupant of a portion of the public domain, under the laws of the provisional government of Oregon, regulating the possession thereof, including block 256, and thereafter became a settler thereon under section 4 thereof, and having complied with the requirements of the act and made proof thereof to the satisfaction of the surveyor general of Oregon, as provided in section 7 of the same, on October 17, 1860, he received a patent certificate for the donation, in and by which the east half thereof was set apart to himself, and the west half, including said block 256, to his wife, Nancy, who had died on April 15, 1854, leaving her husband and four children surviving her, who thereupon, under said section 4, took said west half of the donation in equal parts, as the donees of the United States.

On January 17, 1860, Lownsdale purchased the interest of Isabella E. Gillihan, a daughter of Nancy by a former husband, in the donation, and on February 14th of the same year conveyed an undivided two-fifths of said interest to Hannah M. Smith, but the deed to her was not recorded until February 12, 1862.

On May 4, 1862, Lownsdale died, leaving four children, and the plaintiffs Emma S. Traver and Ida M. Graham, the children of a deceased daughter; and on June 6, 1865, a patent to the donation was issued by the United States to the heirs of said Lownsdale and Nancy, dividing the same between them as provided in the certificate.

On April 28, 1864, William T. Gillihan, a son of Nancy by a former husband, brought a suit in the state circuit court for partition of the west half of the donation, in which the other children of Nancy and the heirs of Lownsdale, together with many other persons claiming divers blocks and lots therein as the vendees of Lownsdale, including Jacob Gozette, under whom the defendant claims, were made defendants, and on May 22 and August 12, 1865, said court determined that Lownsdale, as the survivor of Nancy and the grantee of Isabella E., was the owner in his life-time of an undivided two-fifths of the west half of the donation, and that said William T. Gil-

lihan and Millard O. and Ruth A. Lownsdale, her children by said Daniel H., were then each the owner of an undivided one-fifth of said half; and set apart and allotted to said three children, in severalty, certain portions thereof, and the remainder to the heirs, vendees, or claimants under Lownsdale according to their respective interests, without determining what they were; and because said partition was unequal, it was further provided that the children of Nancy should be paid the sum of $39,156.02, to be apportioned among the several parcels of land set apart to the heirs, vendees, or claimants aforesaid, and to be a lien thereon, of which sum $475.37 was assessed upon lots 1, 2, and 3 of said block 256, and thereafter duly paid by said Jacob Gozette.

On February 23, 1869, James P. O., a son of Lownsdale by a former wife, purchased from Hannah M. Smith the interest formerly conveyed to her by Lownsdale, and afterwards and before the commencement of this suit said James P. O. and all the heirs of Lownsdale, except the plaintiffs Emma S. and Ida M., conveyed their interests in the premises to the plaintiff George W. Traver.

The defendant claims that the covenant in the deed of Lownsdale to Wilkinson is a warranty of "all that piece or parcel of land" described in the deed, in effect, as three-fourths of block 256, against all persons claiming the same "through or by" the former, and therefore the plaintiffs, who claim through him as his heirs, are estopped to claim any interest in the premises, the same as Lownsdale would be if living.

The plaintiffs deny that the covenant in the deed relates to or affects any interest in the premises except what Lownsdale then had —the one-fifth he took as the survivor of his wife, Nancy, and the three-fifths of the fifth he purchased of Isabella E. and did not convey to Smith; and further, that the legal operation of the partition was to effect an exchange of distinct parcels of land between the heirs of Lownsdale and the children of Nancy, and that the former thereby took three-fifths of block 256, as purchased from said children, and not by descent from Lownsdale, and therefore they are not bound by his covenant or contract in relation thereto, and also that they have since become the owners by purchase from Smith of the two twenty-fifths sold to her by Lownsdale prior to his conveyance and covenant to Wilkinson, and therefore they are entitled to seventeen twenty-fifths of the premises and the defendants to the remaining eight twenty-fifths—the interest owned by Lownsdale at the date of his conveyance to Wilkinson.

In the case of *Fields* v. *Squires*, 1 Deady, 391, I held that by this partition the land was divided between the children of Nancy on the one hand and the heirs and vendees of Lownsdale on the other, according to the respective interests of the latter, without attempting to determine what they were, giving to the children in land and owelty what was deemed the equivalent of three-fifths of the premises, and to the heirs and vendees in land charged with the payment of this owelty what was deemed the equivalent to two-fifths of the same, and I am still satisfied with the ruling. And in *Davenport* v. *Lamb*, 13 Wall. 428, this view of the matter is taken and stated by Mr. Justice FIELD as a matter of course.

This partition was not an exchange of distinct parcels of land owned in entirety by either party, but a separation of undivided interests in a tract theretofore owned by the parties in common. The portions or parcels then ascertained and set apart in severalty to the children of Nancy, were, in contemplation of law, the very three-fifths which they took from the United States under the donation act, after the death of their mother, and in like contemplation the remaining two-fifths were the very portion of the premises which the heirs of Lownsdale inherited from him, subject, however, to the legal effect of the acts done and suffered by him concerning the same. Neither was the character or origin of the estate or title of the parties changed or affected by this decree and partition.

The heirs of Lownsdale took the two-fifth tract by descent from him, as his heirs, and as such were and are so far bound by his acts and conduct relating to the same as he would be himself, if living.

The rights of the parties in the premises must be determined, then, by the operation and effect of the deed to Wilkinson. The operative words in the premises of this instrument are "bargain, sell, release, convey, and quitclaim;" and, so far, it is only in legal effect a quitclaim deed,—one in which no covenant was implied,—and only served to pass the present interest of the maker. *Lamb* v. *Kamm*, 1 Sawy. 240; 2 Washb. Real Prop. 605–7. But it purports to be not only a quitclaim of all Lownsdale's right, title, and interest in the premises, whatever that might be, but of "all that piece or parcel of land" situated and bounded as therein stated.

The subsequent undertakings or agreements in the deed, while they cannot enlarge the effect of the granting clause, must be construed as referring to the subject-matter of the sale and quitclaim as therein stated; that is, a certain "piece or parcel of land." These undertakings, though in some respects awkwardly and obscurely

drawn, are easily divisible into three covenants, which may be substantially stated as follows: (1) That Lownsdale will warrant and defend "the possession" of that "piece or parcel of land" to Wilkinson, his heirs or assigns, against all claims made "through or by" himself; (2) that "said land" was a part of the claim that had been awarded to Lownsdale and "affirmed" by the secretary of the interior on July 13, 1860, and a patent therefor directed to be issued to him; and (3) that if such patent did issue to Lownsdale, the deed then made to Wilkinson should be considered as one with a general warranty of the premises to the grantee.

The contingency contemplated by the last covenant only arose as to the one-fifth interest which Lownsdale took in the west half of the donation as the survivor of his wife. For this a patent was issued to him after his death, which inured to his heirs, and it is admitted that the deed to Wilkinson had the effect to divest him of that interest, and that the same is now in the defendant. The second covenant was merely a personal one, having no prospective operation like a covenant of seizen, and did not run with the land. The first one, so far as it relates to a claim made by Lownsdale himself, is a mere personal covenant of non-claim, and would not estop any one but himself. But so far as it relates to a claim made "through" himself, it will estop any of his heirs or subsequent grantees from claiming the possession of any interest or estate in the premises which the deed purports to convey.

Whatever right or interest the plaintiffs claim in this suit—except the two twenty-fifths purchased by James P. O. from Smith—they must claim "through" Daniel H. Lownsdale or his heirs, and that brings them within the express words of the covenant, so far as the deed purports to affect the premises. And, as we have seen, it purports to sell and quitclaim the "land"—the whole estate or interest therein—without any qualification or reservation, and not of any partial, limited, or uncertain right or interest in the same.

The covenant of warranty is as broad as the subject-matter of the conveyance, and therefore estops the plaintiffs from maintaining any suit for the possession of any portion of or interest in the same, acquired through Lownsdale.

That it was the intention of Lownsdale to sell and convey to Wilkinson not only his then undivided interest in the "land," but also all that he might afterwards acquire therein, and particularly by partition with his co-tenants, is manifest from the fact that he warranted Wilkinson in the possession of the same, as against himself

and all persons claiming through him. For, if it was only intended to pass the interest which Lownsdale then had in the premises, be that much or little, the covenant of warranty was a useless and senseless act. 2 Washb. Real Prop. 665.

And I think that the price paid for the property—$600 for six lots 50x100 feet each, in the woods, in 1861—indicates that the sale was, as it purported to be, of the "land," and not an undivided two-fifths interest therein.

Three cases have been cited from the decisions of this court to show that the covenant of warranty in this deed does not affect any interest in the premises but that which Lownsdale then had. They are *Lamb* v. *Burbank*, 1 Sawy. 232; *Lamb* v. *Kamm*, Id. 238; and *Lamb* v. *Wakefield*, Id. 257.

In the first of these cases it may be said that the deed—a quit-claim, of March 8, 1850—purported to convey the land—"lot 4 in block 7." But the court held that this only passed the estate which Lownsdale than had in the premises—the bare possession under the laws of the provisional government. In coming to this conclusion, weight was probably given to the fact that all parties knew they were simply dealing with the possession, and to the further fact that the deed contained a covenant that if Lownsdale obtained title from the United States he would convey the same. The case was heard upon a demurrer to the bill alleging that the deed was fraudulent and void, and a cloud on the plaintiff's title, who claimed the property as heir of Lownsdale. What was said upon this point may be considered as *obiter*, as the defendant could protect himself under the covenant to convey, if the deed was valid. The other two cases are not in point. The deeds in both of them only purported to pass all "the right, title, and interest" of Lownsdale in the premises.

As to the two twenty-fifths interest purchased by James P. O. from Smith on February 23, 1869, for $1,050, the plaintiffs are not prevented by Lownsdale's covenants to Wilkinson from claiming the same. Lownsdale had conveyed this interest to Smith a year and eight days before he made the deed to Wilkinson, and neither she nor her grantee are in this respect affected by any subsequent sale or covenant of Lownsdale. But it is alleged in the answer that the deed to Smith is void as against Wilkinson, because it was not recorded until after March 11, 1861.

By section 27 of the act relating to conveyances, then in force in Oregon, (Code of 1854–5, p. 522,) it is provided that a deed not recorded within 30 days from its execution "shall be void against any

subsequent purchaser in good faith and for a valuable consideration" of the same property, whose conveyance shall be first recorded.

It does not appear from the answer but that Smith's deed was recorded within 30 days from its execution. It is only alleged that it was not recorded until after March 11th, which may be true, although it was recorded within 26 days from its execution. Nor is it alleged in the bill that it was ever recorded. But the plaintiffs have put the deed in evidence, and it appears therefrom that it was not recorded until February 12, 1862. No question is made but that Wilkinson was a purchaser in good faith and for a valuable consideration. Smith's deed was recorded after Wilkinson's and more than 30 days after its execution, and therefore the statute postpones it—declares it void as against Wilkinson's. The plaintiffs, as to this interest, now claim under this void deed against a grantee under Wilkinson, and their right is the same as if the suit was brought by Smith against Wilkinson.

The plaintiffs not having any interest in the premises which they can assert in this court against the covenant of their ancestor and grantor, the bill for partition is dismissed.

ROGERS *v.* MARSHALL.*

(*Circuit Court, D. Colorado.* January 20, 1883.)

1. PRACTICE—REHEARING, EFFECT OF.

When a rehearing is granted for the reason that the court, upon the pleadings and proofs as they stood at the hearing, is inclined to doubt the correctness of the decree, it is the proper practice to set aside such decree until the case is again heard. It would be otherwise if rehearing was granted in order to allow additional proof. In the latter case, the decree should stand, pending the rehearing.

On motion to vacate order setting aside interlocutory decree, and permitting defendants to file further answers.

MCCRARY, J. This case was heard at the October term, 1881,† upon final proofs, and, as the result of that hearing, an interlocutory decree was entered, setting aside a conveyance from complainant to respondent, James Y. Marshall, of certain mining property, and referring the case to a master to take proofs respecting profits

*From the Colorado Law Reporter. †See 13 FED. REP. 59.

received by said Marshall from the mine in controversy after said sale. Soon after the entering of this decree, and during the same term of court, a petition for a rehearing was presented on behalf of the respondents. The court granted this petition, and set the same down for rehearing at Keokuk in July last. The application was based—*First*, upon the record as it stood at the former hearing; and *second*, upon the ground of newly-discovered evidence. At the time and place above named the parties appeared, and the whole case was exhaustively reargued, both upon the original record and proofs, and upon the alleged newly-discovered evidence. The application for rehearing upon the ground of newly-discovered evidence was overruled. The application for rehearing upon the record as it stood at the former trial was sustained, and the case was reopened for further consideration upon certain questions stated in the opinion. The court being of the opinion, upon reconsideration of the whole case, that the interlocutory decree ought not to have been entered, made an order setting the same aside, which order was entered of record in term time.

It is now insisted, upon the part of the complainant, that the court had no power to set aside the interlocutory decree, but is bound to let the same stand until the final hearing upon further proof.

If the court had merely reopened the case for the purpose of letting in newly-discovered evidence, it would certainly have been very improper, and probably erroneous, to have set aside the interlocutory decree pending such further hearing; but where the court grants a rehearing upon the record as it stood at the first hearing, and, as a result of that rehearing, reaches the conclusion that an interlocutory decree previously entered was not justified by the proof as it stood, it is not only the right, but the duty, of the court to set it aside, although it may be that, upon further showing, the complainant may be able to make a case which would justify the granting of the same relief by another decree. The question in such a case is, was the interlocutory decree right upon the record as it stood when the same was entered, and at the time of the rehearing? This rule was distinctly laid down in the case of *Fourniquet* v. *Perkins*, 15 How. 82. In that case the court proceeded to a hearing upon the first proofs, and passed a decree in favor of the complainants, vesting in them certain real property, together with the gains thereof, and referring the case to a master in chancery to take and report an account. The account having been taken and stated by the master, certain exceptions were filed to his report. At the argument upon the ex-

ceptions, the court reconsidered its opinion, upon which the interlocutory decree was entered, and dismissed the bill. The case was taken by appeal to the supreme court, where objection was made to the decree of dismissal, because it was made at the argument upon the exceptions, and was contrary to the opinion upon the merits expressed by the court in its interlocutory order. Chief Justice TANEY delivered the opinion of the court, and said (page 85) on this point:

"But this objection cannot be maintained. The case was at final hearing at the argument upon the exceptions, and all of the previous interlocutory orders in relation to the merits were open for revision, and under the control of the court. This court so decided when the former appeal, hereinbefore mentioned, was dismissed for want of jurisdiction. And if the court below, upon further reflection or examination, changed its opinion after passing the order, or found that it was in conflict with the decision of this court, it was its duty to correct the error."

It follows, from this ruling, that if the present case had come before the court upon the report of the master, stating an account, and exceptions thereto, it would have been competent, at that stage of the proceeding, to reconsider the interlocutory decree upon the original proofs, and set the same aside. Of course, the power of the court was the same when the application for rehearing was made pending the accounting, and before the report of the master. By reference to the opinion filed upon the rehearing, it will be seen that I am not satisfied, from the proof as originally submitted, that the complainant had title to the mine in question, which she conveyed to Marshall. The interlocutory decree proceeds necessarily upon the assumption that complainant was the owner of the full undivided interest in fee, which she undertook to convey. With this point unsettled, and with a strong inclination, upon the proof as it stands, to hold adversely to the complainant, it was manifestly my duty to set aside the interlocutory decree, and leave the parties in the positions they severally occupied at the commencement of the suit; at least, until the complainant shall make a stronger case than that which now appears. The court cannot be expected to adhere to an interlocutory order setting aside the conveyance, and making other provisions equivalent to the appointment of a receiver, after its attention is called to facts appearing in the record, which, to say the least, render the right of complainant to such a decree extremely doubtful. It is said that the argument at Keokuk in July last was upon the question whether the respondents should be allowed a rehearing, and not upon a rehearing. I do not so understand it. The petition

for rehearing was granted almost as a matter of course, in so far as it was based upon the record as it originally stood, and the case was set down for reargument at Keokuk at the time named. At that hearing the whole case was elaborately reargued, and I certainly should not have given it the time and attention I did if I had understood that it was simply an application for leave to be reheard. Under the circumstances, if I were to take the view suggested by complainant's counsel, I should certainly not desire to hear the same argument over again, and therefore the rehearing would be a mere matter of form.

The motion to vacate the order setting aside the interlocutory decree, and allowing defendants to file further answers, must be overruled, and it is so ordered.

HECKLING, EX'X, *v.* ALLEN.*

(*Circuit Court, D. Colorado.* December Term, 1882.)

1. JUDGMENT—POWER OF COURT OVER, AFTER TERM.
   Suit was brought in Colorado on a judgment rendered by the superior court of Cook county, Illinois, and judgment was rendered here. Subsequently the Illinois judgment, the case being removed by writ of error to the appellate court of that state, was reversed. Defendant sets up these facts in a petition, and moves that the judgment be vacated. *Held*, that such proceeding is allowable.
2. SAME—CIRCUMSTANCES ARISING AFTER JUDGMENT.
   While it is the general rule that, as to all matters that were in issue, or which might have been contested at the time judgment was rendered, the court has no power to vacate judgment after the expiration of the term at which it was rendered, yet as to matters arising after the judgment, or before the judgment but too late to be presented as a defense, the rule is different. Relief in such case may be had by motion to vacate or otherwise, as the circumstances may require.
3. THE ISSUE GROWING OUT OF THE SUBSEQUENT FACTS MUST BE TRIED.
   In this case the judgment of the superior court having been reversed and the case remanded for retrial there, proceedings in this court will be stayed until final action by the courts of Illinois, when proper steps can be taken to afford relief, either by a renewal of this motion, or by proceeding in equity, or otherwise, as the circumstances may require.

Motion to Vacate Judgment after the Term.

M. B. Carpenter, for defendant.

S. P. Rose, for plaintiff.

*From the Colorado Law Reporter.

HALLETT, J. This suit was brought March 2, 1880, in the district court of Lake county, on a judgment recovered in the superior court of Cook county, Illinois, February 14, 1880, for the sum of $11,540. A writ of attachment was issued and levied on certain property which was claimed by third parties under a mortgage from Allen. No defense to the action was made except by demurrer to the complaint and motion to dissolve the attachment, and the cause having been removed into this court September 13, 1880, judgment was entered here October 30, 1880, in favor of plaintiff's testator and against defendant, Allen, for $12,059.30.

At this term defendant has filed a petition setting up the proceedings in this court, and alleging that in November, 1881, he caused the judgment of the said superior court of Cook county, Illinois, to be removed into the appellate court of the first district of Illinois by writ of error, and that such proceedings were had in the said appellate court; that on the twenty-sixth day of October last past the judgment of the said superior court was reversed, and the cause remanded for further proceedings; that on the thirtieth day of October, 1882, plaintiff moved the said appellate court to strike out the order remanding the said cause to the said superior court, and to allow an appeal from the judgment of the said appellate court to the supreme court of Illinois, which motion was denied. Wherefore defendant asks that the judgment of this court entered on the thirtieth day of October, 1880, and all proceeding thereunder in the sale of certain property, real and personal, be set aside and for naught held.

The substance of the matter is that, since the judgment of this court was entered, the judgment of the superior court of Cook county, Illinois, on which the same was based, has been reversed, and no authority remains in any tribunal to reinstate it; therefore the judgment of this court and all proceedings thereunder should be vacated and set aside. The facts set out in the petition are sufficiently established by a transcript of the proceedings in the appellate court of Illinois, and they are not controverted by plaintiff. But it is contended that after the term in which judgment was rendered the court has no jurisdiction of the case to vacate the judgment or make any order affecting it. Unquestionably the general rule as to all matters which were in issue, or which might have been contested in the cause at the time judgment was rendered, is as stated. *Bank of U. S.* v. *Moss*, 6 How. 31; *Cook* v. *Wood*, 24 Ill. 295; *Spafford* v. *Janesville*, 15 Wis. 526.

The rule was enforced in this court in a case in which, after the term in which judgment was entered, the parties agreed to vacate it, but failed to carry out the agreement within the time limited by them. *Newman* v. *Newton*, 3 Colo. Law Rep. 193; [S. C. 14 FED. REP. 634.]

But as to matters arising after judgment, or before judgment and too late to be presented as a defense in the action, the rule appears to be different; as, that the defendant was discharged under an insolvent act on the day judgment was entered, (*Baker* v. *Judges of Ulster*, 4 Johns. 191;) that the defendant became bankrupt after the cause of action accrued, and obtained a certificate after judgment, (*Lister* v. *Mundell*, 1 Bos. & P. 428;) that an agreement relating to the manner of paying the judgment has been made, (*Cooley* v. *Gregory*, 16 Wis. 322;) that an act forbidden by injunction has become lawful since the decree was entered, (*Pennsylvania* v. *Wheeling Bridge Co.* 18 How. 421; *Wetmore* v. *Law*, 34 Barb. 515.)

"When the case is such that the defendant ought to have relief, his remedy is a direct proceeding to get rid of the judgment, either by setting it aside or obtaining an order for a perpetual stay of proceedings. This relief is granted in a summary way, on motion, by the court in which the judgment was rendered, and upon such terms as the justice and equity of the case may require. If the judgment was irregularly entered, it will be set aside and the defendant allowed to plead his defense. In cases where he has had no opportunity to plead, as where the original debt or demand was satisfied, released, or discharged between the verdict and the judgment, the judgment will either be set aside or a perpetual stay of proceedings will be ordered, as the circumstances of the case may require; and where some matter arises after the judgment which should preclude the plaintiff from having execution, a perpetual stay of proceedings or an acknowledgment of satisfaction will be ordered. Formerly the remedy in such cases was by writ of *audita querela*, but the courts began about two centuries ago to give a more cheap, expeditious, and equally-efficient remedy by motion, and the writ of *audita querela* has everywhere fallen into disuse." BRONSON, C. J., in *Clark* v. *Rowling*, 3 N. Y. 226.

The case at bar appears to be within the exception thus stated to the general rule: that after the term in which a judgment may be entered, no order affecting it can be made in the same cause. At the time judgment was entered in this court the judgment of the superior court of Cook county, Illinois, was in full force, and defendant had no means of resisting it except by writ of error from the proper appellate court, and that course was pursued. It is a matter arising after judgment, which would have been an effectual bar to the action if it had occurred during the pendency of the suit. Obviously defendant is entitled to relief in some form of proceeding, and a motion will answer the purpose as well as any other.

It is conceded that the ultimate facts on which defendant's liability depends must be examined. It is not enough that the judgment of the superior court of Cook county, Illinois, has been reversed, but we must in some way ascertain whether defendant is liable to plaintiff in the sum for which judgment has been given against him. Cases have arisen in which it was thought necessary to require a defendant in a judgment at law to seek relief in equity from such judgment. Where the facts are numerous and complicated, the propriety of that course will be apparent.

In other cases it may be necessary to frame an issue for a jury in order to determine the liability of the defendant. *Cooley* v. *Gregory*, 16 Wis. 303.

Upon any information we now have in the case at bar it will not be necessary to resort to either of these proceedings. According to the opinion of the Illinois court the matter in issue between the parties is the effect of a discharge in bankruptcy on plaintiff's demand. That matter will be heard in the superior court of Cook county, Illinois, and we can await the decision of that court without putting the parties to the expense of another trial here. Meanwhile all proceedings on this judgment will be stayed, with leave to defendant to renew his motion to vacate our judgment if he shall be successful in the courts of Illinois. If this measure of relief shall not be adequate to the protection of defendant's rights, he may be compelled to go into equity; or, if he has anything further to suggest in this proceeding, he will be heard after notice to plaintiff.

PRESSLEY *v.* MOBILE & G. R. CO.

(*Circuit Court, M. D. Alabama.* May Term, 1882.)

1. PRINCIPAL AND AGENT—LIABILITY FOR MALICIOUS ACTS OF AGENT.
   An agent acting under an authority to control and supervise the lands of a corporation cannot institute against parties a criminal prosecution for larceny or other offense against the criminal laws, committed in reference to the property in his custody as agent, and so bind his principal in damages for a malicious prosecution, though it be shown that the prosecution was without probable cause and was malicious.
2. SAME—LIABILITY, WHERE ATTACHES.
   If an agent, while acting within the range of his employment, do an act injurious to another, either through negligence, wantonness, or intention, then for such abuse of the authority conferred upon him or implied in his appointment the master or employer is responsible in damages to the person thus injured;

but if the agent go beyond the range of his employment or duties, and of his own will do an unlawful act injurious to another, the agent is liable, but the master or employer is not.

3. Railroad Companies—Unlawful Acts of Land Agents—Liability.

An agent of a railroad company, having and exercising supervision over the lands of the company and in charge of such lands, making leases, collecting rents and stumpage, and negotiating sales of the lands for the company, who invokes the criminal law by bringing a charge of grand larceny against a party for spoliation of the timber lands of the company, is not in so doing acting within the scope of his agency or in the course of his employment, and the company is therefore not to be held responsible for such actions done maliciously by him.

Heard upon Motion for New Trial.

D. S. Troy and *H. C. Tompkins*, for plaintiff.

David Clopton and *J. T. Norman*, for defendant.

Bruce, J. This is an action for damages for a malicious prosecution, instituted by the plaintiff against the defendant, a corporation organized under the laws of Alabama and doing business in the state of Alabama. The declaration alleges that the defendant, on the twenty-fifth day of March, 1881, at Pollard, in the county of Escambia, in the state of Alabama, the circuit court for said county being then and there in session, * * * by its duly-authorized agent, W. J. Van Kirk, upon oath wrongfully, falsely, and maliciously, and without any reasonable or probable cause, * * * charged the plaintiff with having committed the crime of grand larceny; * * * that the defendant caused and induced the grand jury to find a bill of indictment against him; and that upon a writ issued he was arrested and held for trial upon the indictment, and afterwards, upon a plea of not guilty, he was tried in said court and acquitted, and the prosecution ended. To this declaration the defendant corporation plead not guilty.

The verdict of the jury was for plaintiff, and the main question made upon the motion for a new trial is, whether the defendant railroad company can be held responsible in damages for what Van Kirk did in the institution of the prosecution against the plaintiff, even if he was the agent of the defendant in the collection of rents, stumpages, and to sell and take charge of the lands of the company, and acted in the matter without probable cause.

It is not claimed that the agent, Van Kirk, had from the defendant railroad company any express authority to do what he did do in the matter of the institution of the prosecution of the plaintiff, nor is it claimed that there was on the part of the corporation, by any of its officers or agents, any subsequent ratification, approval, or sanction

of what Van Kirk had done in the matter of the prosecution; and the proposition of the defendant railroad company is that it cannot be held for the malicious acts of its agent, Van Kirk, upon any implied authority to do what he did in the matter of the prosecution of plaintiff, and that it can only be held responsible upon proof showing express authority or subsequent ratification of his (the agent's) acts.

Van Kirk's employment was that of a land agent for the company, and he had and exercised supervision over the lands of the railroad company in Escambia and other counties in Alabama. He was in charge of their lands; made leases, collected rents, stumpage, and even negotiated sales of lands for the railroad company.

The question then is, can an agent, acting under such an authority, institute against parties a criminal prosecution for larceny or other offense against the criminal laws, committed in reference to the property in his custody as agent, and so bind his principal in damages for a malicious prosecution, if it shall be shown that the prosecution was without probable cause and malicious?

It is settled law that corporations are liable for torts committed by their agents in the discharge of the business of their employment, and within the proper range of such employment. *Philadelphia, W. & B. R. Co.* v. *Quigley*, 21 How. 202; *Merchants' Bank* v. *State Bank*, 10 Wall. 645; Redf. Railw. § 130, and authorities there cited.

It was formerly held that a railroad company could not be held for the willful act of its employe, unless the act was previously ordered or subsequently ratified by the corporation. That rule has been modified, and in the recent case of *Gilliam* v. *S. & N. A. R. Co.*, in manuscript, the supreme court of Alabama, after saying that the rule has never been fully satisfactory, say:

"The precise modification is that if the agent, while acting within the range of his employment, do an act injurious to another, either through negligence wantonness, or intention, then for such abuse of the authority conferred upon him, or implied in his appointment, the master or employer is responsible in damages to the person thus injured; but if the agent go beyond the range of his employment or duties, and of his own will do an unlawful act injurious to another, the agent is liable, but the master or employer is not."

To this proposition many authorities are cited. The court proceeds:

"The older cases follow the doctrine declared in *McMannus* v. *Crocket*, 1 East, 106, and relieve the master or employer from liability for tortious acts of the agent if intentionally done, although within the range of his duties, unless the tortious act was commanded or adopted by the master. In *Railroad*

Co. v. *Webb*, 49 Ala. 240, this court held that a railroad company cannot be sued in trespass for the willful tort of its employe unless the act was previously ordered or subsequently ratified by the corporation. We think the principle there announced should be so far modified as to limit its application to tortious acts of the agent done outside of his employment; to this extent we adopt the modified rule as applicable to railroads and their employes."

The question, then, is, not whether the agent, Van Kirk, had been ordered by the railroad company to do the act complained of, or whether the act had been subsequently ratified by the corporation; nor is the question what was the agent's motive in what he did—whether to serve his principal or to carry out a purpose of his own; but the question is, and the test of the matter is, *was the act complained of done by agent Van Kirk in the course of his employment, and within the range of his duties* as agent of the defendant railroad company?

Tested, then, by this rule, can it be maintained that Van Kirk, in the institution of the prosecution complained of, was acting within the range of his duties as agent, and in the course of his employment as such agent? He was in charge of the lands of the company, and it may be said that in every agency there is incidental or implied power and authority to the agent from his principal to employ all the necessary and usual means to execute the principal authority with effect.

Authorities are cited to this general proposition, and they show that this rule is carried, not only to the extent that an agent is authorized to employ the usual means to effect the object of his employment, but it goes so far as to authorize an agent to employ extraordinary means and remedies provided by law; as, for instance, when an agent is authorized to collect a debt he may not only bring suit, but may resort to attachment process, or to a replevin or detinue suit, and has authority to bind his principal in a bond required by law in order to obtain such remedy.

Cases are also cited to the proposition that an agent authorized to collect a debt, may, when the law allows it, arrest and imprison the debtor, upon the principle that it is one of the means of the recovery of the debt.

Imprisonment for debt, however, is inhibited by article 1, § 22, of the state of Alabama; and conceding that Van Kirk, in order to carry out the objects and purposes of his appointment, might employ all the usual and even the extraordinary means and remedies provided by law, still the question remains, could he for such a purpose resort

to a criminal prosecution, and so bind his principal for damages, if the prosecution was malicious?

It is claimed that, by section 4362 of the Revised Code of Alabama, a criminal prosecution for larceny is a means for the recovery of a debt, because by its terms the owner of the property stolen may recover the value of his property. That section provides in cases of conviction for larceny, and when the property has not been returned, "* * * the assessed value shall be made an item in the costs of the case, and whenever the costs in such cases, including the value of the property stolen, are paid or worked out at hard labor, the court of county commissioners must, upon a proper showing, allow and draw a warrant on the county treasury in favor of the owner of such property, for the value thereof, to be paid out of the fund arising from the proceeds of such labor."

In view of the constitutional provision to which we have referred, it can hardly be maintained that it was the object of this statute to furnish a remedy to a party whose property had been stolen, and thus give sanction to the idea that a criminal prosecution may be resorted to as a means for the recovery of a debt. It is more consistent to say that this provision of the law was not intended for the benefit of the person whose property had been stolen, but that it was to lend additional sanction to the law, and thus more effectually deter persons from the commission of this class of crime.

When crime is committed against person or property, it is a menace to the public welfare, and the law is invoked to protect society and vindicate public justice. Grand juries are not organized to make inquest and indict persons in order that some one whose property has been wrongfully taken may have restitution, but courts and juries are charged with the administration of the law for the public good.

An argument is made that there is no more effectual way by which this property of the railroad company (its timber lands) could be protected than by invoking the criminal law against depredators upon it, and the prosecutions in the United States courts are referred to, showing the purpose and efficiency of this remedy in protecting the public lands from spoliation. Grant all that can be said upon that subject, and it does not show that an appeal to the criminal law of the land by the individual citizen is a proper means to obtain redress for a private wrong. When an offense is committed against the law, as to the person or property of the individual citizen, he properly makes complaint and institutes a prosecution against the

wrong-doer; but he does so in vindication of the law which has been violated on his person or property, and not to secure a remedy to himself for his private wrong.

In the case at bar, if the property of the corporation defendant in charge of agent Van Kirk was depredated upon, and the criminal law violated in regard to it, it might have been the agent's duty to complain to the officers of public justice, and even to take proper steps to have the matter presented to a grand jury; but in doing so could he act otherwise than as a citizen—that is, in the absence of express authority from his company so to do?

The question is, can such action on his part be held to be within the scope of his agency and in the course of his employment? There may be, and the books recognize some difficulty in determining what acts of an agent or employe are properly within the range and course of his employment; but to say that to put the criminal law in operation against a party on a charge of larceny of the property of the corporation is within the scope of his agency, and in the course of his employment, is a proposition which, in the light of the decided cases, cannot be maintained. There are cases to the contrary. *Carter* v. *Howe Sewing-machine Co.* 51 Md. 290, and authorities there cited.

This conclusion seems to be strengthened from another view of the subject. Corporations can only act by means of agents and employes, and the decided cases upon the question of the liability of corporations for the acts of their agents and employes are mainly cases in reference to railroad corporations where the employes were employed in the operation of rolling stock upon the road in the transportation of freight and passengers. In these cases, employes such as conductors, engineers, and others are put in their positions by the corporations, and are charged with the management and control of agencies and instruments put into their hands by, and to be used by them in behalf of, the corporation in its business, and while so employed the railroad company must be held to assent to their acts, for they are the *corporation* itself *in action*, and it is bound for their acts, whether done negligently, unskillfully, or willfully.

In the case at bar the employment of Van Kirk as agent was not an employment of this character; his agency was not connected with the operation of the railroad, and he was not charged with the property of the railroad company used in the operation of the railroad. His agency had reference to other property altogether, and his action in regard to it cannot be held to be the action of the corporation in the same sense and to the same extent as if he had been an engineer

or a conductor employed and charged with the management and control of the means and agencies by and with which the corporation carried on its business.

The conclusion is that when Van Kirk invoked the criminal law as he did he was not acting within the scope of his agency, or in the course of his employment, and the company cannot be held responsible for his action, and that, therefore, the motion for a new trial must prevail; and it is so ordered.

PARODY *v.* CHICAGO, M. & ST. P. RY. CO.

(*Circuit Court, D. Minnesota.* December Term, 1882.)

1. MASTER AND SERVANT—DEFECTIVE MACHINERY—LIABILITY OF MASTER FOR PERSONAL INJURY TO SERVANT.
   Where a master has expressly promised to repair a defect in the machinery used by the servants in his employment, the servant may recover for an injury caused thereby within such a period of time after the promise as would be reasonable to allow for its performance.
2. SAME—PROMISE BY AGENT OF MASTER.
   A promise to repair made by the agent of the master is binding on the master, but the burden of proof is on the plaintiff to establish such promise.
3. SAME—MEASURE OF DAMAGES.
   The award of damages in such cases must not be excessive. They are only to be remunerative,—compensatory,—a just and fair amount for the injury sustained.

Ueland & Shores, for plaintiff.

Bigelow, Flandrau & Squires, for defendant.

NELSON, J., (*charging jury.*) This suit is brought to recover damages for a personal injury. The plaintiff was in the defendant's employment as brakeman on a switch-engine in defendant's yard. His duty was to couple the engine to cars in making up and breaking trains. He alleges the injury complained of was the result of a defective and unsuitable draft-iron or draw-bar attached to the engine, and that he informed the yard-master of the danger attending its use, who promised to remove it, but failed to do so. The defendant takes issue upon the alleged defective construction of the draw-bar, and danger in its use, and it being conceded that the plaintiff remained in the service of the defendant, coupling with this draw-bar, after knowledge of its danger, alleges that it is not responsible for the injury. The issue is sharply defined, and presents, in connection with

the facts for your determination, a consideration of an exception to the rule exempting the common employer from liability to one employe for an injury caused by the negligence of a fellow-employe, and in some respects the duty and obligation of a railroad company to its employes. The burden of proof is on the plaintiff, and he must establish to your satisfaction that the injury occurred; that the draw-bar was dangerous to operate and defective in construction, and that he informed the yard-master of the fact, who promised to remedy the defect, but did not; and that the draw-bar was the approximate cause of the injury.

There is evidence tending to show that the draw-bar was an improper one, and not in ordinary use by the company in the yard; that the switch-engine upon which plaintiff worked when first employed did not have it attached; and that shortly after he worked upon this engine he complained to the yard-master, telling him that it was dangerous, who promised to remove it, but did not, and that he remained at work after complaint and unfulfilled promise until, on May —, 1882, he was injured.

The evidence on behalf of the defendant tends to show that due care had been exercised in selecting the draw-bar; that it was safe and not defective in construction, nor dangerous, but safer than ordinary draw-bars in use by the company; that it had no notice of any complaint from the persons using it, and never promised to remove it.

It was necessary for the defendant to use switch-engines in the yard with draft-irons or draw-bars at each end, in order to properly conduct its business; and in supplying such engines for this work it was the duty of the defendant to exercise reasonable care in the selection of suitable and safe appliances to be used. It owed this duty to the plaintiff. It was under no obligation to furnish the safest known draw-bar. If the company observed all the care which prudence suggested, and was required by the exigencies of the situation, in securing and furnishing a draw-bar adequately safe for the plaintiff to use, it fulfilled its duty and performed its part of the contract.

The work of coupling is an exceedingly hazardous one under the most favorable circumstances, and when the plaintiff entered such service it was implied in the contract between himself and the defendant that he assumed the dangers which ordinarily attend the performance of his work in which he voluntarily engaged, and that he risked these dangers for the compensation paid him. If he was not satisfied with the service he could withdraw. If it was too dan-

gerous, and attended with great risks which he did not care to take, the defendant could not compel him to remain, and if he did the company did not absolutely insure his safety.

The injury being conceded, the first question for you to decide is, was the draw-bar attached to the engine so defective in its construction and manner of use that it was dangerous? The affirmative of this issue is upon the plaintiff, and he must prove by the preponderance of evidence that this draw-bar was a dangerous appliance, and entirely insecure for coupling, and that the defendant, in the selection of it, was wanting in care. If he has not satisfied you, by the evidence, that the defendant failed to exercise reasonable care in purchasing and providing this draw-bar, and you believe it reasonably safe if proper care was exercised in its use, then the defendant is entitled to a verdict, for the reason that it has fulfilled its duty and obligation in respect to the appliance furnished. On the other hand, if you should arrive at the conclusion that the draw-bar was dangerous, and defective in its construction, and also that the company failed to exercise such caution as would ordinarily suggest itself to a prudent person, then you are to further consider whether the defendant was informed of its dangerous and defective character, and promised to remedy it and provide another.

In regard to the notice required to inform defendant of this, it is sufficient that notice was given to that agent or servant of the defendant, who made a requisition for the appliances necessary to be used in the yard of the defendant, and whose duty it is to guard against injurious consequences of defects in the particular appliances used therein. Such a person is the yard-master. He represents the company, and since it delegated to him the authority to make requisition for engines, etc., for the use of the yard, notice to him of dangerous draw-bars will be notice to the defendant. He is the proper person, and if after such notice he promised to remedy it, a failure to do so is the negligence of the defendant. The evidence of notice to the yard-master and a promise to remedy, is conflicting. The burden of proof is upon the plaintiff to show it. He must prove by a preponderance of evidence that he gave the notice and that the promise was made. The plaintiff and some of his witnesses testify to the fact, and the yard-master is equally positive that no complaint was made by the plaintiff, or by any one for him, or in his presence, and that he never promised to have the draw-bar removed.

The plaintiff must prove that the defendant had notice of the danger in using this draw-bar, and promised to remedy the defects; for

in no view of the case can he recover, although the draw-bar was dangerous, unless he can satisfy you of knowledge by the defendant, and a promise to furnish a safe and secure draw-bar. If he has not by the preponderance of evidence proved this, then he must fail in his action, and your verdict will be for the defendant.

If, however, you find that the yard-master was notified of the danger in using this draw-bar, and that he promised to remove it or remedy the defect, then, before the plaintiff can recover, you must consider further and determine whether the plaintiff, in remaining in defendant's employ, assumed all the risk and danger of working with this draw-bar under the circumstances.

The following rule is recognized by the supreme court, (see 100 U. S. 225:)

"There can be no doubt that where a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby within such a period of time after the promise as it would be reasonable to allow for its performance, and, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept."

If, in your opinion, the time that elapsed was unreasonable, and the plaintiff was not justified in relying upon the assurance of the defendant to remedy the defect, and that no prudent man would continue the employment when so long a time had elapsed after notice of the defect was given, and the promise to remedy it not fulfilled, the liability of the company ceases, and by remaining he was wanting in care and contributed to his injury, and the defendant is entitled to a verdict.

If, however, under all the circumstances, in view of the promise to remedy the defect, the plaintiff exercised due care in continuing to use this draw-bar, and was free from fault at the time of the injury, then he is entitled to a verdict.

Should you so find, the damages which you award must not be excessive. They can only be remunerative,—compensatory,—a just and fair amount for the injury sustained.

Verdict for plaintiff.

See *King* v. *Ohio, etc., R. Co.* 14 FED. REP. 277.

UNITED STATES *v.* BOSTON & A. R. CO.

SAME *v.* FITCHBURG R. CO.

(*District Court, D. Massachusetts.* February 16, 1883.)

1. CARRIERS OF LIVE-STOCK—CONSTRUCTION OF STATUTES.

By the provisions of the Revised Statutes of the United States, §§ 4386, 4390, no common carrier of cattle, sheep, swine, or other animals, conveying the same from one state to another, shall confine the same in cars, boats, or vessels for a longer time than 28 consecutive hours, without unloading the same for rest, water, and feeding for a period of at least five consecutive hours. Section 4387 gives to those who give such care a lien on the animals for the expenses incurred, and relieves them from liability for the detention. Section 4388 fixes the penalty for violating such statute at not less than $100 nor more than $500. Sections 4389 and 4390 provide that the penalty may be recovered by civil action in the name of the United States in the circuit and district courts, and that the lien given by section 4387 may be enforced by petition in the district court.

2. SAME—CONSTITUTIONALITY OF STATUTE.

Authority for this legislation is found in that clause of the constitution which confers upon congress the power to regulate commerce among the several states.

3. SAME—PENALTY FOR VIOLATION.

The penalty imposed by section 4388 is not less than $100 nor more than $500, where more than one animal is carried and confined in violation of the statute. The statute cannot be so construed as to make the unlawful confinement of each animal constitute a separate offense, and thus multiply the penalty by the whole number of animals.

On Demurrer.

A. E. Pillsbury, for plaintiff.

A. L. Soule, for Boston & A. R. Co.

W. S. Stearns, for Fitchburg R. Co.

NELSON, J. These two cases are actions against railroad companies to recover penalties incurred under Rev. St. §§ 4386–4390. The answer in each case contains a demurrer to the plaintiff's declaration. Section 4386 reads as follows:

"No railroad company within the United States, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one state to another, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one state to another, shall confine the same in cars, boats, or vessels of any description for a longer period than 28 consecutive hours, without unloading the same for rest, water, and feeding for a period of at least five consecutive hours, unless prevented from so unloading by storm or other accidental causes. In estimating such confinement the time during which the animals

have been confined without such rest on connecting roads from which they are received shall be included, it being the intent of this section to prohibit their continuous confinement beyond the period of 28 hours, except upon contingencies hereinbefore stated."

Section 4387 makes it the duty of the owner or custodian, or in case of their default of the railroad company, or owners or masters of boats and vessels, to properly feed and water the animals when unloaded; gives to the latter a lien on the animals for the expense so incurred; and relieves them from liability for the detention:

Section 4388. Any company, owner, or custodian of such animals, who knowingly and willingly fails to comply with the provisions of the two preceding sections, shall, for every such failure, be liable for and forfeit and pay a penalty of not less than $100 nor more than $500. But when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest, the provisions in regard to their being unloaded shall not apply.

Sections 4389 and 4390 provide that the penalty may be recovered by civil action, in the name of the United States, in the circuit and district courts, and that the lien given by section 4387 may be enforced by petition in the district court.

In the first case the declaration alleges that the—

"Defendant's road forms part of a line of road over which cattle, sheep, and swine are conveyed from one state to another, to-wit, from the state of New York to the state of Massachusetts;" that in July, 1882, the "defendant, being engaged in conveying 1,380 sheep over its said road from Albany, in the state of New York, to Boston, in the state of Massachusetts, did knowingly and willfully confine said sheep, and each and every one thereof, in cars upon its said road, without unloading the same for rest, water, and feeding for the period of five hours, in any period, for and during a longer period than 28 consecutive hours, to-wit, for 41 consecutive hours, inclusive of the time during which said animals had been so confined without such rest on a connecting road, to-wit, the New York Central & Hudson River Railroad, from which said defendant received the same; that said defendant or said connecting road was not prevented from so unloading said animals or any thereof by storm or other accidental cause, and that said animals were not then and there carried by the defendant, or by said connecting road, in cars or other conveyance in which they could and did have proper food, water, space, and opportunity to rest."

The penalty demanded is "$100 for each of said animals, to-wit, the sum of $10,000."

In the second case the declaration is similar in substance, and alleges that the—

"Defendant's road forms part of a line of road over which cattle, sheep, and swine are conveyed from one state to another, to-wit, from the state of Ver-

mont to the state of Massachusetts," and that in July, 1882, the defendant "being engaged in carrying 1,875 swine over its said road from Winchendon to Cambridge, in said state of Massachusetts, in the course and as a part of the transportation of said swine from points in the Dominion of Canada into and through said state of Vermont, and thence into and through said state of Massachusetts to said Cambridge, did knowingly and willfully," etc.

The penalty demanded is "$100 for each of said animals, to-wit, the sum of $10,000."

1. The first ground of demurrer stated is that the statute on which the declaration is based is unconstitutional and void. Authority for this legislation is found in that clause of the constitution which confers upon congress the power to regulate commerce among the several states. In congress alone, under the constitution, is this authority vested. No state is competent to make regulations of this character, and, until congress exercises its authority upon the subject, transportation of merchandise from one state to another is free. All this is settled beyond controversy by a long line of decisions of the supreme court. *Gibbons* v. *Ogden*, 9 Wheat. 1; *Welton* v. *Missouri*, 91 U. S. 275; *Sherlock* v. *Alling*, 93 U. S. 99; *Railroad Co.* v. *Husen*, 95 U. S. 465; *Pensacola Tel. Co.* v. *West. U. Tel. Co.* 96 U. S. 1; *Telegraph Co.* v. *Texas*, 105 U. S. 460; *Bridge Co.* v. *U. S.* 105 U. S. 470; *Sweatt* v. *Railroad Co.* 3 Cliff. 339. The statute in question is directly within the terms of this clause of the constitution. It imposes regulations upon a particular class of traffic between states, and declares in what manner and upon what conditions it shall be carried on. The statute cannot be any the less within the constitutional authority of congress, because its object is to require the humane treatment of live animals when in course of transportation as articles of commerce from one state to another. A railroad company in this state, whose road forms part of a line of road over which live animals are conveyed from another state to points in this state, and which receives from its connecting roads to be transported in this state animals which have been brought from another state, is engaged in interstate commerce, and as such is within the terms of the act of congress.

2. The second ground of demurrer is that the penalty sued for is not the penalty imposed by the statute. This must be sustained. The confinement of the entire number of animals for a longer period than 28 consecutive hours, without unloading for rest, water, and feeding, is a single offense, for which the defendants are made liable to the penalty. By no fair construction of the statute can the

unlawful confinement of each animal be held to constitute a separate offense, and thus the penalty be multiplied by the whole number of animals carried. The statute fixes the penalty at "not less than one hundred nor more than five hundred dollars." Within these limits the amount of the penalty is to be determined by the court, after verdict for the plaintiff. The plaintiff can only sue for the penalty prescribed by the statute.

The demurrers are overruled on the first ground and sustained on the second. The plaintiff is to have 10 days within which to amend its declaration in each case. Ordered accordingly.

BARTRAM and others *v.* ROBERTSON.

(Circuit Court, S. D. New York.)

TREATY—STIPULATIONS CONSTRUED.

The stipulation in a treaty with a foreign power, to the effect that no higher or other duties shall be imposed on the importation into the United States of any article, the produce or manufacture of the dominion of the treaty-making power, * * * than are or shall be payable on the like articles being the produce or manufacture of any other foreign country, *held*, not to prevent congress from passing an act exempting from duty like products and manufactures imported from any particular foreign dominion it may see fit.

Dunning, Edsall, Hart & Fowler, for plaintiffs. *Thos. H. Edsall*, of counsel.

Stewart L. Woodford, U. S. Atty., for defendant. *R. H. Worthington*, of counsel.

WALLACE, J. The demurrer to the complaint presents the question whether the plaintiffs are entitled to recover duties alleged to have been illegally exacted by the defendant, as collector of the port of New York, upon the following facts: The plaintiffs, in March and April, 1882, imported several invoices of sugars and molasses, which were the produce and manufacture of the island of St. Croix, a part of the dominions of the king of Denmark, upon which the defendant exacted and collected duties at the rates imposed on sugars and molasses by the act of congress of July 14, 1870, as amended by the acts of December 22, 1870, and March 3, 1875. These acts prescribe the duty to be collected upon all sugars and molasses of designated grades.

Since 1857 there has existed a treaty between the United States and Denmark, one stipulation of which is as follows: "No higher or other duties shall be imposed on the importation into the United States of any article, the produce or manufacture of the dominion of his majesty the king of Denmark, * * * than are or shall be payable on the like articles being the produce or manufacture of any other foreign country."

In 1875 a treaty was concluded between the United States and the Hawaiian islands whereby several specified articles, among them being sugars and molasses, but "being the growth, manufacture, or produce of the Hawaiian islands," were to be admitted to all the ports of the United States free of duty. This treaty was not to take effect until a law to carry it into operation should have been passed by congress. In 1876 the necessary legislation was passed, and, upon due proclamation by the president, the treaty became operative and has ever since remained in force.

The plaintiffs duly protested against the exaction of duties upon their importation, insisting that, by force of the treaties and legislation referred to, their importations, being the produce and manufacture of the dominions of Denmark, were exempt from duties, and no other or higher duties could lawfully be imposed upon them than were payable upon like articles when the growth, manufacture, or produce of the Hawaiian islands. Having taken all the requisite preliminary steps required by statute, plaintiffs brought this action to recover the duties exacted by the defendant. They now rely upon the position that the Danish treaties operates to limit the duties on Danish products to the amount collectible under the Hawaiian treaty upon Hawaiian sugar and molasses.

The consideration of the case will be simplified by assuming, without extended discussion, that the stipulation of the Danish treaty is operative and controlling, except so far as it has been annulled by the subsequent laws of congress. When the provisions of a treaty by their terms, or by reasonable implication from their subject-matter, require legislative action to carry them into effect, they do not operate of themselves. The Danish treaty contained two stipulations, in separate articles, that required the payment of money on the part of the United States. The other stipulations, including the one under consideration, could execute themselves. Congress made the necessary appropriation for the payment of the moneys promised. 11 St. at Large, 261. No further action on its part seemed necessary, and its silence when the subject was before it is significant as a leg-

islative construction that it was not required to speak. That congress had the power to annul this treaty, so far as it might have validity as a rule of municipal law, is not disputed. Both treaties and acts of congress are, under the constitution, the supreme law of the land, and each are of equal authority within the sphere of the constitutional power of the respective departments of the government by which they are adopted; therefore the treaty or the act of congress is paramount, according as it is the latest expression of the will of the law-making power. *Ropes* v. *Clinch*, 8 Blatchf. 304; *Taylor* v. *Morton*, 2 Curt. C. C. 454; *Gray* v. *Clinton Bridge*, Woolw. 150; *Cherokee Tobacco*, 11 Wall. 616.

Assuming the stipulation of the Danish treaty and that also of the Hawaiian treaty to be completely operative, the question in the case may, in one aspect, be considered as one of construction, to ascertain the meaning and result of several laws, adopted at different times, relating to the general subject of duties to be imposed on importations from foreign countries. By the earliest law, the Danish treaty, all importations, the product of the Danish dominions, are to be free from the payment of higher duties than may be imposed upon products when imported from any other foreign country. By a later law—the several acts of congress imposing duties—specific duties are laid upon enumerated articles, irrespective of the countries whence they are imported; and by the latest law—the Hawaiian treaty—importations, the products of the Hawaiian islands, are exempted from duty. This question would certainly be presented in a light the most favorable to the plaintiffs by viewing their case as though the Danish treaty being in force, congress had subjected all sugars and molasses to specified duties, excepting the sugars and molasses the product of the Hawaiian islands.

It cannot be fairly claimed that the Hawaiian treaty has more vigor than this would concede to it. Giving it this effect, an authority directly in point and adverse to the plaintiffs is found in *Taylor* v. *Morton*, *supra*. In that case a treaty between the United States and Russia contained a stipulation in the identical language of the Danish treaty, (8 St. at Large 446,) and by the tariff act of 1842 congress imposed a duty of $40 per ton on all hemps, "excepting Manilla, Suira, and other hemps of India," on which a duty of $25 only was laid. The collector of the port having exacted a duty of $40 per ton upon hemp imported from Russia, an action was brought to recover the difference between that duty and the duty collectible on the hemps of India, upon the ground that by force of the Russian

treaty no higher duty could be exacted than was leviable upon the hemps of India. It was urged that the tariff act should be read as though the Russian hemp were excepted as well as the Indian hemp. The court refused to sanction the suggestion, stating "that it would do violence to the language of the act, and would force into it an exception which it does not contain."

Irrespective of the authorities of *Taylor* v. *Morton*, and considered as an original proposition, there would seem to be no reasonable foundation for the plaintiff's contention. By the legislation of congress passed subsequent to the Danish treaty, the duties on importations from Denmark, as well as on all other importations, were imposed as congress had the right to prescribe them. It is not for the court to say that congress did not intend to prescribe the duties it laid, or incorporate an exception into the legislation which was not expressed. The court cannot assume that congress was ignorant of the stipulation in the Danish treaty, and cannot undertake to decide whether congress meant to ignore that stipulation or to recognize it. The judiciary must take the legislation as it finds it. It may interpret and construe, when the language of legislation permits, but here its powers and duty end. Grant that every intendment should be implied in favor of the observance of treaty obligations, here is an explicit enactment which leaves no room for implication. Certainly no greater efficacy can be imputed to the Hawaiian treaty than to an act of congress of the date when the treaty took effect. If congress, at the time that treaty became law, had passed an act exempting importations from the Hawaiian islands from duty, such an act would not manifest an intent to create a further exemption in favor of importation from Denmark, or to repeal existing duties on such importations.

Were it to be conceded that the stipulation of the Danish treaty should be deemed incorporated into the acts imposing duties as though congress had declared that the duties therein enumerated should not be collected, on importations the products of Denmark, at higher rates than might thereafter be imposed on importations being the products of any other foreign country, the plaintiffs would not be in any better plight. It would be necessary for them to maintain that their importations were subjected to higher duties than the products of other foreign countries. How is it to be determined what duties are imposed on importations of other foreign countries, except by reference to the general standard of duties? If the products of all countries, save one, are subjected to a uniform duty, how can it be

said the plaintiffs' products were subjected to a higher duty than those of any other country? The meaning of the stipulation is that there shall be no unfriendly discrimination in the imposition of duties between the duties of Denmark and those of other countries. The stipulation is satisfied when there is no discrimination, according to the rule and policy observed with foreign nations in general. The plaintiffs' argument involves the assumption that the exception is to be deemed the general rule.

There is a broader view of the controversy, however, which cannot be slighted. Stipulations like the one relied on are found in upwards of 40 treaties made between the United States and foreign powers since 1815. Without attempting an enumeration, it suffices to say there is a similar stipulation in the treaty with Prussia, with Sweden and Norway, with the two Sicilies, with Portugal, with Nicaragua, with Hayti, with Honduras, and with Italy, all of which were in force when congress enacted the present tariff act. If the argument for the plaintiffs is sound, all these treaty stipulations are to be deemed embodied in the tariff act so as practically to exempt from duty the importations of all these foreign countries whenever the products of a single country may be exempted from duty.

Can it be for a moment supposed that a stipulation in a treaty with a single power, exempting the products of that country from the payment of duty when imported here, made in the interest of our own commerce or manufactures, or designed upon special considerations of comity between the two nations, could be intended to affect such a far-reaching abrogation of our own revenue laws as would thus ensue? The proposition is too startling to be entertained.

Other considerations are suggested, opposed to the contention of the plaintiffs; but, without pursuing the subject further, it seems clear that their position is untenable.

Judgment ordered for defendant upon the demurrer.

WILDER *v.* KENT and others.

(*Circuit Court, W. D. Pennsylvania.* February 2, 1883.)

1. EXECUTION—LEVY—WHAT ARTICLES EMBRACED.
   A sheriff's levy described the premises as "having erected thereon a large two-story brick building, known as the Corry Wooden-ware Works, with machinery for manufacturing tubs, pails, etc., large boilers and engine, pulleys, shafting, belting," etc. *Held*, that the levy embraced two patented machines, although loose and portable, used in the works in the ordinary course of the manufacture of tubs and pails, to paint or grain designs thereon and thus finish them for the market.
2. SAME—WHAT PASSES WITH PATENTED MACHINE.
   Whatever right to use a patented machine the defendant in an execution may have, passes with the machine to the purchaser upon a sale thereof by the sheriff.

In Equity.

Bakewell & Kerr and *J. M. Stoner*, for complainant.

George H. Christy, for respondents.

Before McKENNAN and ACHESON, JJ.

ACHESON, J. In Pennsylvania, as between vendor and vendee, heir and executor, and debtor and execution creditor, machinery, whether fast or loose, of a manufactory, which is a constituent part thereof for the purposes of the business there conducted, and without which the establishment would not be fully equipped, is a fixture, and passes as a part of the freehold. *Voorhis* v. *Freeman*, 2 Watts & S. 116; *Ege* v. *Kille*, 84 Pa. St. 333; *Morris' Appeal*, 88 Pa. St. 368. That the two graining machines, the subject-matter of this suit, although loose and portable, were fixtures, within the above-stated principle, we incline to think. But, in our apprehension of the case, it is not necessary to pass definitely upon that question. The sheriff's levy upon the real estate, after describing the factory lot, proceeds thus: "And having erected thereon a large two-story brick building, known as the Corry Wooden-ware Works, *with machinery for manufacturing tubs, pails, etc.*, large boilers and engine, pulleys, shafting, belting," etc.

Now, the two graining machines were then used in said works in the ordinary course of the manufacture of tubs and pails, to paint or grain designs thereon, to finish the vessels, and make them marketable wares. Clearly they were within the scope of the levy. In *Voorhis* v. *Freeman*, *supra*, where the sheriff's vendee claimed duplicate detached rolls, the premises having been described as "a lot or

piece of ground, with one iron rolling-mill establishment situate thereon, with the buildings, *apparatus*, steam-engine, boilers, bellows, etc., attached to the said establishment," Chief Justice GIBSON said: "And, were it necessary, we would further hold that they might have passed, had they been chattels, by force of the word 'apparatus' in the description of the premises." So, in this instance, we decide without hesitation that, under the sheriff's levy, sale, and deed, the title to the two graining machines vested in his vendee as part of the designated machinery.

Each machine is a patented apparatus constructed under letters patent granted by the United States to John R. and Alfred J. Cross. The plaintiff, David H. Wilder, having acquired the exclusive territorial right to the patent for the counties of Erie and Warren, Pennsylvania, set up said two machines (one of which he bought from one of the patentees and the other of which he constructed himself) in the Corry Wooden-ware Works, in the said county of Erie. They were there operated under the patent for a number of years by Wilder & Howe and the Corry Manufacturing & Lumber Company, (of both which concerns the plaintiff was a member,) and by the plaintiff individually, he having eventually become the sole owner of the works and machinery, including the machines in question. Afterwards, upon an execution against Wilder, the sheriff levied upon the works and machinery, and sold the same to Adams Davis, one of the defendants. The sheriff's sale, as already shown, embraced the two graining machines, and under the title thereby acquired the defendants are operating them at said works. This is the alleged infringement of which Wilder complains.

We are therefore called upon to decide what rights a purchaser at sheriff's sale takes in a patented machine belonging to and sold as the property of the owner of the patent,—the defendant in the execution. The learned counsel agree that the question has never been judicially determined; and upon diligent search no case has been found involving the precise point now presented for decision. In *Sawin* v. *Guild*, 1 Gall. 485; 1 Robb, 47, the sheriff, upon an execution against the patentee, levied on and sold the "*materials*" of several of the completed patented machines, and such sale was held to be no infringement of the patent-right.

"He sold," said Mr. Justice STORY, "the *materials* as such, to be applied by the purchaser as he should by law have a right to apply them. The purchaser must therefore act at his own peril, but in no respect can the officer be responsible for his conduct."

The specific ruling in *Chambers* v. *Smith*, 5 Fisher, 12, was that a purchaser at a marshal's sale of a patented machine was an infringer in operating it outside of the district to which its use was limited by the license granted to the defendant in the execution.

The position taken by the plaintiff's counsel is that when the owner of a patent, who does not manufacture for sale, makes a machine for his own use only, and such patented machine is sold at a forced sale by the sheriff, the right to use it does not pass with it, but only the ownership of the materials of which the machine is constructed. To sustain this proposition reliance is placed upon the cases of *Stephens* v. *Cady*, 14 How. 528; and *Stevens* v. *Gladding*, 17 How. 477, in which it was held that the seizure and sale of the copperplate of a copyrighted map, under an execution against the owner of the copyright and plate, did not carry with it the right to print and publish the map. But the reason assigned for this is that the copyright—the exclusive and intangible right to multiply copies of the original work—does not inhere in and has no necessary connection with the plate, which is the mere instrument for producing the copies. The copyright and the plate are wholly distinct and disconnected subjects of property, each capable of being owned and transferred independent of the other, (Id.,) and therefore a judicial sale of the one does not carry any title to the other.

But the lawful sale of a patented machine takes it out of the monopoly, either altogether or *pro tanto*, according to the nature of the contract. The purchaser of a machine from the patentee acquires no right in the patent itself, and needs none to enable him to enjoy his acquisition. By implication he is invested with a license to use that particular machine, and, in the absence of express stipulation to the contrary, such license passes with the machine to successive owners as an incident of proprietorship. That such is the law in case of a voluntary sale of a patented machine by the patentee is incontrovertible. But wherefore should the rights of the sheriff's vendee, under an execution against the patentee, be less than those of a purchaser directly from the patentee? The rule is that the purchaser at a sheriff's sale succeeds to the beneficial rights of the defendant in the execution to the property sold. *Chambers* v. *Smith*, *supra*. But why should an exception be made where the subject-matter of sale is a patented machine? To deny to the sheriff's vendee the right to use such machine would in effect prevent its sale upon an execution at law, as an operative apparatus, and practically withdraw it from the reach of the owner's execution creditors. The

mischievous consequences to such creditors to which the doctrine contended for would lead (now that patented machinery has come into almost universal use) can hardly be estimated. The plaintiff's position is untenable. It is very true that the patent-right itself, being incorporeal and resting exclusively upon statutory grant, cannot be levied on at law, and is available to creditors only by proceedings in a court of equity. *Ager* v. *Murray*, 105 U. S. 126. But a patented machine is susceptible of manual seizure, and the unrestricted sale thereof does not involve the transfer of any interest in the patent. The conclusion, therefore, is that whatever right to use the patented machine a defendant in an execution may have, passes with the machine when sold by the sheriff to his vendee; hence it follows that the plaintiff has no just cause of complaint against these defendants.

The foregoing views being decisive of the case, it is unnecessary to consider the other questions which the counsel have so ably discussed.

McKennan, J. I concur fully in the foregoing opinion.

Per Curiam. Let a decree be drawn dismissing the plaintiff's bill, with costs.

Baum and others *v.* Gosline.*

(*Circuit Court, D. Colorado.* January, 1883.)

1. Attaching and Judgment Creditors—The Latter cannot Prorate with Former.

   In this state attachment writs are not made returnable to terms of court. There is no such class of actions as mentioned in section 116 of the Code of Civil Procedure, and that section is inapplicable. The proceeds of attached property cannot be distributed as provided in that section.

Motion to Prorate Judgment with Attaching Creditors.

Decker & Yonley, for plaintiff.

No counsel appeared for the other parties in interest.

Hallett, J., (*orally.*) September 30, 1882, Abraham Kuh and others brought suit in this court against H. S. Gosline to recover $1,491, alleged to be due to them from the said Gosline for goods sold and delivered. On the same day they took out an attachment, which was levied on certain goods of the defendant. October 17,

*From the Colorado Law Reporter.

1882, judgment was rendered in this court in that action against the defendant for the said sum of $1,491. In like manner and with the same proceedings, Leopold Simons and others obtained judgment against Gosline for the sum of $1,224. Executions were issued on those judgments, under which the property attached was sold, and the proceeds, after paying expenses, amounting to $2,719, are now in the hands of the marshal.

This term of court was opened on the third day of October, 1882, and it will be observed that the suits above mentioned, in which writs of attachment were issued, were begun before the term. The present case, in which Julius Baum and others are plaintiffs, was begun October 14, 1882, and judgment rendered therein against the defendant October 18, 1882, for the sum of $1,378.50.

No writ of attachment was issued in this suit, but plaintiffs claim that they are entitled to share in the proceeds of the property attached in the other suits above mentioned, under section 116 of the Code, which reads as follows:

"In all cases where more than one attachment shall be issued against the same person or persons and returned to the same term of court to which they are returnable, or when a judgment in a civil action shall also be rendered at the same term against the defendant, who is the same person and defendant in the attachment or attachments, the court shall direct the clerk to make an estimate of the several amounts each attaching or judgment creditor will be entitled to out of the property of the defendant attached, either in the hands of the garnishee or otherwise, after the sale and receipt of the proceeds thereof by the sheriff, calculating such amount in proportion to the amount of their several judgments, with costs, as the same will respectively bear to the amount of the sum received, so that each attaching and judgment creditor will receive his just part thereof in proportion to his demand," followed by directions for distributing the fund.

That section was in the first attachment act of the territory of Colorado, approved October 29, 1861, (First Session Territorial Assembly, 210,) and it was obtained from the statutes of Illinois. Before it was enacted by the territory of Colorado, it had received a construction in Illinois to the effect that only those creditors who should obtain judgment at the term of court to which writs of attachment were returned and returnable, could share in the proceeds of property attached. *Rucker* v. *Fuller*, 11 Ill. 223.

In the territory of Colorado this section survived the changes made from time to time in the attachment act, until the admission of the state, (Rev. St. 1868, p. 6,) when it was incorporated into the Code as section 116.

In the practice of the state of Illinois and in the territory of Colorado, writs of attachment and other process for commencing suits were made returnable to terms of court. Under that system of procedure the meaning of the section was well understood. It defined a class of creditors who were entitled to participate in the proceeds of property which should be seized by attachment. They were creditors who had writs of attachment returned and returnable to the same term of court, and other creditors proceeding by ordinary summons, who might be able to obtain judgment in the same term with the attaching creditor. This is shown by the case from 11 Ill. before referred to. In the Code of Colorado there is no such class of creditors. Writs of attachment are not made returnable on any day or at any term of court, and process of summons requires the defendant to answer within a certain number of days after service, so that there are no such creditors known to the courts of Colorado or defined in the laws of the state as are mentioned in section 116 of the Code. By their motion, plaintiffs allege in substance that they are of a class of the creditors of H. S. Gosline who are entitled to share in the proceeds of this property. But it seems that there is no such class under the law, and therefore the motion must be denied. In No. 1043, the Exchange Bank against the same defendant, and No. 1066, C. E. Mantz *et al.* against the same defendant, judgments were also entered at this term, and the plaintiffs would be entitled to participate in the distribution if any order of that kind could be made; but the rule must be the same as to all these parties. Section 116 is entirely inoperative in connection with the other provisions of the Code, and no order of distribution can be made.

UNITED STATES *v.* CENTRAL NAT. BANK.

(*District Court, S. D. New York.* February 1, 1883.)

1. INTERNAL REVENUE—TAXATION OF NATIONAL BANKS.

   Under section 120 of the revenue act of June 30, 1864, (13 St. at Large, 283,) the plaintiff, in order to recover a duty upon certain sums alleged not to have been returned, must prove that these sums were either declared as dividends, or added to the surplus or contingent funds of the bank.

2. SAME—SURPLUS FUNDS.

   Construing together sections 120 and 121, their import should be held to be to tax only the actual profits made—*i. e.*, under section 120 for profits declared or added to their surplus funds, and under section 121 for such profits earned as were *not* so declared or added to the surplus or contingent fund; and where

a dividend was declared by a bank, besides paying under the state law the state tax imposed upon the par value of its shares as against the stockholders, and the bank made return of and paid to the United States officers the tax on the dividend declared, but not on the state tax paid on account of its stockholders, and it afterwards appeared that embezzlements concealed during this period exceeded the amount of the state tax not returned: *held*, on demurrer, that if the bank would have been liable to pay the duty upon the sum paid for state tax, it was entitled to show the embezzlements as a correction of the returns, and that no further tax under section 120 was due to the government.

S. L. Woodford, U. S. Atty., and *E. B. Hill*, Asst., for the United States.

Martin & Smith, for defendant.

BROWN, J. By the amended complaint in this action the plaintiff seeks to recover under section 120 of the revenue act, passed June 30, 1864, (13 St. at Large, 283,) a duty of 5 per centum upon certain sums of money alleged to be dividends declared by the defendant due to stockholders, of which the defendant made no return, and upon which it is alleged it paid no duty. See same case, 10 FED. REP. 612. The answer, by its first defense, denies that it made any such dividends as alleged. For a second defense it avers that the sums claimed as dividends were paid to the state of New York as taxes levied upon the par value of the shares of its capital stock, pursuant to law. By the third defense, it avers that its returns were in excess of the requirements of the law by reason of large embezzlements, through which it had lost large sums in excess of the amounts alleged not to have been returned, and which losses were not discovered until long afterwards. The plaintiff demurs to the second and third defenses.

I am of the opinion that to entitle the plaintff to recover it must show that the sum paid as taxes, on which it claims duty under section 120, was a dividend or a part of a dividend declared by the defendant due to stockholders.

The second defense asserts that it is advised and believes that these moneys so paid for taxes were a legitimate expense of its business, and in no sense a part of its dividends. I do not find any averment or admission in the second defense that such moneys so paid were a part of any dividends declared, and, under the state law as pleaded, it does not appear that they would be necessarily such. For this reason the demurrer to the second defense, and to the other analogous defenses, must be overruled.

In regard to the third defense, the demurrer admits that the loss from embezzlements, which were concealed and unknown to the de-

fendant at the time it made its returns, exceeded the amount claimed to be deficient in its returns, being the amount paid by the defendant for state taxes; that its return was made in good faith, and with the belief that it was a correct statement of the profits realized; that in consequence thereof it was led and induced to pay and distribute among its stockholders a much larger sum than it really earned, and to pay a much larger tax thereon to the plaintiff than it was in fact liable to pay; and that in making such payment it in fact did pay and distribute among its stockholders from its capital, and from its surplus and contingent fund earned in former years, not only the amounts now claimed, but a much larger sum, and did erroneously pay for the year mentioned an excessive tax. This defense, if true, it seems to me ought to be upheld. It leaves no equity in the claim for duty under section 120.

Sections 120 and 121 seem to me clearly to indicate the real intention of the law, namely, that the banks should pay a tax upon all their profits and earnings for the year; if declared as dividends, or added to their surplus or contingent funds then payable under section 120; but if no dividends or additions to the surplus or contingent funds were made, then upon the amount of profits "accrued or earned and received" under section 121, of which the president or cashier was required to make return under oath. The question is not presented here as to the obligation of a bank where it intentionally declares a fictitious dividend, for the answer states that the dividends were declared in good faith, and in ignorance of the large losses by concealed embezzlements, whereby the dividends actually returned, and on which duty was paid, were in excess of its "earnings, income, or gains." That a dividend is declared is undoubtedly *prima facie* evidence of such "earnings, income, and gains," under section 120; and the burden of proof to show the contrary is upon the defendant. But if the defendant, after having declared such dividends in ignorance of large losses, had discovered these losses before the time for making its return, it would clearly have the right to have the error corrected. I think the court ought to allow the same correction now, by way of defense, as the government officers must have allowed, if opportunity had occurred for correction before them. No injury is thereby done to the government, and no injury ought to be done to the defendant by refusing such a correction.

The demurrer, therefore, to the third defense and the others similar to it, should also be overruled.

DAVENPORT NAT. BANK *v.* MITTELBUSCHER, Collector, etc., and another.

(*Circuit Court, S. D. Iowa.* January, 1883.)

1. TAXATION—STOCK OF SAVINGS BANKS.
   Whether the law of Iowa exempts from taxation the shares of the capital stock of savings banks, not decided.
2. STATE STATUTES—CONSTRUCTION OF—PROVINCE OF STATE SUPREME COURT.
   It is the peculiar province of the supreme court of the state to determine the meaning of the statutes of such state, and with such determination courts of the United States will hesitate to place upon a state statute any construction which will bring such statute in conflict with a statute of the United States, and therefore render it void.
3. SAME—REVENUE LAWS—CONSTRUCTION—RULE OF.
   In the construction of revenue laws, if property, which by a previous general statute is declared liable to taxation, is to be exempted under a later act from bearing its proportion of the public burden, the exemption must rest upon some clear and unequivocal provision of the statute.

In Equity. On final hearing.

A. J. Hirschl, for complainant.

Nath. French, for defendants.

MCCRARY, J. The complainant is a national bank located in the city of Davenport, Iowa. The defendant Mittelbuscher, as tax-collector for said city, has demanded of complainant $1,631 as tax levied by said city upon the shares of the capital stock of the bank. The complainant alleges that said tax is an illegal charge against it, and that the same is null and void, because the statutes under which the same was levied are contrary to section 5219 of the Revised Statutes of the United States, which provides that shares of national banking associations shall "not be taxed at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens."

It is alleged that under the statutes of Iowa the shares of stock in savings banks are exempt from taxation, while those in national banks are subject thereto, whereby the latter class of property is taxed at a greater rate than the former. Complainant alleges a willingness to be taxed the same as savings banks, and as a reason for not tendering any sum as the tax legally due, it says that if assessed or taxed under the statute of Iowa, under which savings banks are taxed, it would have nothing at all to pay as city tax for 1882, because all its capital stock and all its surplus are now and were during the whole of the years 1881 and 1882, and long prior

thereto, invested in non-taxable bonds of the United States government, and because, furthermore, its other personal property, to-wit, moneys and credits, are not, and were not during said period, equal to the average amount of debts by it owing.

Counsel have argued very fully the following questions:

(1) Does the law of Iowa exempt from taxation the stock of savings banks? (2) If so, is such law void as being in conflict with section 5219, Revised Statutes of the United States? (3) Does it appear from the pleadings and proof that complainant is not liable to pay any tax whatever to the city of Davenport for the year 1882?

1. Are the shares of the capital stock of savings banks exempt from taxation?

The general provision of the statute of Iowa is very broad and sweeping. It is found in section 813 of the Code of 1873, and declares that "depreciated bank notes and the stock of corporations and companies shall be assessed at their cash value."

In *Cook* v. *Burlington*, 13 N. W. Rep. 113, it was held by the supreme court of Iowa that the legislature has the power to impose a tax on the shares of stock of a corporation, in addition to a tax on the property of the corporation.

That the general provision would, if it stood alone, apply to and dispose of this case is very clear; but the question of difficulty arises upon the construction of section 28 of the act to authorize the organization of savings banks in the state, which is as follows:

"The paid-up capital of all savings banks, organized and doing business under this act, shall be subject to the same rates of taxation and rules of valuation as other taxable property, by the revenue laws of the state, which taxes shall be levied on and paid by the banks, and not the individual stockholders, and the general assembly shall never impose any greater tax upon property employed in banking under this act than is or may be imposed upon the property of individuals. The franchise of all such banks, the savings and funds deposited therein, and the mortgages and other securities, wherever the same are invested, are not to be taxed, but are expressly exempted therefrom, and may be omitted from assessments of the banks, required by the revenue laws of this state." See McClain's Code, 319.

Does this section, construed in connection with the previous law, exempt the shares in saving banks from taxation? It provides in the first clause that the paid-up capital of savings banks shall be subject to taxation as other taxable property, and that the tax shall be levied upon the banks, and not upon the individual stockholders. Under this provision we suppose the bank is to be taxed upon the capital actually paid in by the stockholders; that is to say, upon the

money which, as a corporation, it actually receives from its stockholders and employs in its business. This is a very reasonable provision, since, to all intents and purposes, the money so paid in is the money of the corporation. Does it necessarily follow that the stockholders are not liable for any taxation upon their stock? Suppose the stock is not full paid, as, for example, that only 50 per cent. is paid in, and that the stock is worth par, would it be contended in such a case that the stockholder would be liable for no tax? If so, one-half of the actual value of the property would escape taxation altogether. Or suppose it is full-paid stock, and worth in the hands of the stockholders 50 per cent. above its par value, would not the stockholders be liable to be taxed upon the excess of the value over and above the par value? It seems probable that this statute and the general provision above quoted, being construed together, ought to be held to require the stockholder to pay taxes upon his shares of stock, at least to the extent that there is no taxation upon the same against the bank. The section in the second clause provides that the property employed in savings banks shall not be taxed to any greater extent than is or may be imposed upon the property of individuals. The third clause exempts from taxation "the franchise of all such banks, the savings and funds deposited therein, and the mortgages and other securities, wherever the same are invested." This clause evidently does not refer to shares of the capital stock, but (1) to the franchise; (2) the deposits; and (3) to the securities in which the capital is invested. A tax upon the capital paid in is substituted for a tax upon these.

The supreme court of Iowa has never placed a construction upon this section. It is the peculiar province of that court to determine the meaning of the statutes of the state. Until it shall construe the statute as exempting the shares of stock in savings banks altogether from taxation, we are disposed to hold that it does not do so, especially since to give it the construction contended for would, to say the least, raise a serious question as to its validity. The courts of the United States are very reluctant to place upon a state statute any construction which will bring it into conflict with a statute of the United States, and therefore render it void.

We understand that this question is now before the courts of the state, and we are therefore content to await the authoritative decision of the supreme court of the state. When that tribunal has construed the statute we will abide by its construction, and if it be such as to bring the law of the state into irreconcilable conflict with section

5219 of the Revised Statutes of the United States, it will be our duty to declare it void. But if it be held that savings banks are subject to taxation the same as other corporations organized under the laws of Iowa, except to the extent that the property of such banks is expressly exempted, and that therefore the stock is not exempt, but may be taxed in the hands of the stockholders according to its cash value, then, of course, the statute will stand as in substantial harmony with the national bank act.

It is now well settled that the shares of stock of corporations generally, in Iowa, are subject to taxation. *Cook* v. *Burlington, supra.* If the stock of savings banks is exempted at all, it must be by the provisions of the section above quoted. As we have seen, it is not clear that such is the effect of that section. It is a sound and well-settled rule for the construction of revenue laws that "if property, which by a previous general statute is declared liable to taxation, is to be exempted under a later act from bearing its proportion of the public burden, the exemption must rest upon some clear and unequivocal provision of the statute.

2. The construction reached upon the first question renders it unnecessary for the present, at least, for this court to consider the second.

3. Nor is it necessary to determine the third question discussed by counsel. It may, however, be observed that, in our opinion, the proof fails to show that all the capital stock, and all the surplus assets of complainant, is and has been invested as alleged in non-taxable bonds of the United States. If the case of the complainant were otherwise made out, it would be necessary to refer the question here suggested to a master for proof. The order is that there be a decree for respondents for costs, and dismissing the bill.

A former Iowa statute, of which the present is almost a literal copy, was construed to exempt state bank shares from taxation. See *Hubbard* v. *Sup'rs*, 23 Iowa, 130. The saving banks capital invested in government bonds is not taxable. *G. A. S. B.* v. *Burlington*, 54 Iowa, 609; [S. C. 7 N. W. Rep. 105.] These banks have power to "discount, purchase, sell, and make loans upon commercial paper, notes, bills of exchange, drafts, or any other personal or public security." Fifteenth General Assembly of Iowa, *c.* 60, § 9, (5.) Section 5219, Rev. St., dates from 1868, and upon the point as to whether it differs from the act of 1864, and whether it prevents discrimination in taxation between national and state banks, there has been but one direct decision, and that holds that such discrimination is prevented. See *City N. B.* v. *Paducah*, U. S. C. C. Kentucky, 5 C. L. J. 347, and in Thompson, N. B. Cases, 300. To same effect is *Pollard* v. *Zuber*, 65 Ala. 635. Other

cases cited were *People* v. *Weaver*, 100 U. S. 545; *Adams* v. *Mayor*, 95 U. S. 22; *Pelton* v. *Com. N. B.* 101 U. S. 539; *First Nat. Bank* v. *Waters*, 7 FED. REP. 156; *Evansville Nat. Bank* v. *Britton*, 8 FED. REP. 870; *Sup'rs* v. *Stanley*, and other cases, U. S. S. C. 1882, 25 Alb. Law J. 443.

Defendants relied upon several of the above-named cases, and upon *Lionberger* v. *Rouse*, 9 Wall. 473; *McLaughlin* v. *Chadwell*, 7 Heisk. (Tenn.) 397; *City of Richmond* v. *Scott*, 48 Ind. 571; *Stratton* v. *Collins*, N. J. 1882, Reporter of May 3d; *People* v. *Com'rs*, 4 Wall. 256; *Hepburn* v. *School Directors*, 23 Wall. 480; *Adams* v. *Mayor*, 95 U. S. 19.

See *Frazer* v. *Siebern*, 16 Ohio St. 625.

The point was also made, though not mentioned in the opinion, that a discrimination in taxation between the national and the savings banks shares was repugnant to the fourteenth amendment of the United States constitution, according to *Railroad Tax Cases*, (California,) 13 FED. REP. 722.

A. J. H.

BALFOUR *v.* WHEELER.

(*District Court, S. D. New York.* February 19, 1883.)

1. BANKRUPTCY—PREFERENCE.

An assignee in bankruptcy, though representing only creditors at large, can maintain an action to set aside as fraudulent and void a sale upon execution issued on a judgment on a *cognovit* note of the bankrupt given with the intent to secure a preference.

2. SAME—COGNOVIT NOTE—REV. ST. § 5128.

Where such *cognovit* note was taken 10 months before proceedings in bankruptcy, but at a time when the debtor was insolvent and known to be so by the creditor, and the *cognovit* note was given pending an extension to the debtor by his creditors, and for the purpose of securing a preference to the defendants in any contingency, and thereafter within two months of filing a petition in bankruptcy judgment was entered on the *cognovit* note, and a levy made upon the debtor's stock of goods, and the debtor thereupon gave consent in writing to a private sale thereof by the sheriff on execution pursuant to the law of Ohio, under which the property was sold to the defendants at such private sale, and the bankrupt remained in charge as before, *held*, that the seizure and sale on execution were "procured or suffered by the bankrupt" within two months of the bankruptcy proceedings, with the intent to give a preference, and that the sale was void under section 5128 as against the assignee in bankruptcy, both as a seizure procured by the bankrupt as well as an "indirect transfer or conveyance." The cases of *Clarke* v. *Iselin* and *Watson* v. *Taylor*, 21 Wall. 360, 368, distinguished. *Held*, also, that the defendants should account to the assignee for the price of the property, on the sale to them.

In Bankruptcy.

C. Steward Davison, for complainant.

J. F. Crombie, for defendants.

BROWN, J. This is an action in equity brought by the complainant, as assignee in bankruptcy of Lucius A. Benton, to set aside as fraudulent and void a sale under execution to the defendants of the stock of goods of the bankrupt at Cleveland, Ohio, on the twenty-fifth of June, 1878.

On July 19, 1878, a petition against Benton was filed in the district court of the United States for the northern district of Ohio, by certain of his creditors, in involuntary proceedings in bankruptcy upon which he was adjudicated a bankrupt on August 5th following. On September 18th the complainant was appointed assignee in bankruptcy, and an assignment duly executed to him of the bankrupt's property. The defendants were engaged in business in the city of New York, under the firm name of Wheeler, Parsons & Hays.

For some years previous Benton had been engaged in the business of jeweler and silversmith at Cleveland, Ohio. On the twenty-fourth of January, 1877, not being able to meet his engagements, a meeting of creditors was called in New York, at which an oral agreement was arrived at for an extension, and the payment in installments of 5 per cent. a month after July, 1877, provided 90 per cent. of the creditors agreed to it. The defendants at that time held a *cognovit* note of the bankrupt for the sum of $7,231.58, which, under the laws of Ohio, authorized the defendants to enter up judgment against the bankrupt and issue execution thereon at any time without further notice.

A paper was drawn up embodying the agreement, which was afterwards left in charge of the defendants. They did not themselves sign it, but by their subsequent letters ratified it and agreed to its terms. In the list of debts presented at the meeting of creditors the defendants' claim of $7,231.58 was mentioned, as well as a further indebtedness of about $500 for goods of the defendants sold by the bankrupt on commission account.

In the month of July following, Benton paid the first installment of 5 per cent. to various creditors, and the sum of $361.59 to the defendants, being 5 per cent. on their *cognovit* note. During all this period Benton was in active and frequent correspondence with the defendants, and from various letters passing between them it is evident that the defendants regarded him as insolvent, and unable to carry out even the lenient terms of the extension. On January 13, 1877, they say to him, "You are a fit subject of compromise," and, in reply to his offers to do whatever they might desire, say: "We wrote Ingersoll [their attorney in Cleveland] to see you, and be

prepared, in case somebody got ugly, to protect us anyhow;" and in several subsequent letters Benton offered, in substance, to do for their security whatever they desired.

In the latter part of July, 1877, after the first installment of 5 per cent. had been paid, one of the defendants went to Cleveland, and, after an interview with Benton in which it was proposed that, if necessary in order to continue payment to the other creditors, the installments payable to the defendants might be omitted, obtained from him, on the first of August, 1877, a new *cognovit* note for the sum of $9,566.77, which embraced the amount due upon the former *cognovit* note, and about $1,800 in addition. This last *cognovit* note was not made known to any of the other creditors. The defendant continued to pay the other creditors in part, and for some months thereafter obtained goods from them on credit.

On June 7, 1878, judgment was entered upon the *cognovit* note, and execution to the sheriff issued upon the same date, under which a levy was made upon Benton's stock of goods. On June 11, 1878, Benton signed a written consent to a private sale of the goods on execution, under which an order therefor was entered in accordance with the law of Ohio, and a private sale thereunder was made for the sum of $7,144.30, of all Benton's stock of goods, to the defendants on the twenty-fifth of June, without advertisement or notice to the other creditors. The proceedings in bankruptcy having been commenced against Benton in July following, as above stated, the assignee, on the twenty-eighth of December, 1878, filed his bill of complaint in this suit against the defendants to have the sale declared fraudulent and void as against the complainant, and to procure an account and payment for the goods or their value from the defendants.

Upon the facts above stated, and the testimony, and numerous letters between the bankrupt and the defendants, which have been put in evidence, the following conclusions seem to me to be unavoidable:

1. That Benton, at the time of the meeting of his creditors in January, 1877, and thenceforward until the adjudication in bankruptcy, was at all times insolvent, and was known to be so, to himself and to the defendants.

2. That when the *cognovit* note was given on August 1, 1877, both Benton and the defendants knew that he was unable to fulfill the terms of the agreement for an extension, and that this *cognovit* note was given for the purpose of securing a preference to the defendants, and of enabling them at a moment's notice, whenever trouble should

be threatened, to appropriate to themselves the whole stock of goods to the exclusion of other creditors.

3. That Benton and the defendants were previously in confidential communication, and continued so thereafter, acting in concert for the preference of the defendants.

4. That the written consent given by Benton on the eleventh of June, 1878, to the private sale of his stock of goods under execution was given in pursuance of his previous promise to do whatever the defendants might desire for their security, and for the purpose of securing a private sale of the goods to the defendants for their benefit and preference, and to enable him, as their agent, to continue in possession of the goods until they should be sold, as was subsequently done.

5. That by means of the installments paid to the other creditors, and the *cognovit* being kept secret from them, Benton obtained from other creditors a false credit, upon which he obtained other goods on credit, and that it was designed by the defendants and by Ingersoll, their attorney, to postpone action under the *cognovit* note until it was believed they might proceed thereon without danger from the bankrupt law. See particularly their letters of February 26, 1877, July 11, 1877, and January 14, 1878.

From these conclusions, as to the facts and the intentions of the parties, it seems to me that it is not to be doubted that the bankrupt in this case did, within the terms of section 5128, "with intent to give a preference to the defendants, procure or suffer his property to be seized on execution" in favor of the defendants, and that they "had reasonable cause to believe him insolvent," and knew that the seizure was made in fraud of the bankrupt act. *Little* v. *Alexander*, 21 Wall. 500; *Buchanan* v. *Smith*, 16 Wall. 277; *Wilson* v. *City Bank*, 17 Wall. 473, 487.

The objection that the plaintiff, as representing only creditors at large, is not in a condition to maintain this action, has been repeatedly considered and overruled. *Platt* v. *Matthews*, 10 FED. REP. 280; *Platt* v. *Mead*, 9 FED. REP. 91, 96.

It is contended on the part of the defendants that the case does not come within section 5128 as amended, because the act of the bankrupt in executing the *cognovit* was more than two months prior to the adjudication in bankruptcy, although the actual entry of judgment and the levy of execution under it were less than two months previous.

It would be an abuse of words to say that under circumstances like these the bankrupt had not "procured or suffered the seizure of his

property on execution." The seizure was not made until within two months of the adjudication in bankruptcy; and consequently if he did procure it, or suffer it at all, he procured or suffered it within the two months. The signing of the *cognovit* gave a continuing authority to enter the judgment and issue execution whenever the defendants desired, and such was its intention; and it speaks, therefore, from the time that it was carried into effect, so far as to constitute a "procuring or suffering of the seizure" of the bankrupt's property; and the knowledge and actual intention of both parties at the time the *cognovit* was signed, must adhere to and characterize it when put into execution. And as this intention of both parties was in fraud of the bankrupt law, the seizure, being within two months of the petition in bankruptcy, must, under section 5128, be held fraudulent and void.

The present case differs essentially from the cases of *Clark* v. *Iselin* and *Watson* v. *Taylor*, 21 Wall. 360, 378; for in those cases it is expressly found that there was no fraud nor collusion, and that the creditor had no reason to believe that the debtor was insolvent at the time when the warrants to confess judgment were given. The opinion of the majority of the court, delivered by Mr. Justice STRONG, in *Clark* v. *Iselin*, turns entirely, as I read it, upon the absence of any fraudulent intention or knowledge of insolvency at the time the warrants were given, and upon the fact that the confessions of judgment were lawful when made. The debtor's intention to give a preference was held essential to make the seizure under execution invalid, as it plainly is, under section 5128; and as there was no subsequent act of the debtor after the warrant was signed, and the debtor had no longer any power over it, the only possible intention that could be imputed to the seizure on his part, was such an intention as existed when the warrant was signed by him; and that intention not being to give a preference, the essential element of an intention to prefer the creditor was wanting, so as to make the acts invalid.

In this case the facts are the opposite, as I have found. The signing of the *cognovit*, instead of being a lawful act when made, as in *Clark* v. *Iselin*, (p. 374,) was itself unlawful and a fraud upon the bankrupt act. But in addition to the original act of signing the *cognovit* for the unlawful purpose of giving a preference, we have in this case the bankrupt's active participation in the proceedings through which the defendants obtained title to these goods, viz., his consent in writing on the eleventh of June, within less than two months of the bankruptcy, to a private sale, evidently designed for the benefit of the defendants. This consent was a necessary condi-

tion of the private sale in the mode in which it was obtained. Having obtained title to the property by means of this act, the defendants cannot disclaim it as non-essential.

Construing these various steps together, they seem to me to constitute, moreover, in effect an "indirect transfer" by the bankrupt of his property to the defendants by means of a judgment, execution, and consent to a private sale by the sheriff; means purposely adopted to avoid, if possible, the hazards of a *direct* conveyance to the same defendants for the same purpose of an unlawful preference.

Section 5128 makes a "transfer or conveyance" by the insolvent of any part of his property, either "directly or indirectly," also void under the conditions above named. Such proceedings as were had in this instance seems to me a mere collusive device to effect such an "indirect transfer" of all the debtor's property to the defendants. In the *Case of Schick*, 2 Ben. 5, BLATCHFORD, J., says:

"I think, also, that the transaction was, in substance and effect, within the provisions of section 39, a *transfer* of the property of the debtor, made by him, and so made with intent to delay, hinder, and defraud his creditors." *In re Pitts*, 8 FED. REP. 263.

The defendants should, therefore, account to the plaintiff as assignee for the value of the property, the same having been sold and converted to the defendants' use. As the value was appraised by sworn appraisers, and the purchase by the defendants was at the price of two-thirds the appraised value, no injustice can be done to the defendants by charging them with this purchase price; and, I think, it will be better for the estate to accept this amount as the value of the goods, rather than to seek to increase it through a difficult and tedious reference.

I allow judgment, therefore, against the defendants for the sum of $7,144.30, with interest from June 24, 1878, with costs.

In re DIEHL, Bankrupt.

(*District Court, S. D. New York.* February 9, 1883.)

BANKRUPTCY—PREFERENCE—DISCHARGE, WHEN BARRED—SECTIONS 5021, 5110.

Where debtors in insolvent circumstances make transfers of their property for the security of a portion of their creditors only, without making equal provision for other creditors known to them, such transfers constitute a preference which will bar the debtor's discharge in bankruptcy under subdivision 9

of section 5110, without regard to the lapse of time, and although proceedings in bankruptcy were not commenced until eight months afterwards.

In such a case the provisions of the act of July 26, 1876, (19 St. at Large, 102,) amending section 5021, do not apply.

Application for Discharge in Bankruptcy.

J. Homer Hildreth, for bankrupt.

G. A. Seixas, for opposing creditors.

BROWN, J. The petitioner, Diehl, was a partner in the firm of Behning & Diehl. In 1877, the firm being indebted to the amount of about $18,000, of which about $9,000 was owing to the opposing creditor, Speers, and being in embarrassed circumstances, a meeting of their creditors was called, the result of which was that the property of the firm, except certain real estate, was divided between the two partners, each agreeing to pay certain specified creditors, and each gave mortgages of the property in trust as collateral security for the payment of certain creditors' claims. The opposing creditor, Speers had previously held a second mortgage on the firm's factory property. They refused to take this property in settlement of their claim, and no provision was made for them in the creditors' arrangement, or in the distribution of the property above referred to, nor did they assent to the arrangement. About eight months afterwards, on the fourth of May, 1878, Diehl was adjudicated a bankrupt in involuntary proceedings. Prior to this time he had paid certain of the creditors whom he had agreed to pay in accordance with the previous arrangement, and others had not been paid anything.

The discharge of Diehl is opposed by Speers under subdivision 9 of section 5110.

On behalf of the bankrupt it is contended that, as the arrangement in behalf of the other creditors, and the securities for them, were made more than six months prior to the adjudication, the objections under subdivision 9 are not available.

It is clear that the arrangement made with respect to the other creditors, without the assent of Speers, for the distribution of the firm property for the payment of the other creditors, was an arrangement giving them a preference. From the evidence it must be assumed, also, that at this time the firm was insolvent within the meaning of the bankrupt law; and the arrangement as respects Speers was of itself an act of bankruptcy, and therefore, within numerous decisions, an act in contemplation of bankruptcy under subdivision 9, § 5110. All the real estate was subsequently sold, and realized nothing above the first mortgage. Speers, who had a second mortgage on a part,

obtained nothing from his security. The event, therefore, shows that he was equitably justified in refusing to take the mortgaged property for his debt, which was nearly half what the debtors owed; and the arrangement made between the other creditors and the bankrupts was wholly indefensible legally as against him.

The court cannot relieve the debtors from the consequences of their acts. It has been repeatedly held that transfers of property in contemplation of bankruptcy and for the purpose of preferring creditors, are, under subdivision 9, a bar to a discharge, without reference to the lapse of time. In the *Case of Kasson*, 18 N. B. R. 379, the present circuit judge thus expressly held. The qualification in the act of July 26, 1876, (19 St. at Large, 102) does not avail the petitioner, inasmuch as these assignments by way of mortgage in trust for some of the creditors were not such an assignment as by that act is not to prevent a discharge in involuntary proceedings, since it was not an assignment of all the debtor's property, nor for the benefit of all their creditors ratably, but designedly excluded the present opposing creditor.

The discharge must, therefore, be denied.

La Croix *v.* May and others.

(*Circuit Court, S. D. New York.* January, 1883.)

1. Trade-Marks—Rights of Aliens—Property in, as Affected by Acts of Congress.

   The fact that one is an alien does not affect his right of property in a trade-mark; but that fact is a necessary allegation to establish the requisite diversity of citizenship to confer jurisdiction upon a federal court. The acts of congress fortify the common-law right to a trade-mark by conferring a statutory title upon the owner, but "property in trade-marks does not derive its existence from an act of congress." 100 U. S. 82. By the express terms of section 10 of the present act of congress the common-law right in trade-marks is preserved intact.

2. Same—Demurrer.

   Where the demurrer was to the whole bill, and the bill was in itself sufficient, aside from the allegations contained in it, upon which the demurrer was taken, the demurrer was overruled.

S. W. Weiss, for complainant.

Briesen & Betts, for defendants.

Wallace, J. The facts alleged in the complainant's bill entitle him to an injunction restraining defendants from the use of his trade-

mark, irrespective of the rights which he acquired by the registration of his trade-mark under the act of congress of March 3, 1881. *Taylor* v. *Carpenter*, 3 Story, 458; 2 Wood. & M. 1; *Taylor* v. *Carpenter*, 11 Paige, 296. The fact that complainant is an alien does not affect his right of property in a trade-mark; but that fact, as it establishes the requisite diversity of citizenship between the parties to confer jurisdiction upon this court, is indispensable to the cause of action alleged.

The act of congress fortifies the common-law right to a trade-mark by conferring a statutory title upon the owner; but, as was said of a former act, (*The Trade-mark Cases*, 100 U. S. 82,) "property in trade-marks does not derive its existence from an act of congress." The present act does not abridge or qualify the common-law right, but, by the express term of section 10, preserves it intact.

The theory of the demurrer is that the complainant's statutory title upon the allegations of the bill is invalid. It is not necessary to decide the questions raised, because, as the demurrer is to the whole bill, the bill is sufficient if all the allegations concerning a registration of the trade-mark were eliminated.

Demurrer is overruled.

See *Burton* v. *Stratton*, 12 FED. REP. 696, and note, 704, and *Shaw Stocking Co.* v. *Mack*, Id. 707, and note, 717.

NATIONAL MANUFACTURING CO. and others *v.* MYERS.*

(*Circuit Court, S. D. Ohio, W. D.* February 13, 1883.)

1. PATENTS FOR INVENTIONS—REISSUE—FLY-TRAPS—VOID FOR WANT OF NOVELTY.

   Reissued letters patent No. 6,811, granted to John Parker for an improvement in fly-traps, *held* void for want of novelty. The claim of said patent to the arrangement and relation of an outer case and an inclosed cone, both made of wire cloth, as forming two chambers, one dark, the other light, into the former of which flies are enticed by means of a bait through an entrance passage, and from which, when they fly, they naturally escape through a narrow aperture into the upper and better-lighted one, from which they are not likely to return through the small and darkened aperture which admitted them, *held* to have been anticipated. The claim of said patent to upright and horizontal stays in the wire-cloth case and to annular and upright stays in the wire cone, *held* to be to mere matters of workmanship, involving no invention.

*Reported by J. C. Harper, Esq., of the Cincinnati bar.

2. SAME—BASE-BLOCK FOR FLY-TRAPS.

Reissued letters patent No 6,493, granted to James M. Harper, for a base-block for fly-traps, described as "the concave base-block, *having extensions and shoulders* in combination with the cylinder and its cone, substantially as described," and being a single piece, the bottom of which is flat, and the top recessed to form a receptacle for bait, provided *with shoulders and extensions to hold the bottom of the cylinder*, and having spaces between the extensions for the passage of flies upward into the cone, the base of the cone being adapted to fit closely the conical shoulders of the piece, thereby serving to sustain the cylinder in its place, *held* to be limited to a base-block of the particular construction described, and not to be infringed by a base-block which is a circular disk with a depression on the upper surface for containing the bait, and using *metallic springs*, over which the case and cone are slipped, and by which they are held in place, *instead of shoulders and extensions.*

In Equity.

Wm. B. Burnet, for complainant.

James Moore, for respondent.

MATTHEWS, Justice. This is a suit in equity to restrain the alleged infringement of two letters patent,—one, reissued letters patent No. 6,811, granted to John Parker, December 21, 1875; the other, reissued letters patent No. 6,493, granted to James M. Harper, June 22, 1875.

1. *The Parker patent.* The reissued patent is for an improvement in fly-traps. The object of the invention, as declared by the patentee in the specification, is "to so construct a fly-trap of wire cloth that, while the insects have free access to enter the trap, they will not be liable to escape from it again." The nature of his invention, he declares, "consists in a wire-cloth case, having a wire-cloth cone within it, said case and cone being strengthened and united together by vertical and horizontal stays, and the case being closed at its top and provided with an entrance passage at its base, which leads to the cone, and the cone having an exit passage which leads into the case." The construction of the trap is described by reference to drawings, in which is represented a hollow outer case, which is of cylindrical form along a greater portion of its height, and terminates in a truncated cone at its top. This case is made of fine wire cloth, which is supported and strengthened by upright narrow stays and shallow horizontal annular stays. The wire cloth and its stays are connected together by means of suitable fastenings, in any proper manner. There is a horizontal annular stay at the base of the wire cylinder, and another at the top of the cylinder or base of the truncated conical tip thereof. The case is open at its bottom, and provided at its top with a discharge passage, and around the vertical

neck of the stay, which forms this passage, a removable cover is fitted. The lower ends of the stays are extended down below the wire-work of the case, so as to form an entrance passage between the lower edge of the cylinder and the bait-holder when the trap is set up for catching flies, and the upper ends of the upright stays may be formed with bait-hooks, to which a swinging bait may be hinged. Within the cylinder, near its bottom, a hollow wire cone is placed, and fastened by suitable means to the inside of the wire-work thereof, so that flies cannot pass between the cylinder and the base of the cone. This cone is truncated at its top, and may be strengthened by annular stays at its base and upper end. Above this cone a second similar one may be arranged and fastened in like manner. The outer case and cone are made of wire-work and light stays, so that the expense of manufacturing the traps may be very slight, and also that the light from the outside may attract the flies from the center to the circumference of the trap.

The mode of its operation is also described as follows:

"The trap being arranged over a shallow bait-holder, the flies enter the case through the passage, and, being attracted by the light above, fly through the first cone into the case; and if two cones are provided they fly through the second cone from the space between the two cones into the space between the second cone and the top of the case. The return of the flies seldom happens, as they naturally fly out towards the circumference of the trap, instead of towards the apex of the cones, which is at the center of the trap."

The two claims, in respect to which infringement is alleged, are the first and third, as follows:

(1) "The wire-cloth case, closed at top and open at bottom, and supported by upright and horizontal stays, and provided with a wire cone having an exit above its base, substantially as and for the purpose herein described." (3) "The wire cone, having an exit above its base and fastened to the inner side of the wire case, which is supported at its bottom by an annular stay, and from top to bottom by upright stays, substantially as and for the purpose described."

The original patent, of which this is the reissue, was dated November 22, 1870.

From the evidence in the cause, as to the state of the art at this date, it is quite clear that, so far as this patent describes the arrangement and relation of the outer case and the inclosed cone, as forming two chambers, one dark, the other light, into the former of which flies are enticed by means of a bait through an entrance passage, and from which, when they fly, they naturally escape through a narrow aperture into the upper and better-lighted one, from which they are

not likely to return through the small and darkened aperture which admitted them, it cannot be claimed to be new. That device was at that time for such purposes well known and in common use. It is contained in the English patent of Delestre, of November 1, 1866, and in Gilbert's patent, No. 15,848, in this country, dated October 7, 1856. It is true that in the former the trap was described as intended to be made of glass, porcelain, or other suitable material; and in construing this as claimed by the complainant, and as indeed seems reasonable, to confine the material to such as shall be similar to glass or porcelain, nevertheless, the arrangement and relation of the parts is substantially what is described above. Delestre's patent evidently contemplated the destruction of the imprisoned flies by their falling into water contained in the bottom of the upper chamber, and so being drowned; but the mode of disposing of the flies is not essential to the trap. On the other hand, Gilbert's patent also contained the same arrangement, operating in the same way, and employed wire gauze as the material for the sides of the upper chamber, and for the conical entrance into it from the lower and dark chamber made of wood. An arrangement, perfectly similar, is also found in the Scott patent of February 16, 1858, in which the outer case and the inner chamber, and both made of wire gauze, are fully described.

The question then recurs, what, in this state of the art, remains as a patentable invention, described in the Parker patent, on which it can operate? The answer made by the complainant is found in the following extract from the testimony of Mr. John W. Hill, an expert called on its behalf, (Printed Testimony, p. 322:)

"The distinguishing features of the Parker invention, confining my attention to claims 1 and 3 of the Parker patent, and to the state of the art as shown by respondent's exhibits, are the addition to the wire-cloth case of the trap *of the vertical and horizontal stays*, to give greater vertical and horizontal stiffness to said case, and *the horizontal stays* to the wire-cloth cone, to furnish greater lateral stiffness to the base of said cone, by means of which additions the case and cone may be constructed of much lighter materials than would be necessary if these valuable adjuncts were omitted. Another valuable feature in the Parker trap, in the light of the state of the art, is the manner in which the wire-cloth cone is attached to the wire-cloth case; that is, by slipping the horizontal annular stay of the cone within the horizonal annular stay of the base of the case, whereby the strength of the base of the trap is represented by the two stays acting in conjunction in the same plane. The merit of an invention, even in a patentable sense, is not infrequently measured by the advantages it confers, in the light of similar devices which have preceded it. And, upon this basis, the Parker invention marks an era in devices of this character. No previous invention proposed the construction of

a fly-trap in such a manner that it might be made of cheap materials and safely packed for transportation to all parts of the world without danger of damage in transit. No previous invention seems to have assembled together, in a simple and systematic manner, the essential elements of a device of this kind, and, although the line of separation between the Parker invention and inventions of a similar character which preceded it may not be broad, it is, in my opinion, broad enough to maintain its claim to novelty and utility, in the distinguishing features which I have ascribed to it."

But the provision for upright and horizontal stays in the wire-cloth case and the annular and upright stays in the wire cone are not inventions. They are suggestions which would occur to any skilled mechanic, in constructing such chambers of wire cloth, from the very nature of the material, and are mere matters of workmanship, involving no invention. As to the mode of fastening the cone to the case by slipping the horizontal annular stays of the former within that of the latter, so that they shall coincide, nothing is said of it in the specifications, and were it otherwise there seems to be no patentable invention in that. The same remark applies to the suggestion of nesting for transportation, with the added observation that as the cases are described as cylindrical and the interior chamber as a cone, this feature does not seem to be practicable, as it would be were all conical in shape.

The conclusion, therefore, is that the Parker patent is void for want of novelty.

2. *As to the Harper patent.* The original patent was dated September 3, 1872. The reissue is limited to the claim for a base-block for fly-traps, which is described as "the concave base-block, having extensions and shoulders in combination with the cylinder and its cone, substantially as described." It is formed of a single piece, the bottom of which is flat and the top recessed to form a receptacle for bait. The base piece is provided with shoulders and extensions, to hold the bottom of the cylinder, having spaces between the extensions for the passage of flies upward into the cone. The base of the cone is adapted to fit closely the conical shoulders of the bottom piece, thereby serving to sustain the cylinder in its place and preventing displacement or accidental overturning.

Waiving all other questions as to this reissue, I am satisfied that the patent must be limited to a base-block of the particular construction described, and that the respondent is not guilty of an infringement. His base-block is a circular disk, with a depression on the upper surface for containing the bait, the shoulders and extensions in

the Harper patent being dispensed with and metallic springs used instead, over which the case and trapping cone are slipped, and by which they are held in place.

For these reasons the bill is dismissed.

ALLIS *v.* STOWELL.

(*Circuit Court, E. D. Wisconsin.* January 17, 1883.)

1. PATENTS—INFRINGEMENT—CONTEMPT PROCEEDINGS.
   Where there is doubt upon the question of infringement, the court will not determine that question in contempt proceedings, instituted after a decree in a pending suit, but will remit the party to his right to file a supplemental bill, or to institute a new and plenary action.
2. SAME—DEMURRER.
   Where the bill alleged the prosecution of a former suit, and the entry of decree therein, holding an infringement as to one of the claims of a patent, and embraced in its allegations and prayer for relief both claims of the infringed patent, *held*, that it was not open to demurrer on the ground that the allegations of the bill show that complainant had received full relief in the former suit.
3. SAME—PRELIMINARY INJUNCTION.
   Where an infringement does not clearly appear to the court, it will not grant a preliminary injunction.

In Equity.

W. G. Rainey, for complainant.

Flanders & Bottum, for defendant.

DYER, J. This is a bill for an injunction to restrain the alleged infringement of a patent for an improvement in head-blocks, granted to Nelson F. Beckwith, December 26, 1871, and the case is now before the court on a motion for a preliminary injunction.

The patentee's specifications as stated in the patent, and so far as it is necessary here to notice them, are as follows:

"The principal difficulties encountered in sawing logs into boards are as follows, to-wit: *First.* When a log has been reduced to such thickness that only sufficient material remains for one or two boards, it is almost impossible to hold it upright upon its edge against the standards upon the carriage during the operation of sawing. The liability of the log to thus turn or slip upon the head-blocks is greatly aggravated if its lower edge next to the standard is wany or rounded off from any cause. For this reason it is customary in all saw-mills to leave the last cut in the form of a thick plank, affording sufficient bearing surface to prevent its turning upon the head-block. Two thicknesses of lumber are therefore sawed from the same log or cant.

Secondly. The standards employed for saw-mill carriages are usually so constructed to hold the log, that, when the latter is to be sawed entirely into narrow boards of the same thickness, the last two or three are liable to bend during the operation of sawing, varying the thickness of each more or less, and producing thereby imperfect boards.

"My invention has for its object to overcome these difficulties, and to this end it consists in constructing the standards with wide-bearing faces for the logs, and in providing each with a central vertical slot or mortise, through which a series of hooks are projected to grasp the log or cant. The lower hook is curved upward, to catch into the lower edge of the log, next the standard, and the upper hooks are curved downward, to catch into the face of the log. The lower hook and the series of upper hooks, therefore, move in opposite directions, to grasp the log between them and prevent it from slipping. The hooks are operated simultaneously by a lever, from the back of the standard, and by a suitable system of connecting bars, as I will presently describe. By this arrangement the upper hooks hold the log securely in contact with the lower hook, while the latter holds it firmly against the standard, and prevents it from slipping until the last board is sawed. By constructing the standards with a wide face, and in arranging the hooks to project through a central slot, a broad bearing is formed for the log upon each side of the hooks, so that, when the log is reduced to the thickness of two or three boards, the latter are held securely against bending while being sawed."

After further describing the construction of his device in detail, the patentee says:

"While I have shown a standard specially constructed to receive the hooks, I do not limit myself to this construction, as I design to apply them to all varieties of standards, old and new."

The first two claims of the patentee are as follows:

"(1) In combination with the standard for saw-mill carriages, the hooks, C, D, adapted to be simultaneously projected in opposite directions through the central vertical slot in the face of said standard, substantially as described, for the purpose specified.

"(2) The combination of the hooks, C, and connecting bars, F, I, with the operating lever and the hook, D, substantially as described, for the purpose specified."

In a suit between these parties heretofore prosecuted in this court to restrain the infringement of this patent, after hearing upon full proofs, the court entered a decree restraining the defendant from making, using, or selling any machine embodying in a head-block for a saw-mill the features set forth and described in the first claim of the Beckwith patent. That suit, in the form of an accounting to ascertain profits and damages, is still pending.

Subsequent to the entry of the decree last mentioned, it was claimed by the complainant that the defendant was still manufacturing and

selling saw-mill dogs, which were an infringement of the Beckwith patent, and was thereby violating the injunction which had been previously granted. Thereupon proceedings were instituted to punish the defendant for contempt of court. These proceedings came on to be heard, and the court decided that, as it was not then made entirely clear that the mill-dogs which the defendant was making infringed the first claim of the patent, it would not enforce its former decree by punishment of the defendant as for contempt. In other words, the court held that, where there was doubt upon the question of infringement, it would not determine that question in contempt proceedings, but would remit the party to his right to file a supplemental bill in the pending suit, or to institute a new and plenary action; and an order was thereupon entered dismissing the contempt proceedings, but without prejudice to the complainant's right to file a supplemental bill in the suit yet pending, or to file an original bill in a new suit, as he might elect.

Subsequently the present bill was filed, which has been demurred to, and the demurrer has been heard concurrently with the motion for a preliminary injunction.

The bill alleges the prosecution of the former suit and the entry of decree therein, and that the saw-mill dog which the court in that suit held to be an infringement of the first claim of the Beckwith patent, and which the defendant was therein enjoined from making and selling, was and is substantially the same as the dog which he is now manufacturing; and the ground of the demurrer is that this and other allegations of the bill show that the complainant has obtained full relief in the former suit. It is to be borne in mind, however,—and this the bill in the present case alleges,—that the decree in that suit only adjudged infringement so far as the first claim of the patent was concerned, while the scope of the present bill embraces both claims of the patent. Moreover, the order of the court dismissing the contempt proceedings, as already stated, was made without prejudice to the right of the complainant to file a supplemental bill in the first suit or an original bill in a new suit, as he might elect; and while, of course, there was contemplated by that order a bill that should be good on demurrer, yet the order was thus made with knowledge that the first suit was yet pending; and, indeed, the order referred to was made in that suit, and the present bill was accordingly filed. In one view of the case it is filed under leave of court, and as the relief it seeks is really broader than that given in the first suit, I think the demurrer should be overruled. An order will be en-

tered accordingly, and the defendant will have 30 days to answer the bill.

Since the decree in the former suit only adjudged infringement of the first claim of the patent, it has since been evidently the view of the defendant that he was at liberty to manufacture and sell saw-mill dogs similar to the Beckwith device, provided the dogs were attached as a separate construction to the standards, so that there should not be a combination of the standard with hooks adapted to be simultaneously projected in opposite directions through central vertical slots in the face of the standard, as described in Beckwith's first claim. And, in this view of his rights as a manufacturer, he has since been making, to some extent, what are described as attachment dogs, and which are more particularly designated as the "Boss dog," and the "Boss dog improved." These dogs were produced on the hearing of this motion as exhibits, and are marked, respectively, "Dog Exhibit No. 4," and "Exhibit Stowell Attachment Dog." The first-named is also marked "Patented December 26, 1871," which is the date of the Beckwith patent. Clear proof has been made that the defendant, since the decree in the former suit, has manufactured saw-mill dogs of the construction of these exhibits, and small-sized models of the same have been exhibited to the court. The defendant has also confessedly manufactured and sold another dog, a specimen of which is in evidence and marked "Exhibit Stowell X." This is known as the "geared dog;" that is, the hooks are operated by means of connections with the lever in the form of cog-wheels instead of connecting bars.

I shall not here attempt to describe in detail the construction of the devices mentioned. In determining in this case, and on this motion, whether they infringe the Beckwith patent, both the claims of the patent before mentioned are to be taken into consideration. As they are attachment dogs, they do not show a combination of the standard with the hooks, so that the latter may project through central vertical slots in the face of the standard. But, taking the patentee's specifications in their entirety, I do not think he limited himself to that precise construction; and it seems to me clear that when the standard is attached to the dog in the manner shown in "Dog Exhibit No. 4," and "Exhibit Stowell Attachment Dog," and when the mechanical construction of the dog is like that disclosed in those exhibits, there is such a union of the dog and standard as to make them practically one device, and such a form of construction, in de-

tail and in entirety, as, within the doctrine of equivalents, makes a case of infringement of the Beckwith patent.

I shall, therefore, grant a preliminary injunction restraining the defendant, pending this suit, from manufacturing or selling a saw-mill dog of the construction shown in "Dog Exhibit No. 4," and "Exhibit Stowell Attachment Dog," or as shown in the brass models in evidence; the complainant first executing a bond with surety, to be approved by the clerk, in the sum of $2,500, conditioned for the payment of all damages which the defendant may sustain in consequence of the injunction, in case it shall be ultimately held that said injunction was improperly allowed.

As to the dog shown in "Exhibit Stowell X," known as the geared dog, a preliminary injunction is denied, for the reason that, because of its peculiarities of construction, I am not now prepared to hold that it infringes the patent sued on.

THEBERATH *v.* RUBBER & CELLULOID HARNESS TRIMMING CO.

(*Circuit Court, D. New Jersey.* February 6, 1883.)

1. PATENT LAW—INFRINGEMENTS—PATENTS FOR DESIGNS.
   To properly sustain a defense to a complaint of infringement on the ground that the original patent lacks the quality of novelty, specimens of the articles alleged to have been made before the time of the complainant's invention should be produced in evidence.
2. SAME—PUBLIC USE.
   By the terms of section 4886, Rev. St., no article is patentable which has been in public use or on sale for more than two years prior to application for letters patent, unless the same is proved to have been abandoned.
3. PATENTS FOR DESIGNS.
   Section 4929, Rev. St., provides for patents on any new and original designs, and by section 4933, Rev. St., all regulations and provisions that are applicable to the obtaining or protecting of patents for the inventions of useful articles are made applicable to design patents.
4. SAME—IMPROVING A CONCEPTION NOT AN INVENTION.
   Merely improving the conceptions of another by change in form, proportion, or degree, is not such an invention as will sustain a patent.

In Equity.

Philip W. Cross, for complainant.

Joseph C. Clayton and *A. Q. Keasbey*, for defendants.

NIXON, J. This is a suit in equity for the infringement of three several letters patent issued to the complainant,—the first, dated

January 18, 1870, and numbered 99,032, for "improvement in the covering of harness trimmings;" the second, a design patent, dated June 13, 1871, and numbered 5,006, entitled "design for harness trimmings;" and the third, dated August 24, 1875, and numbered 167,040, for "improvement in harness mountings." The defendant company have filed their answer, setting up that the patents of the complainant are void for want of novelty and non-infringement. The complainant's patents have reference to improvements in the coverings of harness trimmings. The first was granted on the eighteenth of January, 1870. Up to that time, harness mountings were ordinarily covered with leather, with a single seam in the center, which left a ridge more exposed to wear than the balance of the covering. The wear upon the covering made the trimming less durable than other parts of the harness, breaking the thread, whereby the seam opened and the whole covering was spoiled. The design of the patentee was to avoid this difficulty, by having two seams, one at or near each side, leaving the center smooth and even, so that one part could not wear out sooner than any other. Although he states in his specifications that the covering might be made of any material, whether elastic or non-elastic, expressly including rubber, and that it might be applied to any and every kind of harness trimmings, I think it is probable that the patentee, when the letters patent were applied for, had in his mind only such coverings as needed to be stitched with threads. He wanted to get the seams in a place where they would be less exposed to wear. The breaking of the thread of the seams, caused by such exposure, was the evil in the then existing state of the art, which he proposed to remedy.

Such an obvious improvement at once claimed the public attention. It was not only more useful, by rendering the leather-covered harness more durable, but it was more attractive to the eye than the trimmings finished in the old way. Hard rubber was already in use for covering harness mountings, and in order to meet the popular demand for this alleged new improvement in style as well as durability, the defendant corporation, having the control of the hard-rubber coating patents, used that material for covering their harness trimmings; substituting, however, two imitation stitch seams in the place of the two real stitch seams of the patent. Not quite sure, I imagine, that such a use of the form of his invention would be regarded as an infringement, and desirous of more completely covering the whole ground, the complainant filed an application for a design patent, which was issued to him June 13, 1871, and is the second

patent on which this suit is brought. In the specifications it is said to relate to a new design for covering harness trimmings, consisting in the formation of a groove or imitation seam near each edge of each covering. In his evidence the complainant states (page 26, Deft. Rec.) that he secured this patent "to prevent others, making harness trimmings with plastic material, from imitating my [his] patent."

The controversy, at the hearing, chiefly turned upon the question of the validity of these two patents. The learned counsel of the defendants maintained—

(1) That letters patent No. 99,032 were void for want of novelty; (2) that if not void they were not capable of receiving any construction which would make the defendants infringers; (3) that it appeared from the complainant's own testimony in the cause that the invention claimed in the design patent, No. 5,006, had been abandoned to the public by his manufacturing and selling harness trimmings, covering the design, more than two years before the patent was applied for.

1. Are letters patent No. 99,032 void for want of novelty?

The patentee states that he has invented a new mode of covering harness trimmings, whereby the rapid wear and destruction thereof are obviated. The new mode consists in abandoning the single seam in the center of the article to be covered, and adopting two seams at or near each edge, which leaves the center smooth and even. The defendants say there is nothing novel in this, and bring forward a number of witnesses to testify their knowledge of such a mode of covering long before the date of the complainants alleged invention. The testimony is sought to be illustrated by a number of exhibits. Defendant's Exhibits Nos. 7 and 39 were particularly relied on as showing an anticipation. Exhibit No. 7 was the ordinary hames, having the draft-eye covered with leather, with double seams; one seam on each edge. No. 39 was called the union or roller-fly hook, also covered with leather, and having the double seam. It seems to have been conceded on the argument that if articles represented by these exhibits were manufactured and put upon the market two years before the date of the complainant's invention, they clearly anticipated everything claimed by him.

It will be observed that it came out in the proofs that these exhibits were not in existence before the date of the complainant's invention, but had been made since for the purpose of illustrating what the witnesses said they had manufactured as early as 1859 and continued to manufacture as late as 1874. Why was this? Why were not some of the older articles found and exhibited? Not because

they were not made in large numbers. Oscar Weiner says, page 3 of defendants' record:

"From about the year 1859 down to about the years 1873–4, our firm was largely engaged in making hames covered with leather, and draft-eyes covered with leather, in the way shown in this exhibit, [No. 7,] with the double seams, one seam on each edge. We made and sold them during all these years to all the leading dealers in the country, and are selling them very largely to-day."

He further says, (page 61:)

"In 1864 or '5 we made trimmings covering the principle of stitching on each side, consisting of fly-hooks, [defendant's Exhibit No. 39;] and we covered some terrets."

Simon Weiner, of the firm of Weiner & Co., being shown Exhibit No. 7, states that they began to cover draft-eyes in hames with double seams, finished like the exhibit, in 1862, and have continued to cover them in that style up to the present time; that in 1864 and 1865 they began to cover terrets and fly-hooks with the two seams as a part of their regular business, and sold the goods to whoever wanted them.

Such testimony seems hardly consistent with two facts:

(1) That not a single article was produced in the case which was proved to have been made before the time of the complainant's invention; (2) that these gentlemen were sued in this court in the year 1873 or 1874 by the complainant for the infringement of these patents, and before a hearing they paid to the complainant $1,300 in cash, and took a license from him for authority to do what they now swear they have been for so many years in the habit of doing.

If the testimony left the case here I should not hesitate to overrule the defense that the complainant's patent lacked the quality of novelty. But the complainant himself went upon the witness stand, and in his cross-examination testified as follows, (Defendant's Record, p. 31:)

"*Cross-question* 99. When did you first know of the leather-covered hames, like defendant's Exhibit 7, as shown at the draft-eye thereon? *Answer*, [examining articles.] Not until I made them first. This is an imitation of my way of covering the draft-eye on a leather-covered hame. *Cross-question* 100. Now, answer my question. When did you first see that? *Answer*. Not till I first made them. *Cross-question* 101. When was that? *Answer*. That was in 1865—in the spring. *Cross-question* 102. Was any considerable number of them made and sold? *Answer*. Yes, sir. *Cross-question* 106. Where were you working when you first made and sold them in 1865? *Answer*. I was in business for myself."

It should be added that subsequently in his cross-examination the witness insisted that the draft-eye on Exhibit 7 had but one

edge and one seam, and stated that such a finish of harness trimmings was not regarded as an infringement of his patent. But the court cannot agree with him in this. It regards such a manufacture as a clear anticipation of the complainant's patent, and his admission that he put upon the market a considerable number of such a manufacture as early as the spring of 1865, is fatal to its validity. It is not invention to transfer such workmanship from the draft-eye of the hames to the terrets and rings of the harness.

2. The second of the complainant's patents is for a design. The authority for such patents is found in section 4929 of the Revised Statutes, which provides that they may be issued to any person who invents any new and original design—

(1) For a manufacture, bust, statue, *alto relievo*, or *bas relief;* (2) for the printing of woolen, silk, cotton, or other fabrics; (3) for any new and original impression, ornament, print, or picture to be printed, painted, cast, or otherwise placed on or worked into any article of manufacture; (4) or for any new, original, and useful shape or configuration of any article of manufacture—the same not having been known or used by others before his invention or production thereof, or patented or described in any printed publication.

Patents for designs were first authorized by the third section of the act of August 29, 1842, (5 St. at Large, 543,) and have been retained, in substantially the same terms, in the several revisions of the patent laws since that date. They differ from patents for inventions or discoveries in this respect, that they have reference to appearance rather than utility. Their object is to encourage the arts of decoration more than the invention of useful products. A picture or design that merely pleases the eye is a proper subject for such a patent, without regard to the question of utility, which is always an essential ingredient in an invention or discovery patent. But, notwithstanding these differences, all regulations and provisions that are applicable to the obtaining or protecting of patents of the latter kind, are, by section 4933, made applicable also to design patents.

There is, therefore, no foundation for the argument of the learned counsel for the complainant, that design patents are not avoided from being in public use or on sale for more than two years prior to the application for a patent. The limitation applies to them, and an inventor is not permitted to exhibit his skill and taste in decorative art by the publication of elegant designs through a course of years, and then debar the public from any further use by obtaining letters patent for the same. The complainant admits that, as early as 1865, he made and sold articles of manufacture which reveal to

the eye the identity of design that characterizes the patent, and hence the patent is void for want of novelty.

3. The object of the third patent of the complainant (No. 167,040) is to protect the edges of the coverings of harness trimmings. The application for the patent was filed May 8, 1875. The patentee states, in his specifications, that in terrets and other covered harness mountings, as then in use, the edges of the coverings were much exposed, and were liable to be worn and defaced. The reins were also liable to be cut and rapidly worn out by rubbing against the sharp edges of the metallic parts, forming the inside of the terrets or other mountings. These defects were to be remedied by covering them on the under side with metal castings, having their edges raised up, or turned up and projecting, so as to form a groove on each side of the mounting for the reception of the covering.

I have examined the specifications and claims of this patent with great care, and if they embrace any new and useful invention, that is not fairly indicated and shown in the first and third claims of the prior patent, (No. 122,163,) issued to William Fawcett on the twenty-sixth of December, 1871, I have failed to discover it.

Fawcett's patent was also for an improvement in the mode of covering harness mountings. His first claim was for harness mountings, covered with leather or hard rubber upon the outer side, leaving the inner side uncovered to receive the plating; and the third claim was for the shoulder or recess formed upon the outer surface of harness mountings, to adapt them to receive a cover upon their outer sides. This is the foundation on which the complainant has builded, and while he has undoubtedly made an improvement, it does not seem to be such an improvement as involves invention. It is merely carrying forward the original conception, which Fawcett patented,—a new and more extended application of it,—involving change only in form, proportion, or degree. The supreme court, in *Smith* v. *Nichols*, 21 Wall. 112, said that this was not such invention as would sustain a patent. Following that decision, I am constrained to hold that this patent is also void.

The bill of complaint must be dismissed, with costs.

HATCH and others *v.* MOFFITT.

(*Circuit Court, D. Massachusetts.* February 12, 1883.)

1. PATENTS FOR INVENTIONS—REISSUE—INFRINGEMENT—"DISCLAIMER," ETC.
   In reissued patents, compared with the original, there is not the same reason for indulgence in the use of vague language, because the reissue is taken after the working of the machine may be supposed to be understood, and broad claims are inserted for the very purpose of being construed broadly.
2. "MODE OF OPERATION."
   In specifications for letters patent, where the invention falls within the category of machines, a claim not only for the mechanism but also for the mode of operation generally, is void.
3. SAME—DISCLAIMER.
   Where, upon the purchase of a patent, the purchaser in a reissue of such patent disclaims a portion of the mechanism as insufficient to produce the desired result, *held*, that a third person has the right to improve such part of the machine by changing its internal form so as to effect a result which the purchaser of the patent, in his reissue, disclaims for it.
4. SAME.
   It seems that the mere fact of showing a new article in the drawings of a patent for a machine will not of itself be an abandonment of the new article, which might properly be the subject of a new patent, until the statutory forfeiture of use for two years has been incurred.
5. ARTICLE MADE BY HAND.
   It seems that an article made by hand in such a way that it might have been used separately from the larger thing to which it was attached, though there was no occasion to so use it, cannot be patented as a new manufacture. A slight variation of form is not sufficient to make a thing a new article of manufacture for which a patent may be obtained.

In Equity.

Chauncey Smith and *T. L. Wakefield*, for complainants.

George Harding and *W. A. Macleod*, for defendant.

LOWELL, J. The plaintiffs own two reissued patents granted to Jesse W. Hatch. The first, No. 6,319, is dated in 1875; the original being No. 117,627, dated in 1871. This is for an improvement in apparatus for crimping the stiffenings of boots and shoes. This reissue contains a broad claim (5) for a process, which is admitted to be void, unless it shall be construed to mean the machinery. In several cases cited for the plaintiffs, the words "mode" and "process" have been thus construed, *ut res magis valeat.* In a reissued patent, as compared with the original, there is not the same reason for indulgence in the use of vague language, because the reissue is taken after the working of the machine may be supposed to be understood, and broad claims are inserted for the very purpose of being construed broadly. The claim in question is:

"In the process of forming heel-stiffeners, first impinging the heel-stiffener against the heel-form at the edge where the stiffener is to be bent, then forcing or wiping the stiffener from end to end, from its outer side over the edge, and converging towards the center of the heel-form, whereby the flange is turned and crimped, substantially as described."

This was not intended to claim merely the mechanism, but, at least, the mode of operation generally. This claim is void. *Brainard* v. *Cramme*, 22 O. G. 769. The third claim is:

"In a machine for crimping heel-stiffeners, a heel-form, a holder, a crimping apparatus, substantially as described, adapted to move in relation to each other, to turn the entire edge of the stiffener from the outside towards the center of the heel-form, substantially as described."

This claim may be held to be for the machinery. Claim 5 of the original is for the combination of the several parts to make up one machine. I understand the plaintiffs to contend that claim 3 of the reissue is substantially like 5 of the original, and that the defendant has infringed it. He is driven to this position by recent decisions. When his case was opened in July, 1880, his expert, in direct examination, mentioned only the process claim as the one infringed. I have little doubt that the reissue was very carefully drawn and purposely expanded; but I shall first compare the actual invention of Hatch with the actual invention of Moffitt, which is the most just and satisfactory mode, and afterwards consider the claims.

The original patent describes a "former," set on springs, and shaped like the heel of a boot or shoe, upon which the leather is to be placed; a clamp, consisting of a thin strip of metal, provided with toggle-arms, connecting with a treadle, by which the clamp is brought down and holds the leather to the former, with a yielding pressure, and crimping-jaws pivoted together at one end, which are then drawn down upon the leather, and at the same time move towards each other, so as to embrace the edges of the leather and crimp them into the desired form.

The defendant's machine is shown in a patent granted to him in 1876, and a working specimen is before me. It has a former of suitable shape, which is not set on springs and does not yield, and the clamping device does not yield, excepting upon about one-sixth of its surface, if at all. When the blank or partly shaped stiffener is placed on this former it is clamped by a block on each side, the two blocks forming a mould which have a positive and very decided unyielding pressure upon the blank, which is then acted on by an iron slide which has a recess shaped partly like a U, and partly like a V, and

is forced over the blank, but not very close to it; this is followed by a roller, which presses the edges of the blank still closer and more firmly into the required form. This roller is said to be necessary to the successful working of the machine as now constructed.

The theory of the plaintiffs is that the Hatch machine was the first which ever made a satisfactory counter, and that his claims should, therefore, be construed broadly. The fact, however, is that one Samuels invented a machine for making heel-stiffeners in 1857, which he used for 10 years, and which was used for several seasons by at least two manufacturers, in Lynn, and probably by five or six, doing good work on certain sizes and classes of counters, some of which were made of leather and some of leather board, though many were of less resilient material. This is abundantly proved by uncontradicted evidence. The plaintiff Jesse W. Hatch heard of this invention in 1873, and immediately bought it of Samuels for $200, and procured him to take out a patent for it, which the plaintiffs own. It is No. 145,017. This machine had a former, a clamp, and a slide, co-operating to do the work of crimping a heel-stiffener. The slide was rigid, and shaped like a U. Looking at the crimping mechanisms in controversy here as improvements upon Samuels, the plaintiffs cut the slide in two and pivot the parts at one end and crimp the leather by bringing these parts towards each other; and the defendant uses a rigid slide, which is advanced over the leather after the manner of Samuels, but by making his slide partly V-shaped instead of wholly like U, he rubs in the edges of the counter, with a mode of operation somewhat like that which the plaintiffs obtain with their closing jaws. Hatch, in his reissued patent, has a paragraph concerning the rigid U-shaped slide, which both parties understand to be a disclaimer of the Samuels machine, which Hatch then owned, though it does not, in terms, disclaim it, but only declares that it will not do satisfactory work, which is true if work of all sorts and sizes is meant, but not true of the small and light work which for years, was done upon it; and which Hatch cannot have supposed to be true when he bought the invention two years before the date of the reissue.

It appears to me that the defendant, Moffitt, had a right, notwithstanding the Hatch crimping jaws, to improve the Samuel rigid slide, and by combining it with a roller and changing its internal form somewhat, cause it to effect a result which Hatch in his reissue thinks the U slide will not effect; or, in other words, that Hatch, considering the state of the art, cannot claim the Moffitt slide as an equivalent for his crimping jaws.

Similar considerations govern the clamping apparatus. Hatch dwells much on the importance of having the clamp yield to the inequalities of the leather. The defendant's clamping apparatus is unyielding, excepting, perhaps, at the rear, which is but a small part of the surface, and it is so different from the elastic strap of Hatch that it cannot be considered a mere equivalent, when we remember that Samuels had an effective clamp which, in its operation, resembled the plaintiffs in being a mere clamp, and that the Moffitt blocks are moulds as well, and unyielding. I am of opinion, therefore, that no claim which represents the true invention of the complainants is infringed by the defendant, and more definitely that claim 3 of the original, and 5 of the reissue, properly construed, are not infringed.

The second patent is for heel-stiffeners, such as are made on the Hatch machine, as a new article of manufacture, granted July 16, 1872, and numbered 129,338, reissued April 20, 1875, No. 6,388. It is admitted that similar counters were made by hand, but only in the course of making the shoes in which they were to be used. It is further admitted that the counters are shown in the drawings of the machine patent dated August 1, 1871. I am much inclined to think that the mere fact that a new article is shown in the drawings of a patent for a machine would not of itself be an abandonment of the new article, which would properly be the subject of a different patent, until the statutory forfeiture of use for two years had been incurred.

I am further inclined to think that if an article has been made by hand in such a way that it might have been used separately from the larger thing to which it was joined, though there was no occasion so to use it, a patent cannot be taken out for that article as a new manufacture. See *Buzzell* v. *Fifield*, 7 FED. REP. 465.

My only doubt upon a third and wholly decisive point is that it has not been argued, and I well know that it is dangerous for a judge to be wiser than counsel in a case which has been carefully and thoroughly prepared, but it does seem to me entirely clear that Samuels and all those who used his machine made counters, from 1857 onwards, which come fully within the scope of the single claim of the original patent, namely: "As a new article of manufacture, a crimped heel-stiffener, in which the seat, *b*, is formed with a smooth surface, and the wrinkles are carried down to the inner margin without notching the leather." In the reissue the description is a little more particular, but I do not know that it is substantially different. Samuels made counters which served the purpose, and that is all that can be required in such an article as a heel-stiffener. Slight variations of

form, or superior smoothness, will not make such things new articles of manufacture if they are used in the same way and for the same purpose, and effect a like result in boots and shoes as the older forms.

Bill dismissed.

FOREHAND and others *v.* PORTER.

(Circuit Court, D. Connecticut. 1883.)

1. PATENTS FOR INVENTIONS—CARTRIDGES.
   Where the cup anvil cartridge of the defendant has the distinctive grooves or indentations of the patent of the plaintiff's assignor, it is an infringement of the patent.
2. SAME—SUIT AGAINST UNITED STATES OFFICER.
   The case of *Campbell* v. *James*, 104 U. S. 356, does not definitely decide that a bill in equity will not lie against an officer of the United States for his unauthorized use of a patent solely in the service of the government.

Causten Browne, for plaintiffs.

Daniel Chadwick, Dist. Atty., for defendant.

SHIPMAN, J. This is a bill in equity to restrain the defendant from the alleged infringement of letters patent which were granted to John C. Howe, the plaintiffs' assignor, on August 16, 1864, for an improvement in metallic cartridges. The plaintiffs purchased the patent and all claims for past infringements on April 28, 1881. The bill was filed May 26, 1881, before the expiration of the patent. The patentee describes in his specification the two parts of his invention which are in controversy in this case, as follows:

"The first part of my invention consists in combining a perforated diaphragm with the rear end of a cartridge case so as to strengthen the cartridge case at that part.

"The second part of my invention consists in constructing the cartridge case with a groove in its periphery behind the position of the charge.

* * * * * * * * *

"The cartridge cases represented in the annexed drawing embody all parts of my invention. The shell of these cartridge cases is constructed of copper, with a perforated diaphragm, *a*, at the butt. This diaphragm is within the cartridge case; separates the primer (represented in red) from the powder; it strengthens the rear end of the case and forms a species of anvil, on which the primer is sustained when struck by the hammer of the lock, so that any special arrangement of the fire-arm for this last purpose is rendered unnecessary. It also, by filling up a portion of the case, protects that part from the explosive force of the charge, so that a portion of the wall of the chamber of

the fire-arm opposite the diaphragm may be removed for any desirable purpose without incurring the risk of the swelling or bursting of the cartridge case through the opening thus made when the charge is fired. The form of the cartridge case represented at figures 1, 2, and 3 is adapted to fire-arms in which the hammer of the lock strikes downward at an angle upon the corner of the cartridge case. The form represented at figure 6 is adapted to a fire-arm in which the hammer strikes through a hole at the butt of the chamber of smaller diameter than the body of the cartridge.

"In order to embody the second part of my invention, the rear end of the cartridge in these examples is formed with a groove, *c*, in its exterior. The groove in this position is useful for two purposes: it may be made use of to retain the cartridge in its place in the chamber, by engaging with an instrument which is arranged upon the fire-arm for that purpose. Moreover, as the metal of the cartridge case is protruded inward by the formation of the groove, it may be made to constitute the means of securing the perforated diaphragm in its position, either by causing the indented material to enter into a corresponding groove in the periphery of the diaphragm, as at figure 2, or by locating the groove immediately in front of the diaphragm, as at figure 6. In case the instrument for engaging in the groove is located further forward on the fire-arm than the position of the diaphragm, a groove or indentation should be made in the cartridge case opposite that point. There may then be one groove at the rear to hold the diaphragm, and another further forward to engage with the holding instrument. Each groove may be replaced by its equivalent, viz., one or more indentations, but I prefer the grooves."

The first and second claims, which alone relate to the question in dispute, are as follows:

"(1) The combination of a perforated diaphragm with the rear end of the shell of a cartridge case, in such manner that the diaphragm forms a perforated partition between the primer and the powder, is rigidly secured to the cartridge case so as to support the primer against the blow of the hammer, and by its breadth of rim protects the part of the cartridge case surrounding it from the explosive force of the powder, substantially as set forth.

"(2) A cartridge case constructed with a groove in its periphery, behind the position of the charge, substantially as herein set forth."

The French patent of Ganpillat and Illig, which was introduced by the defendant as an anticipating device, describes a perforated disk first made concave and then introduced forcibly into the cartridge by compression, so that its circumference was flattened and it became "perfectly set in the interior of the cartridge," and formed "an anvil fixed at the bottom of the cartridge." The cavity behind the disk is furnished with fulminate, so that when the point of the firing-pin strikes the bottom of the shell explosion takes place. This patent shows that a perforated diaphragm, within and at the rear end of the shell, and forming a partition between primer and powder, and being an anvil to receive the blow of the hammer, and in a certain way

and degree made fast to the shell, was known before the date of the Howe cartridge, but does not show a diaphragm rigidly secured to the cartridge case in the manner and with the efficiency of the Howe device.

The cartridge of the Delaire French patent, which was a loaded ball, headed with a copper priming cap, had a primer head; that is, the head of the cartridge, made of a copper cap, in the bottom of which the inventor says:

"I put a copper washer, of the thickness of one frame-piece, having at the center of its back an indentation recess or pocket, in which I put a grain of fulminating powder, which is held there by the bottom of the cup."

When percussion takes place the flash ignites the powder through two small holes pierced at the side of the pocket. The disk is secured by contracting the periphery of the shell in one of two ways. One is by placing the shell in a lathe and applying a tool to the periphery; "the other is by the use of a contracting die."

It will thus be seen that the Howe invention was a narrow one, and did not consist in making a perforated partition between primer and powder which should support the primer against the blow of the hammer, and which should be secured to and protect the rear end of the cartridge case, but it consisted chiefly in the way in which this chamber within the case was rigidly secured to the case, and secondarily in such a construction of the diaphragm that by the breadth of its rim it protected that part of the cartridge case surrounding it from the explosive force of the powder.

The invention described in the first claim is, therefore, a hollow metallic shell or cylinder, closed at its rear end, having a perforated diaphragm, which separates the black powder from the fulminate, and which is rigidly attached to the shell, inside of it, and close to its rear end, by means of a groove or indentations which protrude inwardly from the outside to the inside of the shell, so that the diaphragm will not move forward when it receives the blow of the hammer. This groove is placed substantially behind the position of the charge. The rim of the diaphragm is sufficiently broad to support and strengthen the surrounding metal of the shell.

The French patent of Vigne showed a cartridge having an internal continuous or partial projection or groove for the purpose of holding the wad of the charge. The invention of the second claim of the Howe patent was the groove, substantially behind the position of the charge, for the purpose of securing and which secured the diaphragm, and the diaphragm is therefore included in the claim. As a mere

cartridge-holding groove, apart from its office of securing the diaphragm in position, I cannot see that its change of location from that in the Vigne patent produced a new result.

The defendant is the master armorer at the United States armory at Springfield, Massachusetts, and as such master armorer has used for armory purposes two kinds of cartridges. One, called the bar anvil cartridge, has no diaphragm, but has a bar diametrically across its rear end, which forms no partition between powder and primer. The bar is fastened in the shell by means of two grooves or indentations in the shell. The black powder is behind the groove, against the closed end of the shell, and the position of the powder has no relation to the location of the anvil. The second kind of cartridge, called the cup anvil cartridge, has a cup-shaped perforated diaphragm within the cartridge shell and close to its rear end, the bottom of the cup being recessed upon its rear side, the primer being separated from the powder, the fire being communicated to the powder through the holes, and the cup being secured within the shell by grooves in the shell which are in front of some portion of the powder, but substantially in rear of the charge.

It is admitted that the bar anvil cartridge does not infringe the first claim of the Howe patent. It has no diaphragm and no partition between the powder and the primer. Neither is the second claim infringed. The groove of this cartridge does not secure a diaphragm, and does not have the location with respect to the powder which is required by the second claim. It keeps a bar in place, but the patented groove is to secure a diaphragm which separates the powder from the primer, and therefore was to be in a specified location with respect to the powder. It was to be substantially behind the charge. In this cartridge the powder is against the closed end of the shell. The cup anvil cartridge has the distinctive grooves or indentations of the patent, and infringes the first and second claims.

I do not definitely understand that *Campbell* v. *James*, 104 U. S. 356, definitely decided that a bill in equity will not lie against an officer of the United States for his unauthorized use of a patent solely in the service of the government.

Let there be a decree for an accounting in conformity with this opinion.

JOYCE *v.* CHILLICOTHE FOUNDRY & MACHINE WORKS and others.*

(*Circuit Court S. D. Ohio, E. D.* February, 1883.)

1. LETTERS PATENT NOS. 154,989, 168,663, AND 172,471—LIFTING-JACKS.
   Letters patent No. 154,989, issued to Jacob O. Joyce, September 15, 1874, for improvement in lifting-jacks, construed, and limited, in view of the state of the art, to the particular combination of parts described, when constructed, arranged, and operating as shown; and *held* not to cover the devices described in letters patent No. 168,663, issued October 11, 1875, and No. 172,471, issued January 18, 1876, to S. E. Mosher for improvements in lifting-jacks.
2. SAME—WHEN SPECIAL FUNCTION WILL SUSTAIN BROAD CONSTRUCTION OF CLAIM TO KNOWN MECHANICAL DEVICES IN COMBINATION.
   Where a special function is relied upon to sustain a broad construction of a claim to known mechanical devices in combination, it must clearly appear that the function in question is one newly called into existence by the use of the devices in the new relation and for the new purpose, and due solely to such use. Such broad construction cannot be predicated upon a function inherent in the construction and operation of the devices themselves, when used in analogous relations or for analogous purposes.

In Equity.

Suit is upon letters patent for an improvement in lifting-jacks, issued September 15, 1874, No. 154,989, to Jacob O. Joyce, complainant, and alleges infringement on the part of defendants, who manufacture lifting-jacks under letters patent issued to S. E. Mosher, October 11, 1875, No. 168,663, and January 18, 1876, No. 172,471; and asks an injunction, and an accounting for profits and damages.

Defendants admit the manufacture of jacks under the Mosher patents, and rely upon the state of the art as necessitating a limited construction of the Joyce patent, under which construction they do not infringe. Defendants cited a number of prior patents, of which the following were introduced at the hearing, and relied upon by counsel for defense:

1	Smith, L.,	Lifting-jack.	No. 56,111.	July 3, 1866.
2	Smith, W. N.,	Cotton-press.	No. 106,417.	Aug. 16, 1870.
3	Smith, W. N.,	Cotton-press.	No. 115,126.	May 23, 1871.
4	Smith, F. B.,	Lifting-jack.	No. 11,303.	July 11, 1854
5	Masser, J. B.,	Sash-holder.	No. 51,469.	Dec. 12, 1866.
6	Williamson, W. P,,	Elevator safety-pawl.	No. 116,656.	July 4, 1871.
7	Hutton, Robert,	Sash-holder.	No. 60,735.	Jan. 1, 1867.
8	Fasig, D.,	Lifting-jack.	No. 36,144.	Aug. 12, 1862.
9	Rodgers, A. C.,	Sash-holder.	No. 87,708.	Mar. 9, 1863.
10	Sawtell, J. N.,	Sash-holder.	No. 65,015.	May 21, 1867.
11	Genung, R. W.,	Lifting-jack.	No. 11,298.	July 11, 1854.
12	Connelly, E. G.,	Sash-fastener.	No. 10,541.	Feb. 21, 1854.
13	Shepherd, Chas. C.,	Sash-holder.	No. 122,496.	Jan. 2, 1872.

*Reported by J. C. Harper, Esq., of the Cincinnati bar.

E. E. Wood, for complainant.

L. M. Hosea, for respondents.

MATTHEWS, Justice, (*orally.*) The letters patent upon which this suit is based contain two claims, only one of which is in controversy, namely, the *first*, which reads as follows:

(1) A pawl for lever-jack, with two or more teeth, and adapted to move in inclined slots, grooves, or guides formed in the frame, substantially as described.

The question of infringement depends upon the latitude of construction given to this claim.

The specification describes, and the drawings show, a frame with parallel sides, between which a pawl moves in parallel slots in the frame, forming guideways inclined toward the vertically-moving ratchet-bar. The pawl is provided with a series of teeth on the face, adjacent to the ratchet-bar, and, at opposite sides, with projections or lugs engaging in the inclined slots of the frame. The guide-slots are inclined at an angle of 45 degrees or thereabouts, and the pawl is actuated solely by gravity to move down the inclines, and engage its teeth with those of the ratchet-bar; and the patentee states in his specification, as one of the objects of invention, his purpose to utilize the gravity of the pawl itself, thus arranged, as a substitute for a spring.

It is contended, on behalf of complainant, that the function of the patentee's device is twofold: *First*, to dispense with the spring usually employed to press the teeth of the pawl against the rack-bar; and, *second*, to obtain greater strength by dividing the load among several teeth of the pawl and rack-bar; and that these two objects could be separately attained by suitable modification of the apparatus within the scope of the invention; for example, by using a spring to start the pawl in movement upon an incline of lesser angle, using the inclined seat to do the holding of the load, as in the defendant's construction.

The defendants manufacture a jack having a many-toothed pawl resting at its bottom upon a seat slightly inclined toward the rack-bar, and actuated by a spring placed behind it within the frame. The inclination of the seat is not sufficient to actuate the pawl by gravity, nor are there any slots or other means of guiding the pawl in the sides of the frame; the function of the inclined seat being rather to assist the spring in preventing a backward slip of the pawl when under pressure, than to facilitate the forward movement of the

pawl, although to the latter result it may contribute in a slight degree.

On behalf of the defendants it is contended that, in view of the state of the art, the patent of the complainant can be sustained only by limiting it to the specific construction and combination of the devices shown; that such in fact is his own statement of invention, making the gravitating function of the pawl, as a substitute for a spring, its essential feature; and that the independent function of causing thereby a more certain engagement of its teeth with those of the rack-bar is old in kindred devices, and not one newly called into existence by the employment of the pawl in a lifting-jack, nor due to its use in that connection, but is inherent in the same construction of parts used for analogous purposes. In support of this view the defendants' counsel presents a number of early patents for lifting-jacks, elevator-cages, sash-holders, etc.

Without referring in detail to the devices exhibited to show the state of the art, I am satisfied that the mechanical principles embodied in the invention of complainant were old and well known in constructions used for the same or analogous purposes; and that his real invention consisted in the construction and arrangement of certain devices in combination by which he adapted those principles in a particular manner to produce his lifting-jack. The claim in question must be limited to the combination of described parts, constructed and operating in the manner shown; that is, a pawl provided with side lugs, moving by gravity alone, between and in inclined guideways in the side walls of the frame.

The bill will be dismissed, with costs, as the defendants do not infringe such claim.

PELHAM *v.* EDELMEYER.

(*Circuit Court, S. D. New York.* January, 1883.)

1. PATENTS FOR INVENTION—PLEADINGS—DEMURRER.

   Courts will refuse to decree unless the substantial groundwork of the case in which relief is sought is distinctly alleged in the complaint; but objections to the form of a pleading should be taken by demurrer, and after proof has been taken the bill will not be critically studied to find defects in the form of the pleading.

2. SAME—EVIDENCE.

   Where the proof shows that the complainant had no legal or equitable interest in the matter in controversy, the bill will be dismissed.

3. INFRINGERS—DEFENSES OF.

Where the defendants were treated in the complaint as ordinary infringers, they were allowed to avail themselves of any defense open to defendants charged with infringement.

Kitchen & Brown, for plaintiff.

J. P. Fitch, for defendants.

WALLACE, J. Upon the merits of this case it is by no means clear that the agreement for a license does not protect the defendants in the right to make and rent to builders any elevators which embody the invention secured by the patent to Thomas M. Pelham. While that agreement contains clauses restricting the licensee to the right to make and rent a particular class of elevators, there are other clauses which indicate that what the parties really had in view was the compromise of an existing suit and an adjustment of future relations, which would permit both to make and rent to others all elevators covered by the patent, upon a fixed basis of compensation. Why should the parties agree upon a scale of prices to be charged and collected upon all elevators, and upon liquidated damages for a breach of the condition, if the defendants were expected to be restricted to elevators of a special structure? If, as would seem to be improbable, the contracts made by the first party and excepted from the operation of the agreement were for the rental of elevators differing in structure from the infringing elevator, the conclusion would be almost irresistible that the agreement was intended to adjust the rights of the parties respecting the future making and renting of all elevators embodying the patented invention.

It is unnecessary, however it would be legitimate, to determine the controversy upon the main question, because there is a fatal objection to the complainant's case which must defeat his cause of action. So far as appears by the allegations in the bill and by the proofs, the title to the letters patent in suit is not vested in the complainant. Both upon the facts alleged in the bill and disclosed by the proofs, the letters patent became the property of Phebe Pelham, as administratrix of the patentee, as part of his estate. The complainant is the sole devisee and legatee under the will of Phebe Pelham, but the will does not purport to bequeath any property held by her in her representative capacity, and of course could not vest the title to such property in the legatee if it assumed to do so.

Manifestly the objection taken for the first time at the hearing of the cause might have been taken by a demurrer to the bill. If it involved only a question of pleading, and the bill were not defective

in a matter of substance not having been taken by demurrer, the objection would not be available now. The objection is not that there is a defect of parties, but that the complainant has no interest in the subject of the controversy. As to all merely formal defects in the bill the objection must be taken by demurrer. So, also, when there is a defect of parties appearing upon the face of the bill, the defendant must resort to a demurrer or the court is at liberty to make a decree saving the rights of the absent parties. If the proofs disclosed title in the complainant, it would be open to consideration whether the general allegation in the bill, that the complainant is the owner of the patent, would be held sufficient to authorize a decree notwithstanding that allegation is a conclusion of law based upon qualifying facts that negative it.

The rule is familiar that the court will refuse to decree unless the substantial groundwork of the case in which relief is sought is distinctly alleged in the bill; but after proofs have been taken the bill will not be studied critically to find defects, and the most liberal construction will be placed upon the allegations consistent with established rules of pleading. The question here, however, is one of evidence rather than one of pleading. The complainant has failed to show himself possessed of any legal or equitable interest in the letters patent on which the suit is founded. If the bill were perfect the court could not decree for complainant upon the proofs. If the complainant were suing upon the agreement for a license the defendants might not be permitted to deny complainant's title to the patent. But the bill assumes to treat defendants as ordinary infringers. They are therefore at liberty to avail themselves of any defense open to defendants who are charged with infringement.

The bill must therefore be dismissed. As this result may be attributable to a slip in practice, the dismissal will be without prejudice to complainant's right to file another bill.

BARKER *v.* TODD.

(*Circuit Court, N. D. New York.* November 29, 1882.)

1. ANNULMENT OF DECREE.
   It being made to appear to the court by the petition of strangers to the record that a decree was obtained by collusion between complainant and defendant, it is annulled and the cause dismissed.
2. BARKER PATENT FOR CHAIN-PUMPS.
   Vacation of judgment in favor of Barker reissue No. 6,531, for chain pumps, reported in 13 FED. REP. 473.

The decision in *Barker* v. *Todd*, reported in 13 FED. REP. 473, has since been set aside upon the application of the L. M. Rumsey Manufacturing Company, and the case finally disposed of by the following decree.

Parkinson & Parkinson, for L. M. Rumsey Manufacturing Company.

R. H. Duell, for Barker.

WALLACE, J. This cause having been heard upon the petition of the L. M. Rumsey Manufacturing Company *et al.* to vacate and annul the decree heretofore entered herein, and upon affidavits and arguments of counsel in behalf of the said petitioners and the said complainant, Barker, and it appearing to the court that the proceedings therein were procured by collusion between the complainant, Barker, and the defendant, Todd, and that there was no real controversy between them, it is hereby ordered, adjudged, and decreed that the said decree, to-wit, the decree entered on or about the twelfth day of September, 1882, be and the same is hereby vacated and annulled, and that this cause be dismissed. It is further ordered that said Barker pay the disbursements incurred in the said application for vacation of said decree.

GRONSTADT *v.* WITTHOFF.

(*District Court, S. D. New York.* February 8, 1883.)

1. SHIPPING—USAGE OF PORT—LANDING CARGO.
   In the absence of any different usage of the port, or other indication in the bill of lading, a vessel is bound to land her cargo at some suitable wharf.
2. SAME—BILLS OF LADING—HOW CONSTRUED.
   Bills of lading, like other commercial instruments, when indefinite in their terms, are to be construed reasonably according to the presumed intention to be gathered from the situation of the parties, and their relations to the ship

and to each other; they should not be construed, unnecessarily, so as to make different consignees responsible for each other's faults, nor for delays of the vessel, if they have no control of her movements or in selecting a dock.

3. SAME—LAY DAYS—WHEN COMMENCE.

Where the bill of lading contains nothing to indicate a contrary intention, the stipulated lay days should be held not to begin to run as against the consignees of cargo on a general ship until the vessel has arrived at her berth, or is in actual readiness to discharge, according to her legal obligation. *Secus*, as against the charterer, or a consignee assuming all the obligations of the charter-party, or having the control of the ship.

4. SAME—CUSTOM AND USAGE.

A custom or usage to dispense with this legal obligation must be so fixed, uniform, and well understood, as to be presumed to form a part of the contract. Such a usage is not made out by evidence that in the majority of cases merely certain kinds of cargo are discharged on lighters for the mutual convenience of the consignee and the vessel, where it also appears that it is not unusual to discharge upon the dock, and that plenty of docks were available.

5. SAME—MODE OF DISCHARGING VESSEL.

The words "to be taken free from on board," in a bill of lading, do not, necessarily, mean to be taken on lighters away from the wharf.

6. SAME—CASE STATED.

The ship Petropolis having arrived with 2,090 empty petroleum barrels stowed above a cargo of iron, which by the charter-party and bill of lading were to be discharged at the same berth, was directed by the consignees of the latter to go to the Erie basin, where barrels would not then be received. The ship arrived there on May 26th, but could not reach the wharf, and moored along-side another vessel. She was unable to get a berth along-side the wharf until June 1st, and the barrels were discharged by the 4th. The bill of lading gave four lay days, and demurrage thereafter, not indicating when they commenced to run. On May 25th the vessel notified the consignee that she would be ready to discharge on the 26th, and the consignee, on the 27th, notified her to discharge the barrels on the dock if lighters were not along-side. *Held*, that the lay days, as against the respondents, did not commence until June 1st, and that no demurrage accrued.

In Admiralty.

Beebe, Wilcox & Hobbs, for libelant.

E. S. Hubbe, for respondent.

BROWN, J. This action was brought against the owners and consignees of 2,090 empty petroleum barrels, imported in the ship Petropolis, from Pillau, and consigned to the respondents in New York, to recover four days' demurrage, at the rate of £10 per day, for delay in receiving the barrels beyond the time specified in the bill of lading. The case turns partly on the construction of the bill of lading, and partly on the question whether the respondents were bound to receive the barrels on lighters instead of on the wharf.

The Petropolis had a cargo consisting mainly of iron, with the petroleum barrels stowed above it. She arrived in New York on the twenty-first day of May, 1880, and upon the request of the owner of the

iron, the major part of the cargo, went to the Erie basin to discharge, without consulting the respondents, where she arrived on May 26th, and moored along-side another vessel. She was not able to obtain a berth by the wharf until the morning of May 31st, and soon afterwards was obliged to haul out again to admit of the departure of another vessel, and did not reach the wharf again until 4 P. M. of the same day. On the following morning, June 1st, the discharge of the barrels was commenced, and completed on the afternoon of the 4th. The iron was thereafter discharged on the wharf.

The bill of lading contained upon the margin the following clause: "To be taken free from on board in four running days, or to pay £10 sterling demurrage for every day longer detained;" and in the body it is provided that the consignee should pay freight, "say one shilling sterling for every barrel taken in, with all other conditions as per charter-party, with primage and average accustomed."

The charter referred to in the bill of lading provided that the Petropolis should proceed to Pillau, and there load, not exceeding about 2,000 empty petroleum barrels, and thence proceed to New York, and deliver the same to the freighter, or his assigns, on being paid freight, "say one shilling sterling for every barrel taken in, £2 gratuity to the master. The captain has liberty to complete the vessel with rails and other cargo; the cargo to be delivered at Pillau free on the railing of the vessel, and to be discharged in the same berth where the rails are discharged. Freight payable on delivery of the cargo agreeably to the bills of lading; the cargo to be taken from along-side the said vessel at merchant's risk and expense. Four running working days are allowed for loading the barrels, and twelve running working days for discharging the whole cargo; and if detained during a longer period, he engages to pay for such detention at the rate of £10 sterling per day."

Prior to the arrival of the vessel, the respondents had sold the barrels to a purchaser who agreed to take them on arrival without delay. On May 25th, before arriving at the dock, the master of the ship gave notice to the respondents that he would be ready to discharge on the following day. On the 27th the respondents notified the captain that if no lighter was along-side, to discharge the barrels on the dock, giving them notice thereof; to which, on the same day, the agent of the vessel replied they would do so, if the respondents would obtain permission from the owners of the dock. The agent testified on the trial that after receiving the respondents' letter he had applied for permission to place the barrels on the dock and been refused; and

that many owners of docks refused to receive petroleum barrels on account of the danger of fire and its affecting their insurance; and that this application had been made before his letter to the respondents. The respondents were not notified that permission had been refused, nor did they reply to the last-named letter.

A general ship is bound to make delivery of her cargo at a wharf, or other suitable place of landing, unless otherwise provided by the bill of lading or the usage of the port. In the absence of any usage or stipulation, she may go to any suitable wharf of her own selection, and if she has on board such a cargo as cannot all be delivered at the same wharf, the burden of delivery still rests upon her, and she must go to different wharves unless she can make arrangements with the owners of the cargo to avoid that trouble. 1 Pars. Shipp. & Adm. 222; *Moody* v. *Five Hundred Thousand Laths*, 2 FED. REP. 608. In the absence of any special provision, the lay days provided in the bill of lading do not begin to run until the vessel has arrived at some usual or suitable place of discharge. *Aylward* v. *Smith*, 2 Low. 192; *Hodge* v. *N. Y. & N. H. R. R.* 46 Conn. 277; *The Grafton*, Olcott, 49; *Irzo* v. *Perkins*, 10 FED. REP. 779, and cases cited.

It has been decided, however, and such seems to be the general rule, that, as between the ship-owner and the charterer, the "arrival" of the ship is deemed complete, and the lay days begin to run from the time when the ship has arrived at the usual or designated place of discharge within the port, such as the public docks, although not able to get a berth immediately, so as to commence her discharge. *Brown* v. *Johnson*, 10 Mees. & W. 331; *Kell* v. *Anderson*, Id. 498; *Nelson* v. *Dahl*, 12 Ch. Div. 568; *Davies* v. *McVeagh*, 4 Exch. Div. 265; *Sleeper* v. *Puig*, 10 Ben. 181; Macl. Shipp. 526–532.

The libelant invokes the application of this rule from the time of the arrival of the Petropolis at the Erie Basin on the twenty-sixth of May; and if this rule is applicable to the respondents as consignees under this bill of lading, they must be held liable, although the four lay days provided by it had expired before the vessel reached her berth.

The question is one of construction of the terms of the bill of lading. As between the charterers and owners, it is just that where the stipulation is that the ship is not to be detained beyond a certain number of days in loading or unloading, the charterer who designates the place of discharge, and after arrival controls the motions of the ship, shall bear the risk of any delay in obtaining a berth at the place of his own selection; for from the time of arrival at the

place designated for discharge "the carrying voyage of the ship is over," and she is at the disposal of the charterer for the purpose of unloading. *Nelson* v. *Dahl*, 12 Ch. Div. 568, 590; *Wright* v. *New Zealand, etc., Co.* 4 Exch. Div. 165, 171; *Adams* v. *Royal M. S. S. Co.* 5 C. B. (N. S.) 492. That construction, under such circumstances, is reasonable, and presumably according to the intention of the parties.

There are several cases in the English courts where a similar rule has been applied also to consignees under the bills of lading of a general ship, (*Porteus* v. *Watney*, 3 Q. B. Div. 534; *Straker* v. *Kidd*, Id. 223; *Leer* v. *Yates*, 3 Taunt. 387; *Randall* v. *Lynch*, 2 Campb. 352; *Harman* v. *Gaudolphin*, Holt, N. P. 35;) but on examination they will all be found to turn upon the express language of the contract made by the bill of lading.

In *Leer* v. *Yates* there were several different consignees, each of whom stipulated that the goods "should be taken out in 20 days after *arrival*, or to pay £4 per day demurrage." The "arrival" being complete from the time of entering the docks, each consignee was held liable *in solido* upon the express contract, although the delay was partly through not getting a berth within the dock, and partly through the negligence of other consignees in not removing the superincumbent cargo.

In *Kell* v. *Anderson*, 10 Mees. & W. 498, 502, Baron PARKE observes that the case of *Leer* v. *Yates* turned entirely upon the words "after arrival," by which the parties had bound themselves. See, also, *Cross* v. *Beard*, 26 N. Y. 89. So, in *Harman* v. *Gaudolphin*, *supra*, the stipulation was that the consignee should "clear the goods in 14 running days after her *arrival* in port." It was held that the consignee took the risk of all delays not occasioned by the delay of the ship. In *Randall* v. *Lynch* the charter-party provided that the lay days should "continue in London from the day of reporting at the custom-house." In *Porteus* v. *Watney* (1878) the charter-party allowed "14 working days for loading and unloading, and demurrage at £35 per day." The bills of lading to various consignees provided for the delivery of goods "on paying freight for the said goods, and all other conditions as per charter-party." The defendant's goods were at the bottom of the ship; and although he was without fault and ready within the time to remove his goods, he was held liable for the delays caused solely by other consignees having goods above his, on account of the express language of the bill of lading, which adopted the terms and the liabilities of the charter-party. The embarrass-

ing results of contracts such as these, making the several consignees virtually answerable for the faults of each other, although without fault of their own, is fully recognized and discussed in this case, as well as in that of *Leer* v. *Yates*, and the defendants were held liable, simply because the terms of the contract left no alternative. Macl. Shipp. 531.

Where the terms of the bill of lading, however, admit of a different construction, a different rule has been applied to consignees; as where it stipulates for a discharge "in the usual and customary manner," or where the time is to be reckoned "from the time of the vessel being ready to unload and in turn to deliver;" or where by the usage of the port and of the trade, the *arrival* is not deemed complete until a berth is reached, or where a discharge is to be made "according to the customs of the port," or where a certain quay is named, in which case the ship must get along-side. *Rogers* v. *Forresters*, 2 Campb. 483; *Robertson* v. *Jackson*, 2 C. B. 412, (Man., G. & S.;) *Nordon* v. *Dempsey*, 1 C. P. Div. 654; *Eleven Hundred Tons Coal*, 12 FED. REP. 185; *Postlethwaite* v. *Freeland*, 4 Exch. Div. 155; *Strahan* v. *Gabriel*, unreported, cited by BRETT, L. J., in *Nelson* v. *Dahl*, 12 Ch. Div. 589, 590.

I have found no case save that of *Dobson* v. *Droop*, 4 Car. & P. 112, in which the liability of a consignee of goods on a general ship is considered, where the bill of lading did not either expressly by its own language, or else by adopting the liabilities of the charter-party, fix or indicate the time when the lay days were to commence. In that case the ship was to be "discharged in 14 running days, or five pounds a day demurrage;" and Lord TENTERDEN held the defendant was not liable for the delay caused by the misconduct of another consignee. This case has, it is true, been referred to as overruled by those above cited. This is not, however, strictly true; since the provisions in the bill of lading were in all of those cases essentially different.

In the present case the bill of lading is substantially the same as in the case of *Dobson* v. *Droop*. It does not adopt the mere terms of the charter-party as to demurrage, as in the case of *Porteus* v. *Watney*, *supra*, so as to assume the liabilities of the charterer. It adopts only "all the other conditions as per charter-party," making its own different provision as to the lay days; which, therefore, supersedes the general provisions of the charter-party on that subject. It provides that the barrels are "to be taken free from on board in four running days, or to pay £10 sterling demurrage for every day longer

detained," with nothing to indicate when the lay days are to commence. In this respect it is ambiguous; and in the absence of proof of any usage settling the question, it ought to be determined in accordance with the presumed intention of the parties, to be gathered from their situation, their relations to the ship, and to the other consignees. *Raymond* v. *Tyson*, 17 How. 53, 59–62.

The same language in a charter-party imports, as the cases above cited show, a liability on the charterer from the time the "arrival" is complete at the public docks, or at the usual or designated place of discharge. As between the ship-owner and the charterer this is a reasonable construction, as I have already said, and presumably represents their intention. The object of the ship-owner is to limit and define as nearly as possible the time for which his ship is let as a whole to the charterer. The owner takes the risks of the time employed in navigation from port to port; but after arrival at the place designated for discharge, and the duties of navigation are over, he obviously intends to limit the period incident to unloading, and to be paid for any longer use of the vessel. It would be unreasonable and unjust, therefore, that the ship should bear the burden of delays caused after arrival, without her fault, in getting a berth at the dock, or at a landing designated by the charterer; and this applies also where a sole consignee is in the situation and has the powers of a charterer. *Philadelphia, etc.*, v. *Northam*, 2 Ben. 1, 4; *Sprague* v. *West*, Abb. Adm. 548. It is reasonable and just that the charterer, or the consignee, who has the control of the ship, should take the risk of such delays as are more or less subject to his own directions; and the charterer may, by the express terms of the bills of lading, protect himself against all delays on the part of the various consignees; and if the charterer means to make all the consignees like himself liable for whatsoever delays, the bill of lading should express that intent clearly, by unambiguous languge, or by adopting as in *Porteus* v. *Watney*, the liabilities of the charterer. *Wegener* v. *Smith*, 15 Com. B. 285.

The situation and relations of one of several consignees of goods on a general ship are very different from those of the charterer. He has no power, like the latter, to designate the place of discharge within the port, or to control the vessel's movements after arrival, unless there be some custom on the subject; and, in that case, custom must also dispose of the liability for delays. All that such a consignee can possibly do is to be ready to receive his goods when the vessel is ready to unload them. The different consignees have no

privity of contract with each other, and no means of protection against each other's defaults. It is unreasonable, therefore, to suppose, and it is in fact incredible, that the parties to the numerous bills of lading on a general ship intend to make all the consignees responsible *in solido*, not merely for the delays of the vessel over which they have no control, but also for the defaults of each other in the removal of the several portions of the cargo, unless the words used in the bill of lading admit of no other construction. It is a maxim, in the interpretation of written instruments, that the construction shall be reasonable, since it is not to be supposed that the parties intended anything unreasonable or unjust, if that can be avoided. Potter, Dwarris, St. 145, 136, 130; Abb. Shipp. *250; *Raymond* v. *Tyson*, 17 How. 59–62.

The language of this bill of lading, like that in *Dobson* v. *Droop*, does not require any such unreasonable construction. It is satisfied just as fully and as naturally by a construction which limits its meaning to a "detention," by some act or default of the consignee after the vessel is ready to unload his particular goods, as by the more extended construction, which includes a "detention," from whatsoever cause, and by whose default soever, from the moment of arrival at the dock or place of discharge. The circumstances, and the relations of the charterer to the vessel and to the other consignees, make the latter construction of such general language as this bill of lading employs, the proper one in a charter-party; while the wholly different circumstances and relations of the various consignees to the vessel and to each other make the former construction the only reasonable and proper one in the case of a general ship, where there is nothing expressed to indicate the time when the lay days begin.

If, in a port like this, where there are many docks equally available for the discharge of general cargoes, a vessel may select her own dock, and then hold all the different consignees liable for demurrage during the delay in getting a berth, great abuses would be likely to arise. The vessel might select the most crowded dock for the mere purpose of multiplying her claims for demurrage; and after arrival there she would have no motive for diligence in securing a berth. On this bill of lading, therefore, I follow the principle of the ruling of Lord TENTERDEN in *Dobson* v. *Droop*, and hold that its proper construction does not make the consignee liable for delay in getting a berth after arrival at the dock or place of discharge.

If I felt compelled, however, to give the same construction and effect to these or similar words contained in the bills of lading of a

general ship, as when contained in a charter-party, so as to hold the consignees liable for delays in obtaining a berth after arrival, still, for the reasons above referred to, and to prevent abuses, I should hold it to be incumbent upon the ship, before recovering for such delays, to prove that she used reasonable diligence in endeavoring to find the least crowded dock as a part of her primary duty to go to a proper place of discharge; and the lapse of a week, nearly double the entire lay days allowed to the respondents, as in this case, before securing a berth, without explanation or excuse, should be regarded as *prima facie* evidence that she had not gone to a proper place of discharge, and therefore was not entitled to count the lay days until she reached her berth.

The Petropolis, however, did not go to the Erie basin on her own selection, but by direction of the consignee of the iron, as owner of the major part of the cargo, for his convenience, and therefore properly at his expense for any delay in getting a berth. The case of the ship against the other consignee is not improved by this direction of the owner of the iron. For one consignee cannot, by his own directions, relieve the ship from her duty to another consignee to go to a proper place of discharge. Any usage giving the owner of the chief part of the cargo the choice of the dock is not legal beyond what is reasonable; and it is manifestly unreasonable that such a consignee should, for his own convenience, direct a ship to a crowded dock, at the expense of the other consignees, when a more suitable one for all could just as well be had. If such directions are given, and the vessel acts upon them without the concurrence of the other consignees, she must be held derelict in her duty to the latter, and therefore not entitled to count lay days against them until she reaches her berth. Nor should the other consignees be required, in consequence of such directions, to discharge otherwise than according to their obligations; or to receive their goods on lighters, when entitled to a discharge on the wharf. Lighters cannot be procured as readily as trucks; more time to get them is necessary; sometimes they cannot be got for several days, and sometimes, through ice, they cannot for a considerable time be used at all. Lay days, therefore, which are agreed upon in a bill of lading, with reference to a discharge on a wharf, cannot be equitably applied to a discharge on lighters; and hence no duty to receive on lighters can be ingrafted upon a contract having reference to a wharf.

In this case the provisions of the charter party, which, aside from demurrage, are adopted by the bill of lading, manifestly contemplate

a discharge at the wharf; for they provide that the barrels shall be discharged, not in the stream, nor while the ship is moored beside another vessel in the dock, but "from the same *berth* where the rails are discharged." The ship was to reach her berth, therefore, alongside the wharf where the rails were to be discharged before the discharge of the barrels was to commence. The notice that she would be ready to discharge on the 26th was, therefore, premature, for she was not ready to discharge at her *berth* until June 1st. This clause in the charter-party would also be a sufficient answer to the further contention of the libelant, that the respondents were bound by usage to receive the barrels on lighters before reaching the wharf, even if such a usage at this port were proved. Some evidence as to such a usage was given by both parties. But no fixed, well-settled, or uniform custom was made out, such as would change the legal rights or obligations of the parties, nor anything more than a practice in the majority of cases to discharge on lighters by arrangement for the mutual convenience of the parties. *The Eddy*, 5 Wall. 481; *The Paragon*, Ware, 328–330.

The requirement, that the barrels should be discharged at the same berth with the rails, also demanded that the ship should go to a dock where both would be received on the wharf, unless no such dock could be found, of which there is no evidence. Under such a clause, clearly, neither the ship nor the other consignee could select a dock where the barrels could not be put on the wharf at all, as was the fact here. For this additional reason, therefore, the vessel did not go to a proper place of discharge, if, as I find was the fact, the respondents were not by any fixed usage legally bound to receive the barrels on lighters. *Tapscot* v. *Balfour*, L. R. 8 C. P. 46. Nor, considering the few lay days allowed to the respondents, can I regard it as a reasonable construction of this stipulation that, though not legally bound to receive the barrels on lighters in the stream away from the wharf, they would do so if the owner of the iron chose to direct the vessel to a wharf where the barrels would not be received. The stipulation that the barrels should be discharged at the same berth with the rails implies, as a necessary condition, that the berth selected should be one where a discharge could be made according to the ship's legal obligation, *i. e.*, on a wharf.

If, on arrival in port, an arrangement is made for a delivery of the cargo on lighters, and either party has acted upon it, the other may doubtless be held for all legal damages occasioned by the arrangement being unfulfilled or revoked. *Irzo* v. *Perkins*, 10 FED. REP.

779. In this case the agent of the vessel testified that the respondent's clerk, on the twenty-sixth of May, called and inquired where the ship was, and where they should send lighters, and that the agent replied that she was at the Erie basin. This certainly does not amount to any agreement to receive on lighters, although it was plainly an intimation, if the clerk had authority to make it, that it was expected that the consignees or their vendee would receive the barrels in that manner. If the Petropolis had, after such an arrangement, and in reliance upon it, gone to the Erie basin, where barrels would not then be received, she might have recovered her damages for her expense and delay in subsequently going to another dock to discharge, like the Roma in the case last cited. But in this case the facts are different. The action of the the Petropolis was not affected by the interview with the clerk in any respect. She was already at the Erie basin, where she had gone without consulting the respondents, and she made no change in consequence of the clerk's inquiry, or of the notice from the respondents on the following day to discharge on the dock, and hence sustained no damages thereby.

The clause in the charter-party that the "cargo is to be taken from along-side the vessel at merchant's risk and expense," and the words of the bill of lading, "to be taken free from on board," are, I think, clauses of similar import. The witnesses were unable to state the precise meaning or intention of the latter clause. But it does not, any more than the former, on its face, import any obligation to discharge the cargo on lighters rather than on a wharf. Clauses substantially the same are not uncommon. *The Kathleen Mary*, 8 Ben. 165; *Smith* v. *Sixty Thousand, etc.*, 2 FED. REP. 396; *Moody* v. *Five Hundred Thousand Laths, etc.*, Id. 607; *Smith* v. *Sieveking*, 4 El. & Bl. 945–6; Leggett, Bills Lad. 390–396.

As the Petropolis was, therefore, bound in this case to make delivery of the barrels at some wharf, as the respondents did not waive that obligation, and are not legally chargeable for the delay in getting a berth, and as they received the barrels within four days after she got her berth and was ready to deliver the barrels, the libel should be dismissed with costs.

THE ARCHER.

(*District Court, S. D. New York.* January 30, 1883.)

1. BOTTOMRY BOND—MORTGAGEE—MALA FIDES—ESTOPPEL.

A bottomry bond executed in a foreign port for repairs to a vessel putting back in distress, by the master, who is also the sole legal owner, cannot be declared void for mere want of authority to execute it as against a mortgagee not in possession, whatever his equities. Where such mortgagee, however, has claims exceeding the value of the vessel, and the lenders on bottomry know that fact, or are chargeable with knowledge of it, one of them being the agent of the ship, and arrangements having been first made with them by which the mortgagee should accept drafts for the repairs, and near the close of the repairs a bottomry bond is demanded, without further communication or notice to the mortgagee, and the master thereupon executed the bond, with a premium of 20 per cent., under a promise of some compensation to himself, which was afterwards paid: *held*, that the bottomry was unnecessary and in bad faith upon the part of the master and lenders, as respects the mortgagee, and that the premium of 20 per cent. included in the bond should be wholly disallowed.

2. SAME—PAYMENT FOR REPAIRS.

The bills for repairs having been paid by the lenders in bottomry in good faith, upon the master's certificate, *held*, that it was too late to consider whether the prices charged were excessive.

In Admiralty.

Theodore F. H. Meyer, for libelants.

William W. Goodrich, for claimant.

Butler, Stillman & Hubbard, for claimants of cargo.

BROWN, J. This libel was filed to recover the amount due upon a bottomry bond, executed by Capt. Crossman, upon the American ship Archer, to one Addicks, at Bremerhaven, on the thirty-first day of December, 1877, for the sum of 21,371 marks, payable five days after the arrival of the vessel in New York, with 20 per cent. premium, amounting in all to 25,645.30 marks. The Archer, having previously sailed from Bremerhaven, had put back in distress and leaking, and arrived there in the early part of November, 1877. The mercantile house of Roters & Co. had previously done some business for the ship when in that port, and paid her disbursements upon the captain's drafts on New York for comparatively small amounts. Previously to the arrival of the vessel, the principal member of the firm of Roters & Co. had died, and the business was then being managed by Mr. Meiners. Capt. Crossman testifies that he saw Meiners and made an agreement with him that Roters & Co. would pay for the necessary repairs of the vessel upon drafts on New York. Mr. Meiners denies that there was such an agreement. Several surveys

of the vessel were afterwards made, and extensive repairs were recommended, which were completed during the months of November and December, 1877. The vessel sailed for New York on the tenth of January, 1878, where she arrived about 60 days afterwards. During the pendency of this action the vessel has been sold by the marshal for $6,700, a sum in excess of the libelant's claim, so that the cargo, which was also attached, is exempted. Payment of the bond is resisted by Mr. Harrison, as owner of the vessel, on the ground that the repairs were excessive in amount, *i. e.*, beyond the necessities of the ship; *second*, that the prices charged for many of the items were extortionate; *third*, that a part at least was paid before the bottomry bond was asked for; *fourth*, that all the repairs were agreed to be paid for in drafts on New York, and that the bond was obtained fraudulently and without necessity; *fifth*, that Mr. Harrison was the owner and in good credit, and the bond was executed without authority.

The question of the ownership of the vessel is of importance in this case. The bond includes about 1,057 marks, as near as I can make out, which was advanced before bottomry was spoken of or contemplated. This could not be included in a subsequent bond for the benefit of the ship's agent as against an absent owner. *The Augusta*, 1 Dod. 283; *The Hero*, 2 Dod. 143. Moreover, communication with the owner before executing a bottomry bond is necessary, where such communication is practicable, in order that the owner may by procuring funds avoid the extraordinary premium which bottomry entails. *The Hamburg*, Brown. & L. 253; *The Lizzie*, L. R. 2 Adm. 254; *The Oriental*, 7 Moore, P. C. 398; *The Onward*, L. R. 4 Adm. 38. Communication by mail and telegraph from Bremerhaven with Mr. Harrison in New York was easy, and there is no claim that he ever authorized bottomry; but on the contrary, in answer to Capt. Crossman's communication, he directed drafts on him at 60 days, and this I find was communicated to Mr. Meiners about November 25th, to which no objection was made.

There is a conflict in the testimony between Capt. Crossman and Mr. Meiners, the former alleging that Mr. Meiners agreed at first to pay for these repairs on the credit of such drafts. There are several circumstances which confirm in part Capt. Crossman's statement, on this subject, and show that such was the expectation at the time the repairs were commenced. Mr. Meiners himself testifies, "the bills were paid by my direction; Capt. Crossman had promised me that remittances would be made from New York to cover his expenses."

At the time, however, when the first conversation, testified to by Capt. Crossman, with Meiners occurred, the surveys had not been completed, and it would seem that no such extensive repairs as were afterwards made were then contemplated; and the distinct defense is here set up, which is supported by some evidence, that much of the repairs, though useful to the ship, and in a sense necessary, was not necessary to enable her to complete her voyage; the principal item being the entire new coppering of the vessel, instead of partial recoppering, where recaulking had become necessary. The probable truth appears to be that Capt. Crossman, understanding that Roters & Co. would advance on New York drafts the moneys necessary to pay for the repairs, thought it best to repair the ship thoroughly, in accordance with all the recommendations of the surveys. From the testimony of Mr. Meiners, I think it is evident that these were much more than was anticipated when the vessel arrived and when repairs were first talked of, but that he must have known their general character and probable amount when Harrison's cable to draw on him was exhibited, and that only until some three weeks afterwards did he demand security by bottomry, to-wit, about the seventeenth or eighteenth of December.

The bond was executed on the 31st, and, so far as appears, no communication was had or attempted with Mr. Harrison between these dates, and no notice given him of the demand of bottomry, or opportunity of furnishing funds to avoid it, as might easily have been done. Upon the authorities above cited, such notice and opportunity, under the circumstances of this case, should be regarded as essential conditions of the master's authority to execute a bottomry bond, if Harrison was entitled to be considered as the legal owner, and Crossman as having no authority other than that of captain.

From the evidence before me, however, Mr. Harrison cannot be considered as the legal owner. By the register, Capt. Crossman appears as sole owner; he is so described in the ship's papers, and these were exhibited to Meiners and to Addicks, the lenders on bottomry. Mr. Harrison was holder by assignment of a chattel mortgage for $3,000 upon three-fourths of the vessel, which was in default, and was also the holder of another mortgage, to secure $7,000, upon the whole vessel, which was not in default. So far as appears, this was his only interest in the vessel. Capt. Crossman states that he received the amounts of both of these mortgages, and that nothing had been paid upon them. He states, it is true, that Mr. Harrison was virtually the owner of the vessel from the time he had

bought her; but no explanation of this statement is given other than the statement of his claims as mortgagee, which, it would seem, equaled or exceeded the value of the vessel. This, however, did not make him legal owner, nor does it appear that he ever took possession of the vessel until after her return to New York in 1878.

Capt. Crossman, at the time of the execution of the bottomry bond, was the legal owner, and where that is the fact, a bottomry bond executed like this, by the sole legal owner, cannot be held void for mere want of authority to execute it, on account of any equities, however great, of a mortgagee not in possession. As this bond was, therefore, executed by Capt. Crossman, the legal owner, and as all the bills for which it was given were incurred by his direction and under his supervision, and the amounts approved by him, the bond must be sustained as respects all the amounts paid on account of the ship before as well as after the agreement for the bottomry bond. *The Panama*, Olcott, 343, 348, and cases cited.

The charges of fraud are not sustained by any proof, so far as respects the amounts alleged to have been paid by Roters & Co. and Addicks. They had no interest in these bills. They paid the full amount of them, and upon the approval of Capt. Crossman. As respects these payments the case is, therefore, wholly unlike that of *Carrington* v. *Pratt*, 18 How. 63, to which my attention has been called, where the charge of fraud was sustained by proof that false vouchers for increased amounts beyond those actually paid on account of the ship had been presented and included in the bond. If the bills in the present case were excessive, it was the duty of Capt. Crossman to correct them at the time. There is no evidence that Roters & Co. or Addicks had any knowledge that they were so; and after payment, upon the approval of the captain, it is too late to question their correctness as against the lenders on bottomry. *The Yuba*, 4 Blatchf. 352.

The premium of 20 per cent. included in the bottomry bond must, upon the evidence, as I am constrained to interpret it, be wholly disallowed, as against Harrison, the claimant in this suit, on the ground that the resort to bottomry was unnecessary, in fact; that the lenders knew it, or were chargeable with knowledge of it; and that it was taken in bad faith, as respects Harrison, both on the part of the lenders and of the captain.

It is clear from the testimony that Crossman, though the legal owner of the vessel, had no pecuniary interest in her of any value, The claims of Harrison, as mortgagee, exceeded her full value, and

he was virtual though not legal owner. On putting back to Bremerhaven, Capt. Crossman had written by mail to Harrison, and in the latter part of November received a cable dispatch, in reply, to draw upon him at 60 days for the repairs. He showed this dispatch, as he testifies, at once to Mr. Meiners, who, as Crossman says, after a few days, replied that that was satisfactory. Mr. Meiners, in his deposition taken nearly five years afterwards, merely says he does not remember such a dispatch; but, as I have said above, he testified that the bills were paid after Capt. Crossman "had promised that remittances would be made from New York to cover his expenses." At that time surveys had been made, and the repairs were already well under way, and the amount of them must have been approximately known. When the repairs were nearly completed, about the seventeenth or eighteenth of December, he told Crossman that a bottomry bond must be given, mentioning 15 per cent. as the probable premium. Capt. Crossman at first expostulated against it, but subsequently acquiesced, without further communication or notice to Harrison. After a short advertisement for offers on bottomry, to which there were no answers, Meiners referred Crossman to Addicks, who had been formerly connected with Roters & Co., and whom Meiners had previously spoken with in reference to it, and bottomry at 20 per cent. premium was then agreed upon between Addicks and Crossman.

Crossman testifies that in this interview with Addicks the latter offered to make the premium 25 or 30 per cent. and return Crossman the difference, upon which Crossman asked "how that would benefit him, as he was owner;" to which Addicks replied, in effect, that though Crossman appeared as owner on the papers, he supposed he was only nominally so. The latter part of this conversation, Addicks, in his subsequent deposition, does not deny, but he does deny that he said anything about charging 25 or 30 per cent. premium and returning the difference. At the close of the interview, however, Crossman testifies that he asked Addicks to give him back 5 per cent., "now that he had got a bond to suit him," and that he promised to do so. Addicks denies such a promise, but he says, "Crossman said, 'I suppose now you will give me some of this money back, as I am a poor man;' and in order to have no further talk about the matter I said, 'We will see about it;'" but that he "never gave him any percentage money back." Crossman, not intending to return with the vessel, had, during the repairs, appointed Thurman as captain, who executed the bond as well as Crossman. On the twelfth of January, two days after the vessel had sailed, Meiners, as Crossman testifies, gave him

400 marks as sent to him by Addicks. Meiners denies that he paid him 400 marks "as coming from Addicks." Mr Addicks denies that he ever sent him 400 marks. The force of these qualified denials is much impaired by the fact that it first became known in September, 1882, when their testimony was given, that the bond, though in the name of Addicks only, was taken upon a secret agreement with Meiners that the latter, on account of Roters & Co., as he says, should advance half the money and have a half interest in the bond. The acts and knowledge of each, therefore, bind the other. Capt. Crossman, on the trial, also testified that in a conversation with Addicks he told him that Harrison was the virtual owner.

The inferences to be drawn from this testimony do not rest upon Capt. Crossman's uncorroborated statements, but are sustained by the admissions, and the meager and qualified denials of both Addicks and Meiners.

No such conversation as Addicks admits in regard to the return of a part of the premium to Capt. Crossman is in the slightest degree probable, except upon the assumption that Addicks knew that Crossman was not the beneficial owner, and it confirms Crossman's statement that he told Addicks that Harrison was virtual owner.

The charge by Meiners of 69 marks for telegrams and postage is not explained. No occasion for telegrams is made known, except to ascertain the responsibility of Harrison; and three or four days after seeing the dispatch from him he told Crossman it was satisfactory. It is not improbable that telegrams had been used for inquiry, as might easily have been done. It is not claimed that any doubt existed as to Harrison's responsibility, or that any notice of objection thereto was given to Crossman, otherwise than as might be implied from the mere fact of demanding a bottomry bond at the last moment. This implication is rebutted by the testimony of Meiners that he offered to take drafts for about one-third of the amount, if two other material-men, whose bills covered the residue, would take similar drafts; that is, if this alleged offer was itself made seriously, which there is some reason to doubt, since it was scarcely to be supposed that material-men, wholly strangers to the ship, would accept payment in that way.

Good faith to Mr. Harrison, who, I cannot doubt, was known to Meiners and Addicks, at the time of the negotiation for the bond, to be in the position of beneficial owner, though not the legal owner, required notice to Harrison of any change in the previous understand-

ing in regard to the payment of the repairs by means of drafts on him, and opportunity to him to provide funds for payment there, if that were insisted on. *The Onward*, L. R. 4 Adm. 38; *The Hero*, 2 Dod. 143; *The Staffordshire*, L. R. 4 P. C. 194; Roscoe, Adm. (2d Ed.) 88. Such notice and opportunity could easily have been given by telegraph at slight expense. But this was not done. That a bottomry bond should be executed at the last moment, and to the agent of the ship, at a high premium, coupled with the subsequent gift of 400 marks to Capt. Crossman, the legal, though not the beneficial, owner, is evidence to my mind that both were willing to take advantage of the situation for their own benefit; Capt. Crossman at first opposing, but afterwards acquiescing, in the unnecessary burden of this premium upon the vessel, to the injury of Mr. Harrison or any one else who might be interested in her.

As against Harrison, therefore, it is inequitable that this premium should be enforced; the lenders knew it, and it should, therefore, be wholly disallowed. The bills making up the principal are all equitable claims as respects the lenders; the bond should stand, therefore, for that amount and interest. *The Packet*, 3 Mason, 255, 260; 1 Pars. Shipp. & Adm. 163. If Crossman had any beneficial interest in the vessel, the premium might be enforced to the extent of his interest; but as he claims none, and manifestly has none as against the claimant, judgment should be entered for the amount of the principal only with interest and costs.

The owners of the cargo are entitled to a dismissal of the libel as to them, with costs.

The L. B. Snow.

(*District Court, D. Massachusetts.* February 13, 1883.)

1. Seamen's Wages—Libel.

   A libel for seamen's wages will not necessarily be dismissed for the reason that the action was prematurely brought, if substantial justice can be done under it.

2. Same—Enforcement of Contract.

   A written contract which appears to be a reasonable one, and, if enforced, will do no injustice to either party, will be so enforced by a court of admiralty, even though it appear that the meaning of the contract may not have been clearly understood by the parties.

3. WAGES OF MINOR—COSTS.

Where it appeared that the managing owner of a vessel was directed by the libelant, in an action by a father to recover the wages of a minor son, not to pay the wages to the son, but to retain them until the libelant called for them, and that the libelant never demanded them before the suit was brought, *held*, that the libelant could not recover costs.

In Admiralty.

J. Cunningham, for libelant.

G. L. Ruffin, for claimant.

NELSON, J. The libelant, Joseph Antone, proceeds for the wages of his minor son, Manuel Antone, earned during the season of 1882 on the fishing schooner L. B. Snow. The parties are Portuguese fishermen, living in Provincetown. In the shipping articles signed by Manuel with the approval of the libelant, on April 12, 1882, Manuel's share is stated to be "one-half a share with eight," and the voyage is described as a cod-fishing voyage, to terminate November 30, 1882. On April 22d the day the vessel sailed, the managing owner signed a separate paper, agreeing "to give Manuel Antone the sum of $200 at the expiration of the fishing season in the schooner L. B. Snow." On November 4th Manuel left the vessel when at Provincetown on one of her return trips, by command of the libelant, and against the objection of the skipper, and shipped on another fishing vessel for the rest of the season. The claim of the libelant is that the voyage was understood not to be for cod-fishing, but for "pollocking;" that there was a verbal agreement outside of the writings that Manuel was to serve only until the vessel "quit pollocking;" and that he left on November 4th because the vessel was then fitting for haddock fishing. The claimant, the managing owner, also insists that the writings do not correctly state the agreement. He claims the true contract to have been that he was to guaranty that Manuel's share in the voyage should not be less than $200, if he remained on board during the whole season, and that, as he left before the end of the season, the libelant cannot recover on the guaranty, but can only recover Manuel's share under the shipping articles, which he alleges to be $100.68, computed on a full share instead of a half share, which sum he offers to pay. It is quite possible that the parties may have misunderstood each other, or, in using a language with which they were more or less unfamiliar, they may have failed to express in their writings their exact meaning. The parol evidence in the case is conflicting. It is by no means clear, under the usages prevailing in Provincetown,

that there is any difference between voyages for cod, haddock, or pollock. These fish are taken on the same grounds, in the same season of the year, and with the same tackle, and are caught indiscriminately on all voyages such as this vessel was pursuing. But the written contract appears to be a reasonable one, and I am convinced that no injustice will be done to either side by enforcing it. Taking the shipping articles as modified by the contract of April 22d, the agreement was this: that Manuel should serve for the season ending November 30th, and was to receive for his wages for that period the sum of $200. No special damage is shown to have resulted to the owners from his having left before the end of the season. The libelant is therefore entitled to recover for the time of his son's actual service at the rate of $200 for the whole season fixed by the shipping agreement, which I find by computation to be $176.83.

This action was undoubtedly prematurely brought. The libel was filed November 8, 1882. At that time there had been no breach of the shipping contract by the owners. The only breach then existing was the act of the libelant in taking his son from the vessel before the end of the season. But the libel is not to be dismissed on that account, if substantial justice can be done under it. *The Hyperion's Cargo*, 2 Low. 93; *The Salem's Cargo*, 1 Spr. 389. Perhaps the claimant has waived the right to insist upon the objection by his admission in the answer that there is a sum due, and offering to pay it. But it appears from the testimony of the managing owner, which I believe, that he was directed by the libelant not to pay the wages to Manuel, but to retain them until he called for them, and that the libelant had never demanded them before this suit was brought. Upon such a case I do not think it would be just to require the claimant to pay costs.

The libelant and his minor son Frank, whose wages the libelant received, also served on this voyage. They both left the vessel before Manuel, the libelant being then in debt to the vessel for 43 cents and Frank for 22 cents. Since the libelant was to receive the wages of both his sons, it is proper that these sums should be deducted from Manuel's wages.

Decree for the libelant for $176.18, without costs.

WENBERG *v.* A CARGO OF MINERAL PHOSPHATE and another.

(*District Court, S. D. New York.* February 19, 1883.)

1. JURISDICTION—PETITORY SUITS—EQUITABLE TITLES NOT ENFORCEABLE.
   Petitory suits must be based upon legal titles; admiralty has no jurisdiction of such suits to enforce a merely equitable title, based upon the respondent's breach of trust.
2. SAME—PRELIMINARY CONTRACTS NOT MARITIME.
   Where the libel alleges the employment of the respondent to procure a "concession" from the French government in the libelant's name to remove guano; that the respondent fraudulently procured such concession in his own name; and that the cargo of guano attached, and which the libelant sought to recover in this action, had been removed without the authority of the libelant: *held*, that upon such facts respondent held a legal title to the cargo: that the contract or employment was not maritime, but only preliminary thereto; and that in both respects admiralty has no jurisdiction, and the libel must be dismissed.
3. SAME—QUESTION OF JURISDICTION, HOW RAISED.
   The question of jurisdiction may be raised on motion to dismiss the libel before the cause is reached on the calendar, although not raised by exceptions before answer.

In Admiralty.

Beebe, Wilcox & Hobbs, for libelant.

Daniel Marvin, for respondent.

BROWN, J. This libel was filed as "a cause of possession, civil and maritime," against a cargo of mineral phosphate on board the bark Busy, and against James C. Jewitt. The ninth allegation asserts that "all and singular the premises in the libel contained are within the admiralty and maritime jurisdiction of the court." The respondent, Jewitt, has answered separately, and in general terms has denied the jurisdiction of the court. Some testimony has been taken in the cause, but no previous exception to the libel, for want of jurisdiction, was taken. A motion is now made to dismiss the libel for want of jurisdiction, as respects Jewitt, or, if that be denied, that a further stipulation for costs be required.

The libel alleges that in the year 1877 the libelant and his partner fitted out an expedition from New York, to search for guano islands, and for that purpose dispatched the schooner Peter Mitchell with George R. Field as supercargo; that on June 22d Constable island was sighted, six miles from the port of Cayenne, and that they landed on the island on that day, hoisted the American flag, and claimed to take possession in the name of the United States for the benefit of the libelant and his partner; that pursuant to section

5571 of the Revised Statutes, the libelant having given notice to the department of state, and such department not being confident that such island was within the jurisdiction of the United States, the libelant employed the respondent, James C. Jewitt, "to procure a concession from the government of France in the name of libelant, which said Jewitt for a consideration agreed to do;" and that said Jewitt, on procuring said concession from the government of France, in fraud of the libelant, had his own name, instead of the libelant's, inserted in such concession; that said cargo of mineral phosphate, now laden on board the bark Busy, was taken from such island since its discovery in the expedition aforesaid without warrant or authority from the libelant, or any one authorized to represent him; that the libelant had acquired his former partner's interest, and claims to be entitled to the whole of such cargo legally and equitably; that he "has demanded the possession of said cargo and the right to control the same, but that such right has been refused him."

The separate answer of Jewitt, in its general denial, denies the averment of jurisdiction. It sets up many other matters not necessary to be referred to here, other than to state that it denies all the material allegations of the libel, and disclaims any interest in the cargo.

It is objected by the libelant that no specific exception having been taken to the jurisdiction of the court before answer, it cannot now be heard upon motion before the trial. I have no doubt that it is competent for the court in its discretion to entertain such a motion before the trial, based upon an entire want of jurisdiction over the subject-matter of the libel, (2 Conkl. Adm. 229; *Cutler* v. *Rae*, 7 How. 729, 731; *Marshall* v. *Pierrez*, 9 Ben. 391; *U. S.* v. *Nourse*, 6 Pet. 470; *The Monte A*, 12 FED. REP. 331;) and where, as in this case, it appears from the pleadings that the testimony concerning other facts put in issue would probably be voluminous, and difficult and expensive to procure, the question of the jurisdiction of the court ought to be passed upon early in the cause. Especially is this the case where, as appears upon the evidence before the court, the libelant is insolvent, and the security filed is insufficient for the respondent's probable expenses in case of a decision in his favor.

The libel is very meager and insufficient in its averments respecting the respondent Jewitt, and any connection between him and the cargo.

I have quoted from the libel all that it contains on this subject. There is no allegation that the cargo was in his possession or control when the libel was filed; or that it was claimed by him; or that it

was removed from Constable island by him or by his authority; or that he has any connection with the cargo; nor does it directly aver that he ever obtained any "concession" from France, although that is implied. But on a motion to dismiss for want of jurisdiction simply, I shall not regard any defects in the form of the averments in the libel, but shall treat the libel as though it did aver that Jewitt obtained from France a "concession" to take guano from the island; that being employed to procure it for the libelant, and in the libelant's name, he fraudulently procured it in his own name; and that he had thereafter authorized this cargo to be removed from the island under that "concession." Assuming all these things, as though they had been alleged in the libel, I am nevertheless of opinion that this court would have no jurisdiction to enforce any claim of the libelant in a petitory suit to recover possession of this cargo.

The basis of such actions is a legal title to the property in the libelant. In suits for possession in admiralty the court does not take cognizance of merely equitable titles, or equitable rights, as against the legal owner. *The Amelia*, 6 Ben. 475; *Kynoch* v. *The Ives*, Newb. 205; *The Perseverance*, 1 Blatchf. & H. 385.

Where the libelant is in fact the legal owner, he may enforce his legal right in this court in a petitory suit against those who have by wrong dispossessed him of his property and undertaken to transfer it to others. *Thurber* v. *The Fannie*, 8 Ben. 429; *528 Pieces*, 2 Low. 323. But in this case the libelant never had any legal title to this cargo. The sole foundation of his claim thereto, as respects Jewitt, is through a "concession" from the French government, which concession, it is assumed, was fraudulently procured by Jewitt in his own name. The legal title to any guano which Jewitt removed under such a concession would be in him. If the libelant should establish the fact that Jewitt was employed by him as alleged, he would at most prove a breach of trust. That would not make the libelant the legal grantee of the "concession" from the French government, nor would it change the legal title in this cargo from Jewitt to the libelant, although a court of equity might upon such proofs adjudge Jewitt to be a trustee for the libelant, and either compel him to account for the proceeds of the "concession," or to transfer it to the libelant, if the terms of the concession from the French government permitted such a transfer.

The very basis of the action, therefore, is to declare and enforce an equitable trust against Jewitt for the benefit of the libelant; and it is well settled that a court of admiralty has no jurisdiction to de-

clare and enforce such a trust, where that is the foundation of the action, nor any accounting based on such a trust. That is the prerogative of a court of equity. *Ward* v. *Thompson*, 22 How. 330; *Kellum* v. *Emerson*, 2 Curt. 79, 81, 82; *Davis* v. *Child*, 2 Ware, 78, 87; *The William D. Rice*, 3 Ware, 134; *The S. C. Ives*, Newb. 205.

In the case of *Andrews* v. *The Essex, etc.*, 3 Mason, 6, 16, STORY, J., says:

"Courts of admiralty have no general jurisdiction to administer relief as courts of equity. They cannot entertain an original bill or libel for specific performance, or to correct a mistake, or to grant relief against a *fraud*."

As a petitory suit to enforce a merely equitable title the libel must, therefore, be dismissed for want of jurisdiction.

But, in addition to the above ground, a still further want of jurisdiction would exist in this case from the fact that the contract or employment alleged in the libel between the libelant and Jewitt is not a maritime contract; at most, it was an employment or contract to procure from France a "concession," which may be assumed to be a license to take guano.

The libel contains no description whatever of the nature of such a concession. The "concession" or license itself would not be a maritime contract; and much less would the services of Jewitt in merely procuring such a concession or license be a maritime service. The removal of the guano from the island to other ports, though authorized under the concession, would nevertheless be an independent act. The concession itself would not necessarily involve any particular voyage as a part of the contract, nor compel any maritime act on the part of the libelant. He might never remove guano himself, but simply authorize others to remove it. The concession, therefore, and the employment of Jewitt to procure it, having no reference to any particular voyage, or to any direct maritime acts, belong to that class of contracts or transactions which are regarded as not maritime in themselves, but merely preliminary contracts, of which the admiralty does not entertain jurisdiction. STORY, J., *Andrews* v. *Essex, etc., supra; The Perseverance*, Blatchf. & H. 385, 387, *supra; The Thames*, 10 FED. REP. 848.

In both aspects, therefore, the subject-matter is not within the jurisdiction of the court, and the libel should be dismissed, but in such cases without costs. *The McDonald*, 4 Blatchf. 477; *Abbey* v. *The Stevens*, 22 How. (N. Y.) 78; *Mayor* v. *Cooper*, 6 Wall. 247; *Hornthall* v. *The Collector*, 9 Wall. 560.

See *The C. C. Trowbridge*, 14 FED. REP. 874.

THORNE and others *v.* TOWANDA TANNING CO.

(*Circuit Court, W. D. Pennsylvania.* December 30, 1882.)

1. REMOVAL OF CAUSE — TIME FOR APPLICATION — PROCEEDINGS BEFORE ARBITRATORS.

   Before a suit was triable in court, or at issue, the plaintiffs entered a rule of reference under the Pennsylvania compulsory arbitration act, and the cause was tried out of court before arbitrators, who made an award, which, under the act, was binding on the parties only by their mutual acquiescence. The plaintiffs appealed from the award, and after the jurisdiction of the court had reattached, petitioned for the removal of the suit to the circuit court of the United States. *Held*, that the proceedings before the arbitrators were not such a trial as precluded the removal, and the plaintiffs had not waived their right to remove by entering the rule of reference.

2. CONCURRENT REMEDIES—AT LAW AND IN EQUITY.

   The plaintiffs, in a suit at law, may file a bill against the defendant therein, on the equity side of the court in which the suit is pending, for the same cause of action, if the controversy be of equitable cognizance.

Sur motion of defendant to remand cause to the state court; and petition *ex parte* plaintiffs for leave to file a bill on the equity side of the court.

W. H. Jessup, *Edward Overton*, and *John F. Sanderson*, for plaintiffs.

Davies, Carnochan & Hall and *Peck & Overton*, for defendant.

ACHESON, J. This action, originally brought in the court of common pleas of Bradford county, was removed to this court by the plaintiffs. The defendant asks to have the suit remanded to the state court, upon the ground that, before the petition for removal was filed, the plaintiffs had entered a rule of reference, under the state compulsory arbitration law, and the case had been tried before a board of arbitrators, and an award made against the plaintiffs, who appealed from the award to the court of common pleas. The cause was not at issue, or triable in court, when the rule of reference was entered, and that state of things continued when the petition to remove was filed. Therefore the single question presented for solution is, whether the plaintiffs lost their right to remove the suit by reason of the rule of reference, and the trial before and award by the arbitrators.

The act of congress provides that the petition for the removal of a suit shall be filed in the state court "before or at the term at which said cause could be first tried, and before the trial thereof." Was the proceeding before the arbitrators a "trial" within the mean-

ing of the act? I think not. The act, it seems to me, contemplates a trial in court, or, at least, a judicial trial of a binding nature. But under the Pennsylvania statute a trial before arbitrators, under a compulsory rule of reference, is, in the first place, a trial out of court. Troubat & H. Pr. § 2231. Such rule may be entered before the cause is at issue, and even before the return-day, (*Henness* v. *Meyer*, 4 Whart. 358;) and the effect of the appointment of the arbitrators, and commitment of the case to them, is to deprive the court temporarily of jurisdiction to try the cause, (*Camp* v. *Bank of Oswego*, 10 Watts, 130.) And then, again, the award when made is conclusive only by the mutual acquiescence of the parties. Either side may appeal, and thereupon the jurisdiction of the court reattaches fully. Surely a procedure so anomalous—so barren of results—is not a trial within the purview of the act of congress. That the rule of reference here was entered by the plaintiffs, is, I think, an immaterial circumstance. If the defendant was not precluded from removing the suit, neither should the plaintiffs be. They waived no legal right by availing themselves of the privilege of compulsory arbitration under the statute.

The motion to remand must be denied.

This brings us to the consideration of the plaintiffs' petition for leave to file a bill on the equity side of the court. It appears from the petition that the plaintiff's cause of action arises out of a series of transactions, extending over a period of about 10 years, under contracts between the parties, whereby the plaintiffs agreed to deliver to the defendant skins and hides, which the defendant agreed to tan and manufacture into leather, and deliver the same to the plaintiffs. The plaintiffs were to sell the leather and pay the defendant the proceeds of sale, after first deducting the original cost of the skins and hides, with a stipulated interest, and certain specified percentages, and insurance, cartage, and inspection charges. Statements of accounts were to be rendered whenever required, in writing, by either party. The contract last in date, viz., the one of November 1, 1875, provided that the plaintiffs should advance to the defendant a specified sum on each hide as delivered, and for such advancements the plaintiffs might retain out of the proceeds of sale, and if they proved insufficient to reimburse them, the defendant agreed to make good the deficiency.

The petition alleges that these dealings were made the subject of book-entries and accounts on the part both of the plaintiffs and defendant, the transactions being very numerous and very large in ag-

gregate amount; that a separate account was kept by the plaintiffs with each invoice of leather, in which the invoice was charged with the cost of hides, etc., and credited with the proceeds of sale, etc.; that the account of purchases is based on invoices of hides, books of weight, etc., and the account of sales on orders and returns of sale made in various parts of the United States and in foreign countries; that the returns of foreign sales generally embrace leather other than that tanned by the defendant, making a separation of items necessary, and are rendered very often in foreign currencies,—English, Danish, Norwegian, French, Italian, Austrian, Swiss, Egyptian, Dutch, etc.,—and said returns involve the adjustment of many items of freight, insurance, customs, discounts, commissions, premiums on gold, etc.; that the book-entries alone connected with the sales are many thousand in number, and that letters, vouchers, checks, drafts, etc., aggregating many hundreds, are involved.

The petition further alleges that from time to time, and during the whole period of said dealings, the plaintiffs rendered accounts to the defendant, which the latter retained without objection, and upon which the plaintiff relied as accounts stated when the pending suit at law (an action of debt) was brought; but that the defendant now denies the correctness of said accounts, and claims that the plaintiffs have not properly accounted for the leather delivered to them, and objects to a very large number of items, etc. Substantially the allegation made is that the controversy involves the whole dealings between the parties, and the investigation and settlement of their entire accounts, in which great complexity exists.

In view of the contract relations between the parties and the character of the accounts involved, I cannot doubt that the controversy, if it be as alleged in this petition, is of equitable cognizance. Bisp. Eq. § 484.

Nevertheless, if the present application were for the transmutation of an action at law into a suit in equity, it could not be entertained. *Thompson* v. *Railroad Co.* 6 Wall. 134. But I do not so understand the petition. The prayer is for leave to file a bill in equity; *i. e.*, to institute an independent and original suit on the equity side of the court. To this I see no valid objection. *Fisk* v. *Union Pac. R. Co.* 8 Blatchf. 301. The pendency of the present action is no obstacle, for it is well settled that a plea of the pendency of an action at law, though between the same parties and for the same subject-matter, is bad and unavailable in equity. Story, Eq. Pl. § 742; Daniell, Ch. Pr. 658.

After answer to the bill the defendant will have an opportunity of applying to the court to put the plaintiffs to their election to proceed in the suit at law or in equity, (Id.,) and any question as to costs can be raised hereafter.

Leave is granted the plaintiffs to file the proposed bill on the equity side of the court.

HUSE and others *v.* GLOVER and others.

(*Circuit Court, N. D. Illinois.* 1883.)

1. NAVIGABLE WATERS—IMPROVEMENT—POWER OF STATE.
   The state of Illinois, in the absence of national legislation upon the subject, can improve the navigable waters within its limits in such mode and to such extent as to her seems best.
2. SAME—TOLLS FOR USE OF LOCKS—STATUTE CONSTITUTIONAL.
   The statutes authorizing tolls to be exacted for the use of the locks on Illinois river are not in conflict with that clause in the national constitution which forbids a state, without consent of congress, from laying duties of tonnage.

In Equity.

Geo. S. Eldridge, for complainants.

Edsall, Hawley & Edsall, James McCartney, Atty. Gen. of Illinois, and *Lawrence, Campbell & Lawrence*, for defendants.

HARLAN, Justice. This is a suit in equity. The present hearing is upon demurrer to the bill. The complainants, constituting the firm of Huse, Loomis & Co., are, and since 1864 (besides a general transportation business) have been, largely engaged in cutting ice at Peru and other points on the Illinois river, and in transporting the same on that river, thence by the Mississippi and other navigable streams to markets in different states. In the conduct of their business they have employed from three to six steam-boats and from thirty to sixty barges, all duly registered and licensed in accordance with the laws of the United States. The defendants are canal commissioners, appointed in pursuance of certain statutes of Illinois, which provided, among other things, for the construction of locks and dams on Illinois river at Henry and at Copperas Creek. The former were completed in 1872 and the latter in 1877, at an aggregate cost of about $854,739.42, the whole of which was paid by this state except about the sum of $62,359 paid by the United States. By the statutes referred

to the commissioners were authorized to establish and collect reasonable tolls for the passage and use of the locks by boats. To that end a schedule was adopted, in accordance with which complainants have been required to pay and have paid, always under protest, tolls for the passage of the locks by their boats, such tolls being ascertained, as to amount, upon the basis of the tonnage measurement of the boats and their cargoes. From the construction of the lock at Henry, up to the spring of 1872, complainants paid to the canal commissioners, for the passage of that lock, in tolls or charges, nearly $3,000 upon the tonnage measurement of their boats, and about $5,000 upon their cargoes of ice in ice-barges towed by such boats. Their average shipments each subsequent year have been quite as large, and upon such shipments tolls have been exacted and paid by them. The prayer of the bill is that the defendants, their agents, servants, and employes, be restrained from imposing and exacting from complainants any tolls or other charges for the right of passage through the locks by steam-boats, ice-barges, and other vessels used in the transaction of their business on the Illinois river.

The substantial grounds upon which complainants proceed are, briefly stated, these: That the locks and dams so constructed by the state not only do not aid or promote their business, but are practical impediments in the way of its prosecution, and to the free navigation of the Illinois river; that their construction and the imposition by the canal commissioners of tonnage duties, under the name of tolls, upon the boats and cargoes of complainants, are in violation—*First*, of that part of the ordinance for the government of the north-western territory which provides that "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of said territory as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor;" *second*, of section 10, art. 2, of the national constitution, which prohibits any state, without the consent of congress, from laying any "duty of tonnage;" and, *third*, of section 8, art. 1, of the constitution, which invests congress with power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

It seems to the court that most of the questions discussed by counsel are concluded, some directly, others substantially, by the adjudged cases.

In *Wilson* v. *Blackbird Creek Marsh Co.* 2 Pet. 245, the question was whether the legislature of Delaware could, consistently with the national constitution, authorize a dam to be constructed across Blackbird creek, in that state. That stream, although wholly within the limits of Delaware, was conceded to be a public navigable highway, in which the tide ebbed and flowed, and was capable of being used, and theretofore had been used, by sloops and other vessels enrolled and licensed under the laws of the United States. After stating that the value of the property on the banks of the creek was enhanced by excluding the water from the marsh; that the health of the inhabitants in the vicinity was thereby probably improved; and that measures calculated to effect such results were within the reserved powers of the state so long as they did not come in collision with the powers of the general government,—the court, speaking by Chief Justice MARSHALL, said:

"But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance. The counsel for plaintiff in error insist that it comes in conflict with the power of the United States 'to regulate commerce with foreign nations, and among the several states.' If congress had passed any act which bore upon the case,—any act in execution of the power to regulate commerce,—the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern states, we should not feel much difficulty in saying that a state law coming in conflict with such act would be void. But congress has passed no such act. The repugnancy of the law of Delaware to the constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several states,—a power which has not been so exercised as to affect the question. We do not think that the act empowering the Blackbird Creek Marsh Company to place a dam across the creek can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."

In *Gilman* v. *Philadelphia*, 3 Wall. 713, the supreme court sustained the constitutional validity of an act of the legislature of Pennsylvania, which authorized the construction of a bridge across the Schuylkill, one of the navigable waters of the United States, although the effect of that structure was not only to seriously impair the value of wharf property above the contemplated bridge, but to prevent the navigation of the river by certain vessels theretofore accustomed to

use such wharves. While recognizing, to the fullest extent, the power of congress to control, in the interest of commerce, the navigable waters of the United States, so as to keep them free of all obstructions, whether interposed by the states or by private persons, the supreme court—affirming the doctrines of *Cooley* v. *Wardens*, 12 How. 299—said that there were some subjects connected with commerce which called for uniform rules and national legislation, while others were best regulated by rules and provisions suggested by the varying circumstances of localities, and to be enforced under the authority of the states, so long as congress did not act. Speaking by Mr. Justice SWAYNE, the court further said:

"It must not be forgotten that bridges which are connecting parts of turnpikes, streets, and railroads, are means of commercial transportation, as well as navigable waters, and that the commerce which passes over a bridge may be much greater than would ever be transported on the water it obstructs. It is for the muncipal power to weigh the considerations which belong to the subject, and to decide which shall be preferred, and how far either shall be made subservient to the other. The states have always exercised this power, and from the nature and objects of the two systems of government they must always continue to exercise it; subject, however, in all cases, to the paramount authority of congress, whenever the power of the states shall be exerted within the sphere of the commercial power which belongs to the nation."

The opinion in that case concludes with these words:

"The river being wholly within her limits, we cannot say that the state has exceeded the bounds of her authority. Until the dormant power of the constitution is awakened and made effective by appropriate legislation, the reserved power of the states is plenary, and its exercise in good faith cannot be made the subject of review by this court."

In *Ry. Co.* v. *Fuller*, 17 Wall. 569, in illustration of these doctrines, it was said:

"When a stream, navigable for the purposes of foreign or interstate commerce, is obstructed by the authority of a state, such exercise of authority may be valid until congress shall see fit to intervene. The authority of congress in such cases is paramount and absolute, and it may compel the abatement of the obstruction whenever it shall deem it proper to do so."

In *Pound* v. *Turk*, 95 U. S. 462, the supreme court sustained the validity of a statute of Wisconsin which authorized the construction of a dam across a navigable river wholly within its limits. After referring to the fact that there were navigable streams in many of the states, whose greatest value in water carriage is as outlets to sawlogs, sawed lumber, coal, salt, etc., the court, speaking by Mr. Justice MILLER, said:

"In order to develop their greatest utility in that regard, it is often essential that such structures as dams, booms, piers, etc., should be used, which are substantial obstructions to general navigation, and more or less so to rafts and barges. But to the legislature of the state may be most appropriately confided the authority to authorize these structures, when their use will do more good than harm, and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the interests of all concerned in the matter. And since the doctrine we have deduced from the cases recognizes the right of congress to interfere and control the matter whenever it may deem it necessary to do so, the exercise of this limited power may all the more safely be confided to the local legislatures."

In *Transp. Co.* v. *Chicago*, 99 U. S. 635, the court, through Mr. Justice STRONG, said: "It has long been held that navigable rivers wholly within a state are not outside of state jurisdiction so long as congress does not interfere."

In addition to these decisions in the supreme court of the United States, reference is made to *Heerman* v. *Beef Slough, etc.*, 8 Biss. 334; *U. S.* v. *Beef Slough Manuf'g Co.* Id. 424; and *U. S.* v. *New Bedford Bridge*, 1 W. & M. 401.

The doctrines of the adjudged cases sustain the authority of this state—there being no act of congress forbidding it—to construct locks and dams upon the Illinois river. Her avowed object in so doing was to improve the navigation of that river and effect a reduction of freights to the headwaters of Lake Michigan and to the Mississippi river. The mode and extent of such improvement, in the absence of national legislation, based upon the power of congress to regulate commerce, was for her determination. Her discretion in such matters is not to be controlled by the courts so long as congress does not interfere. That locks and dams cause some delay to, or in some degree affect the interests of, those whose business on the Illinois river does not absolutely require the use of such instrumentalities, may be conceded. But if, in the judgment of the state, which has jurisdiction over all persons and things within its limits, except as restrained by the national constitution, the system of locks and dams is more advantageous to the general public than the river in its natural condition; if she deems it important to improve the navigation of the Illinois river, although thereby certain classes engaged in commerce may be subjected to inconveniences which do not exist in the use of the river in its unimproved or natural condition,—her determination in the premises is not to be questioned by any authority except congress. Until the national legislature interposes its paramount authority, the state cannot be controlled by the judiciary as to the mode and extent

of improving such navigable streams as are wholly within her limits.

Nor do we perceive that the power of the state in this respect is in any degree affected by the ordinance of 1787, even if that ordinance, as to the matters now under consideration, be not superseded by the constitution of the United States. *Strader* v. *Graham*, 10 How. 94; *Permoli* v. *Municipality, etc.*, 3 How. 589; *Pollard's Lessee* v. *Hagan*, Id. 224; *Woodman* v. *Kilburn*, 1 Biss. 546; *Columbus Ins. Co.* v. *Curtenius*, 6 McLean, 209. Illinois entered the Union upon terms of equality in all respects with the states which existed at the time the constitution was formed. In the statute of Virginia, authorizing the cession to the United States of the territory north-west of the Ohio river, and in the deed of cession, one of the conditions prescribed was that the states formed out of that territory should be admitted "members of the federal Union, having the same rights of sovereignty, freedom, and independence as the other states." The ordinance itself provided for the admission of the new states "on an equal footing with the original states, in all respects whatever." So that, it seems to the court, Illinois has as full power and jurisdiction over her navigable streams as Virginia has over the navigable streams within her limits. But if her powers in that respect are in any degree affected or controlled as to their exercise by the ordinance of 1787, it is not perceived that the position of complainants can be maintained. The recognition of the right of the state, when unrestrained by acts of congress, to improve navigable streams within her borders, in such manner and to such extent as to her seems conducive to the public interests, is not necessarily inconsistent with the provisions of that ordinance. The declaration therein that the navigable streams leading into the Mississippi river shall be common highways, and be forever free to the inhabitants of the territory, and to citizens of all the states, was certainly not intended as an inhibition upon the improvement of such highways by the federal government or by the respective states formed out of the north-west territory. We cannot suppose that Virginia intended, when ceding this vast domain, to withhold from the future states to be erected therein that control of navigable streams which, upon the adoption of the constitution, she would have over those within her own limits. The utmost, perhaps, which can be claimed is that that provision was intended to secure the use of such navigable streams as highways upon terms of equality; that is, without discrimination against inhabitants of that terrritory or against citizens of any of the United States. The Illinois river is none the less a common highway because its nav-

igability has been improved so as to meet the wants of the public in a larger degree than it was capable of doing in its natural state. It is still a common highway, for use alike by all citizens of the United States under regulations which do not seem to be inconsistent with the ordinance of 1787. Besides, in the opinion of the court, the rights secured by the provisions of that ordinance, so far as it relates to navigable streams, are in substance secured by the constitution of the United States. Consequently, if that which Illinois has done towards the improvement of the Illinois river be not forbidden by the national constitution, it is not in conflict with the provisions of the ordinance of 1787.

The only remaining question which we deem necessary to consider relates to the right of the state to charge tolls for the passage and use of these locks, such tolls being based upon the tonnage measurement of the boats and their cargoes. It is contended by complainants that the exaction of these tolls is inconsistent with that clause of the constitution which prohibits the states, without the consent of congress, from laying any duty of tonnage. The court is of opinion that the right of the state to charge for the use of its locks may be placed upon the same ground upon which rests the authority of municipal corporations, owning improved wharves upon the navigable waters of the United States, to charge for the use of such wharves by vessels, even those licensed under the laws of the United States and engaged in commerce with foreign nations or among the several states. Municipal regulations of this character have been maintained even where the wharfage fees are measured by the tonnage of the vessel using the wharves. Such fees, so measured, are not deemed duties of tonnage within the meaning of the constitution, where they are exacted, not for the mere privilege of landing at a wharf, but as fair and reasonable compensation for the use of additional facilities furnished for those engaged in commerce. *Packet Co.* v. *St. Louis*, 100 U. S. 429; *Vicksburg* v. *Tobin*, Id. 430; *Packet Co.* v. *Keokuk*, 95 U. S. 80. So in reference to tolls for the use of locks constructed on a navigable stream lying wholly within a state. Although measured by the capacity of the vessel or the extent of the cargo, they are not, necessarily, tonnage duties, which the states are prohibited from laying. They are not, within the meaning of the constitution, duties upon the vessel or its cargoes, but compensation exacted for the use of improved commercial facilities. In this case it cannot be claimed that the charges exacted by the commissioner are disproportioned to the amount expended by the state in the con-

struction of these locks and dams, or that they are, in themselves, unreasonable in amount. Referring to that clause in the ordinance of 1787 which prohibits any tax, impost, or duty upon the right to navigate the navigable waters therein described, Mr. Justice McLEAN, in *Spooner* v. *McConnell*, 1 McLean, 337, said:

"The provisions of the ordinance had reference to the navigable waters and the carrying places as they then were. And in that state they were to remain free, without tax, etc. But this does not prevent the legislature from improving the navigation of rivers and the carrying places between them. Such improvements can in no sense be considered as repugnant to the ordinance, but in promotion of its great object. And it would seem to be no violation of the compact if the legislature should exact a toll, not for the navigation of the rivers in their natural state, but for the increased facilities established by the funds of the state."

It is unnecessary to extend this discussion. The court is of opinion, for the reasons given, that the state of Illinois has the same power to improve the navigable waters within her limits that she possesses over other highways; and where money has been expended in making improvements it is competent for the state to impose tolls for their use, even where the stream is one to which the regulations of commerce may be extended. This statement of the rule is, however, subject always to the qualification that the action of the state, touching navigable streams within her borders, is subordinate to the paramount authority of the nation, whenever and as it may be exercised, under the power granted to congress of regulating commerce with foreign nations and among the several states.

Let the demurrer be sustained; and if the complainants do not wish to amend, an order may be rendered dismissing the bill, with costs to defendants.

SPITLEY v. FROST and others.

(Circuit Court, D. Nebraska. February, 1883.)

1. EQUITY—HOMESTEAD LAWS—WIFE'S INTEREST.
   Under the homestead laws of Nebraska enacted in 1866, the wife had no vested interest in the homestead, and was, therefore, not a necessary party to any judicial proceedings relating to it. The supreme court of Nebraska has held that the homestead law in force when a contract is made, is the one that shall govern in subsequent proceedings in reference thereto.
2. SAME—POWER OF THE COURT IN CASES AFFECTING HOMESTEADS.
   The court in which a case affecting the homestead is pending may exercise such power only as the parties before it might, in the absence of judicial proceedings, exercise over the subject-matter.

3. SAME—RETROSPECTIVE LAWS.

It is only where the intent of the legislature to make an act retrospective is plainly expressed, that courts will undertake to apply it to antecedent contracts, and determine whether it impairs their validity.

4. SAME—EXEMPTION LAWS—PERSONAL PRIVILEGES.

The general doctrine is recognized that exemption laws are grants of personal privileges to debtors, which may be waived by contract or surrender, or by neglect to claim before sale.

5. RES ADJUDICATA—WHAT ORDERS ARE.

There is a distinction to be noted between orders made upon motions respecting collateral questions arising in the course of a trial and final orders affecting substantial rights, and from which an appeal lies: the latter are *res adjudicata*, and binding upon the parties, unless reversed or modified by an appellate tribunal.

In Equity. Upon rehearing.

The controlling question in this case is whether the sale of the real estate in controversy, under the judgment of this court, in a case in which John I. Redick was plaintiff, and the respondent, George W. Frost, alone, was defendant, rendered in a suit in attachment, was a valid sale. The premises had been levied upon by writ of attachment at the commencement of the suit, and upon final hearing there was judgment, with an order for the sale of the attached property under a special execution. The contention of the respondents George W. Frost and wife, in the present case, is that the levy and sale were void, because the premises were their homestead, and therefore exempt from judicial sale under the laws of Nebraska. After the sale under the execution in the case of *Redick* v. *Frost*, a motion was made to confirm the same, which motion was opposed by Frost, on the ground, among others, that the premises constituted his homestead; but the sale was nevertheless confirmed. Subsequently the said George W. Frost moved the court to set aside the sale on several grounds, and among them upon the ground that the premises constituted his homestead, and were therefore exempt. Thereupon the court referred the case to a referee to take testimony upon the question of homestead; and testimony upon both sides was accordingly taken, and a report thereon was made, upon consideration of which, the court overruled the motion to set aside the sale.

The controlling question in the present case is whether the judgment of the court confirming the sale, and overruling the motion to set the same aside, is a final adjudication of the homestead question by which the parties are bound, and which estops the present defendants to claim the property as a homestead.

McCRARY, J. Upon the former hearing it was assumed that the question whether the premises in controversy were exempt as the homestead of respondents Frost and wife was a question arising under the provisions of an act of the legislature of Nebraska entitled "An act to exempt homesteads from judicial sale," approved February 19, 1877; and as that act vested the homestead right in the husband and wife jointly, and expressly provided that no conveyance or incumbrance of the homestead should be of any validity unless executed by both, it was held that the wife was a necessary party to any proceeding to subject property claimed as a homestead to judicial sale. It resulted from this ruling that, in the judgment of the court, the respondents Frost and wife were entitled to a decree setting aside the sale under execution of the premises in question, notwithstanding the confirmation of that sale by this court in a proceeding in which the wife was not joined with the husband as a party. If there was no error in assuming that the act of 1877 was the governing statute, I am of the opinion that the former ruling was entirely correct. But it is now suggested that an earlier homestead act,—that of 1866,—being the act in force when the contract was entered into, is the governing statute, and that under that statute the wife had no vested interest in the homestead independently of her husband, and was therefore not a necessary party to any judicial proceeding relating to it. Gen. St. 616.

It is true that the last-named act, which was the homestead law in force when the contract was made, only exempted the homestead owned "by the head of the family." It did not provide, as the more recent act does, that the homestead of the *family*, whether owned by the husband or wife, should be exempt; nor did it contain the provision now found in most homestead laws, that no deed or mortgage of the homestead shall be of any validity unless executed by both husband and wife, if both are living. Under this statute, had the wife an interest in the homestead which could not be divested in a proceeding against the husband alone, the title being in him? Both upon authority and principle I am constrained to hold that where the wife has no power to prevent the voluntary alienation of the homestead by the husband, she is not a necessary party to a proceeding to subject it to judicial sale, or to determine whether a given piece of property is a homestead. The cases cited in the former opinion, and other like cases, in which it is held that the wife is a necessary party to any judicial proceeding affecting the homestead, are all, it is believed, cases which arose under statutes conferring homestead rights

upon the wife, and placing those rights beyond the control of the husband. The statute now under consideration does not do this. It provides only for the exemption of a homestead to be selected by the owner "so long as the same shall be *owned* and occupied by the debtor as such homestead." The wife is not mentioned in the act; and however vital her interest in the home may be, we cannot hold that she has, in the absence of a statute to confer it, any legal interest in the property of the husband, such as to make her a necessary party to any proceeding touching the title or possession.

It has been repeatedly held by the supreme court of Nebraska that the wife had no control over the homestead, and no legal interest therein, under the statute in question. Thus, in *Rector* v. *Bottom*, 3 Neb. 171, it was held that the homestead right under that statute was a purely personal one, which the owner could at any time waive or renounce, and that it was lost by a failure of the owner at the time of a levy upon it to notify the officer of what he regards as his homestead. It was there held, also, that the exemption was a right guarantied to the head of the family, who was at perfect liberty to sell the homestead or pledge it for the payment of his debts if he chose to do so. "The legislature," says the court, by LAKE, C. J., "never intended to assume a guardianship over the owner of the homestead and render him disqualified to make valid contracts respecting it. It imposes no restraint upon him whatever in this respect; *even the wife, when the title is in the husband, has no power to prevent him from making such disposition of it as he may think best.*". The same language is repeated in *State Bank* v. *Carson*, 4 Neb. 501.

Accepting, as we are bound to do, this construction of the statute, we are unable to perceive any satisfactory ground for holding that a court of competent jurisdiction may not dispose of the question of homestead arising under it in any case where it properly arises, and to which the owner of the homestead is a party. It is only for the reason that the husband is, by law, deprived of the power to dispose of or incumber the homestead without the wife's concurrence, that it has been held under some statutes that the presence of both before a court is necessary to the jurisdiction of the court over the question of homestead rights.

The court in which a case affecting the homestead is pending may exercise such power only as the parties before it might, in the absence of judicial proceedings, exercise over the subject-matter. If the husband alone is in court, the power of the court is limited to his interest, and where this cannot be divested without the presence of

the wife the court is powerless. But where the entire control of the homestead is vested in the husband, the wife's presence as a party in court is not necessary.

It is insisted that the statute that we are considering does not govern the decision of this case. It is conceded that it was in force when the contract was entered into; but a later act (that of 1877) was enacted after the contract was made, and before the judgment was obtained or the sale made. This latter act, it is said, ought to be adopted as the law of this case, for the reason that it does not enlarge but diminish the amount of the homestead exemption. By the former act the value of the exempted property was left with no limit; by the latter, it is limited to $2,000. By the former, as we have seen, the exemption was for the benefit only of the head of the family, and the property was left under the entire control of the owner; by the latter, it is for the benefit of the family, and the wife is given a vested right in and control over the homestead. Counsel have discussed the question whether this last act can be applied to pre-existing debts without impairing the obligation of contracts. In one respect the homestead exemption is very much enlarged by the act of 1877, which extends the benefits of the exemption to the wife, and makes her consent necessary to its alienation; and there is force in the suggestion that to apply the latter act to the determination of this case, under the existing circumstances, would very seriously impair the rights of the complainant. This question does not, however, necessarily arise and it is not decided. The act of 1877 does not purport to be retroactive, and should, therefore, not be held to be so. It is only where the intent of the legislature to make an act retrospective is plainly expressed, that courts will undertake to apply it to antecedent contracts, and determine whether it impairs their validity. If, consistently with the terms of this act, it can be made to apply only to subsequent contracts, it should be so construed. Thomp. Homesteads & Exemptions, § 9. The supreme court of Nebraska has accordingly held that the homestead law in force when the contract was made is to govern. *Dorrington* v. *Meyers*, 9 N. W. Rep. 555. This rule is binding upon this court, and is, besides, in accordance with our view of the law.

We are brought to the conclusion that the act of 1866, which was in force when the contract was made, entered into and became a part of it, and must be looked to as determining the rights of the parties under it.

In this view of the case we are again to consider whether the homestead question was finally adjudicated and settled in the case of *Redick* v. *Frost*. And it is a wholly different question from the one considered and decided upon the former hearing, because it must now be discussed in view of the fact now ascertained that Frost, the husband and owner of the homestead, was the only necessary party to that proceeding. It is undoubtedly true that if the court had jurisdiction to pass upon the question of homestead, and did pass upon it by a final order, the judgment not having been appealed from is final. The statute of Nebraska provides that upon the return of any writ of execution upon which real estate has been sold, the court shall carefully examine the proceedings of the officer, and if satisfied that the sale has in all respects been made in conformity to the statute, shall direct the clerk to make an entry on the journal that the court is satisfied of the legality of the sale, and an order that the officer make to the purchaser a deed, etc. Gen. St. 1873, § 498. The general doctrine is recognized that exemption laws are grants of personal privileges to debtors which may be waived by contract or surrender, or by neglect to claim before sale, and it is probably true that where the homestead exemption is a personal privilege granted to the owner alone, as in this case, and the homestead is seized on attachment in a case in which the owner is a party, it is his duty to claim the exemption in the progress of the case, and before there is judgment, execution, and a sale. Thomp. Homesteads, etc., § 646. But, however this may be, it appears in this case that the respondent George W. Frost did not claim the exemption in opposition to the confirmation of the sale, and also as the basis of an application made by him to the court to set the sale aside. It would seem that it was necessary for the court to decide the question of exemption in order to determine the question presented by this application. If the property was exempt the sale was void, and should have been set aside. In order, therefore, to decide the question whether it should be set aside, it was necessary, the question being raised, to decide whether it was exempt. The practice in Nebraska seems to be to determine questions of this character upon the hearing of motions to confirm sales made by sheriffs under execution; and the rulings of the inferior courts of the state upon such questions have been regarded as final judgments, reviewable upon appeal or writ of error by the supreme court of the state. *Rector* v. *Bottom, supra; Banker* v. *Collins*, 4 Neb. 49; *Eaton* v. *Ryan*, 5 Neb. 47.

It being conceded that the owner of the property claimed as a homestead, and levied upon and sold under execution, may raise the question of exemption, upon a motion to set the sale aside, and that the court must decide it when so raised, and that its decision is a judgment, how can we escape the conclusion that it is, if not appealed from, final and conclusive? In the original opinion the question was suggested whether the homestead question can, in any case, be finally adjudicated upon a motion made to the court to confirm or set aside a sale on execution of the property claimed as a homestead; but the question was not then deemed material, and was, therefore, not considered. It now becomes material and must be disposed of. There are many cases in the books which hold, as a general rule, that orders and decisions of courts made in passing upon motions are not *res adjudicata*. But there is a distinction to be noted between orders made upon motions respecting collateral questions, arising in the course of the trial, and final orders affecting substantial rights, and from which an appeal or writ of error will lie. It is believed that the test is the one here suggested. If the order is one affecting substantial rights, is in its nature a final order, and one which may be reviewed upon appeal, it is an adjudication binding upon the parties, unless reversed or modified by an appellate tribunal. This is well illustrated by two New York cases. Before the adoption of the Code in that state it was held that an order made on motion in summary proceeding was not a final adjudication. *Simpson* v. *Hart*, 16 Johns. 63. After the adoption of the Code, providing for appeals from "final orders," it was held that an order made upon a motion to set aside executions issued upon certain judgments, and to have those judgments canceled, was a conclusive adjudication as between the parties. *Dwight* v. *St. John*, 25 N. Y. 203. In the latter case the court say that the defendant "was the moving party, and if he objected to the order granted in any respect, he should have appealed therefrom and have had it made correctly." And again: "Since, then, a full hearing, with the right of appeal, was open to the defendant on that motion, how is he to avoid the binding effect of that decision so far as it covers what was actually and necessarily tried?" etc. And see Freeman, Judgm. 585, 586.

That the order confirming the sale, and that overruling the motion to set the same aside, was reviewable, appears, not only from the course of practice in Nebraska, but from the terms of the statute.

By section 581 of the General Statutes it is provided that any order affecting a substantive right, made in a special proceeding or in a summary adjudication in an action after judgment, is a final order, which may be vacated, modified, or reversed by the supreme court. And section 582 of the same statutes provides that "a judgment rendered or final order made by the district court may be reversed, vacated, or modified by the supreme court for errors appearing upon the record." It is clear that the order in question was a final order, and that it affected substantial rights. It was, therefore, reviewable under either of said sections. Being a final order or judgment rendered by a federal court, it was in like manner reviewable by the supreme court of the United States. It was either a part of the main cause and could have been reviewed upon writ of error taking up the whole case, (*New Orleans* v. *Morgan*, 10 Wall. 256,) or it was a special proceeding under the statute, and therefore itself a suit and reviewable as such, (*Parker* v. *Overman*, 18 How. 137.) This latter was a statutory proceeding to confirm a judicial sale instituted by the publication of notice to all persons claiming an interest in the property sold to come in and assert their rights. The decision and order of confirmation in such a case was held to be a final judgment, binding both upon absent claimants and present contestants, and as such reviewable in the supreme court of the United States.

It is suggested by counsel that it does not appear from the record that the court decided the homestead question in passing upon the motion to confirm the sale, or upon the application to set the same aside. Assuming, without deciding, that it must appear from the record that the question was *necessarily* passed upon, and that it is not sufficient to show that it might have been decided, how does the case stand? The motion was to set aside the sale on several grounds, and among them upon the ground that the property was exempt as a homestead. The motion was overruled and the sale was confirmed. In order to reach this conclusion it was necessary for the court to decide the question of homestead adversely to the respondent Frost. If the sale had been set aside by the court without specifying upon which ground, it might have been contended that the decision of the court did not necessarily involve a determination of the question of exemption; but since the sale was confirmed, it must have been because in the judgment of the court none of the grounds urged against the validity of the sale were good. If the court had not decided this question of exemption against the right claimed, it could not have

confirmed the sale. The case comes, therefore, clearly within the doctrine of *res adjudicata.*

The question now before us arose in a former case between the same parties or their privies. It was properly presented to the court, testimony was taken, a hearing was had, and a final order was made.

The orders heretofore made respecting the issues upon the cross-bill of respondent Bryant are to stand without modification.

If respondents George W. and Abbie S. Frost desire an appeal, the same will be granted upon proof that the property is worth more than $5,000, and the bond for costs will be fixed at $500.

SPRINGFIELD *v.* HURT and others.

(*District Court, N. D. Mississippi.* 1883.)

1. LIABILITY OF THE LANDS OF A DECEDENT TO PAY HIS DEBTS.
   The liability of the lands of a decedent to pay his debts depends upon the statutory provisions in relation thereto.
2. SAME—JURISDICTION IN EQUITY.
   The statute of Mississippi, which renders lands so liable, provides the mode by which they shall be so applied, and that mode must be pursued, when it can be done, and only in event that it cannot be done, can it be reached by a bill in equity.
   Partee v. *Kortrecht*, 54 Miss. 66.
3. DEMURRER TO BILL SUSTAINED.
   A demurrer to a bill in equity, praying for the sale of lands of a decedent, and that the proceeds of the sale be applied to the payment of complainant's claims, will be sustained when the averments of the bill fail to show that the complainant has pursued the mode which the statute lays down to be followed before relief can be sought in a court of equity.

A. J. Baker, for complainant.

H. A. Barr, for defendants.

HILL, J. The questions presented in this cause arise upon defendants' demurrer to complainant's bill. The bill in substance charges that complainant is a creditor of the estate of Miss Alice Totten, who died in Madison county, Tennessee, having made a last will and testament, which has been proven and admitted to record, and of which Howell E. Jackson was executor; that the debt due complainant from the estate of Miss Totten has not been paid, for the reason that the property belonging to her estate in Tennessee has been or will be

applied to the payment of the debts against her estate in that state; that the said Miss Totten owned, at the time of her death, the land described in the bill, situate in Coahoma county, in this state; that her said will, being attested by only two subscribing witnesses, was insufficient to pass the lands under her will, and that the title thereto, subject to the payment of her debts, passed to the defendants as her heirs at law; that there has been no administration upon her estate in this state. The prayer of the bill is that the lands, or so much thereof as may be necessary, be sold and applied to the payment of complainant's debt. The demurrer, among other causes, assigns as ground of demurrer that this court, as a court of equity, has no jurisdiction to grant the relief prayed for, and, as this must be decisive of the case, no other need be considered.

It is admitted that, prior to the Code of 1871, providing for the appointment of an administrator upon the estate of a decedent in another state, who died possessed of lands in this state, and which provision is brought forward in the Code of 1880, that this objection to the bill *could* not have been maintained. The question here is, does this provision in the present law of the state oust this court as a court of equity from jurisdiction of this bill, and granting the relief prayed for?

The liability of the lands of a decedent to pay his debts depends upon the statutory provisions in relation thereto. The decision of the supreme court of the state upon the question is binding on this court. This question was settled by the supreme court in the case of *Partee* v. *Kortrecht*, 54 Miss. 66. In that case it is held that the lands of a decedent are by statute liable to the payment of his debts, but that the statute which so renders them, provides the mode by which they shall be so applied, and that that mode must be pursued when it can be done, and that, in the event that it cannot be done, only *can it be* reached by bill in equity, and that under the statutes of the state, in a case like the present, an administrator can be appointed; if no one else applies, that the administration will be conferred on the county administrator. The facts in that case, so far as the point in question is concerned, were the same as those in this case. The demurrer was sustained and the bill dismissed. When six months have expired after the death of the decedent, and no one has applied for letters of administration, and there is no county administrator in the county in which the land, or some part of it, is situate, and these facts are averred in the bill, I am of opinion that the chancery court, or this court, as a court of equity, would have

jurisdiction to grant the relief sought. This would unquestionably be so, if the bill further averred that application had been made to the chancery court to appoint a county administrator, which perhaps ought to be done. Neither the creditor nor any one else is compelled to administer upon the estate. The county administrator is a public officer, and as such required to discharge his duty. This bill does not contain these necessary averments, as held by the supreme court of the state; consequently the demurrer must be sustained and the bill dismissed, with leave, however, to the complainant to amend his bill, if he can, so as to avoid the ground of demurrer stated.

UNITED STATES v. CARUTHERS and others.

(District Court, N. D. Mississippi. December Term, 1882.)

1. INDICTMENT.
   When the act charged in an indictment is fraudulent, it is not necessary to use the word "fraudulent."
2. SAME—APPOINTMEMT OF INCOMPETENT ASSISTANT INSPECTORS OF ELECTIONS —REV. ST. § 5515.
   An indictment charging inspectors of elections with the appointment of incompetent and unsuitable persons as assistant inspectors, to be good under section 5515, Rev. St., must state that it was with the intent to affect the election or the result thereof, otherwise it would be insufficient and quashable. These allegations must on the trial be proved to the satisfaction of the jury, beyond a reasonable doubt; if not, no conviction can be had.
3. SAME—QUALIFICATIONS OF.
   Although a statute providing for the appointment of persons to fill vacancies or assist as inspectors of elections does not use the words "competent and suitable person," these qualifications are necessarily implied, as the vacancy would not be properly filled unless by one having the same qualification possessed by the person for whom he is substituted.

G. C. Chander, Dist. Atty., and *J. R. Chalmers*, Asst. Dist. Atty., for plaintiff.

H. A. Barr and *C. B. Hourey*, for defendants.

The questions now presented for decision arise upon defendant's motion to quash the indictment against them. The grounds alleged in support of the motion are that the indictment does not allege any offense against the statutes of the United States under the title of "Crimes." The indictment in substance alleges and charges that the defendants were appointed and acted as inspectors of the election at Taylor's election precinct in Lafayette county, at the election held on the seventh day of November, 1882, for the election of a representa-

tive in congress for the second congressional district of Mississippi; that as such inspectors it became their duty, under the statutes of the state of Mississippi, to appoint some suitable person to act with them as such inspectors; and that said defendants neglected and refused to appoint a suitable person to act as such inspector, but that they did then and there appoint as such inspector one Richard Henderson, who was then and there totally illiterate and wholly incompetent to discharge the duties of said office, with intent to affect the election, or the result thereof.

HILL, J. The question is, was the failure to appoint some person as such inspector who could read and write, and was suitable and competent to discharge all the duties of said office required of the defendants, acting as such inspectors, required by the laws of the state of Mississippi; and, if so, did they fail to do so, either by failing to make the appointment, or by appointing a person wholly illiterate or incompetent and unsuitable to discharge the duty imposed by law upon inspectors of election? The Code of 1880 of this state constitutes the governor, lieutenant governor, and secretary of state a state board of elections, and makes it their duty, as such board, to appoint three competent and suitable persons as county commissioners of elections for each county, and that these boards of county commissioners shall appoint for each election precinct in their respective counties three competent and suitable persons as inspectors of elections, whose duty it is to hold the elections; to receive all legal votes given in at such elections as may be directed by law to be held at their election precincts; to count the votes when the polls are closed, and to ascertain the number of votes cast for each candidate voted for at such election, and to make out a statement thereof to be signed by them; and by one of their number, or by some suitable person to be appointed by them, to cause the said returns, with the tally-sheets and votes, to be returned and delivered to the board of county commissioners within a prescribed time. The statute further provides that if, at such election, either of the inspectors so appointed shall, from any cause, fail to attend and act as such inspector, those who do attend and act shall fill such vacancy by appointing some other person to fill the vacancy.

While the statute, in providing for the filling of such vacancy, does not use the words "competent and suitable person," these qualifications are necessarily implied; the vacancy would not be properly filled unless by one having the same qualifications possessed by the person for whom he is substituted. The statute provides that the boards of

county commissioners, and also the inspectors, shall not all belong to the same political party, provided competent and suitable persons of different parties can be secured to serve as such. The plain meaning of this provision of the statute is that if competent and suitable persons of different parties cannot be secured to serve as such commissioners or inspectors, then it shall be the duty of those making the appointment to appoint competent and suitable persons of the same party. The statute provides, and properly so, that, in any event, competent and suitable persons shall be appointed to discharge these highly important trusts, if such persons can be procured, and the presumption is that every county and election district does contain a sufficient number of such competent and suitable persons to perform these duties, and that, if appointed, they will serve. If any county or district should be so unfortunate as not to contain such persons, they ought to be abolished and added to such as do contain them. It is an impossibility for a person who can neither read nor write to properly discharge the duties of an inspector of such elections; it is their duty to determine what votes are proper to be received and counted, and those properly to be rejected; to ascertain the whole number cast for each candidate, and to make and sign the proper returns.

It is urged for defendants that they can rely upon their associates and clerks. This is no answer to the objection. Each inspector judges for himself, and is not required to rely upon another. The proper discharge of the duties of these officers is a subject in which every voter, as well as the persons voted for, has a vital interest, as well as the whole public.

I am satisfied, from the numerous election cases which have been before me, that the neglect, if not refusal, to appoint competent and suitable persons to act as such election commissioners and inspectors, is the cause of the majority of the election causes which have come before the courts in this state, and an evil that ought to be corrected.

It is insisted that the duty of the defendants, in making the appointments, acted in a judicial capacity, and [are] therefore not liable for any mistakes which they might have made. This is true, if it was a mistake; but the indictment charges that it was done with intent to affect the election or result thereof. This is, in effect, charging that it was fraudulently done. It is true that the word "fraudulent" is not used, but it is not necessary; when the act charged is fraudulent it is not necessary to use the word. The defendants being elec-

tion officers, the indictment, to be good under section 5515 of the Revised Statutes of the United States, under which it is framed, must state that it was with the intent to effect the election, or the result thereof, otherwise it would be insufficient and quashable. These allegations must, on the trial, be proved to the satisfaction of the jury, beyond a reasonable doubt; if not, no conviction can be had.

I am satisfied that the offense is sufficiently charged under the section above referred to and under which it is framed, and that the motion to quash must be overruled.

BARBER *v.* CONNECTICUT MUTUAL LIFE INS. CO.

(*Circuit Court, N. D. New York.* 1883.)

1. SALE AND DELIVERY—GOOD-WILL OF BUSINESS.
   The good-will of an established business, is a common subject of contract, although it is nothing but the chance of being able to keep the business which has been established, yet the rights of a purchaser of such good-will will be enforced in equity and recognized at law as effectual between the parties to the contract.
2. INSURANCE COMPANY—AUTHORITY OF GENERAL AGENTS.
   Where the general agents of an insurance company, by their representations, induced complainant to invest money in the purchase of the good-will of a special insurance agency; if without right he was deprived of an opportunity of transferring his interest to another, he is entitled to compensation to the extent of his loss.
3. SAME—RESTRICTION ON AUTHORITY.
   The general agents of a foreign insurance company in a state other than the state of its creation, having authority to solicit applications for insurance and collect the premiums therefor, and authorized to appoint local agents and pay them reasonable commissions, and obligated to bear all the expenses of the business within their territory, cannot bind the company by their conduct or representations respecting the purchase of the good-will of a local agency.
4. SAME—CONTRACT NOT BINDING ON COMPANY.
   A contract which would create the relation of vendor and purchaser between an insurance company and a third party, and as such outside the ordinary and customary contracts, which are within the implied authority of the general agents of the company, is not binding on the company.

Sedgwick, Ames & King, for complainant.
Pratt, Brown & Garfield, for defendant.

WALLACE, J. The proofs establish, in substance, the theory of the bill that the complainant purchased the good-will of Marvin and of Carr in their business as local agents for the defendant, upon

the faith of the assurances of Peck & Hillman, the general agents of the defendant in this state. These representations were to the effect that it had been their uniform practice, while having charge of the local agencies within their territory, to permit their subagents, when desiring to relinquish their agencies, to sell the good-will of the agency business to some acceptable successor, and that the right of the local agents to make such transfers was always recognized and protected by the general agents, and that complainant might rely upon this privilege when he wanted to relinquish his agency. The value of this right is apparent, in view of the peculiar character of the interest of the local agents in the business of their agencies. They were not appointed for any definite period of time, they received no salary, and their only compensation was by commissions upon premiums collected by them while they continued to act as such local agents. They were expected to solicit insurance upon lives for a commission upon the original premiums, and the renewal premiums which might be paid during the continuance of their employment. In view of this uncertain tenure, and, doubtless, in order to stimulate them to make their agencies valuable, the custom of permitting them to dispose of the good-will of their agencies had been sanctioned by the general agents. Purchasers could be found who would be willing to pay a large consideration for the interest in an established agency business, which was producing a revenue from the commissions to accrue upon the renewal premiums paid in from year to year by those who had insured with the agency. The agents' privilege of finding such a purchaser, and the assurance that the general agents would co-operate in making this a practical and valuable possibility, was a substantial incident of the relation between the subagent and the general agent.

Notwithstanding the precarious value of such a right, there seems to be no good reason why it should not be recognized and protected by the law. The good-will of an established business, which is a common subject of contract, is nothing but the chance of being able to keep the business which has been established. The sale of a mere chance, which vests in the purchaser nothing but the possibility that a preference which has been usually extended to those whose rights he acquires will be extended to him, has been enforced in equity, and recognized at law as effectual between the parties to the contract. *Phyfe* v. *Wardell*, 5 Paige, 268; *Armour* v. *Alexander*, 10 Paige, 571; *Hathaway* v. *Bennet*, 10 N. Y. 108.

The complainant having been induced by the representations of

Peck & Hillman to invest several thousand dollars in the purchase of this property interest, acquired as against them what he purchased, and if without right he was deprived of an opportunity of transferring his interest to another, he is entitled to compensation to the extent of his loss.

It has been objected, however, that the complainant's remedy is at law, and as there is no relief to which he is entitled except a recovery of damages, the objection seems unanswerable. He cannot found his right to resort to equity upon the ground of fraud or trust. His case must rest upon the plain theory of the violation of a contract. There are allegations in the bill that he was deprived of vouchers relating to his agency business by the false representations of the general agents. These vouchers were the property of the defendant. The complainant does not assert that he had any lien upon them.

There are no difficulties in the way of establishing his damages at law, which would not be encountered in equity. Doubtless it would be difficult in either jurisdiction to determine the just measure of his compensation, but his recovery would depend upon the same rule of damages in both.

There is another ground upon which the complainant must fail, and that is because he has selected the wrong party as defendant. Peck & Hillman had no authority to bind the defendant by their conduct or representations respecting the purchase by the complainant of the good will of his predecessors. They were the agents of the defendant for this state to solicit applications for insurance, and collect the premium paid by persons insuring in their territory. They were authorized to appoint subagents and pay them reasonable commissions, and were obligated to bear all the expenses of soliciting insurance and collecting premiums within their territory, including the commissions and expenses of the subagents. Although they were termed general agents, the complainant had no right to assume that they possessed unlimited authority and could bind their principal in a transaction so far outside the scope of the usual powers of agents of their description. The state agents of insurance companies ordinarily exercise limited powers, although they represent their principal throughout an extensive territory. It is stated in May, Ins. § 125, that their powers differ from those of local agents principally in their geographical extent, except that they may, generally, appoint local or subagents, which local agents cannot. They have a wider field of action than local agents, and are expected to exercise a supervisory authority over them.

It may for present purposes be assumed that the defendant would be responsible for the contracts made by Peck & Hillman respecting the compensation to be paid to the subagents they were authorized to appoint, but it would not be responsible for a contract made by them giving an extraordinary compensation to a subagent. The limitation upon the implied powers of such agents to charge their principals is well illustrated by the case of *Anchor Life Ins. Co.* v. *Pease*, 44 How. 385, where it was held that the general agents of a life insurance company had no implied authority to make an agreement with a physician employed by them in examining applicants for insurance, whereby the company were obligated to accept his services in payment of the premium on a policy issued to him by the company. The contract to which it is sought to hold the defendants is one which would create the relation of vendor and purchaser between the company and the complainant, and, as such, is quite outside the ordinary and customary contracts which are within the implied authority of such agents to make.

Furthermore, the proofs show that Peck & Hillman did not assume to speak for the insurance company in the negotiations respecting the purchase by complainant. The representations made by Hillman were concerning the course which Peck & Hillman had adopted in the past, and would adhere to in the future, respecting the transfer by their subagents of the good-will of their agencies, and related solely to their personal conduct and intentions. The case is destitute of evidence to show that complainant ever had any reason to suppose that he was dealing with the defendant in the purchase of the agency business.

The theory that the complainant was justifiably removed as local agent, for dereliction of duty, has not been considered, because it has not been deemed necessary to the decision of the controversy. Whether there was any misconduct on the part of the complainant, and, if so, whether the right to terminate his agency would relieve Peck & Hillman of liability for refusing to permit him to transfer the good-will of his agency business, are questions which ought not to be determined unnecessarily. The bill is dismissed.

Good-Will.

There is hardly space enough within the limits of a note to a case fully to set forth the law of good-will with all its distinctions and details. But the authorities may be collected, and the general principles stated and partially

illustrated. This will be attempted in the present note. Probably there can be no better definition of good-will than that framed by Mr. Justice STORY, who says: "Good-will may properly enough be described to be the advantage or benefit which is acquired by an establishment, beyond the mere value of the capital stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position or common celebrity, or reputation for skill or affluence or punctuality, or from other accidental circumstances or necessities or even from ancient partialities or prejudices." Story, Partn. § 99. Other definitions are met with in the books; as, for example, in *Crutwell* v. *Lye*, 17 Ves. 335, by Lord ELDON; *Churton* v. *Douglas*, Johns. Ch. 174, by Vice-Chancellor Sir W. PAGE WOOD; *Wedderburn* v. *Wedderburn*, 22 Beav. 84, by Sir JOHN ROMILLY, M. R.; *Chissum* v. *Dewes*, 5 Russ. 29, by Sir JOHN LEACH, M. R. See, also, *Giblet* v. *Read*, 9 Mod. 460.

Lord ELDON, in *Kennedy* v. *Lee*, 3 Mer. 440, says: "There is another way in which the good-will of a trade may be rendered still more valuable; as by certain stipulations entered into between the parties at the time of the one relinquishing his share in the business; as by inserting a condition that the withdrawing partner shall not carry on the same trade any longer, or that he shall not carry it on within a certain distance of the place where the partnership trade was carried on, and where the continuing partner is to carry it on upon his sole and separate account." To this interest or advantage transferred by the retiring partner, Judge STORY, following Lord ELDON, (Partn. § 99,) has applied the name "good-will;" but this is not quite accurate. Good-will denotes a relation existing between a man or firm and the public with reference to a particular business. It is the good-will of the public to the man or firm. All the partners in a firm have an interest in the firm's good-will, and when they withdraw they may take their interest in the good-will with them, or sell it to such partners or purchasers as remain to carry on the firm business. But a part of a thing is not the whole of it; no more is a partner's interest in his firm's good-will the good-will, and it cannot properly be so called.

Good-will has been held to be purely local; that is, so attached to the house or premises wherein the business was carried on as to pass by a lease or conveyance of such house or premises, (*Chissum* v. *Dewes*, 5 Russ. 29; *Dougherty* v. *Van Nostrand*, 1 Hoff. 68; *Williams* v. *Wilson*, 4 Sandf. Ch. 379; *Elliott's Appeal*, 60 Pa. St. 161;) but the weight of modern authority is clearly against this view. It is, as has been aptly said by Mr. A. S. Biddle, (14 Amer. Law Reg. 8, "Good-Will,") "a species of incorporeal personalty, subject, with but few exceptions, to the general laws which regulate that kind of property."

It may be sold or given away, like other personal property. *McFarlan* v. *Stewart*, 2 Watts, 111; *Holden* v. *McMakin*, 1 Pars. Eq. Cas. 27; *Howe* v. *Searing*, 19 How. Pr. 14; *Dougherty* v. *Van Nostrand*, 1 Hoff. 68; *Williams* v. *Wilson*, 4 Sandf. Ch. 379; *Mussellman's Appeal*, 62 Pa. St. 81; *Shackle* v. *Baker*, 14 Ves. 468; *Crutwell* v. *Lye*, 17 Ves. 335; *Mellersh* v. *Keen*, 28 Beav. 453; *Bradbury* v. *Dickens*, 27 Beav. 53; *Johnson* v. *Helleley*, 34 Beav. 63; *Wedderburn* v. *Wedderburn*, 22 Beav. 84; *Turner* v. *Major*, 3 Giff. 442; *Churton* v. *Douglas*, Johns. Ch. 174; *Banks* v. *Gibson*, 11 Jur. pt. 1, 680; *Hitchcock* v.

Coker, 6 Adol. & E. 438; *Beal* v. *Chase*, 31 Mich. 490; 14 Amer. Law Reg. 561.

It may be bequeathed. *Hitchcock* v. *Coker*, 6 Adol. & E. 438. See, also, *Smith* v. *Everett*, 27 Beav. 446. But see *Robertson* v. *Quiddington*, 28 Beav. 529.

A few cases hold that good-will is not a partnership asset. See *Howe* v. *Searing*, 19 How. Pr. 14, and cases referred to therein. But the clear weight of authority holds that good-will is a partnership asset. *Lewis* v. *Langdon*, 7 Sim. 421; *Banks* v. *Gibson*, 11 Jur. pt. 1, 680; *Johnson* v. *Helleley*, 34 Beav. 63; *Macdonald* v. *Richardson*, 1 Giff. 81; *Williams* v. *Wilson*, 4 Sandf. Ch. 379; *Martin* v. *Van Shaick*, 4 Paige, 479; *Case* v. *Abell*, 1 Paige, 401; *Dougherty* v. *Van Nostrand*, 1 Hoff. 68; *Mussellman's Appeal*, 62 Pa. St. 81; *McFarlan* v. *Stewart*, 2 Watts, 111; *Holden* v. *McMakin*, 1 Pars. Eq. Cas. 270; *Willett* v. *Blandford*, 1 Hare, 271; *Wedderburn* v. *Wedderburn*, 22 Beav. 84: *Turner* v. *Major*, 3 Giff. 442; *Austen* v. *Boys*, 2 De Gex & J. 626; *Bradbury* v. *Dickens*, 27 Beav. 53; *Mellersh* v. *Keen*, 28 Beav. 453; *Bininger* v. *Clark*, 10 Abb. Pr. (N. S.) 264; *Shepherd* v. *Boggs*, 2 N. W. Rep. (N. S.) 370; S. C. 9 Neb. 258.

Being a partnership asset the question arises whether it survives in case of the death of a partner. Lord LOUGHBOROUGH held that it survived. *Hammond* v. *Douglas*, 5 Ves. 539. This was the position taken by Vice-Chancellor Sir L. SHADWELL in *Lewis* v. *Langdon*, 7 Sim. 421. But Lord ELDON, in *Crawshay* v. *Collins*, 15 Ves. 218, doubted whether Lord LOUGHBOROUGH was correct as to the good-will surviving, and held that it did not survive. To the same effect see *Wedderburn* v. *Wedderburn*, 22 Beav. 84; *Smith* v. *Everett*, 27 Beav. 446; *Holden* v. *McMakin*, 1 Pars. Eq. Cas. 274; *Howe* v. *Searing*, 19 How. Pr. 14. In *Webster* v. *Webster*, 3 Swanst. 490, note, the court refused the suit of surviving partners to enjoin executors of a deceased partner from using the name of the testator in the trade carried on by them in partnership. See, also, *Bradbury* v. *Dickens*, 27 Beav. 53; *Turner* v. *Major*, 3 Giff. 442; *Williams* v. *Wilson*, 4 Sandf. Ch. 379; *Scott* v. *Rowland*, 26 Law T. (N. S.) 391.

Upon the point whether, where a partnership is dissolved during the life of the partners, they have each a right to continue business under the old firm name, Sir J. ROMILLY, M. R., in *Banks* v. *Gibson*, 34 Beav. 566, said: "If two persons carried on business as Child & Co., and they thought fit to separate, each might call himself Child & Co., and there is nothing to prevent him from so doing." But in *Williams* v. *Wilson*, 4 Sandf. Ch. 405, it was decided that one partner could not exclude the others from the business and continue it alone under the old firm name. See, also, *Van Dyke* v. *Jackson*, 1 E. D. Smith, 419; *Fenn* v. *Bolles*, 7 Abb. Pr. 202; *Staats* v. *Howlett*, 4 Denio, 559; *McGowan, etc., Co.* v. *McGowan*, 22 Ohio St. 370; *Bowman* v. *Floyd*, 3 Allen, 76; *Spann* v. *Nance*, 32 Ala. 527; *Rammelsberg* v. *Mitchell*, 29 Ohio St. 22.

Good-will passes to assignees in bankruptcy, (*Ex parte Thomas*, 12 Mont., D. & De G. 294,) who may sell it, (*Crutwell* v. *Lye*, 17 Ves. 335,) and pending sale a receiver may be appointed to carry on the business and preserve the good-will, (*Martin* v. *Van Schaick*, 4 Paige, 479.) Since it is intangible, or incorporeal, there must be some way by which the person, firm, or corporation possessing the good-will can indicate to the world that such corporation,

firm, or person has a right to it. This is done by the use of some symbol or name or trade-mark. A sale or other transfer of the good-will passes the right to use the name or trade-mark which symbolizes it. Indeed, the name or trade-mark is considered to be a part of the good-will.

The name of a literary production constitutes part of the good-will of the publishers thereof. Thus *Bradbury* v. *Dickens*, 27 Beav. 53, holds that the title of a work, "Household Words," forms part of the firm assets. See, also, *Hogg* v. *Kirby*, 8 Ves. 215; *Bell* v. *Locke*, 8 Paige, Ch. 75; *Holden's Adm'r* v. *McMakin*, 1 Pars. Eq. 270; *Byron* v. *Johnston*, 2 Mer. 29; *Keene* v. *Harris*, 2 Ves. 342; *Seeley* v. *Fisher*, 11 Sim. 582; *Spottiswoode* v. *Clarke*, 2 Phill. Ch. 154; *Prowett* v. *Mortimer*, 2 Jur. (N. S.) 414; *Clement* v. *Maddick*, 1 Giff. 98; *Chappell* v. *Sheard*, 2 Kay & J. 167; *Same* v. *Davidson*, Id. 123; 8 De Gex, M. & G. 1; *Ingram* v. *Stiff*, 5 Jur. (N. S.) 947; *Maxwell* v. *Hogg*, L. R. 2 Ch. App. 307; *Sheldon* v. *Houghton*, 5 Blatchf. 285.

The name under which a business is conducted is part of the good-will of the business. John Douglas, a member of John Douglas & Co., having sold to his partners all his share in the good-will of the firm, was restrained by injunction, at the suit of such partners, from using the firm name of John Douglas & Co. And the vice-chancellor said that if the old firm had been merely "John Douglas," and a person of that name had sold all his share in the good-will of the firm, and "had secured the three managing men in the former business, and was going, as here, to set up the old firm of John Douglas with these three men, I should hold then, as I hold now, that he was not at liberty to trade under such misrepresentation," (*Churton* v. *Douglas*, Johns. Ch. 174; see, also, *Rogers* v. *Nowill*, 3 De Gex, M. & G. 614; 6 Hare, 325;) and, generally, if a name be valuable, even another person of the same name will not be allowed fraudulently to use it. *Rodgers* v. *Nowill*, 6 Hare, 325; 3 De Gex, M. & G. 614; *Holloway* v. *Holloway*, 13 Beav. 209; *Burgess* v. *Burgess*, 3 De Gex, M. & G. 896; *Taylor* v. *Taylor*, 23 Law J. Ch. 255; *Dent* v. *Turpin*, 2 Johns. & H. 139; *Churton* v. *Douglas*, Johns. Ch. 174; *Sykes* v. *Sykes*, 3 Barn. & C. 541; *Fott* v. *Lee*, 13 Ir. Eq. 490; *Croft* v. *Day*, 7 Beav. 84; *Fonthorn* v. *Reynolds*, 12 Law T. (N. S.) 75; *Lee* v. *Haley*, L. R. 5 Ch. App. 154. So a person will be restrained from representing himself as in business with, or the successor of, another. *Harper* v. *Pearson*, 3 Law T. (N. S.) 447; *Edgington* v. *Edgington*, 11 Law T. (N. S.) 299.

Where the name, trade-mark, or symbols are words *publici juris*,—that is, words which the public have a right to use,—their use will not be enjoined. The following words have been held *publici juris:* "Pennsylvania Wheat," "Kentucky Hemp," "Virginia Tobacco," "Sea-Island Cotton," *D. & H. Canal Co.* v. *Clark*, 13 Wall. 311; "Lackawanna Coal," *Colladay* v. *Baird*, 4 Phila. 139; "Extract of Night-blooming Cereus," 5 Phila. 464; "Glendon," (the name of a town,) *Glendon Iron Co.* v. *Uhler*, 13 Amer. Law Reg. 543; but see *Hirst* v. *Denham*, L. R. 14 Eq. 542; *Rudde* v. *Norman*, L. R. 14 Eq. 348. As to the word "Eureka," see *Ford* v. *Foster*, 27 Law T. (N. S.) 219. The use of "Bolton's L. L." was restrained on account of similarity with "Kinihan's L. L.," *Kinihan* v. *Bolton*, 15 Ir. Ch. 75. The use of the word "Anatolia," as applied to licorice, was restrained in *McAndrews* v. *Bassett*, 10 Jur. (N. S.) 540; "Onondaga Akron Cement or Water Lime" was enjoined because of similarity with "Akron Ce-

ment or Akron Water Lime." *Alvord* v. *Newman*, 49 Barb. 588. As to "Christy's Minstrels," see *Christy* v. *Murphy*, 12 How. Pr. 77.

In *Wotherspoon* v. *Currie*, 27 Law T. (N. S.) 393, the defendant was restrained from using the word "Glenfield," the name of a place in Scotland, it having acquired a particular meaning by complainant's use of it to designate his manufacture of starch. In *Bury* v. *Bedford*, 4 De Gex, J. & S. 352, the use of the figure of a lion couchant, surmounted by crossed arrows, with four initial letters, J. O. B. S., within the spaces formed by the arrows, was enjoined.

Several cases present instances of injunctions granted to enforce contracts relating to the good-will of hotels and public houses. *Marsh* v. *Billings*, 7 Cush. 322; *Howard* v. *Henriques*, 3 Sandf. 725; *Stone* v. *Carlan*, 3 Mo. 360; *Deig* v. *Lamb*, 6 Robt. 535; *Woodward* v. *Lazar*, 21 Cal. 448.

Where the plaintiff held a public house under a lease from the defendant, containing a proviso that at the expiration of the term all such sums of money as could be procured for the good-will of a licensed victualer in respect of said premises should belong to the plaintiff, at the expiration of the lease the defendant claimed an increased rent, and a sum by way of premium. The plaintiff refused these terms, and the premises were leased to one B. at an increased rent, and a premium of £1,300, for a 14-years' lease. Nothing under the name of good-will was paid by B. It was found by an arbitrator that the rent reserved was a sufficient rental for the premises, without any bonus, apart from the special value which the premises possessed, owing to the old and successful business which had been carried on there by plaintiff; and also that the good-will of plaintiff would, if belonging to the defendant, have been worth over £1,300. *Held*, that the proviso had been broken, and that, in determining the value of the good-will, the arbitrator was not to be guided absolutely by the fact that £1,300 had been paid by B. as premium, and that he was to consider the increased value of the good-will by reason of the general improvement of the locality. *Llewellyn* v. *Rutherford*, L. R. 10 C. P. 456.

A carrier's "route" on a newspaper is his property, and may be sold, together with the good-will of the customers. It would appear that an adequate remedy existed at law for the breach of contract to sell such a "route," but if it be shown that a breach of such contract would result in losses exceeding the market value of the route, or that its profits were not ascertainable by a jury, then specific performance will be decreed. *Senter* v. *Davis*, 38 Cal. 450. But see *Fallon* v. *Chronicle Pub. Co.* 1 MacArthur, 485.

Where a corporation, with the consent of its principal stockholders, has embodied their names in the corporate name, the right to use the name so adopted will continue during the existence of the corporation. A rival company, subsequently formed and embracing such stockholders, will have no right so to use the names of such stockholders as to mislead those dealing with them into the belief that the two companies are the same. *Holmes B. & H.* v. *H. B. & A. M. Co.* 37 Conn. 278.

It has been doubted whether the good-will of professional men or firms was a subject of sale or transfer. See *Austin* v. *Boys*, 2 De Gex & J. 626; *Farr* v. *Pierce*, 3 Mod. 74. It has been urged that the business of professional

men depended upon the confidence of their patrons, and how, it has been asked, can this confidence be sold or transferred? Yet it is not unusual for physicians and lawyers to sell their practice. Perhaps sales of interests in practice and business to younger men who are admitted into the law firm or practice, and thus given an opportunity of acquiring the confidence of patrons, are more frequent than the sales of the entire practice. But the latter is not unusual, and the recommendation of the older practitioner goes far towards securing for the purchaser the continued patronage and good-will of the circle of patrons.

There is no doubt that an attorney's practice may be sold, and a sale of it is not contrary to public policy. *Bunn* v. *Guy*, 4 East, 190. See, also, *Dakin* v. *Cope*, 2 Russ. 170; *Thornbury* v. *Bevill*, 1 Young & C. Ch. 554. But the recommendation of the retiring atttorney may be withdrawn if the purchaser abuses it, (*Bunn* v. *Guy*, *supra*,) and it appears that such a contract is not specifically enforceable. "The business of an attorney consists in his being employed by others, from the confidence which they repose in his skill and integrity. In what way, then, is the court to decree the transfer of such a business?" Sir WILLIAM GRANT, in *Bozon* v. *Farlow*, 1 Mer. 459. See, also, *Baxter* v. *Connolly*, 1 Jacob & W. 580; *Candler* v. *Candler*, Jacob, 225; *Coslake* v. *Till*, 1 Russ. 376. But an injunction will be issued restraining an attorney who has sold the good-will of his business from practicing. *Whittaker* v. *Howe*, 3 Beav. 383; *Harrison* v. *Gardner*, 2 Mod. 198. So an injunction will be granted restraining the vendor of the lease of an academy from teaching school in the neighborhood. *Spier* v. *Lambden*, 45 Ga. 319. And see, *Bell* v. *Locke*, 3 Paige, 75. A suit for damages at law will lie if the contract of sale be broken either by vendor or vendee. *Bunn* v. *Guy*, 4 East, 190.

As to the vendor going into business after selling the good-will, in *Shackle* v. *Baker*, 14 Ves. 468, the Lord Chancellor ELDON said that where there is an undertaking upon the sale of the good-will of a trade not to carry on the same business, and to use the best endeavors to assist the purchaser, the remedy for a breach by enticing the customers of plaintiff was by an action of covenant or issue *quantum damnificatus*, and refused an injunction. See, also, *Williams* v. *Williams*, 2 Swan, 253; *Smith* v. *Fremont*, 2 Swan, 330. The general rule appears to be that the vendor of a business and good-will may set up a business *similar* but not identical with the one he has sold, but he must not solicit his old customers either to deal with him or to refrain from dealing with his vendee, else he will be enjoined. *Crutwell* v. *Lye*, 17 Ves. 335; *Cook* v. *Collingridge*, Jacob, 607. See, also, *Rupp* v. *Over*, 3 Brewst. 133; *Churton* v. *Douglas*, Johns. Ch. 174; *Hall* v. *Barrows*, 33 Law J. Ch. 204; *Davis* v. *Hodgson*, 25 Beav. 177; *Howe* v. *Searing*, 19 How. Pr. 14; *Johnson* v. *Helleley*, 34 Beav. 63; *Labourchere* v. *Dawson*, L. R. 13 Eq. 322; *Palmer* v. *Graham*, 1 Pars. Eq. Cas. 476; *Hall's Appeal*, 60 Pa. St. 458; *Augier* v. *Webber*, 14 Allen, 211; *Beal* v. *Chase*, 31 Mich. 490; 14 Amer. Law Reg. 561; *Buckingham* v. *Waters*, 14 Cal. 147; *Ginesi* v. *Cooper*, 14 Ch. Div. 596.

But while it is obviously unfair for a retiring partner who has sold his interest in the good-will of his firm to set up business and to attempt to decoy the old customers from the partner to whom the business has been sold, yet

no rule of justice requires that, in the event of these customers coming without solicitation to the retired partner's place, he be restrained from dealing with them. *Laggott* v. *Barrett*, 43 Law T. Rep. (N. S.) 641.

If a fraudulent representation be made in the sale of the good-will of a business, the contract of sale may be rescinded. *Cruess* v. *Fessler*, 39 Cal. 336.

Evidence to show that a new store opened by a retired partner two doors from that of his former copartners, to whom he had sold out, and with whom he had agreed not to go into business again, resembled the old store in appearance, is admissible in determining whether there has been a breach of the agreement. *Dethlefs* v. *Tamsen*, 7 Daly, 354.

A physician, purchasing the practice of another, who has deceived him by falsely representing such practice as being regular, legitimate, and allopathic, and worth $6,000 a year, may sue for damages, and upon trial may show that such practice was irregular and eclectic; that it consisted in part of abortion cases; and that the income was less than $6,000 per year. *Bradbury* v. *Barden*, 35 Conn. 577.

The measure of damages for a breach of a covenant not to re-enter business on the sale of the good-will of a trade is not the actual profit made, if title to more can be established through the default of the vendor. *Scott* v. *Mackintosh*, Ves. & B. 503.

In an action to recover the balance of purchase money of a school, where the vendor had agreed to sell the good-will of the institution, circulars and advertisements of a rival school, containing the name of the vendor as a member of the faculty of such rival institution, are not competent and relevant testimony to show damage by way of set-off, without first showing that such circulars, etc., were issued at the instigation of the vendor. *McCord* v. *Williams*, 96 Pa. St. 78.

But the remedy for a breach of a contract of sale of good-will is not confined to an action at law for damages. There is a remedy in equity. Some early decisions base the jurisdiction of equity in good-will and trade-mark cases entirely upon fraud and deceit, but in the light of later decisions this is not quite true. The jurisdiction of equity rests upon complainant's right, title, or property in the firm name, the trade-mark, or the symbol, and the use of a trade-mark or firm name will be restrained by injunction, although the person using it did so in good faith, without knowledge that it belonged to another, and supposing the trade-mark was merely a technical term. *Millington* v. *Foy*, 3 Mylne & C. 338. See, also, *Hall* v. *Barrows*, 33 Law J. Ch. 204; *Farina* v. *Silverlock*, 6 De Gex, M. & G. 214; *Partridge* v. *Mench*, 2 Barb. Ch. 101; *Leather Cloth Co. Lim.* v. *Amer. L. C. Co. Lim.* 4 De Gex, J. & S. 143; 1 Hem. & M. 271; 11 H. L. Cas. 523; *Wotherspoon* v. *Currie*, 27 Law T. (N. S.) 393. And it appears that an injunction will not be granted until a title to the good-will or trade-mark is made out in an action at law. See, as to this, *Motley* v. *Downman*, 3 Mylne & C. 1; *Bacon* v. *Jones*, 4 Mylne & C. 433. Sir JOHN ROLTS; Acts 25, 26, Vict. *c.* 42; *Partridge* v. *Mench*, 2 Barb. Ch. 101.

The complainant who seeks to restrain another's use of a particular name or mark, must come into equity with clean hands, else relief will not be granted to him. Thus, in *Leather Cloth Co. Lim.* v. *Amer. L. C. Co. Lim.* 11

H. L. Cas. 523, the dismissal of complainant's bill was affirmed, on the ground that it had been guilty of misrepresentation in using upon goods the words "Crockett & Co., Tanned Leather Cloth, Patented," and "J. R. & C. C. Crockett, Manufacturers," all of which was untrue.

But a distinction was pointed out by Lord WESTBURY. "Suppose," said he, "a partnership to have been formed a century ago, under a style or firm composed of the names of the then partners, and that the partnership has been continued by the admission of new partners in an unbroken series of successive partnerships, trading under the same original style, although the names of the present partners are wholly different from those in the original firm. Is it an imposition on the public that such partners should continue to use the style or firm of the original partnership? This question must be answered, without any doubt, in the negative.

"But suppose an individual or a firm to have gained credit for a particular manufacture, and that the goods are marked or stamped in such a way as to denote that they are made by such person or firm, and that the name has gained currency and credit in the market, (there being no secret process or invention.) Could such person or firm, on ceasing to carry on business, sell and assign the right to use such name and mark to another firm, carrying on the same business in a different place? Suppose a firm of A., B. & Co. to have been clothiers in Wiltshire for 50 years, and that broadcloth marked "A., B. & Co., Makers, Wilts.," has obtained a great reputation in the market, and that A., B. & Co., on discontinuing business, sell and transfer the right to use their name and mark to the firm of C., D. & Co., who are clothiers in Yorkshire. Would the latter be protected by a court of equity in their claim to an exclusive right to use the name and mark of A., B. & Co.? I am of opinion that no such protection ought to be given. Where any symbol or label claimed as a trade-mark is so constructed or worded as to make or contain a distinct assertion, which is false, I think no property can be claimed for it; or, in other words, the right to the exclusive use of it cannot be maintained." *Leather Cloth Co. Lim.* v. *Amer. L. C. Co. Lim.* 4 De Gex, J. & S. 143.

Chicago. ADELBERT HAMILTON.

McCLELLAND, Receiver, etc., *v.* WHITELEY.

(*Circuit Court, E. D. Wisconsin.* 1883.)

1. STOCK COMPANIES—SUBSCRIPTION—HOW MADE—LIABILITY—WHEN ATTACHES.
   A person cannot be held liable as a stockholder of a company until his name has been signed by himself or his authorized agent in the stock-book of the company, kept for that purpose. Writing one's name in the private memorandum-book of a party soliciting subscriptions to the stock of the company is not of itself authority to such person to sign a subscription for stock.
2. SAME—PROXY—RATIFICATION OF UNAUTHORIZED ACTS.
   The defendant agreed to subscribe to the stock of a company, providing a certain appointment was secured for him, but declaring at the same time that he could not then subscribe for the stock. He subsequently authorized the

party soliciting for subscription to the stock to appear for him by proxy at the meeting of the stockholders, in anticipation of his future subscription to the stock, which was never made. *Held*, that such proxy was not a ratification by the defendant of the act of the one to whom it was given in having signed defendant's name on the stock-book of the company as a subscriber without his knowledge or consent.

3 SAME—RATIFICATION OF ACTS OF AGENT—WHAT ESSENTIAL TO.

The ratification of an act of an agent previously unauthorized must, in order to bind the principal, be with a full knowledge of all the material facts.

Owings v. *Hull*, 9 Pet. 607, followed.

Jenkins, Elliott & Winkler, for plaintiff.

Fish & Dodge, for defendant.

DYER, J. The plaintiff in this action sues to recover upon an alleged subscription by the defendant of $2,000 to the capital stock of a corporation now dissolved, known as the Chicago Publishing Company, incorporated and organized in 1877, under the laws of Illinois. One O. A. Willard, since deceased, was the largest stockholder, and the president and business manager of the company.

In July, 1878, the Rock River Paper Company, a creditor of said corporation, filed its bill against the publishing company, and all alleged stock subscribers of that company, in the superior court of Cook county, Illinois, to wind up the affairs of the company, and to compel the payment of all subscriptions to stock, for the benefit of creditors. The defendant herein was made a party to that bill. As he was a resident of Wisconsin, no personal service of process could be made upon him, but jurisdiction of him was attempted to be obtained by publication in a manner said to be authorized by the laws of Illinois. In that suit the plaintiff herein was appointed receiver of the property and effects of the publishing company, and subsequently a decree was entered by which it was, among other things, decreed that all of the solvent stockholders or subscribers to the capital stock of said corporation, including the defendant herein, pay, or cause to be paid, to the plaintiff receiver, the several sums of money alleged to be due from them respectively on account of their subscriptions to the stock of the company. Subsequently, the Illinois court made a further order authorizing and directing the receiver to prosecute suit against the defendant herein to recover the amount of his alleged subscription, and it is understand that the various proceedings in the Illinois case were in accordance with the statutes of that state authorizing the same.

The case at bar was submitted to the court without the intervention of a jury, and upon the argument it was contended by the coun-

sel for the defendant that the right or capacity of the receiver to sue was limited to the jurisdiction of the court that appointed him, and that he could not come into this jurisdiction and, as receiver, prosecute this suit against the defendant. Further, that the receiver cannot maintain this action, because he shows no judgment of the court appointing him, which is conclusive against the defendant. In the view which the court takes of the merits of the case, it is unnecessary to pass upon these questions.

Since the superior court of Cook county did not get jurisdiction of the defendant by personal service of process upon him, and as, therefore, its decree was not conclusive as to him, it cannot be denied, and indeed it is admitted, that he may make here the same defense upon the merits that he could have made in the Illinois suit had he appeared therein and contested the question of liability.

The material question for determination then is, did the defendant, upon the facts here shown, incur liability as a stock subscriber of the publishing company? If he did, then he ought to contribute with other stockholders to the payment of the debts of the corporation. The stock subscription-book is in evidence, and the name of the defendant appears therein as representing a subscription for 20 shares, amounting to $2,000. It is satisfactorily shown, however, and this was conceded by counsel for the plaintiff after the proofs were in, that the defendant's signature on the stock-book was not in his handwriting, and was not his genuine signature. That it was written in imitation of his signature is apparent.

Enough is disclosed by the evidence to show that in January, 1878, Willard, who had authority to solicit stock subscriptions, came to Racine, where the defendant resided, and requested him to become a subscriber. The defendant told him he was not in a situation to engage in a joint-stock enterprise. This is shown by the testimony of the plaintiff, who testifies to statements made to him by the defendant concerning the defendant's interview with Willard. Further conversation on the subject was had between Willard and the defendant, but precisely what was said is not directly proven, for the reason that Willard is deceased, and therefore, under the statute, the defendant was not a competent witness to testify to conversations between the parties. The answer alleges that, as the result of the negotiations, the defendant told Willard that if he could secure the appointment of United States consul at Bradford, England, he would be able to take and pay for stock to the amount of $2,000. But, notwithstanding this hiatus in the proofs, enough appears to quite

clearly indicate that the defendant was not then prepared to make a subscription, but that in certain contingencies he would be willing to do so. Thereupon Willard presented to the defendant a memorandum-book, and the defendant wrote therein, "Simeon Whiteley—2,000—20;" the figures evidently meaning $2,000—20 shares. It is satisfactorily shown that this book was Willard's personal memorandum-book and not the stock-book of the company. There was one other signature on the page upon which the defendant thus wrote his name, but nothing was written on the pages which preceded these signatures. The fact is not clearly proven, but the whole evidence and the circumstances of the transaction, I think, warrant the inference that the defendant wrote his signature in the manner stated, not as a present subscription, but as indicative of what he would be willing to subscribe in a certain event; for it is clearly demonstrated that he never subscribed for stock in the subscription-book of the company, and he has testified unqualifiedly that he never authorized Willard or any other person to subscribe for him, or to place his name on the company's stock-book, and his testimony is not impeached.

After the death of Willard, the book which contained the defendant's signature was found by his wife among his personal effects, and on the leaves which preceded the page on which the defendant signed his name, there had been written a list of the stock subscribers of the company, with the amount and number of shares subscribed by each, in substantially the same order in which the names of subscribers appear on the genuine stock subscription-book of the company. At the top of each page were also written in appropriate places the words "names" —— "amount" —— "shares." On the first page of the first leaf was written, in the handwriting of Willard, "Chicago Publishing Company. Capital stock, $150,000;" and on the second page of the same leaf was written, also in the handwriting of Willard, a form of subscription for stock, which is in fact a copy of the subscription signed by actual subscribers. These leaves were removed from the book which contained them by Mrs. Willard after her husband's death, for reasons stated in her testimony, and are here produced in evidence; and the witness Harriet Dewey, who was in the employment of the publishing company as a clerk, testifies that by Willard's direction she wrote the list of signatures on the pages which preceded the defendant's name after his signature was written therein, thus corroborating the defendant's statement that nothing was written on those pages at the time of his interview with Willard.

After Willard's death and on the thirteenth day of May, 1878, Mrs. Willard, who was then the business manager and treasurer of the publishing company, finding the defendant's name on the stock subscription-book, and undoubtedly supposing him to be a stock subscriber, sent him by mail a certificate for 20 shares of stock, but he immediately returned it and made no payment on account thereof.

It further appears, as a fact in the case, that on or about the eighteenth day of February, 1878, Willard sent to the defendant a blank proxy to vote on stock at a stockholders' meeting thereafter to be held. This proxy the defendant filled up, signed, and returned, and thereby in terms constituted Willard attorney and agent for him, and in his name and stead, to vote as his proxy at any and all meetings of the stockholders of the publishing company, according to the number of votes he should be entitled to vote if personally present. The defendant testifies that the letter in which the proxy in blank was sent to him, did not, according to his recollection, contain any notice of a stockholders' meeting; that he did not then know that his name appeared on the company's stock-book as a subscriber for stock, and that he signed the proxy for the reason that whenever the anticipated time arrived when he should take stock in the company, he desired Willard to have entire control of it.

It appears from the secretary's records that subsequently a stockholders' meeting was held, and that Willard voted or appeared at such meeting, not only for himself, but as the defendant's proxy. There is, however, no proof that the defendant at the time, or subsequently, had any knowledge of those proceedings.

There is nothing in the evidence tending to show that the act of Willard, in causing the list of stock subscribers and the form of a subscription to be placed on the leaves in his memorandum-book, which preceded the page on which the defendant's signature was written, was done with the authority, consent, or even the knowledge of the defendant, and to the point in the history of this transaction when that event occurred, the proofs are wholly inadequate to show that the defendant became a subscriber to the stock of the corporation. He had not made a subscription on the stock-book of the company. He had told Willard he was not in a situation then to engage in the enterprise. He had written his name on a blank page of Willard's private memorandum-book and placed $2,000 opposite his signature. The heading, the list of actual subscribers, and the words "amount" and "shares" were written there afterwards without

his authority or knowledge. He gave Willard no authority to place his name upon the stock subscription-book of the company, and he executed the proxy under the circumstances stated.

Argument is not needed in support of the proposition that, to entitle the plaintiff to recover, it must be established by the evidence that the defendant subscribed a contract to take stock in the publishing company, or that he authorized some person to sign such a contract for him, or that in the absence of such original authority, with knowledge that a subscription had been made in his name, he ratified the act. The first and second of these propositions of fact are not only not proved, but are affirmatively disproved. The only question about which the court has been at all in doubt is that which relates to the effect upon the rights of the parties in interest of the proxy given by the defendant to Willard, February 18, 1878. It is true that that proxy enabled Willard to represent the defendant at a stockholders' meeting and to vote as his proxy according to the number of votes the defendant would be entitled to vote if himself present. But in fact the defendant had not yet subscribed for any stock, and was, therefore, not entitled to vote at such meeting by virtue of any actual subscription. The most, therefore, that can be claimed as the legal effect of the proxy is that the defendant thereby ratified the act of Willard in placing his name on the stock subscription-book of the company. But it is in proof that the proxy was sent only in anticipation of a future subscription which was never made, and that the defendant had no knowledge that Willard had placed his name on the company's stock subscription-book. On the subject of ratification "no doctrine is better settled," said the court in *Owings* v. *Hull*, 9 Pet. 607, "both upon principle and authority, than this: that the ratification of an act of an agent, previously unauthorized, must, in order to bind the principal, be with a full knowledge of all the material facts." To the same effect are *Combs* v. *Scott*, 12 Allen, 493, and *Pittsburgh & Steubenville R. Co.* v. *Gazzam*, 32 Pa. St. 340. In order, therefore, to treat the execution of the proxy as a ratification of the act of Willard in placing the defendant's name on the company's subscription-book, it should appear that the defendant had knowledge of Willard's act. And since it is affirmatively shown that he had no such knowledge and never authorized that act to be done, and further that he had not previously subscribed for stock, and had given no one any authority to subscribe for him, it seems to follow as a necessary conclusion that the giving of the proxy cannot have the legal effect claimed by the plaintiff.

The case has been argued by plaintiff's counsel upon the theory throughout that the defendant agreed to subscribe for stock. This is not proven, and the allegation of the answer on the subject does not sustain such theory. That allegation is that the defendant told Willard that if he secured a certain appointment he would be able to take and pay for $2,000 of stock, and that as a memorandum of such proposition he wrote his name in Willard's memorandum-book. The case is not one of a signature to a contract of subscription with amount, number of shares, and the like left in blank, and the blank to be filled by the representative of the company. It is not the case of an actual signing of a contract of subscription, with an oral understanding making it conditional. It is a case where the party did not subscribe, did not authorize any one to subscribe for him, did not make a legal ratification of an unauthorized act, and, according to the proofs and the allegations of the answer, did not even agree unqualifiedly to take stock in the future. In such a case it is plain that creditors of the corporation have no greater rights or equities, so far as the defendant is concerned, than the company had.

I have carefully examined the case of *Jewell* v. *Rock River Paper Co.* 101 Ill. 57, and find nothing therein in conflict with the conclusions arrived at in the case at bar.

In *Union Mut. L. Ins. Co.* v. *Frear Stone Manuf'g Co.* 97 Ill. 537, the parties sought to be charged were actual subscribers for stock, and it was held that as such subscribers they could not limit their liability by agreement between themselves and the company.

Judgment must be entered in favor of the defendant.

DRAPER *v.* TOWN OF SPRINGPORT.

(*Circuit Court, N. D. New York.* 1883.)

1. NEW TRIAL—CITIZENSHIP—PLEADINGS—GENERAL DENIAL.
   Under the old system of pleadings the issue of citizenship could only be presented by plea in abatement.
2. SAME.
   Under the New York Code, pleas in abatement are abolished, and the question can now be raised by a special denial in the same answer in which the defendant pleads to the merits, but not by general denial.
3. SAME.
   Unless the answer contains such a special denial the plaintiff need give no proof of citizenship.

4. SAME.

Where the plaintiff allowed testimony on a point which should have been specially pleaded without objection or exception, *held*, that he had by such act waived his right to object to the sufficiency of the pleading.

Motion for New Trial.

James R. Cox, for motion.

William F. Cogswell, opposed.

COXE, J. This action is on coupons cut from bonds alleged to have been executed and issued by the defendant.

On the first trial the defendant succeeded on the ground that the bonds were void for lack of seals, but the supreme court reversed the judgment and ordered a new trial, which took place at the last November circuit. A verdict was then ordered for the defendant solely upon the ground that the court had no jurisdiction, the plaintiff not being a citizen of Massachusetts at the time the action was commenced. The circumstances of the trial were somewhat anomalous. The plaintiff, who was called as a witness by the defendant, testified, in substance, that he sold his real estate in Massachusetts in 1876, and since that time had been there but once or twice, and then for a few hours only, though he regarded himself as a resident of Barrington, in that state. He further testified that since 1876 he had kept house and spent most of his time in the city of New York. The question of citizenship not being entirely free from doubt, it was submitted to the jury to find a special verdict on that issue. The verdict being against the plaintiff, the court disposed of the case as before stated. On the trial the attention of the court was not called to the pleadings. The evidence was admitted, the question of citizenship submitted, and a general verdict directed, without objection or exception by the plaintiff.

The plaintiff now moves to set aside the verdict, insisting that there was a mistrial; that the verdict was inconsequential, indecisive, and on an immaterial issue not presented by the pleadings. The allegations applicable are as follows:

In the complaint:

"David S. Draper, a citizen of the state of Massachusetts, plaintiff in this action, * * * complains * * * as follows."

In the answer:

"The said defendant denies each and every allegation in said declaration, except as hereinafter admitted, viz.: It admits that it, the said defendant, is a municipal corporation."

The pleadings were unverified.

The defendant argues that the above allegation of the complaint, assuming it to be an averment of citizenship, and not a mere *descriptio personæ*, is controverted and put in issue by the answer; but the plaintiff contends that this can only be done by a plea in abatement. It would seem that neither position is wholly correct; that in order to raise an issue on the question of citizenship, where the defect does not appear on the face of the complaint, it is necessary that the answer should contain a special and specific denial; a general denial is not sufficient. The plaintiff is entitled to be advised in advance of the issues which the defendant desires to try. Under the assimilation act of June, 1872, the pleadings in actions at law are required to conform to those in the state courts. It therefore becomes important to examine the provisions of the New York Code, in force at the time this action was commenced, January, 1877.

Section 143 of the Code of Procedure provides that the only pleading on the part of the defendant shall be either a demurrer or an answer. A demurrer (section 144) may be interposed on various grounds, among which are the following: That the court has no jurisdiction of the subject of the action, and that the plaintiff has no legal capacity to sue. When any of the matters enumerated in section 144 do not appear on the face of the complaint, the objection may be taken by answer. Section 147. It is further provided, by section 148, that if no such objection is taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action. Section 149 provides:

"The answer of the defendant must contain (1) a general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief; (2) a statement of any new matter. * * *"

Every material allegation of the complaint not controverted by the answer shall, for the purposes of the action, be taken as true. Section 168. A defense which does not involve the merits of the action shall not be pleaded unless it is verified. 2 Rev. St. p. 352, part 3, *c.* 6, tit. 2, § 7, and Code of Civ. Proc. § 513.

The foregoing provisions are substantially retained in the new "Code of Civil Procedure;" they seem to have escaped from the Revision comparatively unimpaired. Under the former system the rule was well-nigh universal that pleading to the merits waived all objection to the plaintiff's capacity to sue. If the defendant disputed the

citizenship of the plaintiff he was required to plead the fact in abatement, and the issue thus formed was to be first disposed of before the case came on for trial on the merits. 2 Abb. U. S. Pr. 55; *De Wolf* v. *Raband*, 1 Pet. 498; *Jones* v. *League*, 18 How. 76; *Sheppard* v. *Graves*, 14 How. 505; *Livingston* v. *Story*, 11 Pet. 351; *Erwin* v. *Lowry*, 7 How. 172; *Green* v. *Custard*, 23 How. 485; *De Sobry* v. *Nicholson*, 3 Wall. 420. But the adoption of the Code wrought a complete revolution in pleading: the old landmarks were swept away, and a new system inaugurated. Separate pleas in abatement are now unknown; they must be pleaded and tried like other defenses. *Gardner* v. *Clark*, 21 N. Y. 399; *Sweet* v. *Tuttle*, 14 N. Y. 468. But now, as always, such defenses must be distinctly, separately, and affirmatively stated in the answer. If not so stated the objection is waived. Proof of such defenses cannot be given under a general denial. *Abe* v. *Clark*, 31 Barb. 238; *Dillaye* v. *Parks*, Id. 132; *Scrantom* v. *F. & M. Bank*, 24 N. Y. 424; *Tremper* v. *Conklin*, 44 Barb. 456; *Hosley* v. *Black*, 28 N. Y. 438; *Merritt* v. *Walsh*, 32 N. Y. 685; *Zabriskie* v. *Smith*, 13 N. Y. 322; *Brennan* v. *New York*, 62 N. Y. 365; *Chaffer* v. *Morss*, 67 Barb. 252.

See, also, as bearing on this question, the statute which provides that "in an action by or against a corporation, the plaintiff need not prove, upon the trial, the existence of the corporation, unless the answer is verified, and contains an affirmative allegation that the plaintiff or defendant, as the case may be, is not a corporation," Code of Civil Proc. § 1776; and also *Bank of Genesee* v. *Patchen Bank*, 13 N. Y. 309; *Phœnix Bank* v. *Donnell*, (1 Hand,) 40 N. Y. 410; *Fulton Ins. Co.* v. *Baldwin*, 37 N. Y. 648.

The rule as heretofore stated would seem, then, to be reasonably clear that in New York proof cannot be given on the trial disputing plaintiff's citizenship, unless notice is given by a special denial in the answer. To hold otherwise would be to establish an unprecedented and dangerous system of pleading—a system offering no check to chicanery, where justice may easily be defeated by trickery and fraud.

It is suggested that the fifth section of the act of March 3, 1875, has changed this rule, and opened the door for an indiscriminate and irrelevant attack upon a plaintiff suing in the federal courts. The section referred to provides in substance that if at any time it shall appear to the satisfaction of the circuit court that such suit does not really and substantially involve a dispute or controversy properly within its jurisdiction, the court shall proceed no further, but shall

dismiss the suit. By using this language congress did not intend to allow the defendant to admit an allegation of his adversary's pleading, and then, on the trial, offer proof that his own admission is untrue. The proof under this section, like other proof, must "appear" in an orderly and proper manner, and must be admissible under the pleadings.

If the fact requiring a dismissal does actually appear, the court should proceed as indicated by the statute. But the defendant cannot offer proof of such fact unless it is admissible on some issue duly presented, and if he attempts to do so, the plaintiff can exclude it by timely objection. In other words, where the issue of citizenship is not raised by the answer, the plaintiff has it in his power at the trial to prevent anything from appearing on the subject *pro* or *con.* If he does not avail himself of this privilege, and allows evidence proving want of jurisdiction to be admitted, the court has no alternative but to act as directed by the statute.

The cases of *Williams* v. *Nottawa*, 104 U. S. 209, and *Rae* v. *Grand Trunk Ry. Co.* 14 FED. REP. 401, are not, so far as disclosed by the record, in conflict with these views. In both, the facts which compelled the dismissal *appeared,* as in this case, on the trial. The question was not one of pleading; it did not relate to the extent and nature of the proof admissible under a particular allegation and denial, but rather to the effect which should be given to evidence already before the court. This inquiry has been somewhat extended because of its general interest and importance, and not because it is necessary to a determination of this motion.

The vital question here is not one of pleading or practice. All these considerations have, in the sequence of events, been left far behind. Whatever the plaintiff's rights may have been, he waived and lost them by allowing the fatal evidence to be admitted. After permitting the question to be submitted without objection or exception, precisely as though there were an issue raised, the plaintiff cannot complain of the disposition of the case at the circuit. His counsel could not have foreseen or prevented the result, which is alone attributable to the conduct of the plaintiff.

These considerations lead to the following conclusions:

First. Under the old system of pleading the issue of citizenship could only be presented by plea in abatement. *Second.* Under the New York Code pleas in abatement are abolished, and the question can now be raised by a special denial in the same answer in which the defendant pleads to the merits, but not by general denial. *Third.*

Unless the answer contains such a special denial, the plaintiff need give no proof of citizenship. *Fourth.* The plaintiff in this case waived the sufficiency of the pleading by going to trial on the issue of citizenship without objection or exception. *Fifth.* In any event, it now appearing affirmatively that the plaintiff is not entitled to maintain his suit in this tribunal, it would be the duty of the court to dismiss it. *Sixth.* The case was properly disposed of at the circuit; but, however this may be, the disposition of it there was tantamount to a dismissal, so far as the plaintiff's rights are concerned. To formally dismiss the case now would be but an idle ceremony.

The motion for a new trial is denied.

KNAPP and another, for use, etc., *v.* WILLIAMSPORT NAT. BANK.*

(*Circuit Court, W. D. Pennsylvania.* December 19, 1882.)

NATIONAL BANK—USURIOUS DISCOUNT—PENALTY—SECTION 5198, REV. ST.—NEW TRIAL.

In this case the jury, in finding a verdict for the amount which plaintiff was entitled to recover, under section 5198 of the Revised Statutes of the United States, for alleged payments made to defendant by plaintiff of a usurious rate of discount, not having made certain deductions as instructed by the court, a new trial will be ordered, unless plaintiff, within 10 days, remit from the verdict all over the amount which the jury would have found had they followed the instructions of the court.

Rule for a New Trial.

Debt, by Knapp and Thompson, for use, etc., against the Williamsport National Bank, to recover the penalty, under section 5198 of the Revised Statutes of the United States, for alleged payments to defendant by plaintiffs of a usurious rate of discount.

On the trial, before MCKENNAN and ACHESON, JJ., it appeared that the defendant had discounted for the plaintiffs accommodation and business paper, within two years prior to the commencement of the action, at the rate of 9 per cent. per annum, the total discount during that period being $2,170.04. The penalty was claimed in double that amount. It appeared that the bank credited the plaintiffs with the net proceeds of the accommodation paper at the time of their discount, and charged them with the face amounts at their maturity, and again crediting them with the net proceeds of the re-

*From Weekly Notes, (Pa.)

newals, until after the plaintiffs' failure, when the accommodation paper (none of which had been paid by the plaintiffs) was taken up and paid by plaintiffs' indorser, one Otto. It also appeared that plaintiffs made cash deposits with defendant, and drew checks thereon, a small balance being due plaintiffs at the date of their failure.

The defendant proved that among the business paper discounted by plaintiffs at defendant's bank were two notes of Snyder Brothers, amounting to some $1,200, and indorsed by plaintiffs, the proceeds of which were passed to the credit of plaintiffs. These notes were not paid at maturity, and the amounts due on them at the time of the trial was about $830, a payment having been made the bank by plaintiffs' assignee since the commencement of the action.

The defendants offered in evidence the following charters of banks in Pennsylvania, which charters, it was alleged, authorized the banks incorporated thereunder to take and receive a rate of interest or discount equal to or greater than that charged by the defendant in this case:

NAME.	Date of Act of Incorporation.	Pamphlet L.
The Southwark Banking Company of the city of Philadelphia,	June 2, 1871.	1872, App. 1359
The Franklin Bank of the city of Philadelphia,	Apr. 1, 1870.	1870, 736
The Germania Bank, located in the city of Philadelphia,	June 2, 1871.	1874, App. 325
The United States Banking Company, located at Philadelphia,	June 2, 1871.	1873, App. 987
The Twenty-second Ward Bank of Germantown, Philadelphia,	May 17, 1871.	1871, 886
The Manayunk Bank, located in the city of Philadelphia,	June 14, 1871.	1871, 1358
The Bank of America, located at Philadelphia,	Apr. 27, 1870.	1871, App. 1532
The People's Bank of the city of Philadelphia,	Feb. 25, 1870.	1870, 237
The Butchers' and Drovers' Bank at Philadelphia,	Apr. 27, 1870.	1871, App. 1537
The Market Bank, to be located at Philadelphia,	Apr. 27, 1870.	1871, App. 1534
The Quaker City Bank,	May 23, 1871.	1871, 1058
The State National Bank,	June 2, 1871.	1872, App. 1357
The Petroleum Bank, at Philadelphia, now the Shackamaxon Bank,	Nov. 30, 1871.	1872, App. 1381 " 1037
The Somerset County Bank,	Mar. 26, 1872.	1873, 1040
The Watsontown Bank,	Mar. 27, 1872.	1873, 1043
The Lycoming County Savings Bank,	Mar. 14, 1872.	1873, 1016
The Iron & Glass Dollar Savings Bank of Birmingham,	Mar. 1, 1872.	1872, 191
The Harmony Savings Bank,	Apr. 24, 1867.	1867, 1310
The Germania Savings Bank of Pittsburgh,	Apr. 8, 1870.	1870, 1049
The Iron Bank of Phœnixville,	May 4, 1871.	1871, 533
The City Bank of Scranton,	Mar. 20, 1871.	1877, 432
The State Bank of Delaware County,	May 19, 1871.	1873, 966

McKennan, J., charged the jury that the court was divided in opinion as to the effect of the offer of the charters of certain banks in Pennsylvania, and that they would now charge that the plaintiffs were entitled to recover, notwithstanding the offer, and that the difference of opinion of the court would be certified to the supreme court of the United States for final decision.

The plaintiffs are entitled to recover double the whole amount of the usurious rate of discount actually paid by them to the bank. The jury should ascertain the whole amount of discount received by the bank, from which they should deduct the discount on the last renewal of the accommodation paper which was paid by their indorser, Otto; from that balance they should deduct the amount due the bank on the Snyder notes, and twice that remainder should be the amount of their verdict.

Verdict for the plaintiffs for $3,085.34, whereupon the defendant obtained this rule.

From the deposition of a juror, it appeared that the jury, in making up their verdict, deducted the Snyder notes, after doubling the whole discount less the discount on the last renewals paid by Otto, the indorser, and that they put the amount of these on the Snyder notes at $750.

C. La Rue Munson, (with him *A. Candor*, *W. H. Armstrong*, and *H. W. Watson*,) for the rule.

The verdict was clearly against the weight of the evidence and the charge of the court. The Snyder notes were shown to be $1,200, less the payment of $370 in March, 1880, and this evidence was not contradicted. The balance due on these notes should have been deducted before doubling the discount. This deduction is not asked as an offset to a penalty, but as showing that to their extent the discount on the accommodation paper had not been paid to the bank by the plaintiff, they having been credited with the net proceeds of the accommodation paper, and charged with the face of such notes at their maturity, carrying them forward by renewals until their payment by Otto, plaintiffs' indorser; the bank having credited them with the net proceeds of the Snyder notes which still remain unpaid. *Swearingen* v. *Birch*, 4 Yeates, 322; *Steimetz* v. *Curry*, 1 Dallas, 234; *Wilson* v. *Whitaker*, 5 Phila. 358; *Hunt* v. *Bruner*, 6 Phila. 204; *Flemming* v. *Maine Ins. Co.* 4 Wheat. 59; *Ross* v. *Eason*, 1 Yeates, 14; *Pringle* v. *Gaw*, 6 Serg. & R. 298; *Willing* v. *Brown*, Id. 457; *Hill* v.

City, 2 Phila. 351; *Stack* v. *Patterson*, 6 Phila. 225; *Machette* v. *Lessig*, 9 Phila. 132; *Webb* v. *Mears*, 4 Phila. 321; *McIntosh* v. *Church*, 3 Phila. 33; *Andritz* v. *Wolf*, 7 Phila. 106; *Whitaker* v. *City*, 2 Weekly Notes, 619; *Wamsher* v. *Shoemaker*, 4 Weekly Notes, 73; *Emmet* v. *Robinson*, 2 Yeates, 514.

This court has decided that there are banks of issue in Pennsylvania, authorized to receive a greater rate of discount than 6 per cent. *First Nat. Bank Mt. Pleasant* v. *Duncan*, 6 Weekly Notes, 158.

The decisions of the supreme court of Pennsylvania construing a statute of the United States are not binding on the federal courts.

All banks may issue circulating notes unless prohibited by their charters. The issue of negotiable paper is an inherent right in every corporation unless expressly denied them.

None of the charters offered in evidence prohibit the banks thereby incorporated from issuing circulating notes.

The general banking act of April 16, 1850, (P. L. 477,) to which many of the banks named were subject, permitted the issue of circulating notes in express terms.

The plaintiffs can recover only double the excess over the legal rate. *Hintermister* v. *First Nat. Bank*, 64 N. Y. 212.

The plaintiffs can recover, if at all, only double the usurious interest actually paid by them, hence the jury should deduct the Snyder notes from the amount claimed by the plaintiffs as received by the bank.

H. T. Ames, (with him *H. C. Parsons* and *H. C. McCormick*,) *contra.*

The verdict of the jury on questions of fact ought not to be disturbed. There was some doubt as to the amount of the Snyder notes, and the finding of the jury should be conclusive. The deduction of the Snyder notes was virtually an offset, which is not allowed in an action to recover a penalty. *Lebanon Nat. Bank* v. *Karmany*, 11 Weekly Notes, 42; *Bletz* v. *Columbia Nat. Bank*, 6 Norris, 87; *First Nat. Bank Clarion* v. *Gruber*, 8 Weekly Notes, 119; *Columbia Nat. Bank* v. *Bletz*, Oct. T. Sup. Ct. at Pbg.

These cases settle the law of Pennsylvania that there are no banks of issue in this state authorized to charge interest at a higher rate than 6 per cent.; and these decisions being constructions of local statutes are binding on the federal courts in Pennsylvania.

The plaintiffs are entitled to recover double the whole amount of the discount paid—not only twice the amount of the excess over the

legal rate. *Lebanon Nat. Bank* v. *Karmany, supra; Columbia Nat. Bank* v. *Bletz, supra.*

Eo Die. THE COURT. The Snyder notes should have been deducted before the discount was doubled. That would not be an offset to a penalty. When the bank credited the plaintiffs with the proceeds of these notes, there was no appropriation of their amount by either party, and as the plaintiffs made no direct payment to the bank of the discount on the accommodation paper, it would now be equitable to make such deduction; for to the extent of such notes the discount had not been paid by the plaintiffs.

The deduction should have been made of the amount of the notes less the sum paid by plaintiffs' assignee thereon. As the penalty bears no interest, neither should there be any interest allowed on the Snyder notes.

Rule absolute, unless plaintiffs within 10 days remit from the verdict all above $2,150.34.

Oral opinion by MCKENNAN, J.; ACHESON, J., concurring.

SHERMAN v. LANDON and others.

(*Circuit Court, S. D. New York.* January 23, 1883.)

SHIPMAN, J. The motion of the defendant for a new trial in the above-entitled cause is denied.

CAREY v. CUNARD STEAM-SHIP CO.

(*Circuit Court, S. D. New York.* January 26, 1883.)

SHIPMAN, J. The motion of the defendant in the above-entitled cause for a new trial is denied, and the stage of proceedings is vacated.

DODD and others *v.* MARTIN and another.

(*Circuit Court, E. D. Arkansas.* October Term, 1882.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS — DEED OF ASSIGNMENT — FAILURE TO ATTACH SCHEDULE.

   The failure to attach the schedule of property described in a deed of assignment, renders the deed inoperative and void as to all property intended to be embraced in the schedule, and not otherwise described than by reference to it.

2. SAME—STIPULATIONS.

   A deed of assignment containing a stipulation that no creditor shall participate in the proceeds of the property assigned unless he accepts the same in full satisfaction of his debt, is valid in Arkansas; but a deed containing such a stipulation, to be valid, must convey all the debtor's property.

On the twenty-sixth of December, 1882, the defendant executed and delivered to Allison, as assignee, a deed of assignment for the benefit of creditors. Two days afterwards the plaintiffs sued out an attachment against Martin, which was levied on a stock of goods in the possession of Allison, the assignee, and which had belonged to Martin. Martin traversed the plaintiff's affidavit, upon which the attachment was sued out, and Allison filed an interplea claiming the goods attached as assignee under the deed of assignment. Both issues were tried before the court. That part of the deed of assignment material to the case reads as follows:

"I, John A. Martin, do hereby grant, bargain, and sell to T. J. Allison, assignee in trust, for the benefit of all my creditors, the goods, wares, merchandise, and property hereto attached in Schedule A, made a part of this conveyance, to have and to hold to him in trust as aforesaid forever; I conveying also to the said T. J. Allison, assignee, for the use aforesaid, all notes, books, accounts, and every class and character of evidence of debt to me belonging, or relating to my business in any manner whatever, with full authority in said T. J. Allison, assignee, to collect the same and apply them to the uses of this trust in manner and form as is by law prescribed in that behalf. The said T. J. Allison, assignee, shall proceed to collect and dispose of goods, wares, merchandise, and property, and choses in action, and apply the same to the payment of my creditors, share and share alike: provided, that no creditor herein provided for shall participate in the assets herein assigned, unless he accepts the same in full of his claim. This assignment to be closed up under the direction of creditors assenting to the same.

"*December* 26, 1882.

[Signed] "J. A. MARTIN."

The deed was acknowledged and delivered, and the keys of the store, house, and possession of the stock of goods delivered to Allison as assignee under the deed at its date; but the assignee did not file

the inventory and give the bond as required by section 385, Gantt's Digest, and had not done so down to the day of trial, and the schedule mentioned in the deed as being attached thereto and made part thereof was not attached, and was not made out at the time the deed was executed and delivered, nor until some time after the levy of the attachment.

U. M. & G. B. Rose, for plaintiff.

The deed is void for the following reasons:

1. It exacts releases and by implication reserves the surplus to the grantor. *Malcolm* v. *Hodges*, 8 Md. 418; *Whidbee* v. *Stewart*, 40 Md. 414; *Ingraham* v. *Wheeler*, 6 Conn. 277; Bump, Fraud. Conv. 430; Burrill, Assignm. § 207.

2. No time is specified within which creditors are to accept and release. Bump, Fraud. Conv. (2d Ed.) 433; Burrill, Assignm. § 197; *Henderson* v. *Bliss*, 8 Ind. 100; 2 Kent, Comm. 533.

3. The Schedule A mentioned in the deed not having been attached thereto, the assignment was ineffectual to convey the property intended to be embraced in the schedule. *Barkman* v. *Simmons*, 23 Ark. 1; *Moir* v. *Brown*, 14 Barb. 39.

4. The assignment took effect as to the choses in action at the time of its delivery. *Clayton* v. *Johnson*, 36 Ark. 406. At the time of the levy it was, therefore, a partial assignment, exacting releases, and void. Burrill, Assignm. (4th Ed.) 273; Bump, Fraud. Conv. (2d Ed.) 492; *In re Wilson*, 4 Pa. St. 430; *Graves* v. *Ray*, 13 La. 454; *Hennesy* v. *Bank*, 6 Watts & S. 300; *Clayton* v. *Johnson*, *supra*.

5. The provision that the assignment shall be closed up under the direction of the creditors assenting to the same makes the assignee the mere agent of those creditors. The assenting creditors are by this clause invested with plenary powers over the estate, and yet they are governed by no law, give no bond, take no oath, and are answerable to no one for an abuse of these powers. Nor would the assignee be responsible for obeying their orders to the prejudice of the rights of other creditors, because one of the conditions of his bond is that he "will execute the trust confided to him * * * according to the terms of the assignment," one of which is that he shall close it up under the direction of the assenting creditors.

Section 43 of the bankrupt act (section 5103, Rev. St.) authorized three-fourths in value of the creditors who had proved their debts to "wind up and settle" the bankrupt's estate by trustees appointed by them. These words were held to be large enough to embrace the entire control and management of the bankrupt's estate, and the

direction of the committee of creditors to the trustee in regard to the settlement of the estate was held to be conclusive and binding on the bankrupt court and all other creditors. *In re Dorby*, 4 N. B. R. 211;* *In re Jay Cook & Co.* 11 N. B. R. 1. And if this deed is held valid, the clause in question has the effect to deprive the assignee of all control over the administration of the trust. The clause is not only without any statute authorizing it, but is in derogation of the statute, which points out specifically how the assignee shall discharge his trust. It is not for the debtor to assume that he can devise a better mode of administering the trust than that prescribed by law. Whenever he has attempted to do so, the assignment has been adjudged void. *Raleigh* v. *Griffith*, 37 Ark. 150; *Teah* v. *Roth*, M. S. opinion, Nov. Term, 1882; *Schoolfield* v. *Johnson*, 11 FED. REP. 297.

6. The statute prohibits the assignee from taking possession of the property assigned until he has filed the inventory and given the bond required by law. Parties cannot defy the law with impunity. The object of the statute was to put it out of the power of an irresponsible or dishonest assignee selected by the debtor to defraud the creditors. The prohibition is addressed to the debtor as well as the assignee. An act knowingly done in violation of an express command of a statute, enacted to prevent fraud, is itself a fraud in law. No inquiry is permissible to show the statute was violated through ignorance, or for a good purpose.

7. The case of *Clayton* v. *Johnson* does not decide that the deed in that case was a valid deed. Objection to the introduction of the deed was not made in the court below; but after it was introduced an instruction was asked that the deed be disregarded because it contained a clause exacting releases. This was the only question of law reserved, and, of course, the supreme court could not pass upon any other point. It is clear that the deed was bad for several reasons, and that it must have been so held if the points had been raised in the trial court.

Joseph W. Martin, for defendant and interpleader.

1. The deed was inoperative for any purpose till the transaction was completed by attaching Schedule A to the deed as contemplated by the parties.

2. This deed is a literal copy of that in *Clayton* v. *Johnson*, 36 Ark. 406, except this clause, "The said Johnson shall proceed to sell said goods, etc., on the best terms he can in his direction," which is omitted. That deed was held valid. True, the main question in

that case was the validity of the clause exacting releases; but before the court could render the judgment they did, they had to find the deed was not constructively fraudulent for *any reason.*

3. There is no such resulting trust or implied reservation of the surplus to the debtor as will render the deed void. *Brashier* v. *West,* 7 Pet. 615; *Skepwith* v. *Cunningham,* 8 Leigh, 271; *Gordon* v. *Cannon,* 18 Grat. 394; *McFarland* v. *Birdsall,* 14 Ind. 129; 11 Ill. 503; 3 Watts, 198; 8 Watts & S. 304; 5 Watts & S. 223; 8 Grat. 457; 58 Ala. 659; 1 Paige, 305; 17 Ala. 659; 1 Ired. 453; 4 Wash. C. C. 232.

4. The clause providing that the assignment shall be closed up under the direction of the creditors assenting to same does not render the deed void. *Kellog* v. *Slawson,* 15 Barb. 56. It does not authorize the creditors to exercise any power inconsistent with the rights of all the creditors and the duties of the assignee and the rules of law. The creditors and the assignee alike would be bound to observe the law. The courts should give instruments that construction which will render them lawful. *Julian* v. *Rathbone,* 39 Barb. 102; *Cardegan* v. *Kenneth,* 2 Cowp. 432; 1 Story, Eq. Jur. § 258. It would be a strained construction to say this clause was designed to perpetrate a fraud; it has no tendency to such a result. The court will not assume that the creditors might attempt to exercise their powers unlawfully, but will rather indulge the presumption that they would act according to law and for the best interest of all.

CALDWELL, J. It will be observed that the deed on its face does not purport to convey all the assignor's property. The property conveyed is limited by the terms of the deed to that mentioned and described in Schedule A, and to the choses in action which are assigned by an independent clause in the deed, and as to which the deed took effect on its delivery.

The failure to attach the schedule renders the deed inoperative and void as to all property intended to be embraced in the same, and not otherwise described than by a reference to it. *Barkman* v. *Simmons,* 23 Ark. 1; *Moir* v. *Brown,* 14 Barb. 39. This being so, it results that the deed of assignment, at the time of its execution and delivery, conveyed only a part of the assignor's property. The supreme court of this state, in *Clayton* v. *Johnson,* 36 Ark. 406, hold that a deed of assignment containing a stipulation that no creditor shall participate in the proceeds of the property assigned unless he accepts the same in full satisfaction of his debt, is valid. But a deed containing such a stipulation, to be valid, must convey all the debtor's property. This

is held in *Clayton* v. *Johnson, supra,* and is the doctrine of most of the courts which maintain the validity of such a stipulation. "It is held," says Mr. Burrill, "almost without exception, that such a stipulation in an assignment of part of a debtor's property is fraudulent." Burr. Assignm. (4th Ed.) 273.

The deed, therefore, stipulating for a release and conveying only a part of the debtor's property, is fraudulent and void. It imparted no title to the assignee as against an attaching creditor, and justified the plaintiffs in attaching the assignor.

The conclusion arrived at in this point is decisive of the case, and renders it unnecessary to decide the other questions so ably argued by counsel.

YALE LOCK MANUF'G CO. *v.* SCOVILL MANUF'G CO.

(*Circuit Court, D. Connecticut.* February 15, 1883.)

PATENTS—VIOLATION OF INJUNCTION.

The plaintiff's motion for an attachment against the defendant for violation of an injunction restraining the defendant from the infringement of plaintiff's patent, and to compel obedience of the master's order to file an account of the articles which are the subject of the motion for an attachment, and which have been made since the service of the injunction order, denied, on the ground that the article complained of is not an infringement.

Frederick H. Betts and *Causten Browne,* for plaintiff.

Charles R. Ingersoll, for defendant.

SHIPMAN, J. These are two motions: one for an attachment against the defendant on account of the alleged violation of an injunction order of this court, which restrained the defendant from the infringement of the first and second claims of reissued letters patent, No. 8,783, dated July 1, 1879, for an improvement in post-office boxes; and the other, to compel obedience to an order of the master directing the defendant to file an account of the post-office boxes which are the subject of the motion for an attachment, and which have been made since the service of the injunction order. The opinion of the court upon the final hearing describes the plaintiff's and the defendant's structures which were in controversy, and construes the reissued patent. 18 Blatchf. C. C. 248; [S. C. 3 FED. REP. 288.]

The defendant's new boxes are made as before, except that the top, bottom, and sides of each box are separated from the corre-

sponding parts of adjacent boxes by thin strips of wood, about an eighth of an inch wide, which are not covered by metal. Each box has thus its own metal front, and is disconnected from every other box by an unprotected strip of wood. The metallic covering of any one box does not join the metallic covering of any other box. As in the original infringing boxes, the sides of each box near its front are protected by a metallic casing or flange. At first sight, this new series seems to be an unsubstantial alteration of the infringing boxes, and to be justly liable to the charge of being a fruitless attempt to evade the patent. A more careful examination of the subject has led me to another conclusion.

The first and broadest claim of the reissue is for the combination, substantially as specified, of a series of metallic door-frames and doors with a series of wooden pigeon-holes, whereby a series of post-office boxes with a continuous metallic frontage is formed." The plaintiff's frames are made with such wide flanges that the whole wooden front is covered with a metallic front; or, in the language of the specification, "when all the frames are in place, a continuous metallic frontage, protecting the wood-work, is presented upon the outside of the series of boxes." The defendant's first infringing boxes were a series of separate boxes with metallic door-frames, the flanges of the frames being so wide that a continuous metallic frontage was formed. "A continuous metallic frontage" does not mean a front without cracks or without joints at the edges of each frame, and a wafer of wood which should be inserted at the top or sides of each frame to separate each side from the adjoining frame would be a mere evasion of the patented invention. In the language of the plaintiff's expert, the metallic frontage is to be "practically continuous,—that is, continuous to effect the purpose secured by the continuity of surface described in the patent;" and by a continuous metallic frontage is meant one so practically continuous as to substantially effect the purpose desired to be obtained by continuity.

The question in the case becomes one of fact, and I am of opinion that the defendant's new boxes, as shown in the exhibits, are not practically continuous, and that, were it not for the metallic covering of the sides, the metallic frontage would not cause security, but the wooden partitions or strips of wood would be an element of weakness. The continuity of the metallic frontage is substantially interrupted by the wooden strips which separate the boxes from each other, and if the Yale boxes were separated in the manner of the new Scovill boxes and without the metallic sheathing upon the front part of the

sides of the boxes, the value and security of the Yale box would be seriously impaired. The metallic casing or flange upon the outside of the sides of the Scovill box has an office, viz., that of protection to the wood-work against outside attack, which the metallic ear upon the inside of the Yale box does not have.

The motions are denied.

GOULD *v.* SPICER and others.

(*Circuit Court, D. Rhode Island.* August 3, 1882.)

PATENTS FOR INVENTIONS—REISSUE—VOID FOR VARIANCE.

In Equity.

Thomas W. Clarke, for complainant.

Benjamin F. Thurston, for defendants.

Before GRAY and COLT, JJ.

GRAY, Justice. In the original patent the only invention claimed or described, or appearing upon its face to have been intended to be claimed or described, is an arrangement of grate-bars, with projections on the under side of each end, in combination with two rotary cams, coming in contact with such projections. The reissue, so far as it relates to the seven new claims introduced therein, is void, because of its variance from the original patent; and it is unnecessary to consider the other grave objections to the validity of the reissue, founded on the lapse of time before it was applied for. But the validity of the claim made in the original patent, and distinctly repeated in the reissue, is not affected.

The result is that the first demurrer, which goes to the whole bill, must be overruled, and the second demurrer, filed in accordance with the thirty-second rule in equity, and limited to that part of the bill which sets forth the invalid claims, must be sustained, and the case stand for replication and proofs upon the first claim.

COTE and others *v.* MOFFITT.

(Circuit Court, D. Massachusetts. February 2, 1883.)

PATENTS FOR INVENTIONS—VALIDITY OF REISSUE.

A reissue may be good as to some of its claims and bad as to others. A patentee may rely on the infringement of the valid claim.

In Equity.

W. A. Macleod, for defendant.

T. L. Wakefield, for complainants.

LOWELL, J. A rehearing is asked for by the defendant, for the reason that since the interlocutory decree was entered, (*Cote* v. *Moffitt*, 8 FED. REP. 152,) and since the accounting was begun before the master, the decisions of the supreme court (*Miller* v. *Brass Co.* 104 U. S. 350; *James* v. *Campbell*, Id. 356) have laid down a rule for ascertaining the validity of reissues which was not understood before, and one which would render the reissue in this case void. The plaintiffs deny that the reissue is void, and object that this petition should have been filed before they had incurred so much expense before the master. If I have a discretion in the matter, arising out of the delay, I do not exercise it, because I think the case of *Gould* v. *Spicer* [reported *ante*] decides the point. It was there held that a reissue might be good as to some of its claims, and bad as to others; and that if a valid claim in the original patent reappeared in the reissue and was infringed, the patentee might rely upon that infringement and prevail, though some other claims were too broad. The single claim of Cote's original patent is repeated, in substance, in the reissue, and will support the plaintiff's decree. Petition denied.

The Badger State.

(Circuit Court, N. D. Illinois. Jauuary 6, 1883.)

1. Collision—Propeller Entering Harbor.
   Where a propeller was entering a harbor on a dark night at a high rate of speed, she was held liable for a collision with a schooner leaving such harbor, notwithstanding the evidence was conflicting as to the position of the lights of the schooner, or the period at which a torch-light had been flashed on the schooner, and although the propeller may have had a proper lookout.
2. Same—Fault—High Rate of Speed—Want of Vigilance.
   In such a case it is fault in a propeller, when entering a harbor on a dark night, not to slacken her speed and take the necessary precautions to avoid a collision.

Admiralty Appeal.

C. E. Kremer, for libelant.

H. W. Miller, for respondent.

Drummond, J. This is a libel filed by the owner of the schooner Helen Blood to recover damages caused by a collision of the propeller Badger State with the schooner on the evening of October 9, 1877. A tug took the schooner in tow on that evening to start out on her voyage from Chicago to Muskegon, Michigan, which, after towing her out a short distance from the harbor, let her go, and the schooner was then proceeding to make sail, and while doing so, the hour being about 9 o'clock, the propeller was observed some distance off, making for the harbor of Chicago. There is some difference of opinion among the witnesses as to the precise course of the two vessels, but it seems sufficient to say that the course of the schooner was about N. by W., and that of the propeller about S. ½ E. The wind was not far from S. W. The collision took place only a short distance from the harbor, probably less than a mile from the pier. The propeller struck the schooner a glancing blow on the starboard side. The night was not very dark, and a light properly displayed on a vessel could be seen at a distance of several miles.

The rule of law in a case like this is well settled. It was the duty of the propeller to avoid the schooner, and not having done so, and the collision having taken place, it is incumbent on the propeller to establish by competent evidence that the collision was caused, in whole or in part, by some fault on the part of the schooner.

It is claimed by the defendant that the schooner was in fault in three particulars: that the schooner did not, just before the time of the collision, show a starboard or green light, as the law requires; that she had no sufficient lookout; and that she was not properly

navigated at the time. The principal difficulty grows out of the first defense alleged. Was the collision caused in consequence of a green light not having been displayed by the schooner at a proper time and in a proper place? The law of congress required that there should be, "on the starboard side, a green light of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles, and so constructed as to show a uniform and unbroken light over an arc of the horizon of 10 points of the compass, and so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side." There seems to be no doubt but that the lights required by the statute were placed upon the schooner before she was released by the tug. There is the concurrent testimony of several of the witnesses that the lights were properly placed prior to that time. The doubt about the green light arises from the testimony of one or two of the witnesses on the part of the defense, and from the fact, as alleged by some of the defendant's witnesses, that the green light was not seen until immediately before the collision by those who were on the lookout on board the propeller. A witness who was on the tug testifies that just as they started out with the tow, and a man was about to put up the lights, he asked him not to put up the green light in its place until they got outside, because it would glare in his face, and he says that it was then put on the top or forward hatch, and was not put up on the vessel before he let go of her; and in this he is corroborated by the engineer of the tug. Some of the witnesses on the propeller, and who were on the lookout, state that if the green light had been in its proper place in the rigging it could have been seen from the propeller for a considerable time before the collision, and in season to have avoided it. These statements of the witnesses on the tug are distinctly contradicted by several witnesses on the schooner, who state that the lights, including the green light, were both in their proper places in the rigging, where they were distinctly visible; and the statement made by these witnesses on board of the tug that the green light was put upon the deck and turned away from the tug, does not seem to be very consistent with that made by several of the witnesses on the propeller, that they saw the green light; one of whom, especially, asserts that it was in the rigging, because if it had been turned away on the deck, as mentioned by the witnesses on board of the tug, it could hardly have been visible in the manner stated by witnesses on board of the propeller. If the green light was on the deck, and it was put in the rigging after that, it must have been by some per-

son on board of the schooner; and we have no testimony from any one on board of the schooner indicating a change of the position of the lights from the time they were first taken and put in place. It is distinctly stated by several witnesses that after the schooner returned to the harbor in consequence of the injury, the lights, including the green light, were suspended in the rigging. It is claimed on the part of the defense that those on board of the propeller constituting the lookout, among whom was the captain, must have necessarily seen the green light if it had been in its proper place. That would seem to be so, provided they did keep a proper lookout. It seems rather singular that the captain should first see a dark object, the vessel itself, and not the lights of the vessel or either of them. There are others on board of the propeller who state that they did see the lights, including the green light; but, as has already been stated, not long before the collision. It may have been in consequence of the fact of making sail, or the course of the two vessels in thus approaching each other, that the light was obscured for a time. It seems, however, very clear that there were not on board of the propeller sufficient precautions taken to avoid the collision. In the first place, the propeller was running too fast; she had not slackened her speed in approaching the harbor, which was nine miles an hour. Being so near the harbor after dark, she should have slackened her speed and kept a specially vigilant lookout for approaching vessels. This appears not to have been done. In the conflict of evidence as to the condition of the green light a short time before the collision, the statements made by the captain on the following day are not without a certain significance. It is true, he denies those statements, and a witness or two present say they were not heard; but another witness present, entirely disinterested, says that the statements were made, namely, that the lights of the schooner were seen, and no satisfactory explanation was then given why the schooner was not avoided by the propeller.

Admitting that this part of the case is not free from difficulty, still I am inclined to think the weight of the evidence is that the green light of the schooner was in its proper place and could have been seen, and the schooner avoided by the propeller, if proper care had been taken. In any event, I think it cannot be asserted, with any degree of confidence, that the absence of a green light in its proper place contributed to the collision.

It is claimed, on the part of the defense, that there was no sufficient lookout on board of the schooner. It may be admitted that

there was not any one stationed as a regular lookout at a proper place prior to the collision; but, if there had been, what difference would it have made? The object of a lookout was to ascertain and guard against approaching vessels. There were many men on board of the schooner who saw the light of the propeller a long way off. The object of the lookout, therefore, was fully accomplished. The light of the propeller was seen, and it was known that it was a propeller approaching. The duty of the schooner, under such circumstances, was to keep on her course without change; and I think the evidence establishes, beyond all doubt, that she did keep on her course, and that if there were any change of the schooner, it was when the collision was so imminent that the change did not contribute in any degree to the collision. Some of the witnesses on the part of the propeller state while some of the sails were full just at the point of collision, others were shaking in the wind, which, it is is claimed, would not have been the case provided she had kept on her course, as she had the wind free. How far this may have been effected, if true, by any change of course at the moment, or by the fact that the schooner had not made full sail on her, I do not think it is necessary to inquire.

There is nothing in the other point, that the schooner was not properly navigated. As already said, it was her duty to keep her course, and the evidence shows that she did; or, if there were any change, it was one that did not cause the collision. Witnesses on board of the schooner state that after the propeller had been observed for some time, and the indications were that proper measures were not being taken to avoid the schooner, a torch was lit and shown from the vessel, in order that additional evidence might be given to the approaching propeller of the danger of collision. Those on board of the schooner declare that this torch was shown in ample time to enable the propeller to avoid the schooner; while those on board of the propeller state that it was shown when the collision was unavoidable. I do not place any great stress upon the exhibition of the torch under the circumstances, because of the conflict of evidence in relation to the time when it was shown. In looking at the whole case, it seems to me that the necessary vigilance required of the propeller at the time and under the circumstances was not shown, and that the collision may be fairly said to have been the consequence of this want of vigilance on her part.

There seems to be no question about the damages, and the decree of the district court is affirmed.

THE STAINCLIFFE, etc.

(*Circuit Court, S. D. New York.* February 27, 1883.)

NEGLIGENT DELIVERY OF CARGO—DELIVERY BY SPECIAL REQUEST—BURDEN OF PROOF OF REQUEST.

The libelant filed a libel against the defendant to recover damages for the non-performance of a contract for the delivery of merchandise in good order. The defense admits the improper delivery, but seeks to justify on the ground that the delivery was made at the request of the libelant, who was anxious for an immediate delivery, and assented to assume the risk. *Held*, that the burden of proof is with the defendants to establish satisfactorily such exculpatory theory.

Benedict, Taft & Benedict, for appellants.

Butler, Stillman & Hubbard, for appellees.

WALLACE, J. The libel in this cause was filed to recover damages for the non-performance of a contract for the delivery, in good order, of 1,000 barrels of Portland cement, shipped on the steam-ship Staincliffe, for New York.

The district court dismissed the libel. The following facts are found:

On or about September 10, 1877, J. B. White & Bros. shipped in good order and condition, on board the steamer Staincliffe, then lying at London and bound for New York, 1,000 barrels of cement, to be carried to New York and there delivered to the libelant, in like good order, for certain freight to be paid. The steam-ship arrived in New York October 2d, and October 3d the libelant paid the freight. October 3d the steam-ship commenced discharging her cargo, and put off 52 barrels of the cement, which was accepted by the libelant. On the fourth day of October slight showers fell in the forenoon, and the indications for more rain were threatening. On that day the steam-ship discharged upon the dock 621 barrels, and delivered to the lighter Comet 327 barrels, making her entire cargo of cement. The libelant, on the third and fourth days of October, had given orders to lightermen, including the Comet and others, for 933 barrels. October 4th the steam-ship was taking in outward-bound cargo, as well as discharging cargo, and the dock was so crowded that access to the cement was not practicable. Late in the afternoon it rained hard, and the cement, though requiring protection from the rain, was not protected; 16 barrels, however, of that discharged upon the dock was taken away by a truckman, to whom the libelant had given an order. The remaining 605 barrels of that put off upon the dock remained unprotected during the night of the fourth, and was taken away in a more or less wet and damaged condition, by the libelant's directions, on the fifth and sixth of October. The fourth day of October was an unsuitable day to put off the cement, owing to the state of the weather, unless it was protected from danger. The injury to the cement was caused by its being wet on the afternoon and evening of October 4th. The libelant did not consent to accept the delivery of the cement put off upon the dock on the fourth day of October.

The conclusion is reached that the libelant should recover, for the following reasons: It is not disputed that a considerable part of the cement which the steam-ship was bound to deliver in good order was injured in consequence of being discharged in unsuitable weather without any protection from the elements; nor is it disputed that such a discharge is not a good delivery of the merchandise. The claimants, however, seek to justify upon the theory that, although the cement was put off in unsuitable weather, this was done at the request of the libelant, who was anxious for an immediate delivery and assented to assume the risk. The burden of proof is with the claimants to establish satisfactorily this exculpatory theory. They have produced two witnesses to sustain it,—Nunns, the steamer's discharging clerk, and Johnson, her cooper,—who testified, in substance, that early in the afternoon of October 4th the libelant requested that all the cement then on board the steamer should be put off, as he expected a lighter there that afternoon to take it away. Nunns further testifies that he objected to discharging the cement on account of the weather, and told the libelant he would not do it unless the latter would take the responsibility of watching and protecting it; that the libelant assented to this, and thereupon he directed the foreman of the stevedores to go on and discharge the cement. The libelant denies that any such conversation took place. If it should be conceded that libelant expected all the cement to be taken away for which he had given delivery orders, there would still have remained 67 barrels for which he had made no provision, and which he would have been obliged to truck away and store. But it does not appear that he had any reason to expect that 106 more barrels, for which he had only that day given delivery orders, would be wanted that day; and, indeed, it is doubtful whether he expected any to be taken away that day other than 500 barrels which the lighter Comet was to take. It is, therefore, improbable that he should have made such a statement as is imputed to him by Nunns and Johnson. It is also improbable that he should have gone away and remained away the rest of the day, and taken no interest in protecting his merchandise, if he expected it to be put off.

The proofs also indicate quite cogently that at the time when this alleged interview must have taken place, there had already been put off upon the dock the greater part of the 605 barrels that were injured. The lighter Comet was expected to take away 500 barrels. Some time after the libelant left the dock, the slip was cleared, and the Comet drew along-side the steamer, and for the convenience of

both vessels the latter discharged the cement directly from her hold to the lighter. When 327 barrels were thus discharged, the captain of the lighter refused to receive any more, because the rain was so heavy as to endanger the cement. The foreman of the stevedores tried to induce the lighter to take her full cargo; and when the latter refused, discharged some 50 barrels, all that then remained in the hold, upon the dock. During all this time the steamer was taking in cargo, the dock was crowded with discharged cargo, and access to it was difficult if not impracticable. The conclusion cannot be resisted that those in charge of the steamer were so solicitous to discharge her cargo that they neglected to protect the libelant's cement. The libelant was justified in assuming that the Comet would be afforded facilities for taking away the cement already upon the dock when he was there, and that the steamer would do her duty and protect it if the weather should require that to be done.

In view of the circumstances, the probabilities, and the testimony of the libelant, the claimants have not satisfactorily maintained the issue of which they have the affirmative.

A decree is ordered for the libelant, with costs of this appeal and in the court below. There will be a reference to a master to ascertain the damages.

BISSIT *v.* KENTUCKY RIVER NAVIGATION CO. and others.*

(*Circuit Court, D. Kentucky.* June, 1882.)

1. CORPORATIONS—CREDITOR'S BILL TO SUBJECT UNPAID SUBSCRIPTIONS.

   A creditor who has obtained a judgment against a corporation, and is unable to realize thereon upon execution, may file a bill in equity against stockholders to subject the unpaid balance due on their subscriptions to the stock of the corporation; but where the complainant is also a stockholder, he must contribute *pari passu* with the defendant stockholders towards the liquidation of his demand against the corporation.

2. SUBSCRIPTION TO STOCK OF KENTUCKY RIVER NAVIGATION COMPANY BY CERTAIN KENTUCKY COUNTIES — VALIDITY — RATIFICATION — ESTOPPEL — STATE DECISIONS.

   In a suit brought in the circuit court by a creditor of the Kentucky River Navigation Company, to subject subscriptions made to its stock by Estill, Owsley, and Jessamine counties, Kentucky, under the act of March 1, 1865, passed by the Kentucky legislature, incorporating said company, which authorized the county courts of the several counties bordering upon or interested in the navigation of said river to subscribe on behalf of their respective counties to the capital stock of said company, and levy and collect a tax to pay the same, *held*, that the decision of the court of appeals of Kentucky in the cases of *Mercer and Garrard Counties* v. *Ky. Riv. Nav. Co.* 8 Bush, 300, was an affirmance of the constitutionality of said act, and that said decision and the construction of said act by said court, (being the highest court of said state,) wherein it was held that subscriptions could only be made under the act through orders of the county courts, made and entered of record by the courts when sitting in their organized capacity, which, in themselves, amounted to completed contracts of subscriptions, and that subscriptions made by commissioners, appointed by said county courts for the purpose, under an order,—in one case declaring "that $25,000 be directed to be subscribed," and in the other "that $100,000 shall be subscribed,"—were not valid, are binding on the circuit court; and *held, further*, that the subscriptions of Estill and Owsley counties come within said rule, and are therefore invalid; but as to Jessamine county, *held*, that whether the original subscriptions were binding or not, the subsequent conduct of the parties was such a ratification of and acquiescence in the subscriptions as to estop said county to deny the validity thereof.

3. CORPORATIONS — STOCKHOLDER'S LIABILITY — COLLUSIVE AND FRAUDULENT JUDGMENT AGAINST CORPORATION NOT CONCLUSIVE AS TO STOCKHOLDERS.

   In a suit by a judgment creditor of a corporation (who was also a stockholder) to subject unpaid subscriptions made by other stockholders, it appeared that, for some time prior to the rendition of complainant's judgment, the defendants and the other stockholders of the corporation, except the complainant, had denied the validity of their subscriptions, and refused to participate in the management of the corporation, and thereafter the complainant, by virtue of the stock he held, had assumed the exclusive management and control of the corporation and its affairs, and elected its board of directors; that the action he brought against the corporation, in which his judgment was rendered, was

*Reported by J. C. Harper, Esq., of the Cincinnati bar.

defended by one of the directors he had elected; that it was brought to trial three months and six days after its commencement, was tried upon a false copy of the contract sued on, in the absence of material and important witnesses for the defense, and resulted in a judgment largely in excess of the amount due. *Held*, that said judgment was collusive and fraudulent, and not conclusive against defendant stockholders of the amount due complainant.

In Equity.

William Lindsay and *Richards & Baskin*, for complainant.

Isaac Caldwell and *Wharton & Ray*, for defendants.

BAXTER, J. The act of March 1, 1865, entitled "An act to incorporate the Kentucky River Navigation Company," under which the defendant corporation organized, authorized the county courts of the several counties bordering upon or interested in the navigation of said river to subscribe for and in behalf of their respective counties to the capital stock of said company, and levy and collect a tax to pay the same. County subscriptions were accordingly made to the amount of $775,000. These were supplemented by a subscription of $150,000 by the city of Louisville, $100,000 by Bissit & McMahon, and $2,300 by 23 other individuals. Thus fortified with subscribtions aggregating $1,027,300,—which the company then believed to have been duly made pursuant to the law,—the company entered into a contract with Bissit & McMahon, of which firm complainant was a member, whereby said firm undertook and agreed to do all the work contemplated by the company's charter, and specified in said contract, for the gross sum of $1,000,000, to be paid in monthly installments upon the estimates of the company's supervising engineer, less 10 per cent. to be retained as a guaranty for the completion of the work. By an agreement between themselves, to which the company was in no way a party, McMahon soon thereafter sold his interest in the contract to complainant, who began work thereunder in June, 1869, and continued the same until December, 1870. But in the mean time a disputation arose in regard to the validity of said county subscriptions. Suits followed, resulting in a decision by the court of appeals in the cases of *Mercer and Garrard Counties* v. *Kentucky River Nav. Co.* 8 Bush, 300, holding that the subscriptions claimed to have been made by said counties had not been made in conformity with the requirements of the statute conferring the authority, and that the same were invalid and not binding upon them. Thereupon the city of Louisville, and all the counties in whose behalf subscriptions had been made, denied the validity of the same, and refused from that time forward to further participate as shareholders in the control of the corporate business. But complainant, in virtue of his ownership of

the $100,000 of stock subscribed by Bissit & McMahon, as aforesaid, assumed exclusive control of the corporation, and, through a board of directors, which he from time to time selected, kept up its organization until after the recovery by him of the judgment at law, to be hereafter more particularly referred to. During the time the complainant was thus in exclusive possession and control of the company's business he began a suit at law in this court, in which he demanded from said corporation $104,850.90, with interest thereon for work and labor alleged to have been done and material furnished under and pursuant to his contract, and $100,000 for profits claimed to have been lost by reason of the suspension and discontinuance of the work. In this suit he recovered a judgment for $132,500 and costs; and failing to realize thereon, after the due and regular issuance of an execution for that purpose, he filed his bill in this case, in which he charges that the defendants Estill, Owsley, and Jessamine counties were indebted to the Kentucky River Navigation Company for subscriptions respectively made by them to the capital stock thereof; the first, in the sum of $25,000; the second, in the sum of $50,000; and the last in the sum of $100,000. And upon these allegations complainant prays for a decree to compel said counties to pay their several subscriptions to the company, to the intent that the proceeds when realized may be applied in liquidation of his judgment.

It is clear if the corporation is indebted to the complainant, and that the defendant counties are indebted, as alleged, to the corporation, the complainant is entitled to the relief prayed for. But the defendants insist (1) that the legislature possessed no constitutional power to authorize such subscriptions; (2) if it had such power their alleged subscriptions were not made pursuant to the law; and (3) if the same were made in conformity with the statute, the Kentucky River Navigation Company was not, at the time complainant recovered his judgment, or afterwards, indebted to the complainant anything, and that said judgment was collusively and fraudulently obtained, and that it is not conclusive of their rights.

The questions thus presented by the first and second defenses have been considered and passed on by the court of appeals in the cases of *Mercer and Garrard Counties, supra.* The first impression of the court was adverse to the constitutionality of the act under which the subscriptions were made, and an opinion to that effect was prepared and announced. But upon a rehearing, the court, three of the four judges constituting the court concurring therein, abandoned the position on which they rested their first decision, and placed their second

decision on the ground that the subscriptions, the validity of which were involved in those cases, had not been made by the county courts in accordance with the requirements of the act authorizing the same, and were, therefore, not binding upon said counties. In this connection the court said that subscriptions could only be made under the act through orders of the county courts, made and entered of record by the courts when sitting in their organized capacity, which, in themselves, amounted to completed contracts of subscriptions; and that subscriptions made by commissioners in the one case under authority of an order of court declaring "that $25,000 be directed to be subscribed," and in the other, "that $100,000 shall be subscribed," were not valid and obligatory on the counties in whose behalf the same were made. The reasoning of the court throughout is a clear and distinct recognition of the constitutionality of the law. The declaration that valid subscriptions could *only* be made through and by means of orders made and entered of record by the county courts, etc., is, in view of the history of those cases, equivalent to a positive declaration that such subscriptions might have been made in that way, and the same necessarily implies that the statute by which such subscriptions were authorized was and is a constitutional statute.

Such, at least, is the natural and reasonable interpretation of the language employed, and this construction of the state constitution by the highest court of the state is conclusive on this court.

The constitutional question out of the way, we are brought to the consideration of the second defense, to-wit: Do the records of the county courts of the defendant counties evidence completed contracts of subscription, within the purview of the act authorizing the same, as construed by the court of appeals? Herein lies the vital point of this controversy. If the orders made by these courts constitute valid subscriptions, within the meaning of that act as construed by the court of appeals, the complainant is entitled to relief; otherwise, his bill will have to be dismissed.

We have not the time to enter upon an elaborate discussion of the details. It must suffice to say that, in the judgment of this court, the records of Estill and Owsley county courts are in nowise materially different from the records of Mercer and Garrard county courts, which were held to be insufficient to bind said counties; and as nothing has since transpired to cure the defects therein, the complainant's bill will, as to these two counties, be dismissed, with costs.

But the case as to Jessamine county cannot be so summarily disposed of. The county court of this county, at its September term,

1865, "ordered that the sum of $35,000 be subscribed" to the capital stock of the defendant company, and appointed John S. Brannaugh a commissioner to make the subscription on the books of the company; and at its November term, 1867, it was further "ordered that John S. Brannaugh be and is hereby authorized and directed to subscribe the further sum of $65,000 to the stock" of said company, subject to certain conditions therein stated. The subscriptions thus authorized and directed were accordingly made by the commissioner named on the books of the company, and the same were accepted, with the conditions annexed, and notice thereof communicated to the court.

Now it may be conceded that these orders do not, when measured by the reasoning of the court of appeals in the cases to which reference has been had, constitute completed and valid subscriptions on the part of the county. But it is manifest that the county court and the defendant company understood the legal effect thereof differently. It appears that after the subscriptions had been made by the commissioner, Brannaugh, in behalf of the county, and accepted by the company and notice thereof given to the court, the latter proceeded to make and enter of record several orders clearly and distinctly recognizing the validity of said subscriptions. These were followed by an agreement between the court and the company to pay in *five* instead of *four* annual installments, and an order was duly made and entered of record levying an *ad valorem* tax of 50 cents on each $100 worth of the taxable property of the county for the payment of the first installment; and more than $18,000 of the tax thus levied was collected, and, by the express order of the court made and entered of record in November, 1869, paid by the county treasurer to the defendant company in part discharge of the county's subscription. For a time the county claimed and exercised the rights incident to the ownership of stock and participated in the management of the corporate business. Such was the practical construction of the effect of the action had in the premises by the parties thereto. The county courts of the several counties authorized to subscribe to the enterprise in question were invested by the act with power to act for their respective counties, and to determine whether subscriptions should or should not be made. The power to make a subscription necessarily carries with it the power to complete an incompleted contract to subscribe; and if the original orders under which Brannaugh acted are not, within themselves, completed subscriptions, the subsequent construction thereof by the county court, acquiesced in by the defend-

ant company, is such a recognition, ratification, and partial execution thereof as, in the judgment of this court, ought to estop both parties thereto from denying the validity and obligatory force of said subscriptions. It follows that the defendant Jessamine county is a stockholder in the defendant company, and, as such, amenable to all the liabilities incident to that relation.

What, then, is the extent of its liability in this case? The answer to this question involves two inquiries: *First*, we must ascertain, if we can, how much is due from the defendant corporation to the complainant; and, *secondly*, the proportion thereof justly chargeable to Jessamine county.

The complainant insists that, having obtained a judgment at law against the defendant corporation for $132,500, and costs, the same is conclusive, as against the stockholders, of the amount due him, and that Jessamine county ought to be made to contribute to the extent of its unpaid subscriptions towards the liquidation of the complainant's demand. But we do not, upon the facts of this case, concur in this view of the complainant's rights. The county took part, as a stockholder, in the management of the corporate business until the decision in the *Mercer and Garrard County Cases* was made. But upon the promulgation of that decision Jessamine county, in common with all the other counties which had taken steps to subscribe stock in said corporation, disclaimed its subscriptions, and thereafter refused to participate further in perpetuating its organization or supervising its business. The complainant, who owned $100,000 of stock, subscribed by Bissit & McMahon, assumed the sole and exclusive control of said corporation, and from that time forward managed and controlled its business through a board of directors elected by himself. Having thus assumed the responsibility, he was bound to due diligence in the execution of it. But we think he failed to discharge the duty thus voluntarily undertaken. The suit in which he recovered his judgment was prosecuted by complainant through counsel employed for the purpose, and defended by one of the directors chosen by him. In short, it was prosecuted on the one side by an attorney selected by him, and defended by a board of directors which he had chosen and placed in position, brought to trial just three months and six days after its institution, tried upon a false copy of the contract, sued on in the absence of material and important witnesses for the defense, and resulted in a judgment largely in excess of the amount due. We are satisfied that the complainant's judgment, to put it mildly, was

unfairly obtained, and for an amount greatly in excess of the sum due. When this was accomplished this suit was begun, in which Jessamine county was, for the first time, brought before the court and afforded an opportunity to be heard. It is bound, as a stockholder, to contribute for the payment of complainant's demand, and ought, we think, notwithstanding complainant's judgment, to be heard in regard to the amount due from the defendant corporation to the complainant. An account will be necessary to ascertain what this is. The matter will therefore be referred to James S. Pirtle, Esq., who is required, as a special master of this court, to consider the evidence on file, and such other testimony as the parties hereto, or either of them, shall adduce touching the controversy, and to report—*First*, the amount, if anything, due from the Kentucky River Navigation Company to complainant for the work and labor done and material furnished under and pursuant to the contract sued on at law, to which reference is made in the pleadings with interest from the time the same ought, by the terms of said contract, to have been paid.

But as the complainant is himself a stockholder, he must contribute *pari passu* with Jessamine county to the payment of the balance that shall be thus found due him. The master will therefore ascertain and report, *secondly*, the amount of stock subscribed by the complainant and said county, respectively; the amount paid thereon and the dates of such payment, calculating interest and adjusting the accounts so as to require each party to pay towards the complainant's demand in proportion to the amount of stock severally subscribed by them. All other questions are reserved until the coming in of the master's report.

The master to whom the matter was referred, found, on the basis of the foregoing opinion, due to complainant, including principal and interest, the sum of $25,274.68, of which one-half, $12,637.34, was charged to Jessamine county and the other moiety to complainant.

As to the first point in the foregoing opinion: Creditors of an incorporated company who have exhausted their remedy at law can, in order to obtain satisfaction of their judgment, proceed in equity against a stockholder to enforce his liability to the company for the amount remaining due upon his subscription, although no account is taken of the other indebtedness of the company, and the other stockholders are not made parties; although, by the terms of their subscriptions, the stockholders were to pay for their shares "as called for" by the company, and the latter had not called for more than 30 per cent. of the subscriptions. *Hatch* v. *Dana*, 101 U. S. 205.

As to decisions of state courts as rules of decision in United States courts,

the supreme court delivered an interesting opinion January 29, 1883, in the case of *Burgess* v. *Seligman*, 2 Sup. Ct. Rep. 11. The syllabus, upon that question, is as follows:

The supreme court of Missouri, after the transaction in controversy took place, and after the circuit court had decided this case, made a contrary decision against the same stockholders, at the suit of another plaintiff, and this decision being urged as conclusive upon the federal courts, *held*, that this court is not bound to follow the decision of the state court in such a case.

The federal courts have an independent jurisdiction in the administration of state laws in cases between citizens of different states, co-ordinate with, and not subordinate to, that of the state courts; and are bound to exercise their own judgment as to the meaning and effect of those laws.

But since the ordinary administration of law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established, which become rules of property and action in the state, and have all the effects of law, especially with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is.

But where the law has not been thus settled it is the right and duty of the federal courts to exercise their own judgment, as they always do in reference to the doctrines of commercial law and general jurisprudence; and when contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation of the law applicable to the case may be adopted by the state courts after such rights have accrued.

But even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts, if the question seems to them balanced with doubt.

Acting on these principles of comity, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts.

As, however, the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals, which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication.

The Effect as to Stockholders and Officers of a Judgment against the Corporation.

1. GENERAL PRINCIPLES. A judgment is conclusive as between parties and privies thereto of all matters of controversy determined by it. Every per-

son whom the parties, plaintiff or defendant, represent in the suit, are bound as privies by the judgment rendered in it. 2 Smith, Lead. Cas. [*684–5;] Morawetz, Priv. Corp. § 383. A corporation represents and binds the stockholder in all matters within the limits of its corporate power, transacted in good faith by its officers, and their discretion cannot be controlled by the stockholders. *Oglesby* v. *Attrall*, 105 U. S. 605; *Baily* v. *B., L. & C. Junc. R. Co.* 12 Beav. 433; *Walker* v. *M. & O. R. Co.* 34 Miss. 245; *Ellison* v. *M. & O. R. Co.* 36 Miss. 572; *Durfee* v. *Old Col., etc., R. Co.* 5 Allen, 242; *Came* v. *Brigham*, 39 Me. 35, 38; Morawetz, Priv. Corp. §§ 236, 382, 387; High, Extr. Leg. Rem. § 278; High, Receivers, §§ 288, 289, 294. Among these fundamental powers are those of bringing and defending suits affecting the rights and obligations of the corporation, in which it represents and binds the stockholder as fully as in the making of contracts. *Farnum* v. *Ballard, etc., Shop*, 12 Cush. 507; *Lane* v. *Weymouth School-dist.* 10 Metc. 462; *Johnson* v. *Somerville, etc., Co.* 15 Gray, 216; *Graham* v. *Boston, etc., R. Co.* 14 FED. REP. 753, 762; *Samuels* v. *Holladay*, 1 Woolw. C. C. 400; *Re Mercantile Discount Co.* L. R. 1 Eq. 277; *Newby* v. *Oregon Cent. R. Co.* 1 Sawy. 63; Morawetz, Priv. Corp. §§ 383, 388. Nor can a stockholder interfere in such proceedings, except in cases where the officers of the corporation refuse to sue or defend for it, when, upon proper application in equity and showing of such refusal, the stockholder, in behalf of himself and all other stockholders, may sue or defend for it. *Memphis City* v. *Dean*, 8 Wall. 73; *Cook* v. *Berlin Mills Co.* 6 Reporter, 188; *Davenport* v. *Dows*, 18 Wall. 626; *Taylor* v. *Holmes*, 14 FED. REP. 498; *Detroit* v. *Dean*, 1 Sup. Ct. Rep. 560, 564; *Bacon* v. *Robertson*, 18 How. 480. The better-considered and later cases "limit this right to cases where the directors are guilty of a fraud or a breach of trust, or are proceeding *ultra vires*." *Hawes* v. *Oakland*, 104 U. S. 450; [S. C. 21 Am. Law Reg. (N. S.) 252; 14 Cent. Law J. 288;] *Marsh* v. *Eastern R. Co.* 40 N. H. 548; *Peabody* v. *Flint*, 6 Allen, (Mass.) 52; *Brewer* v. *Boston Theater*, 104 Mass. 378. In *Hawes* v. *Oakland*, *supra*, the supreme court of the United States held that, in order to entitle a stockholder to sue in behalf of the corporation, there must be shown: "(1) Some action or threatened action of the directors or trustees which is beyond the authority conferred by the charter, or the law under which the company was organized; or (2) such a fraudulent transaction, completed or threatened by them, either among themselves or with some other party, or with shareholders, as will result in serious injury to the company or the other shareholders; or (3) that the directors, or a majority of them, are acting for their own interests, in a manner destructive of the company, or the rights of the other shareholders; or (4) that the majority of shareholders are oppressively and illegally pursuing, in the name of the company, a course in violation of the rights of the other shareholders, which can only be restrained by a court of equity. (5) It must also be made to appear that the complainant made an earnest effort to obtain redress at the hands of the directors and shareholders of the corporation, and that the ownership of the stock was vested in him at the time of the transactions of which he complains, or was thereafter transferred to him by operation of law." See, also, *Detroit* v. *Dean*, 1 Sup. Ct. Rep. 560, (Jan. 22, 1883.)

2. THE JUDGMENT CONCLUSIVE. In such cases as that decided by Judge BAXTER in the opinion above reported, viz., suits in the nature of creditors'

bills to subject a stockholder's indebtedness, to the corporation on account of *unpaid subscriptions to stock*, the authorities are uniform in holding that in the absence of fraud in their rendition, judgments against the corporation are conclusive against stockholders as to the amount and validity of the creditor's claim. Morawetz, Corp. § 619; *Henry* v. *Vermillion, etc., R. Co.* 17 Ohio, 187. Even in New York, where the decisions have been conflicting in actions to charge stockholders on their *statutory liability*, the court of appeals has recently held, that in suits to subject unpaid subscriptions, the stockholders were concluded by the judgment against the corporation. *Stephens* v. *Fox*, 83 N. Y. 313. In *Henry* v. *Vermillion, etc., R. Co. supra*, the court says: "Even if there were irregularities in these judgments, and fraud in giving them, or mistake, by accident or otherwise, in the amount, it would constitute no defense, either in whole or in part, in these cases. The judgments cannot be impeached collaterally. Between the parties who had a legal right to fix the amount, it has already been done; and nothing is left as against the debtors of the company but to determine the amount due from them." But the judgment could probably be impeached for fraud, by cross-bill or cross-petition, in the action upon it. *Conway* v. *Duncan*, 28 Ohio St. 102; *Bank of Wooster* v. *Stevens*, 1 Ohio St. 233.

In actions to enforce the *statutory liability of stockholders*, judgments against the corporation have been held equally conclusive. *Donworth* v. *Coolbaugh*, 5 Iowa, 300; *Came* v. *Brigham*, 39 Me. 35; *Merrill* v. *Suffolk Bank*, 31 Me. 57; *Milliken* v. *Whitehouse*, 49 Me. 529; *Wilson* v. *Pittsburgh, etc., Coal Co.* 43 Pa. St. 424; *Gaskill* v. *Dudley*, 6 Metc. 546; *Hawes* v. *Anglo-Saxon Petroleum Co.* 101 Mass. 385; *Johnson* v. *Somerville, etc., Co.* 15 Gray, 216; *Holyoke Bank* v. *Goodman Paper Manuf'g Co.* 9 Cush. 576; Thompson, Liab. of Stockh. § 329 *et seq.*; Freeman, Judgm. § 178. See *Boyd* v. *Hall*, 56 Ga. 563; Bigelow, Estop. (3d Ed.) 89.

In *Gaskill* v. *Dudley, supra*, D. recovered a judgment, by default, against a school-district, in an action on a contract with the district to build a schoolhouse, and levied his execution on the goods of a member of the district. *Held*, that he could not give evidence that D. had not performed his said contract, and therefore ought not to have recovered judgment against the district. SHAW, C. J., said: "Every member of a corporation is so far privy in interest in a suit against the corporation, that he is bound by a judgment against it." And, as was remarked by the same learned jurist in *Farnum* v. *Ballard, etc., Shop*, 12 Cush. 507, 509, as to a private corporation, the case is much stronger than as to such a public body as a school-district. Morawetz, in his recent work on Private Corporations, makes an admirable statement of the rule, and the reasons on which it is founded: "A judgment obtained against the corporation is certainly conclusive (until reversed for error or impeached for fraud) in a suit to charge the stockholders upon their unpaid subscriptions; and by analogy it should also be held conclusive in a suit to charge them upon their additional individual liability to creditors. It must be borne in mind that a corporation is composed of its stockholders, and that a judgment obtained against the corporation is in reality a judgment obtained against the stockholders in their corporate capacity. There is no reason why the members of a corporation should be allowed to contest a creditor's claim twice,—

once in the suit against the corporation through the corporate agents, and again in the suit brought to charge them individually. If the judgment against the corporation was obtained by fraud or through collusion with the company's agents, the stockholders may obtain relief through equitable proceedings." Morawètz, Priv. Corp. § 619.

The rule is the same in England. A statute of New South Wales provided that the chairman of a company could be sued on behalf of the company, and that execution on a judgment in such an action could be issued against the property of any member of the company, as if the judgment had been obtained against him personally. In an action upon such a judgment against a member beyond the territory of the colony, *held*, that the judgment might be impeached for want of jurisdiction or fraud in obtaining it, but that the defendant was precluded from disputing that the promises upon which the judgment was founded were never made, or from showing that they were obtained by fraud by the plaintiff. *Bank of Australasia* v. *Nias*, 4 Law & Eq. 252; S. C. 20 Law J. Rep. (N. S.) Q. B. 284. See, under a statute somewhat similar, *Hampton* v. *Weare*, 4 Iowa, 13; *Donworth* v. *Coolbaugh*, 5 Iowa, 300.

The judgment is *prima facie* evidence of the indebtedness, and can be questioned only for fraud or mistake. *Merchants' Bank* v. *Chandler*, 19 Wis. 435; *Grund* v. *Tucker*, 5 Kan. 70. See *Berger* v. *Williams*, 4 McLean, 577; Bigelow, Estop. (3d Ed.) 89. But in the Kansas case, while it was not necessary to decide that it was more than *prima facie* evidence, the reasoning of the court goes to the length that it is conclusive. Thompson, Stock Liab. § 329, note. And GRAY, Com., in *McMahon* v. *Macy*, 51 N. Y. 155, 165, while holding that the judgment was not even *prima facia* evidence, said that if it was given that force, "not having been made so by statute, I am unable to understand why it is not, like a judgment in any other case, conclusive."

In suits against officers of a corporation to charge them with debts on account of the neglect of some duty imposed upon them, the judgment recovered against the corporation is conclusive of the existence of the debt for which it was rendered. *Thayer* v. *N. Eng. Lith. Co.* 108 Mass. 523. *Contra, Miller* v. *White*, 50 N. Y. 137. See Thompson, Liab. Officers, etc., § 463; Thompson, Liab. Stockh. § 330.

Where stockholders are liable only on a particular class of debts or to a particular class of creditors, it is proper to go behind the judgment to prove that the debt recovered belonged to the class for which the stockholders are made liable. *Wilson* v. *Stockholders*, 43 Pa. St. 424; *Conant* v. *Van Schaick*, 24 Barb. 87; *Larrabee* v. *Baldwin*, 35 Cal. 135; Thompson, Liab. Stockh. § 334. And the judgment may not be conclusive as to the organization and existence of the corporation. *Hudson* v. *Carman*, 41 Me. 84.

3. NEW YORK CASES. The conclusiveness of the judgment has not been questioned except in New York, that I have been able to find, and the decisions in that state present a spectacle of great confusion. Chancellor KENT, in the case of *Slee* v. *Bloom*, held that a judgment against the corporation was not binding upon stockholders when sued individually, on the ground "that the acts of the trustees or agents of the company, while it subsisted as

a corporation, however binding and conclusive upon the company in its corporate capacity, and over the corporate property, are not binding and conclusive upon the individual stockholders of the company, when charged in their persons and property in their individual character; inasmuch as, in that character, they never were represented by such agents and trustees." On appeal to the court of errors this case was reversed, the court, in an opinion delivered by SPENCER, C. J., holding that the stockholders were concluded by the judgment against the corporation. 20 Johns. 669, (1822.) This last holding was referred to with approbation in *Moss* v. *Oakley*, 2 Hill, 265, 267, (1842.) In *Moss* v. *McCullough*, 5 Hill, 131, (1843,) a case arising upon stockholders' liability in the same corporation as in *Moss* v. *Oakley*, *supra*, the supreme court (COWEN, BRONSON, and NELSON, JJ.,) held that the judgment was not even *prima facie* evidence of the genuineness or validity of the debt. This case, after having gone through a remarkable history of judgments and reversals, came before the new supreme court, where it was held that the judgment was *prima facie* evidence, but subject to be impeached for collusion or mistake. *Moss* v. *McCullough*, 7 Barb. 279, (1849.) The question next came before the court of appeals. Three of the judges expressed the view that the judgment was *prima facie* evidence, while four refused to commit themselves to giving even that force to the judgment; and the case went off on other questions. *Belmont* v. *Coleman*, 21 N. Y. 96, (1860.) Below, the judgment had been held *prima facie* evidence. *Belmont* v. *Coleman*, 1 Bosw. 188. In 1861 the supreme court held that it was not even *prima facie* evidence. *Strong* v. *Wheaton*, 38 Barb. 616, 621. *Conklin* v. *Furman*, 8 Abb. Pr. (N. S.) 161, (1865,) follows the decision of the court of errors in *Slee* v. *Bloom*, *supra*. In *McMahon* v. *Macy*, 51 N. Y. 155, (1872,) before the commission of appeals, LOTT and GRAY, JJ., held the judgment not even *prima facie* evidence, while HUNT, J., held that it was. Contemporaneously with the case last cited, the question was before the court of appeals. *Miller* v. *White*, 50 N. Y. 137. That was an action to charge the trustees with a debt of the corporation, for failing to file and publish an annual report, and it was held that a judgment against the corporation for the debt was neither conclusive nor *prima facie* evidence of its validity. See, also, *Wheeler* v. *Miller*, 24 Hun, 541. The latest decision of the court of appeals upon the question (*Stephens* v. *Fox*, 83 N. Y. 313) seems to indicate a disposition to limit its previous rulings; in that case the court holding that in suits by creditors to subject unpaid subscriptions owing by a stockholder, a judgment against the corporation was the highest evidence of the indebtedness of the corporation to the creditor.

The answer to Chancellor KENT'S reasoning would seem to be clear. The statutory liability to creditors is an obligation that persons must, in contemplation of law, be held to have had in view when they became stockholders. It is conceded that the officers and agents of a corporation, in the absence or fraud, can bind the stockholders by contracts made in behalf of the corporation. They have the power to execute bonds and other negotiable instruments, which not only have a *prima facie* validity, but may fasten an indisputable liability upon the corporation. These acts of the officers are given their ordinary legal effect, not only against the corporation, but also against the stockholders in all proceedings to make them individually liable. It is

admitted further that the officers not only have the power, but it is their duty, to represent the corporation in litigation against it. Why, then, should not the result of such litigation, as much as the acts of the officers and agents of the corporation in reference to contracts, be given its ordinary legal effect?

Cincinnati, March 1, 1883. J. C. HARPER.

BUCKNER *v.* STREET.

(*Circuit Court, E. D. Arkansas* October Term, 1882.)

1. EQUITY.—MISTAKE.
   The mutual mistake against which equity relieves, relates to something not within the contemplation of the parties in making their contract, and, therefore, not covered nor intended to be covered by it. If there is no misrepresentation or fraudulent concealment of a material fact or a mistake, consisting in an unconsciousness, ignorance, or forgetfulness of a material fact, the contract must stand.
2. SAME—MISREPRESENTATIONS—WHAT SUFFICIENT TO VOID CONTRACT.
   A contract may not be set aside on the ground of misrepresentation, unless it be of some material matter constituting some motive to the contract, something in regard to which reliance is placed by one party on the other, and by which he was actually misled, and not merely a matter of opinion open to the inquiry and examination of both parties.
3. SPECIAL WARRANTY DEED.
   A deed with a special warranty against all persons claiming by, through, or under the grantor, cannot be extended to a general covenant of warranty against all persons; and the rule is that a party has no remedy on the ground of a mere failure of title, if he has taken no covenants to secure the title, and there is no fraud in the case.
4. SAME—STATUTE OF LIMITATIONS.
   In Arkansas the plea of the statute of limitations of five years, to a note given for the purchase money of lands, is not good in bar of a decree *in rem* for a sale of the lands; but it is a bar to the recovery of a personal judgment against the defendant.

In Equity.

The plaintiff filed his bill to foreclose a vendor's lien on certain lands reserved in the deed by which he conveyed the lands to the defendant with covenant of warranty against those only "claiming or to claim the same by, through, or under" the grantor. The defendant filed an answer and cross-bill identical in their statements. The plaintiff has demurred to the cross-bill and excepted to the answer.

The substance of the cross-bill is that the lands in question were owned many years ago by one Faulkner, who executed what is known as a "real estate bank stock mortgage" on them; that Faulkner be-

came otherwise largely indebted to the bank, and finally conveyed the lands and other property to the bank in satisfaction of his indebtedness to it; that Faulkner and his attorney and others understood and believed that this conveyance paid and extinguished the "stock mortgage" as well as his other indebtedness to the bank; that one Sessions afterwards purchased the lands from the bank or its representatives; that Sessions became indebted to the plaintiff and executed to him a mortgage on the lands to secure such indebtedness; that this mortgage was foreclosed, and the lands purchased at the foreclosure sale by the plaintiff, who sold them for their full value to the defendant; that Sessions, at the time he purchased the lands, was advised by his counsel, Mr. Pike, and by Faulkner that the stock mortgage was no longer a lien on the lands; that the plaintiff was also advised to the same effect by his counsel, Mr. Garland; that the defendant was advised to the same effect by Mr. Gallagher, whom he specially retained to examine the title, and by all the other parties named, including the plaintiff; that both plaintiff and defendant honestly believed the mortgage had been paid; that if defendant had not so believed he would not have purchased the lands; that the deed to the defendant was not a general warranty, and contained no covenant against incumbrances, because both parties believed a special warranty sufficient to carry a good title, and that defendant was advised to that effect by his attorney, Mr. Gallagher; that lately a bill has been filed by the state to foreclose this stock mortgage, and that the same is now pending in the chancery court, and if the claim of the state is sustained she will obtain a decree against the lands for a sum largely in excess of their value.

Prayers for injunction and for special and general relief.

John M. Moore, for plaintiff.

Martin & Martin, for defendant.

CALDWELL, J. It is not alleged that the plaintiff was guilty of any fraud, willful misrepresentation, or concealment, or that the parties made any other or different contract than that disclosed by the face of the deed. Nor is it alleged that the plaintiff had any other or better sources of information than the defendant, either as to the fact or the law relating to the question as to whether the stock mortgage was or not a lien on the lands. It remained on the public records unsatisfied. The defendant knew this. He knew all that could be learned about the facts of the transaction by consulting those cognizant of them, and he knew all about the law applicable to the matter that could be known by consulting learned and able counsel,

upon whose advice he acted in receiving a deed without covenants of warranty.

It is not alleged that the plaintiff expressed any opinion on the question based or claimed to be based on his personal knowledge, or that the expression of his belief founded on information, the sources of which were equally open to defendant, was the inducement to the purchase. He was a citizen of another state; he acquired the lands, not by a purchase from free choice at private sale as an investment, but at judicial sale, when he was compelled to purchase for better for worse to save a debt. He acquired the lands without warranty, and it is clear from the averments in the cross-bill that it was his purpose to convey them as they came to him; to sell whatever he acquired by his purchase at the marshal's sale and no more; and to enter into no covenant that would render him liable beyond that. He seemed to realize the hazard of relying on the uncertain and fading recollections of men to overcome a solemn written record, and he knew that with the lapse of every year this hazard would be increased, and he probably also recognized the fact that the law is not one of the exact sciences, and that the most learned counsel, as well as courts, sometimes err; and, having no personal knowledge on the subject, he prudently declined to covenant against this incumbrance apparent upon the public records, although it was stale with age and was reported to be paid. The defendant, possessed of a more sanguine temperament and less caution, or having more faith in the memories of men and the advice of his counsel, chose to take the risk.

It is not alleged the stock mortgage is a lien upon the land. Indeed, it is in effect said that it is paid, but that, nevertheless, it is possible the state will have a decree, and that in that event the loss should fall on the plaintiff, because it would then be a case of mutual mistake. Mutual mistake about what? Not about the terms of the contract, for that is in writing, and is conceded to express the agreement of the parties. Not about the existence of the stock mortgage, for that was well known to both parties. If the parties were mutually mistaken about anything, it was as to whether or not the state could enforce the stock mortgage. It was precisely because the plaintiff recognized that the information which he, in common with the defendant, possessed on that subject might be erroneous, that he declined to warrant against incumbrances. If it shall turn out that the parties were mutually mistaken on this point, it is a mutual mistake about a matter which in its very nature possessed

elements of uncertainty; and which party should take the risk and bear the loss, in the event of a mutual mistake on the point, was made a matter of convention between the parties, and found expression in the terms of the deed. The mutual mistakes against which equity relieves relate to something not within the contemplation of the parties in making their contract, and therefore not covered, nor intended to be covered, by it.

All the cases cited by the learned counsel for the defendant have been examined. In all of them, where the facts are given, there was the element of misrepresentation or fraudulent concealment of a material fact, or a mistake consisting in an unconsciousness, ignorance, or forgetfulness of a material fact. All of these elements are wanting in this case.

"It is well settled that to set aside a contract on the ground of misrepresentation it must be of something material constituting some motive to the contract, something in regard to which some reliance is placed by one party on the other, and by which he was actually misled; not a matter of opinion merely, equally open to the inquiry and examination of both parties." *Smith* v. *Richards*, 13 Pet. 26; *Hill* v. *Bush*, 19 Ark. 522.

In *Raymond* v. *Raymond*, 10 Cush. 134, the court say the grantee "took a deed with covenants of a very limited character, and having thus taken certain express covenants of his vendor he must be restricted to them, and cannot ingraft upon them the more extended engagement found in a verbal promise made at the time of the execution of the deed. A deed with a special warranty against all persons claiming by, through, or under the grantor cannot thus be extended to a general covenant of warranty against all persons." And the rule is that a party has no remedy on the ground of a mere failure of title, if he has taken no covenants to secure the title, and there is no fraud in the case. *Chesterman* v. *Gardner*, 5 Johns. Ch. 29; *Gouveneur* v. *Elmendorf*, Id. 79.

There is a plea of the statute of limitations to one of the notes given for the purchase money. More than five and less than seven years elapsed between the maturity of the note and the institution of this suit. The plea is not good in bar of a decree *in rem* for a sale of the lands. *Hall* v. *Denkla*, 28 Ark. 507; *Birnie* v. *Main*, 29 Ark. 591. But it is a bar to the recovery of a personal judgment against the defendant.

In the course of the opinion in *Birnie* v. *Main*, *supra*, there is an expression from which it might be inferred that the court held the law on the last point to be otherwise. Such a doctrine is so obviously

unsound and so clearly against all authority that we must suppose that, if the expression referred to is susceptible of such a construction, it is the result of inadvertence or clerical misprision, and does not express the deliberate judgment of the court.

The demurrer to the cross-bill and the exceptions to the answer, except so much thereof as pleads the statute of limitations in bar of a personal judgment on one note, are sustained.

UNITED STATES v. MISKELL.*

(*Circuit Court, D. Kentucky.* March, 1883.)

MAKING OR USING FALSE AFFIDAVIT TO OBTAIN PAYMENT OF CLAIM—SECTION 5438, REV. ST.

To support a conviction under section 5438, Rev. St., for making or using a false affidavit for the purpose of obtaining the payment or approval of certain claims against the government, it must be shown, not only that the affidavit was false, but also that the claim, the payment of which was sought to be obtained by the use of the affidavit, was false, fictitious, or fraudulent.

Indictment. Motion for new trial.

Geo. M. Thomas, Dist. Atty., for the Government.

Samuel McKee, for defendant.

BAXTER, J. The act under which the indictment in this case was framed (section 5438, Rev. St.) provides that "every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any officer in the civil, military, or naval service of the United States, any claim upon or against the government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining, or aiding to obtain, the payment or approval of such claim, makes, uses, or causes to be made or used, any false affidavit, etc., knowing the same to contain any fraudulent or fictitious statement," etc., shall be punished, etc.

The indictment follows the statute. It contains one count for making and presenting, or causing to be made and presented, for payment a false, fictitious, and fraudulent claim, etc., and another count for having made and used a false affidavit, etc., for the purpose of obtaining the payment of a false, fictitious, and fraudulent

*Reported by J. C. Harper, Esq., of the Cincinnati bar.

claim, etc. Upon a trial had, the defendant was acquitted of the first and convicted of the crime alleged in the second count; and thereupon moved for a new trial. No evidence was offered by the government upon the trial tending to show that the claim, in support of which the alleged false affidavit was used, was either false, fictitious, or fraudulent. Hence we are called on to determine whether a conviction obtained for the making and using of a false affidavit, etc., to obtain payment or allowance of a claim upon or against the United States, can be sustained, without proof showing that the claim, in support of which such affidavit was made or used, was itself false, fictitious, or fraudulent.

The crime created and defined by the statute and formulated in the second count of the indictment is not the making or using of a false affidavit to obtain payment of *a claim* upon or against the government, but it is the making or using a *false affidavit*, etc., for the purpose of obtaining the payment or approval of a *false, fictitious*, or *fraudulent* claim, etc. In other words, the crime charged in the second count of the indictment under consideration is composed of two elements—*First*, a false affidavit; and, *secondly*, the making or the using of such false affidavit to obtain the payment or allowance of a false, fictitious, or fraudulent claim. But in this case there was no evidence tending to establish the false, fictitious, and fraudulent character of the claim, the payment of which defendant sought to obtain by use of the false affidavit referred to.

The crime, therefore, of which the defendant stands convicted was only half made out; but one of the foregoing two elements which constitute it was proven, and it follows that defendant is entitled to a new trial, which is awarded.

An indictment under section 5438, Rev. St., 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. *U. S.* v. *Ambrose*, 2 FED. REP. 764. In an indictment under that section it is sufficient to charge a presentation to the "first auditor of the treasury," without naming the person who held such office; and the different items of an account may all be included in one count of the indictment, and it is not necessary that there should be separate counts for each false item. *U. S.* v. *Ambrose, supra.* Section 5438 includes a false claim pre-

sented by a person as a pensioner, demanding money as a pensioner, and where the pension certificate was genuine, but had been fraudulently obtained, each presentation of the certificate constituted a distinct offense within the meaning of the statute. *U. S.* v. *Goggin*, 3 FED. REP. 492.—[REP.

MALLOY *v.* BENNETT.

(*Circuit Court, S. D. New York.* February 21, 1883.)

1. ACTIONS FOR LIBEL—NEW TRIAL—SURPRISE—EXCESSIVE DAMAGES, ETC.
   Where a new trial is asked for on the ground of surprise, and that the party seeking the new trial forgot to offer certain letters in evidence, the omission to show the letters, or copies of them, is significant, and raises an inference against their importance.

2. SAME—PROOF OF FALSITY OF STATEMENTS.
   It is not necessary for the plaintiff, in a suit for libel, to disprove the truth of the criminal charges contained in it; but he may always give proof of the falsity of the statements in order to enhance damages. It is only by such evidence that the essential character of the publication can be determined.

3. SAME—MENTAL SUFFERINGS.
   Mental suffering is one of the elements of personal injury for which compensation should be awarded, and this, even when the injury is not malicious, but merely negligent.

4. SAME—EXEMPLARY DAMAGES—PRINCIPAL AND AGENT.
   There is nothing in the law of damages, or of principal and agent, to justify the assumption that the principal is not liable in exemplary damages for the acts of his agent. An employer is responsible for the willful as well as the negligent acts of his servants, when they are performed in the course of the servant's employment. Actions of libel, so far as they involve questions of exemplary damages, and the law of principal and agent, are controlled by the same rules as are other actions of tort. The right of a plaintiff to recover exemplary damages exists wherever a tortious injury has been inflicted recklessly or wantonly, and it is not limited to cases where the injury resulted from the personal malice or recklessness of the defendant. It follows that the owner of a newspaper is responsible for all the acts of omission and commission of those he employs to edit it and manage its affairs, as he would be if personally managing the same.

5. SAME—NEW TRIAL IN ACTIONS FOR LIBEL.
   The court will not grant a new trial in actions for libel on the ground of excessive damages, "unless the amount is so flagrantly atrocious and extravagant as to show that the jury must have been actuated by passion, partiality, prejudice, or corruption."

6. SAME.
   Where it seems evident that the refusal of the court to charge the jury as requested, though such refusal be not properly subject to an excepton, had the effect upon the jury to render their verdict larger than it otherwise would have been, the court will grant a new trial.

At Law.

Wm. L. Royall, for plaintiff.

John Townsend, for defendant.

WALLACE, J. The defendant moves for a new trial upon the several grounds of surprise, excessiveness of damages, and error in the rulings upon the trial. The action is for libel. The jury found a verdict for plaintiff for $20,000.

On October 31, 1881, the New York *Herald*, a newspaper of which the defendant was the proprietor, published an account of a disastrous fire which on the day before had nearly destroyed the village of Edgefield, South Carolina. The account purported to be a communication from the special correspondent of the *Herald*. It occupied nearly a column of the paper, and was calculated to attract the attention of all the readers of the paper. After describing the incidents, and enumerating the losses and peril of life caused by the fire, the account stated that the fire was supposed to be the work of an incendiary, and that the leading citizens of the place were of the opinion "that one Malloy, a white man who some time ago was suspected of burning his own store for the purpose of obtaining the insurance, kindled the fire which resulted so disastrously." The account proceeded to set forth the suspicious circumstances pointing to the guilt of Malloy, and concluded by the statement that he had hastily left the place; that a party of men were out in search for him; and that the people of the place were swearing vengeance upon him, and he was to be summarily dealt with if caught.

Upon the trial it was proved that the whole account, so far as it related to the charge of incendiarism, was a fabrication. To show that the plaintiff was the Malloy referred to, it was proved that he was the only person of that name in Edgefield, and that he had, a year or so before, lost his store by fire, and his claim for insurance upon it had been contested by the insurer.

So far as the present motion proceeds upon the grounds of surprise, the case made for the defendant does not merit discussion. If there was surprise it was inexcusable; and if the letters which the defendant forgot to offer in evidence were of any importance, the fact cannot be ascertained, because copies of them have not been exhibited. The omission to show the letters is significant, and raises a somewhat cogent inference against their importance.

The rulings upon the trial, which are asserted to be erroneous, relate to the reception of evidence against defendant's objection, and to the instructions to the jury. Most of them involve only the appli-

cation of familiar rules of evidence, and the elementary principles of the law of libel.

It is urged that it was error to permit the plaintiff to show affirmatively that the statements in the publication relating to the charge against the plaintiff were without color of truth. It is not necessary for the plaintiff in a suit for libel to disprove the truth of the criminal charges contained in it; but no doubt is entertained that it is always competent to give affirmative proof of the falsity of the statements in order to enhance damages. *Fry* v. *Bennett*, 28 N. Y. 324. It is only by such evidence that the difference between a technical or erroneous misstatement and a reckless or cruel perversion of the facts can be discriminated, and the essential character of the publication appreciated.

The instruction to the jury that the injury to the plaintiff's feelings caused by the publication was to be considered in awarding damages, was confidently challenged on the argument. All the commentators and authorities treat mental suffering as one of the elements of the injury for which compensation should be awarded. 2 Greenl. Ev. § 267. Even when the injury is not malicious, but merely negligent, the plaintiff is entitled to a *solatium* for his mental suffering. *Blake* v. *Midland Ry. Co.* 10 Eng. Law & Eq. 437; *Seger* v. *Town of Barkhamshall*, 22 Conn. 296, 298; *Canning* v. *Williamstown*, 1 Cush. 451; *Ransom* v. *N. Y. & E. R. Co.* 15 N. Y. 415.

It is insisted that the instructions in reference to exemplary damages were erroneous. The jury were instructed that although there was no reason for imputing personal malice towards the plaintiff to the defendant, still, they were at liberty to consider whether there was such recklessness in the publication, and such indignity in the subsequent treatment of the plaintiff by the *Herald*, as to entitle plaintiff to exemplary damages. It was in evidence that although the plaintiff had twice applied to the managers of the newspaper for the name of the author of the communication, no notice was taken of the request; but that a month or so after the publication an editorial paragraph was published which was capable of being construed as derogatory to the plaintiff.

The argument for the defendant seems to assume that the proprietor of a newspaper has some peculiar immunity from liability for exemplary damages; that he should not be held responsible for the acts of his employes; and that in this case if they were reckless, indifferent, or indecent in their treatment of the plaintiff, their conduct should not be imputed to him. There is nothing in the law of dam-

ages or of principal and agent to justify such an assumption. The action of libel, so far as it involves questions of exemplary damages and the law of principal and agent, is controlled by the same rules as are other actions of tort. The right of a plaintiff to recover exemplary and punitive damages is not peculiar to actions of defamation; it exists whenever a tortious injury has been inflicted recklessly or wantonly; and it is not limited to cases where the injury has resulted from the personal malice or recklessness of the defendant. It is recognized and enforced against employers when there has been gross misconduct on the part of their employes. *Beach* v. *Ry. Co.* 1 Dill. 569; *Milwaukee & St. P. R. Co.* v. *Arms*, 91 U. S. 489; *Phila., W. & B. R. Co.* v. *Quigley*, 21 How. 202. The authorities are ample to the effect that an employer is responsible for the willful as well as the negligent acts of his servants when they are performed in the course of the servants' employment. The doctrine is well stated in Sherman on Negligence, § 65, where the author says:

"There is no such rule of law as that the master is not liable for the willful and wrongful acts of his servants, though such a doctrine has often been propounded in judicial opinions. The true ground upon which a master avoids liability for most of the willful acts of his servants, when unauthorized by him, is that they were not done in the course of the servant's employment."

Tested by these principles, it cannot be doubted that when the owner of a newspaper delegates to others the power to edit it and publish it and manage its affairs generally, he is responsible for all the acts of omission and commission of his employes in this behalf, and cannot shirk liability for their misconduct because he has abandoned to others that supervision which he might have exercised himself. If he allows incompetent, careless, or unscrupulous agents to wield the vast power of such an instrumentality, he must stand by all the consequences when it is used to strike down reputation.

The more difficult question presented by the motion is whether the damages awarded by the jury were not excessive. If this question were to be determined exclusively in view of the character of the publication, the subsequent conduct of the defendant, the injury to the plaintiff which might be legitimately inferred, and the limitations which should be imposed upon the discretion of a jury in awarding punitive damages, it would be a delicate and difficult one.

The original publication, although its sensational character and flagrant mendacity were well calculated to outrage the feelings of the plaintiff, was so destitute of a color of truth that it could

not seriously injure him in the estimation of the immediate community in which he lived; nor is it reasonable to suppose that it could have injured him permanently in his good name in the opinion of any person who had sufficient interest in him to investigate the facts. These considerations were suggested to the jury, though perhaps not as fully as they should have been. If the case had been one for compensatory damages only, the verdict would be so clearly excessive as to justify the inference that the jury acted under misconception, or were influenced by partiality or prejudice. But the facts and the instructions of the court authorized a verdict for exemplary damages. The jury, undoubtedly, regarded the refusal of the defendant's newspaper to give the plaintiff the name of the author of the communication, and the editorial paragraph which it subsequently published, as aggravations of the original wrong which deserved severe condemnation. When a newspaper, after publishing an atrocious calumny, refuses to retract it upon discovering its true character, and refuses to disclose the name of the originator, fair-minded men are disposed to think that the conductors of the paper are willing, deliberately and completely, to assume the paternity of the slander, and identify themselves with the author. If the ethics or canons of journalism do not permit the names of anonymous correspondents to be disclosed, or retractions to be made, such a code will hardly be respected in the jury-box or find many advocates upon the bench.

The alleged retraction published by the defendant's newspaper was probably construed by the jury as a studied attempt to ridicule the plaintiff; as meant to be read between the lines; as intended by its qualified negations and pregnant implications to disavow what was inconsequential, and reiterate what was substantial in the original calumny. So far as the *animus* of the retraction was important in determining whether it was an aggravation or a mitigation of the libel, it was the province of the jury to decide the question. It may be that they drew a wrong conclusion, and misconceived the spirit of the article. If the retraction was designed, as it may have been, to sooth the wounded feelings of the plaintiff, and announce to those who knew him that the newspaper had been led by haste, inadvertence, or imposition into doing him injustice, the purpose was equivocally expressed, and the defendant cannot complain if the jury deemed it a cowardly and churlish attempt to escape responsibility without making reparation.

Upon the assumption that the case was one in which the plaintiff was entitled to exemplary damages, not only because of the reck-

lessness of the original publication, but also because the wrong was aggravated by the subsequent conduct of the defendant, by what standard can it be determined that the jury overstepped the limits of their fair discretion? Such damages are awarded upon the theory that public example requires the defendant to be punished. What is the measure of punishment which may reasonably be inflicted upon a defendant who permits the vast power of an influential newspaper to be used to befoul the good name of an inoffensive citizen, and then refuses to make the only reparation that can mitigate the wrong?

Notwithstanding the very exceptional, perhaps unprecedented, damages awarded in this case, it is not clear that the verdict could be set aside without departing from the rules which control the judicial discretion upon motions of this character. It is said by Chancellor KENT, (*Coleman* v. *Southwick*, 9 Johns. 45,) that the court will not grant a new trial in actions for libel on the ground of excessive damages, "unless the amount is so flagrantly atrocious and extravagant as manifestly to show that the jury must have been actuated by passion, partiality, prejudice, or corruption." The very large verdict rendered by the jury has led to a critical review of the proceedings at the trial, in order to ascertain whether anything took place which may have unduly influenced their judgment; and the conclusion is reached that they may have derived a wrong impression from the court's refusal to give them an instruction requested by the defendant.

The plaintiff's counsel, in his opening address to the jury, with considerable amplification depicted the injury in the nature of special damages which the plaintiff had sustained by the libel, among other things stating that he had been compelled to abandon Edgefield as his place of business and residence. When evidence tending to show special damages was offered by the plaintiff, it was objected to by the defendant, because there were no averments of special damage in the complaint; and the objection was sustained and the evidence excluded. Later in the course of the trial, however, the plaintiff proved, without objection by the defendant, that he had abandoned his residence at Edgefield.

The jury were explicitly instructed in the charge by the judge that the plaintiff was not entitled to recover special damages, because the complaint did not contain the requisite averments. Among the requests for instructions, 16 in number, made by the defendant, there was one to the effect that the jury should disregard the statements of fact made by plaintiff's counsel in his opening, except so far as

the same might have been proved on the trial. As the jury's attention had been directed to the precise issues to be considered, and to all the evidence bearing upon the question of damages, and as they had been explicitly instructed as to the rules of law relating to special damages, and to decide the whole case upon the evidence introduced, this particular instruction was deemed unnecessary; therefore was not given. It was deemed unnecessary in view of the instructions already given, but the reason was not announced; and it was denied in a general refusal to instruct otherwise than had been already charged. This refusal is not now believed to have been an error or legitimately subject to an exception. It was one resting in discretion. With an ordinary verdict it would not deserve attention, but with this verdict it starts the suggestion that the jury may have misconceived the reason why it was withheld. The refusal to give it was especially liable to misconstruction in view of the testimony that the plaintiff had abandoned Edgefield, and that his counsel had dwelt upon this as one of the elements of a recovery for special damages. Solicitous that the defendant shall have the full and exact measure of justice to which he is entitled, and doubting whether the large verdict against him may not have been influenced by misapprehension on the part of the jury, the motion for a new trial is granted, in the belief that a thorough and deliberate consideration of the controversy by a second jury will best advance the ends of justice.

CURRIE *v.* TOWN OF LEWISTON.

(*Circuit Court, N. D. New York.* 1883.)

1. MUNICIPAL BONDS—TOWN "OFFICERS."

   An act of the legislature of the state of New York, entitled "An act for the relief of the towns of Newfane, Wilson, and Lewiston, to abolish the office of railroad commissioners of said towns, and to enable each of said towns to adjust its indebtedness and issue bonds therefor," authorized the supervisor and justices of the peace, "or any three of such officers," to issue the bonds provided for thereunder. *Held*, that the term "officers of a town" includes the supervisor, and that the bonds having been executed and issued by four of the officers so named, though the supervisor was not one of them, were valid.

2. STATE AND FEDERAL COURTS.

   State and federal tribunals are entirely independent of each other, and the United States circuit courts cannot be called upon to close their doors to suitors because the questions which they seek to litigate are also involved in other actions between different parties in the courts of the state.

3. SAME—UNCONSTITUTIONALITY OF STATE ACTS.

The federal courts will not willingly pronounce, in advance of the state courts, a state act unconstitutional.

Rhodes, Coon & Higgins, for plaintiff.

M. S. & B. J. Hunting, for defendant.

COXE, J. This action is on bonds and coupons alleged to have been executed and issued by the defendant, pursuant to chapter 13 of the laws of New York passed February 17, 1881. The act is entitled "An act for the relief of the towns of Newfane, Wilson, and Lewiston, to abolish the office of railroad commissioners of said towns, and to enable each of said towns to adjust its indebtedness and issue bonds therefor."

The said act repeals all inconsistent acts, abolishes the office of railroad commissioner, authorizes the supervisor and justices of the peace, or any three of them, to issue new bonds at a rate of interest not exceeding 5 per cent., to redeem the railroad bonds issued by said towns, or any judgment entered thereon, and to adjust the said indebtedness. The fourth section is in the following words:

"The said bonds shall contain a recital that they are issued under the provisions of this act, and such recital shall be conclusive evidence, in any and all courts and places, of the validity of said bonds and the regularity of their issue."

The bonds in suit were issued under this act, and contain on their face a recital that they were so issued. They are signed by the four justices, but not by the supervisor; although the predecessor of the present supervisor, one William P. Mentz, signed an agreement, together with the four justices, to exchange the new bonds of the town for the old ones held by the plaintiff.

On the seventh day of August, 1879, the plaintiff commenced an action in this court against the defendant to recover on coupons cut from the original bonds issued in aid of the Lake Ontario Shore Railroad. An answer was interposed containing substantially the same defenses to those bonds which the answer here contains. On the trial of this action the plaintiff succeeded, and judgment was thereafter entered in his favor for the full amount demanded in the complaint. This judgment was satisfied by the plaintiff, and the old bonds held by him were surrendered: in consideration thereof the new bonds, under the act of 1881, were issued.

As to all questions litigated or in issue in that action the judgment is conclusive evidence, and this court will not again inquire into defenses which were there disposed of. See, also, as decisive of these

questions, *Phelps* v. *This Defendant*, 15 Blatchf. 131. The only defenses that can be considered here are those having reference solely to the new bonds issued under the act of 1881.

First. It is argued that the bonds are invalid because the supervisor did not sign them. The language of the act is: "The supervisor, together with the justices of the peace, or any three of such officers, * * * are hereby authorized to execute, under their hands and seals, and to issue, new bonds," etc.; and again: "The supervisor and justices * * * are hereby authorized to settle and adjust said indebtedness." The use of the word "officers" is significant. Had the legislature intended to make the signature of the supervisor an indispensable condition to the validity of the bonds, the act would have provided that the supervisor, together with the justices of the peace, or any three of such *justices*, are authorized, etc. There would have been a distinction between the two classes of officials. To argue that the qualification applies only to the justices of the peace, leaves out of sight the fact that the supervisor is, equally with them, a town *officer*. It seems reasonably clear that it was the intention of the legislature to authorize a majority of the five officers named to issue the bonds. Four of them having signed, the bonds are valid in this regard.

Second. On the third day of April, 1882, certain tax-payers of the town commenced an action in the supreme court of the state of New York, pursuant to chapter 531 of the Laws of 1881, against Galen Miller, as supervisor, praying for a perpetual injunction restraining him from paying over to the bondholders any of the town money received by him, and asking for other specific and general relief. A temporary injunction, granted by the county judge of Niagara county, is still in force. The pendency of this action is pleaded as a defense. How the plaintiff here can in any way be affected by a chancery action in the state courts between different parties, it is difficult to perceive. Such a defense could not be successfully pleaded in a similar action in the state courts, although it might there be said that two actions to determine substantially the same questions were unnecessary in the same tribunal, and that one should be stayed to await the result of the other. But such considerations are not relevant here; the state and federal tribunals are entirely independent of each other, and it will be hardly possible to produce an authority holding that the United States circuit courts should close their doors to suitors because the questions which they seek to litigate are

also involved in other actions between different parties in the courts of the state.

Third. It is alleged that the act of 1881, *c.* 13, is unconstitutional, null and void, for the reason that section 8 provides that "Any and all pieces or parcels of land situated and embraced within the boundaries of the towns of Somerset, Newfane, Wilson, and Lewiston, * * * except such pieces or parcels of land as by law were taxable in other towns prior to the passage of the general railroad bonding act of 1869, * * * shall be assessed for all taxes levied in said towns for the purpose of paying and liquidating any and all obligations or indebtedness of the towns aforesaid, respectively." The answer alleges that—

"At the time of the issue of said bonds there were, and ever since have been, and still are, a large number of persons owning and occupying farms divided by the town lines between the town of Lewiston and towns adjoining thereto, the occupants whereof then, and ever since have continuously, resided and still reside in the said town of Lewiston."

The pleader may have had in mind some article of the constitution which he thought forbade this legislation, but it is not pointed out. No authority has been cited upholding such a proposition, and the entire subject is, with the exception of the brief paragraph of the answer quoted, left wholly to conjecture. This court, in any case, should hesitate long before pronouncing, in advance of the state courts, a state act unconstitutional; but here there is apparently no foundation for the allegation. It is difficult to see wherein the limits fixed by the constitution are transgressed, and why the subject-matter of the act does not come directly within the scope of legislative powers. It follows that the plaintiff is entitled to recover.

PORTER and others *v.* BEARD.

(*Circuit Court, D. Massachusetts.* March 5, 1883.)

DUTIES—ACTION TO RECOVER FOR ERRONEOUS ASSESSMENT.

Where, under decision 3633 of the secretary of the treasury for 1878, a merchant leaves a sum of money with the collector of duties instead of the goods, and an examination is made by the appraisers before delivery, and the importer binds himself to abide the results of the appraisement "the same as if the goods had been retained," *held*, that neither party can take advantage of the delivery as changing the rights of the other.

C. L. Woodbury and *J. P. Tucker*, for plaintiffs.

Chas. Almy, Jr., Asst. U. S. Atty., for defendant.

LOWELL, J. In this action against the collector to recover back duties, said to have been erroneously assessed, the parties have waived a trial by jury, and have agreed to most of the facts. The losing party is to have 20 days to file exceptions to my rulings of law.

The goods were 33 packages of dye-stuffs, imported from France, by way of Liverpool, entered and liquidated at a valuation, which the defendant afterwards raised by reliquidation. The regularity of the reappraisement and reliquidation is denied. The plaintiffs had received their goods, excepting eight cases, before the controversy arose; and, when they paid the additional duty on all but these eight cases, the collector had no means of compelling the payment, and they cannot now recover the money from him, since the payment was voluntary. *U. S.* v. *Schlesinger*, 14 FED. REP. 682.

The eight packages were delivered after a reappraisement had been begun, and upon what are known as special deposits, under decision 3633 of the secretary of the treasury for 1878, p. 578 of the printed synopsis for that year, by which a sum of money is left instead of the goods, and an examination is made by the merchant appraiser and general appraiser before delivery, and the importers bind themselves to abide the results of the appraisement "the same as if all the goods had been retained." Where goods are received in this way, I hold that neither party can take advantage of the delivery, as changing the rights of the other. On the one hand, the collector cannot say that the payment was voluntary, because he had the power to appropriate the plaintiffs' money instead of their goods; and, on the other hand, the plaintiffs are estopped to contend that the new liquidation was made after the goods were delivered.

These eight packages were imported at four different times, but one will serve to illustrate the question which has been argued. Two cases of "Nicholson Blue, A," were imported by the Istrian, and entered January 15, 1878, at the invoice valuation, and the entry was liquidated accordingly, February 8, 1878. In March, 1879, the appraisers recalled the invoice and made a new report, April 9, 1879, increasing the value on these two cases. The plaintiffs asked for the appointment of a merchant appraiser, as provided by Rev. St. § 2930, and one was duly appointed and sworn. These two cases were sent to the appraiser's store, June 5, 1879, and were duly examined, and there were several hearings by the board, at which both parties ex-

amined witnesses, and at which counsel were heard. December 10, 1879, the board reported, sustaining the higher valuation of these Nicholson Blue, A, goods, and the defendant made a reliquidation of the entry, April 20, 1880. In the mean time the goods were delivered June 6, 1879, in the special manner already mentioned. The duties were assessed at this higher valuation, and were paid under protest, and due appeal was taken to the secretary of the treasury, who confirmed the doings of the collector.

The only point of protest and appeal now insisted on is that the reliquidation was made more than a year after the entry, the goods having been delivered and duties paid in the mean time, contrary to St. 1874, *c.* 391, § 21, (18 St. 190.)

To this contention there appear to be two answers: (1) In point of fact, the duties were not paid on these eight packages of goods until after the reliquidation. (2) If I am mistaken and the goods had been delivered, it was under a stipulation which treated them as still in the possession of the defendant, and bound the plaintiffs to abide the results of the reappraisement. The only result which it was important that they should abide, was the reliquidation which ensued, of course, when the value was increased by the board of appraisers.

My decision, therefore, is that the reliquidation of the eight packages was regular and binding, and that the plaintiffs cannot recover. When the bill of exceptions has been filed and allowed, there will be judgment for the defendant.

THE SARATOGA, etc.

(*Circuit Court, S. D. New York.* February 27, 1883.)

1. PENALTY—PROCEEDINGS TO RECOVER—VIOLATION OF REVENUE LAW.
   Whenever a vessel, or the owner or master of a vessel, has become subject to a penalty for a violation of the revenue laws of the United States, such vessel shall be holden for the payment of such penalty, and may be seized and proceeded against summarily by libel to recover such penalty.
   Section 3088, Rev. St.
2. SAME—WHEN VESSEL NOT SUBJECT TO SEIZURE.
   The act of congress of February 8, 1881, provides that no vessel shall be subject to seizure or forfeiture as above by reason of the penalty incurred under section 2873, Rev. St., unless it shall appear that the master, at the time of the alleged illegal act, was a consenting party or privy thereto.

Stewart L. Woodford, U. S. Atty., for appellant.
Goodrich, Deady & Platt, for claimants and appellees.

WALLACE, J. Upon the appeal to this court from the district court, the libel to which the claimants' exceptions were sustained in the court below has been amended so that it affirmatively concedes that the libeled vessel "was used by the owners thereof as a common carrier in the transaction of their business as such carrier, and that neither the owner nor the master was a consenting party or privy to the illegal act for which the penalty was incurred." This amendment relieves the case from any mere technical question, and the right to seize the vessel and proceed against it summarily by libel under section 3088, Rev. St., to recover a penalty incurred under section 2873, although it was a vessel used as a common carrier, and neither the owner nor master was a consenting party or privy to the act for which the penalty was incurred, is the broad question presented by the claimants' exceptions. The act of congress of February 8, 1881, declares explicitly that a vessel so used shall not be subject to seizure or forfeiture by force of the provisions of title 34 of the Revised Statutes, unless it shall appear that the owner or master, at the time of the alleged illegal act, was a consenting party or privy thereto; and section 2873 is one of the provisions of that title.

Fully concurring in the conclusion reached by the district judge, and deeming that nothing can be added to the convincing exposition which this act has received in the opinion delivered by him, his decision is adopted, and the exceptions are sustained by this court.

LORILLARD and others *v.* WIGHT.

(*Circuit Court, D. Maryland.* February 21, 1883.)

1. TRADE-MARK—COLORED TIN DEVICES.

Where complainants were the first to adopt and use as a mark for their product tin tags variously colored, with the name of their brand and their own name stamped thereon and fastened upon the outside of their plugs of tobacco, although their patent therefor was declared void after surrender and reissue, they had the right to the device as a trade-mark, the public having come to know their tobacco by the tags of their peculiar color, shape, and size.

2. SAME—INFRINGEMENT.

Where defendants use tin tags which are a close imitation of the tags of complainant,—so close an imitation that they are calculated to mislead the retail purchaser, whether so intended or not,—it is an infringement of complainants' trade-mark, and such use may be enjoined.

In Equity. Motion for injunction.

Cowen & Cross, for complainants.

Charles Marshall, for respondent.

Before BOND and MORRIS, JJ.

BOND, J. This bill alleges that the complainants are largely engaged in the manufacture and sale of plug tobacco; that it frequently occurred, after a box of tobacco sold by them was emptied, the dealer would refill it with other tobacco not of complainants manufacture, and by means of the labels and trade marks on the box, sell it for tobacco of complainants. That to prevent this fraudulent practice the complainants invented a disk of tin, upon which was stamped their name and the names of the brand of tobacco, placed it upon each plug of tobacco in a box, and varied the colors of the disks so as further to distinguish to the eye the brands, and sold their product and advertised it as red tin tag or blue tin tag tobacco. The device in the present suit complainants allege they first adopted about August, 1879. At one time they placed the tag beneath the last covering or skin of the tobacco, where it would be held firmly and show through the surface. For this process they obtained a patent, which afterwards they surrendered and obtained a reissue, which was subsequently declared void, because it embraced more than the original patent. But the bill alleges that they had constantly used the device of a colored tin tag, with their name and the brand of the tobacco stamped upon it, placed upon the outside of the plug as a trade-mark in order to show a purchaser at retail that each plug of tobacco purchased by him was of the Lorillard manufacture. The complainants allege further that having advertised their tobacco largely as "red tin tag," "blue tin tag," "green tin tag" tobacco, it is known generally by those names to consumers, who ask for it at the shops by those appellations and know that they get Lorillard tobacco when they see the "red tin tag" or "blue tin tag" upon each plug. The defendant, who alleges himself to be a broker and not a manufacturer of tobacco, denies that complainants have any trade-mark, but alleges that the use of tags to distinguish the grade and quality of many manufactured articles has long been practiced, and that even if the complainants had such a trade-mark defendant has not infringed it, because those whom he represents as broker make tobacco of such different sizes and colors, and use tags with names of brands so different from complainants', that no one would mistake the one for the other.

We think the evidence shows that the Lorillards were the first to adopt and use as a mark for their product the tin tags variously colored with the name of the brand and their own name stamped thereon

and fastened upon the outside of plugs of tobacco; that while their patent for fastening these tags on the tobacco was declared void after surrender and reissue, they clearly had the right to the device as a trade-mark, the public having come to know their tobacco by its having on it tin tags of a peculiar color, shape, and size.

This being so, a glance at the device used by the defendant, or those whom he represents as broker, is clearly an imitation of the Lorillard device, or the Lorillards' is an imitation of it. To be sure, the little disk of tin upon the tobacco sold by defendant has upon it different names for the brand, and has not Lorillard's name. But the words are in such small letters that no one without the closest inspection would distinguish the difference. But they are of the same size and shape, of precisely the same color and enamel finish, and the minute letters on them are made with same colored ink.

The proof shows that the complainants have for a long time, and very extensively, advertised their tobacco as "red tin tag" or "blue tin tag" plug tobacco. It may not be sold to jobbers always as such, but it is so inquired for by and sold to the consumer.

The purchasing public, notwithstanding the size of the plugs of tobacco sold by defendant, and their color and flavor, may differ from the size and color and flavor of Lorillard's plug tobacco, would be deceived by the color of the tag and its resemblance to that of complainants', and think the red-tag tobacco of the one is the red-tag tobacco of the other. The defendant contends that the shape and flavor of the plug sold by him will advise the retail purchaser of the manufacturer. But one seldom determines the manufacture by the size of the piece the dealer gives him for his money, and he cannot taste the tobacco till after he has bought it. Besides, if the size and flavor of the plugs will show the purchasing public they are buying the defendant's or his principal's tobacco, why should he use a tag of any color to distinguish it. For some reason the tags closely resembling those in use by complainants are placed upon the article sold by him, when, as he claims, the public would know his manufacture by the label on the box, the size and shape of the plug, and its flavor.

We think the Lorillards were the first to adopt this method of distinguishing the grade and quality of manufactured plug tobacco; that they have a trade-mark; that the defendant's tin tags are a close imitation of it—so close that they are highly calculated to mislead and do mislead the retail purchaser, whether it is so intended or

not; and that he should be restrained from selling tobacco having such imitated devices. The defendant has the right to use tin tags, but they must be of such size, shape, and color as will not mislead the public.

An order will be passed in accordance with this opinion.

MORRIS, J., concurred.

NEW YORK BELTING & PACKING CO. and others *v.* SIBLEY.

(*Circuit Court, D. Massachusetts.* March 2, 1883.)

1. PATENT LAW—CONSTRUCTION OF CLAIMS IN LETTERS PATENT.
   The disclaimers, qualifications, and limitations imposed by the patent-office upon a patentee are forever binding upon him if he chooses to accept a patent containing them. Such qualifications are conditions precedent, and are made to protect third persons, who might otherwise be misled to their injury by the subsequent enlargement by reissue or by construction.
2. SAME—REMEDY OF PATENTEE.
   The applicant for a patent may refuse to take it with limitations, and being rejected may apply to the supreme court of the District of Columbia, under Rev. St. § 4911; and, if still dissatisfied, he has his remedy in equity by section 4915.

C. H. Drew, for complainant.

B. F. Thurston and *F. P. Fish*, for defendant.

Before GRAY and LOWELL, JJ.

LOWELL, J. The decision of this case, like so many others of its class, depends upon the construction to be given to the claims of the patent. It is No. 140,635, granted to George Merrill, July 8, 1873, for an improvement in knitting-machines. The result accomplished by the new machinery is the production of a knitted fabric, into which warp and weft threads are introduced, without weaving in the ordinary mode, for the warp and weft are locked or held together by a second weft or knitting thread. Any knitting-machine may be adapted to this use, and the mere operation of knitting in not changed. The most essential thing is to present the warps to the knitting needles at an angle to the line of action or reciprocation of the needles, else there will be no opportunity for them to move as they must, in and out, to form and interlock the loops. So plain is the necessity for this special mode of operation, that the witnesses in chief for the plaintiffs testify that a piece of cloth shown them as having been

made by the defendant must have been made by a machine substantially like that of the patent; and this appears to be so, if the claims can have the broad scope which the plaintiffs contend for.

The invention is said in the specification to be applicable to several different kinds of cloth, and that which is particularly described, which is a tube made on a circular knitting-machine, has been found very valuable for the hose of fire-engines, and other similar purposes. A cylinder, called the ring, C, is furnished with needles, which reciprocate vertically; a frame, F, for distributing the warp threads, is suspended above the cylinder, and provided with a hole or space for each warp thread, and is so much larger than the cylinder that the warp threads which pass through it are bent over as they descend, and are presented at an angle to the line of reciprocation of the needles; and, by raising or lowering this frame, the angle may be varied. Two weft threads are now laid round the cylinder,—one for the filling and one for the knitting, or locking, which is done by the needles in any ordinary mode of knitting.

The fifth and last claim of the patent is not infringed. The other four contain, as an element of their combination, the warp frame, F.

The first claim is:

"(1) In combination with a series of reciprocating needles, arranged to operate as described, the frame, F, or its equivalent, arranged to guide and deliver a series of warp threads, at an angle to the line of reciprocation of said needles, between the needles, substantially as set forth."

Claim 2 is for—

"Such a frame, or guide, F, when made adjustable in relation to the needles, whereby the angle at which the warp threads are presented to the needles may be varied, as set forth."

The third and fourth claims both mention a frame or guide arranged to deliver its threads at an angle to the line of reciprocation of the needles.

This case turns upon the question whether the defendant uses the guide frame, F, or its equivalent. He has a frame which is not of such a shape as to present the warp threads at angle to the line of reciprocation of the needles. For this purpose he uses a cam placed towards the bottom of his cylinder, which pushes out a few threads at a time at the right moment. The plaintiffs insist that the devices of the defendant are the equivalents for his warp frame. The defendant replies that a patent was granted in England, in 1852, to Nichols, Livesey & Wroughton, for a knitting-machine, calculated to

do the work of the plaintiffs' machine. These English patentees, in their specification, take for granted one well-known sort of knitting-machine, in which the needles are horizontal, and do not reciprocate, but the fabric reciprocates, and show how warp and weft threads are to be laid and knitted into a fabric substantially like Merrill's. The defendant has produced in court a machine which appears to be made from the description and drawings of this patent. This machine employs a cam for pushing out the warp threads. On the other hand, the plaintiffs contend that the Nichols, Livesey & Wroughton patent was a paper patent merely, and that the machine described in it would do no useful work.

We are of opinion, in accordance with the defendant's argument, that the plaintiffs are estopped to say that the English patent did not describe a working machine. When Merrill applied for his patent, with claims in which the guide or frame, F, or its equivalent, was claimed in a general way, the examiner wrote that several of the claims were anticipated by the patent of Nichols, Livesey & Wroughton, and by two others. The first claim was then amended by adding after the word "guide" the words "and deliver," and after the words "frame, F, or its equivalent, arranged to guide a series of warp threads," these words: "at an angle to the line of reciprocation of said needles." The examiner again objected that the first claim would still be too broad unless a certain part of the specification should be limited, and that other claims, which mentioned the frame, F, without the qualification which had been added to the first claim, were still too broad; for, though they claimed the frame in combination with reciprocating needles, "it is not supposed," he wrote, "that applicant intends to base any claims to patentability upon the fact that his case employs reciprocating needles, while those in the reference are stationary, for both classes of machines are equally familiar," etc. The applicant appealed to the commissioner of patents, but without effect. He then submitted amended claims, in which he added, after frame, F, the words "arranged as above described," and the office required him to add, after arranged, "to deliver its threads." In the letter making this condition, the examiner wrote, in reference to a change in the specification such as he had before referred to:

"As the whole merit of the case is made to turn on the fact that the warp threads are delivered to the needles at angle to the line of their reciprocation, and as the specification describes no advantage in so delivering them, rather than moving them out of line, (as in the reference cited,) it should be amended to do so."

Accordingly the patentee added the paragraph which immediately precedes the claims:

"The great advantage of a machine constructed on this plan is that by thus combining the reciprocating needles with a warp frame, arranged to deliver its threads as described, the needles in their movements pass between the warp threads, and are in such a position that the weft and locking threads can be laid in position by a simple carrier, and the whole operation of uniting and binding together the threads is performed by the needles alone, without the use of any other devices; the needles and the mechanism that operates them being the same as is in general use in knitting-machines."

In this paragraph we find admissions and statements which require us to say that the change from one form of knitting mechanism to another has nothing to do with this invention, and that the frame, F, delivering its threads at an angle, is not the same thing as a frame which cannot of itself guide and deliver the threads at an angle, but must add a cam, or "other devices," as the patent has it, for that purpose.

It has been several times decided by the supreme court that disclaimers, qualifications, and limitations, imposed upon a patentee by the patent-office, are forever binding upon him if he chooses to accept a patent containing them. Not only are third persons likely to be misled to their injury by any subsequent enlargement by reissue, or by a broad construction of claims thus intended to be limited, but these qualifications are conditions precedent, without which there would have been no grant at all, and, of course, the grant must be taken as it is given. If the applicant considers the case important enough, he may refuse to take a limited patent, and, being then rejected altogether, may apply to the supreme court of the District of Columbia, under Rev. St. § 4911; and if still dissatisfied, he has his remedy in equity by section 4915. These remedies are ample, and they are exclusive under the decisions cited by the defendant. *Legett* v. *Avery*, 101 U. S. 256; *Goodyear Co.* v. *Davis*, 102 U. S. 222; *James* v. *Campbell*, 104 U. S. 356; *Miller* v. *Brass Co.* 104 U. S. 350, 355, per BRADLEY, J.

Construing the patent as we must according to the requirements of the office, acquiesced in by the patentee, the defendant does not infringe it, because his frame has not the peculiar construction which the examiner declared was the only ground for issuing the patent. It does not guide and deliver the warps at an angle without the aid of other devices, but employs a cam to assist in that work, as in the older English invention. Bill dismissed.

STANDARD MEASURING MACHINE CO. *v.* TEAGUE and others.

(*Circuit Court, D. Massachusetts.* March 2, 1883.)

1. PATENT LAW—INFRINGEMENT.

Where a wholly new method or art has been discovered by a patentee, the courts will construe the claims of his patent broadly, and so as to cover all such mechanical means as embody the real invention.

2. SAME—EVIDENCE OF INFRINGEMENT.

Evidence, in an action for infringement of a patent, that the defendants made one machine of the kind complained of and exhibited it at a mechanic's fair, is not sufficient, in the absence of proof that they ever used or sold such machines.

Chauncey Smith and *T. L. Wakefield*, for complainants.

George L. Roberts & Bros., for defendant.

Before GRAY and LOWELL, JJ.

LOWELL, J. The plaintiffs bring this suit for the infringement of two patents. The first and more important patent is No. 194,743, granted to Tapley and Porter, August 28, 1877, entitled "improvement in devices for automatically measuring the superficial area of sides of leather," etc., and is described as consisting, first, in the use, in combination with a weighing scale, and an index operated thereby, of a series of weights suspended above the platform of said scale at points equidistant from each other, and each representing a given fractional part of a square foot of area, and adapted to be automatically deposited upon the platform of the weighing device, either separately, collectively, or any given number thereof, according to the area of the object to be measured.

The patentees then proceed to describe the particular machinery by which this operation is to be performed:

A number of pins are set above the platform of the weighing device, and to each pin is attached a weight, both being held above the platform by a spiral spring attached to the pin; the pins project through perforated tables, and the upper table, which is set on springs, rises to the exact height of the pins. The skin, or other thin article, to be measured, is laid on this table, so that it is supported in part by the table, and in part by the heads of so many of the pins as its area will cover; a "follower," or pierced platform, is now brought down over the skin by a simple lever, and these two, with the pins upon which the skin rests, are lowered by the action of the same lever until these pins deposit their weights upon the platform of the weighing device; the remaining pins are not acted on at all, but push up through the holes in the follower. The pins are equidistant from each other, and the weights are all precisely alike. The result is that certain definite areas of the leather, marked out by the distance of the pins from each other, are represented by certain equal

weights, which are registered on the scale of the weighing machine. It is of no consequence what the areas are, or what the weights are, so that they are all alike; so many square inches, or halves, or quarters, or any other fractions of an inch, or of a foot, are represented by so many pins carrying equal weights, which may be pounds or ounces, or any known weight, or definite fraction of such weight, provided the scale is graduated accordingly.

The patent was reissued May 18, 1880, as No. 9,204, and this suit is, of course, brought on the reissued patent.

The only evidence in the case is that of experts on each side, and admissions of the defendants as to certain machines. It appears from the absence of testimony which would not fail to be produced, if it could be found, that this invention was wholly new, and that, for the first time, the superficial area of a side of leather, or other thin article, was ascertained by a weighing machine, through the ingenious conception and contrivance of representing a given area by a given weight.

The defendants admit that they own two later patents, called in the record Winter No. 1 and Winter No. 2, and that they have made and sold a machine made in conformity with No. 2, which is represented in the case by a model. The only questions in this part of the case are, whether this machine infringes the reissued patent; and, if it does, whether any claim which it infringes is justified by the original.

The defendants' machine has a perforated or "slatted" table, upon the rear of which is balanced, upon knife edges, another table, or frame, or follower, to the slats of which are hung weights at equal distances from each other; the front of this frame is connected with a spring balance, which has an index graduated to represent areas of surface. When the frame is brought down to the table, with nothing between them, all the weights pass through the interstices of the table; when a skin is placed upon the table and the frame is brought down, the skin intercepts a number of weights, according to its area, and the weighing machine indicates the exact area thus intercepted.

The plaintiffs rely on the first and second claims of the reissue. The first claim is:

"(1) A machine for measuring surfaces, embodying the following elements, viz., a weighing mechanism provided with an index finger, and a scale graduated to represent square feet and fractional parts thereof; and a Jacquard mechanism adapted to be acted on by the object to be measured, and thereby cause a movement of the index finger along the scale, in proportion to the size of the object being measured, for the purposes specified."

The second is still more general.

We think both these claims are infringed. The accomplished expert of the defendants testified that no Jacquard mechanism was ever operated by strings and weights; but, in reply, the complainant's expert proved, by a citation from Knight's Mechanical Dictionary, that such a contrivance, in a loom called Jacquard, was known before the date of this patent.

In the defendants' machine, as compared with that sued on, everything is reversed; the weights descend to the leather, instead of the leather to the weights; the index is arranged to show areas by the weights omitted, rather than by those covered; a spring balance is substituted for the platform scale. But, considering that Tapley and Porter had discovered a wholly new method or art, they should be permitted to construe their patent broadly, covering all such mechanical means as embody the real invention, which is, equidistant weights to correspond with equal areas, and a selecting mechanism like the Jacquard, to cause the aggregate of these weights to be measured upon the index of a weighing machine. So construed, there is no doubt of the infringement.

This invention was described in the original patent. We suppose the reissue was taken out to guard against a narrow construction of the claims of the original patent; but, in so novel an invention, we think the first and sixth claims of that patent might well be held to embrace the defendants' machine. The only points in which they might seem to be too narrow, are in mentioning the platform of a weighing machine, when, as we have seen, the defendants use a spring balance, and, in one of the claims, a downward movement of the leather is mentioned, whereas the defendants move their weights down to the leather. These are undoubted and well-known equivalents, and the omission of a distinct claim for equivalents is not important.

The second or Etheridge patent, dated August 28, 1877, No. 194,662, which is for an improvement on the Tapley and Porter invention, is owned by the plaintiffs, and is thought by them to have been infringed by the defendants in making a machine under their own patent, Winter No. 1. There is very little evidence upon the subject in the record, and the defendants object, with some reason, that there is no call upon the court to decide whether Winter No. 1 does infringe Etheridge. The only evidence of infringement is an admission by the defendants that they made one machine like their patented improvement (No. 1) and exhibited it at the mechanics' fair, in Boston, in 1878. They do not admit that they ever used or sold such a

machine, but contend that it was made, or may have been made, as a model or illustration of their own patent. We consider the evidence of infringement of this patent insufficient to require us to compare the inventions with each other.

Decree for the complainants.

KIMBALL and others *v.* HESS and others.

(*Circuit Court, N. D. New York.* February 26, 1883.)

1. PATENT LAW—CONSTRUCTION OF THE CLAIMS OF THE PATENTEE.
   Where the patentee appears to have been the first to discover a new method or process, the court will, if possible, give a broad enough construction to his claims to cover all such mechanical means as embody the real invention.
2. SAME—INFRINGEMENT.
   The defendants employed the plaintiff's patented process of treating tobacco, with the exception that they made use of an equivalent for the gum arabic used by the plaintiffs to produce the same effect as that rendered by the plaintiff's process. *Held*, an infringement.

Geo. B. Selden and *B. F. Thurston*, for complainant.

W. F. Coggswell and *H. McGuire*, for defendants.

WALLACE, J. Infringement is alleged of letters patent granted to the complainant as assignees of William S. Kimball, bearing date June 30, 1874, for an improvement in preparing tobacco. The patent contains two claims—one for a process and the other for the product. The invention relates to a process of treating tobacco while being prepared for use by which the product known in the trade as "flake-cut tobacco" is made. Tobacco known by that name is readily distinguished by its appearance from other varieties of the manufactured article, but was unknown until it was introduced to the trade by the patentee about a year prior to obtaining his patent. When the process of its preparation is completed, the article as designed for use, instead of being fluffy like the long-cut, or fleecy like the fine-cut, or broken like the granulated, is in the form of thin flakes, the particles adhering closely together and being hard and dry. When crumbled for use the flake-cut does not pack as closely in the pipe as the other preparations, and thereby facilitates a better draft, and the smoke is cooler and freer, and does not burn the tongue. Practically there is no difficulty in determining what is meant by the term "flaky" as descriptive of the characteristic of the product.

The utility of the invention is demonstrated by the fact that the "flake-cut" speedily became recognized as an approved preparation of smoking tobacco, and since its introduction has commanded a large and constantly-increasing market. The defendants have added their contribution to the general acknowledgment of its merits by manufacturing it and introducing it to their customers. The validity of the patent is contested upon the grounds that the specification is so ambiguous and obscure as to render the patent void, and that there is neither novelty nor utility in the invention. The reasons why these defenses were held to be untenable were stated by the court orally at the close of the hearing, and it is unnecessary to repeat them now. It has been deemed best, however, to formulate the views of the court in regard to the construction of the patent, in order that there need be no misapprehension as to what constitutes infringement.

In view of the prior state of the art, the gist of the invention described in the patent consists in treating the leaves of the tobacco while they are being prepared for the cutting-machine with a solution of gum arabic or an equivalent adhesive material, so that the leaves will adhere together without other pressure than they are subjected to by the cutting-machine. A sufficient quantity of the gum arabic or its equivalent must be employed, so that the fibers will adhere together after passing through the cutting-machine, and remain in flakes or lamina after the product is dried and prepared for use. This broad construction is given because the patentee was the first, so far as the proofs show, to employ an adhesive material during the process of preparation for the purpose of producing the flaky characteristics which not only serve to distinguish the product, but impart to it its peculiar value.

The proofs show that tobacco prepared for chewing has customarily been treated with a variety of materials for sweetening or flavoring it. Some of these, like licorice, contain sufficient gum to produce more or less adhesion between the leaves when they are moistened and pressed together in the cutting-machine. They were never applied with the object of producing adhesion, and the degree of adhesiveness which they contributed, when appreciable, was inconsiderable. Unless they are used in such proportions as to be not only an equivalent for gum arabic, but to impart the flaky characteristic to the product after it is dried and fully prepared for use, the patented process is not infringed. The defendants for a time adopted the precise treatment described in the patent; subsequently, however, they dispensed with the gum arabic and saturated the leaves

of their tobacco with adhesive substances by sweetening them with syrup, and intermixing with the leaves what is known as plug-scrap, which is highly charged with adhesive material. Their product, upon examination, is found to contain a greater quantity of adhesive material than the complainant's product as usually prepared according to the process of the patent. Whether the defendants have thus attempted a colorable evasion of the patented process, or whether in good faith they have believed themselves justified in adopting their substituted treatment, is not material. They have used an equivalent for the gum arabic of sufficient adhesive properties to impart the flaky characteristic to the product when dried. This is infringement.

The usual decree for an injunction and accounting is ordered.

BURDELL *v.* COMSTOCK.*

(*Circuit Court, S. D. Ohio, W. D.* March 5, 1883.)

1. DAMAGES FOR INFRINGEMENT OF PATENT—WHEN EQUITY HAS JURISDICTION.
   The proper forum in which to sue for damages arising from infringement of a patent is a court of law, but chancery courts may take cognizance of such cases if they involve some element of equitable jurisdiction; and when such courts have once rightfully obtained jurisdiction they may proceed and decree full relief.
2. SAME—SUIT BROUGHT JUST BEFORE EXPIRATION OF PATENT—FRAUD ON EQUITY JURISDICTION.
   Where, though a bill in equity, alleging infringement of a patent and praying for an injunction and an account, was filed only five days before the expiration of the patent and no effort was made to obtain an injunction, *held* that the prayer for an injunction was a mere pretext, and that the court never acquired jurisdiction of the case.
   Gottfried v. *Moerlein*, 14 FED. REP. 170, distinguished.
3. DEFECT OF JURISDICTION—WHEN AVAILABLE.
   A plain defect of jurisdiction may be insisted upon at the hearing.

In Equity.

Hoadly, Johnson & Colston, for complainant.

Perry & Jenney, for respondent.

BAXTER, J. The proper forum in which to sue for damages arising from an infringement of a patent is a court of law. *Root* v. *Railway Co.* 105 U. S. 189. But chancery courts may take cognizance of such cases if they involve some element of equitable jurisdiction.

*Reported by J. C. Harper, Esq., of the Cincinnati bar.

Owners of patents are entitled, as well to protection against future invasions of their rights, as to compensation for past injuries. Hence, parties desiring such relief must, from the necessities of their cases, invoke the aid of courts authorized to issue injunctions, and when jurisdiction is once rightfully obtained, the court may proceed and decree full relief. This principle was applied in the case of *Gottfried* v. *Moerlein*, 14 FED. REP. 170. The bill in that case was filed 16 months before the expiration of the patent sued on. Therein the complainant prayed for an injunction and an account. The prayer for an injunction, based on a statement of facts *prima facie* entitling the complainant to that relief, gave equitable jurisdiction. The defendant acquiesced in this view of the case. He took no exception to the jurisdiction, but answered and proceeded to take proof and prepare the case for trial. The patent expired in May, 1881, and the case was heard in November, 1882. Most of the evidence was taken after the patent had expired. When the case was called for hearing, the defendant moved to dismiss it for the want of jurisdiction. But the court thought that the jurisdiction acquired in the beginning was not ousted by the subsequent expiration of the patent, and disallowed the motion. I am satisfied with the decision and adhere to it. But this is a very different case. The bill herein was filed in November, 1864, just five days before the expiration of the patent sued on. It also prayed for an injunction and an account. But it is manifest that the prayer for an injunction was a mere pretext—"a device to transfer a plain jurisdiction to award damages from a court to which it properly belongs, to this court." *Betts* v. *Gallais*, L. R. 10 Eq. 392. The injunction prayed for was neither expected nor desired. No court would, under the facts stated, have granted it. If issued, it could only have operated for the few days intervening between the filing of the bill and the expiration of the patent. We have no hesitation in declaring that, upon these facts, this court *never had jurisdiction of the case.* The defendant, taking this view of the law, promptly demurred, alleging a want of jurisdiction. His demurrer was overruled. But this decision is not conclusive of the question. Objections to the jurisdiction are usually taken in the first instance, but a plain defect of jurisdiction may be insisted upon at the hearing. *Thompson* v. *Railroad Co.* 6 Wall. 137. Our opinion is that this court is without jurisdiction, and complainant's bill will, therefore, be dismissed, with costs.

BURDELL *v.* DENIG and others.*

(Circuit Court, S. D. Ohio, W. D. March 5, 1883.)

1. REPLICATION—NEW CAUSE OF ACTION.
   A replication cannot go behind the case made by the declaration and add another and different cause of action.
2. PATENTS—ACTION FOR DAMAGES FOR INFRINGEMENT—INSUFFICIENT REPLICATION TO PLEA OF AN ACCORD AND SATISFACTION.
   In an action for damages for infringement of a patent, plaintiffs averred the construction and use by defendants of certain infringing machines from January 23, 1861, when plaintiffs acquired their joint title to the patent, until the commencement of the action, October 6, 1861. Defendants pleaded an accord and satisfaction with an authorized agent of plaintiffs, to which plaintiffs replied that on March 13, 1860, (nearly a year before plaintiffs acquired their joint title to the patent,) the defendants purchased the infringing machines from persons unknown to and with whom plaintiffs had no connection, and that defendants thereafter used said machines as alleged in the declaration. On demurrer such replication *held* to be bad.

Hoadly, Johnson & Colston and *Pugh & Pugh*, for complainants.
Perry & Jenney, for defendants.

BAXTER, J. This suit was commenced on the seventh of October, 1861. At a trial thereof had several years since, plaintiffs recovered a judgment for $125. This judgment was reversed by the supreme court and the cause remanded to this court for a retrial. Upon its return the parties began to plead *de novo*. The case, as made by plaintiffs' amended declaration, is a claim for damages alleged to have been sustained by the plaintiffs by reason of an infringement of a patent, described in the pleadings, in consequence, as is averred, of the construction and use of seven sewing-machines, by defendants, from the twenty-third of January, 1861,—the date at which the plaintiffs acquired their first title to the invention alleged to have been infringed,—until the commencement of this suit in the following October,—a period of 8 months and 14 days. If the plaintiffs recover and obtain a fair assessment of damages, they would probably not recover enough to pay more than 10 per cent. of their attorney's fees for services in the prosecution of the suit. Nevertheless, they are American citizens, and have a constitutional right to litigate, if they want to, and, judging from the record, there is no just ground to doubt their desire to be heard.

Plaintiffs' amended declaration was filed January 7, 1881. The defendants pleaded thereto two special pleas, averring in substance

*Reported by J. C. Harper, Esq., of the Cincinnati bar.

an accounting with an authorized agent of the plaintiff for the damages claimed in this action. To these, plaintiffs file eight replications. In two of them they set out and aver that on the thirteenth of March, 1860, nearly a year before they acquired their joint title to the invention alleged to have been invaded, the defendants purchased the seven sewing-machines, detailed in their declaration, from parties unknown to and with whom plaintiff had no connection, and that they thereafter used them as set forth and alleged in their declaration.

Possibly there may be some pertinency in these two replications; but if so this court is unable to see it. No recovery can be had in this suit for any infringement of the plaintiffs' patent before they acquired their title thereto. The defendants raise no question as to the validity of plaintiffs' patent, nor do they deny their title, or the alleged use thereof. Their defense is that they have accorded with and paid, or secured to be paid to an authorized agent, the damages claimed therein. This is the issue tendered by the defendants' special pleas. The replication is an effort to go behind the case made by the declaration, and add another and different cause of action. To these replications defendants demur, and we think the demurrer is well taken. But the case will proceed to trial on the other issues made by the pleading. This court, however, thinks that now, after the lapse of 21 years, 4 months, and 26 days since its institution, the case might be amicably adjusted, without offending the court or doing violence to the rights of the parties.

POAGE *v.* McGOWAN and others.*

(*Circuit Court, S. D. Ohio, W. D.* March 5, 1883.)

1. REISSUE INVALID BY REASON OF DEFECTIVE AFFIDAVIT—"INOPERATIVE AND INVALID" CONSTRUED.

   Where the affidavit, upon an application for the reissue of a patent, alleged simply that the patent sought to be reissued was not "fully valid and available," *held*, that that language is not the equivalent of the statutory requirement that the original must be "inoperative or invalid by reason of a defective or insufficient specification," and that a reissue predicated on such an affidavit is invalid.

2. Reissue No. 5,544, for improvement in water-tanks for railways, *held* invalid.

*Reported by J. C. Harper, Esq., of the Cincinnati bar.

In Equity. Suit on reissued letters patent No. 5,544, granted to the McGowan Pump Company. The original patent was No. 63,418, issued to John Morton for an improvement in water-tanks for railways.

L. M. Hosea, for complainant.

Stem & Peck, for respondents.

BAXTER, J. Complainant complains of an infringement by defendants of a patent which he claims to own. His prayer is for an injunction and an account. The original, of which complainant's patent is a second reissue, was issued on the second of April, 1867. It was reissued September 5, 1871, and again on August 1, 1873. The defendants, among other defenses, deny the validity of the reissue sued on. A reissue may be had when the original "is inoperative or invalid by reason of a defective or insufficient specification, when the same arises from inadvertence, accident, or mistake, without any fraudulent or deceptive intention." They are obtained, as originals, upon petition and affidavit of the applicants. These set forth the grounds upon which the applicant demands either the original or reissued patent.

A petition and affidavit were filed upon which the reissued patent sued on herein was predicated. But the affidavit does not affirm that the original or the first reissue was either inoperative or invalid, but in lieu of this statutory requirement the affidavit alleges that the same was not "fully valid and available." The language thus employed is not the equivalent of that prescribed by the statute; it is an evasion, declared by this court in *Whitely* v. *Swayne*, 4 Fisher, 117, to be insufficient to support a reissued patent. For a full discussion of the question reference may be had to Judge LEAVITT'S opinion in that case. See, also, the following: *Giant Powder Co.* v. *Cal. Vigoret Powder Co.* 18 O. G. 1339; *Twain* v. *Ladd*, 19 O. G.; *Miller* v. *Bridgeport Brass Co.* 21 O. G. 201; and *James* v. *Campbell*, 21 O. G. 341.

The complainant's reissued patent, tested by these adjudications, was issued without authority of law, and is invalid. His bill will, therefore, be dismissed, with costs.

POPE MANUF'G CO. *v.* MARQUA and others.*

(*Circuit Court, S. D. Ohio, W. D.* March 5, 1883.)

1. REISSUES INVALID BECAUSE OF UNREASONABLE DELAY IN APPLYING FOR THEM.
   On demurrer to bill of complaint, upon reissued patents, one of which was reissued 13 and the other 11 years after the originals were issued, *held*, that the right to have the patents reissued had been abandoned and lost by unreasonable delay, and that the reissues are, therefore, invalid.
2. SUITS ON PATENTS—MULTIFARIOUSNESS OF BILL.
   When the bill of complaint seeks relief upon two patents and fails to show that they are capable of conjoint use or have been in fact so used by defendants, *quære*, whether the bill is multifarious.
3. Reissues Nos. 7,972 and 8,252, for improvements in velocipedes, *held* invalid.

In Equity. Suits on reissues Nos. 7,972 and 8,252, for improvements in velocipedes. The original patents were Nos. 59,915 and 46,705, respectively.

Coburn & Thacher, for complainant.

Stem & Peck and *Wood & Boyd*, for respondents.

BAXTER, J. This is a bill to restrain further infringement and recover for past infringement of two reissued patents. The original of one of them was issued on the seventh of March, 1865, and was reissued May 28, 1878. The original of the other was issued twentieth December, 1866, and was reissued November 27, 1877. The bill is demurred to.

Complainant fails to show by his bill that the two inventions alleged to have been infringed are capable of conjoint use, or that they have in fact been so used by defendant. For the want of this averment it is insisted that the bill is multifarious, etc. 3 Fisher, 63; 6 Fisher, 286; and 7 FED. REP. 354–5.

I am inclined to think the demurrer is well taken. But in view of another question raised by the demurrer, which is clearly fatal, I have not fully considered, nor have I deemed it necessary to decide, whether the bill is or is not multifarious.

One of the patents was reissued 13 and the other 11 years after the original. The right to this reissue had been abandoned and lost by unreasonable delay. *Bantz* v. *Frantz*, 105 U. S. 160, and *Miller* v. *Bridgeport Brass Co.* 104 U. S. 350, decided at the last term of the United States supreme court. The reissued letters sued on are therefore invalid. Complainant's bill will be dismissed, with costs.

*Reported by J. C. Harper, Esq., of the Cincinnati bar.

WALLERTON *v.* SNOW and others.

(*Circuit Court, D. Kansas.* November 28, 1882.)

1. EQUITY—PRE-EMPTION—GOVERNMENT PATENTS.
   By joint resolution of April 10, 1869, congress provided that a *bona fide* settler upon certain lands known as the "Osage ceded lands," in Kansas, should have a right to purchase on certain terms. The defendant, Snow, was such a settler, and, having the right to purchase under said joint resolution, he made the requisite proof and tender of the purchase money to complete such purchase. *Held*, that he was entitled to a patent from government, and has an equity in the land and improvements thereon which he is at liberty to sell and convey.
2. SAME—LOCAL LAND-OFFICER.
   The refusal of a local land-officer to receive the purchase money, on the ground that it was too late to give notice to others who were supposed to have an adverse claim, will not defeat such settler's rights.
3. SAME—RIGHTS OF SUBSEQUENT PURCHASERS.
   Where one holding an equitable title as above conveys that equity and gives up possession to another, who agrees to pay therefor when the grantor's equity shall have ripened into a legal title, such purchaser will not be allowed to make use of the possession so obtained to perfect a title in himself, and thus release himself from his liability to the party whose equity he has so purchased; and subsequent purchasers of land so acquired take whatever rights they have in the land, subject to the rights of the party in whom the equity thereto was first vested.

In Equity. On demurrer to bill.

The material allegations of the bill are, in substance, as follows:

(1) On the twenty-ninth day of August, 1876, one Stephen Hardin filed his declaratory statement in the proper local land-office for pre-emption upon the quarter sections of land now in controversy, and on the twenty-second of December following he made proof and payment, under the act of congress of August 11, 1876, (19 St. 127,) and obtained the usual certificate and receipt.

(2) Subsequently, on the first day of June, 1877, the said Hardin and his wife, being then in possession of the land, executed to complainant a mortgage to secure the sum of $1,000.

(3) Default having been made on the payment of said debt, suit was brought to foreclose the same, to which suit defendant Snow was made a party, but as to him the suit was dismissed, and decree of foreclosure, with the usual order of sale, was taken against the other defendants. At the sale under said decree the land was purchased by one Noble for complainant, to whom he subsequently made conveyance; but when possession under the master's deed was demanded, it was refused, the said Hardin having yielded possession to one Sherrill, who claimed to hold under defendant Snow.

(4) At the time of the foreclosure suit, the defendant Snow held a patent from the United States for the land in controversy. The complainant claims,

however, that this patent was obtained in violation of his rights and against good conscience, and he seeks a decree that it be held in trust for him.

(5) The facts with respect to Snow's title are as follows, as appears by the bill: The land in controversy is a part of what is known as the "Osage ceded lands," in Kansas. By joint resolution of April 10, 1869, congress provided that any *bona fide* settlers upon any of said lands should have the right to purchase on certain terms; and Snow was such a settler, having entered upon the land and bought the improvements belonging to an earlier settler in 1870. Having the right to purchase under said joint resolution, Snow made the requisite proof, and tendered the purchase money to complete such purchase; but the local land-officers refused to execute to him the proper receipt and certificate, for what reason does not appear by the bill, but it is said in argument that it was because there was not time in which to notify certain railroad companies then supposed to have some adverse interest in the land. Snow continued to occupy the premises until 1875, when he made a conditional sale of the same to one Samuel Sherrill for $4,150, giving bond for a deed when his title should be perfected, and Sherrill should pay the purchase price, represented by four promissory notes due at different dates, only one of which has been paid. In pursuance of this contract, Snow yielded possession to Sherrill, who, on the seventh of April, 1875, sold and conveyed such equities as he had to Hardin. Having thus obtained possession, Hardin proceeded, as above stated, to obtain title under the act of 1876, which, like the joint resolution of 1869, authorized sales of said lands under certain terms and conditions to *bona fide* settlers. The right of Hardin to purchase was contested by Snow, and, as a result of that contest, Hardin's entry was set aside and Snow was allowed to make proof of entry as of his first settlement, and thereupon he completed his entry and received his patent.

Rossington, Johnston & Smith, for complainant.

Hutchings & Denison and *L. Stillwell*, for defendants.

McCRARY, J. Snow was, prior to his sale to Sherrill, the defendant in possession of the land, owning valuable improvements thereon, and having done all that the law required to enable him to obtain the title. He had made the necessary proof and tendered the purchase money as required by the joint resolution of congress of April 10, 1869. He was undoubtedly a *bona fide* settler, and had an equity in the land. The adverse decision of the local land-officers was, clearly, not fatal to the claim. It could be attacked in the courts or before the land department of the government in a new proceeding to test his rights. *Harkness* v. *Underhill*, 1 Black, 319, and cases cited. And even if conclusive of his rights under the joint resolution of 1869, it would not have deprived him of the benefit of other laws intended for the protection of *bona fide* settlers upon the public lands. This adverse ruling was, however, set aside by a later ruling of the commissioner of the general land-office and the secretary of

the interior, by which a patent was awarded to Snow. That this last action of the land department was in accordance with the law, as between the United States and Snow, is, we think, entirely clear. The ruling of the local land-officers rejecting Snow's application to purchase, on the ground that it was then too late to give notice to certain railroad companies who were supposed to have an adverse interest, cannot be upheld upon any sound construction of the joint resolution of 1869; and unless, prior to the order granting a patent to Snow, Hardin had acquired a vested right in the lands which entitled him to a patent, the complainant cannot recover. We are, therefore, to consider whether Hardin acquired such a vested right in the *interim* between the rejection by the local officers of Snow's application to purchase, and the decision of the department at Washington awarding him the patent. It appears that while yet in possession, owning the improvements and possessing the equities to which we have referred, Snow made a conditional sale of the premises to one Samuel Sherrill for $4,150, giving him a bond for a deed to be executed when Snow should complete his title to the land, and Sherrill should pay the purchase money, which he was to do in installments due January 1, 1876, January 1, 1877, January 1, 1878, and January 1, 1879, with interest. The bond was to be void if the notes were not paid. Only the first installment has been paid.

The court is of the opinion, independently of all other questions in this case, that Snow had an equity in the land, and improvements which he was at liberty to sell and convey to Sherrill, and that he was at liberty to secure the purchase money by the execution of a bond for a deed. This contract was perfectly valid as between Snow and Sherrill, and all other persons chargeable with actual or constructive notice of the rights of Snow under it. It is not alleged in the bill that Hardin, under whom, through a mortgage foreclosure, the complainant claims, was without notice of the rights of Snow under the bond above named. On the contrary, it is averred that Hardin, before attempting to procure a patent, purchased the claim and improvements from Sherrill, and notice of the contract between Sherrell and Snow is *impliedly* admitted by the allegation of the bill that "on the twenty-third day of January, 1875, the said Snow entered into a contract with the said Sherrill, whereby the said Sherrill became seized and possessed of said premises and the improvements thereon." Besides, if it be true, as stated by counsel in argument, that Sherrill conveyed to Hardin by quitclaim deed then, it follows that

the latter cannot be regarded as a *bona fide* purchaser without notice. *May* v. *LeClaire*, 11 Wall. 217.

We conclude, therefore, that Hardin acquired whatever rights he had in the land, subject to the rights of Snow, under the bond executed by him to Sherrill. He simply took the place of Sherrill, and it required no argument to show that if Sherrill, instead of selling to Hardin, had gone on and applied for a patent under the act of 1876, whatever title he might have acquired would have been held by him subject to his liability to Snow. Snow had an equity in the land for which Sherrill agreed to pay him a given sum as soon as the equity should ripen into a legal title. By virtue of the contract between them, Sherrill obtained possession from Snow. It would be grossly inequitable to permit him to use that possession to perfect title in himself, and thus release himself from liability to Snow. No court of equity would listen to such a claim. This is upon the assumption that Sherrill could have perfected title under the act of 1876, as Hardin claims to have done. But this we do not decide. We only say that if Sherrill had by a contract of purchase acquired Snow's equities in deeding his possession and his valuable improvements, and had then attempted to abandon the contract of purchase, ignoring his liability under it, and to acquire the title under the act of 1876, we should hold Snow's claim for purchase money good against the land in Sherrill's hands, even if he had obtained a patent in his own name under that act. In such a case he would have used the possession and other equities acquired from Snow to perfect his title, and he would have obtained for his own use the valuable improvements of the latter. It follows that, even in the most favorable view of the law for complainant, we must hold that Hardin took any interest he has in the land, subject to the claim of Snow under the bond. The complainant took a mortgage upon the land from Hardin to secure a debt. Hardin had at best but an equity, and his mortgagor is, therefore, not entitled to the protection extended by court of equity to *bona fide* purchasers without notice. This doctrine applies only to the purchaser of the legal title. Story, Eq. Jur. § 1502; *Vattier* v. *Hinds*, 7 Pet. 252; *Butler* v. *Douglass*, 1 McCrary, 630; [S. C. 3 FED. REP. 612.]

The conclusion is that Hardin acquired at the most only a right to the land after paying the balance due from Sherrill to Snow, and that the complainant stands in Hardin's shoes and can perfect his title, if at all, only upon the same condition. This conclusion accords with

our sense of justice and equity, since a contrary ruling would involve the injustice of depriving Snow of his possession, his improvements, his right to purchase at the minimum price, and all his equities and rights, without exacting that he shall be paid for them the sum agreed upon between him and Sherrill, to whom he sold and conveyed therein upon the condition that payment be made. As complainant has not tendered payment of the sum due defendant Snow upon the bond and notes for the purchase money, the bill is in our view bad, and the demurrer must be sustained upon this ground, without considering the other important and perhaps doubtful questions argued by counsel.

CROCKER *v.* CITY OF NEW YORK and others.

(*Circuit Court, S. D. New York.* 1883.)

1. WHARF FRANCHISE—CITY GRANT—RIGHTS OF GRANTEE.

Where a city had full power derived from the state to establish wharves and to cause them to be erected by the owners of the adjacent property, and to grant the right to receive and collect wharfage, but was restrained from conveying the land in controversy by an act of the legislature, and the restricting act was subsequently repealed, with a proviso enacted that no grants should be made beyond the exterior line fixed by statute, and it granted to the orator the land of which he was riparian owner to the exterior bulk-head line, as fixed by the legislature, upon which, by the terms of the indenture, he was required and covenanted to build a wharf, with the right to collect wharfage and cranage advantages by or from that part of the exterior line of the city, but the grant was not to be construed as a warranty of seizin, or to operate further than to pass the title or interest the city may lawfully have or claim by virtue of its charter and the various acts of the state legislature, *held*, that a preliminary injunction may issue to restrain the city from building permanent structures outside of the orator's wharf, which structures would have the effect to cut plaintiff's wharf wholly off from the navigable waters of the river and destroy his right to collect wharfage and cranage at his wharf without making compensation therefor.

2. SAME—RIGHTS UNDER CONTRACT CANNOT BE DIVESTED.

Where the state legislature fixed the exterior line of the city, and left the city with authority to grant wharves to that line, and expressly declared that there should be no solid filling beyond that line, the act of the legislature is a part of the consideration for the purchase of the land and the building of the wharf, and the city cannot divest rights which have accrued under its contract without just compensation therefor.

In Equity.

Stephen A. Walker and *Henry H. Anderson*, for orator.

James C. Carter, for defendants.

WHEELER, J. This cause has been heard on the motion for the preliminary injunction to restrain the defendant from building new wharves in front of the orator's wharf in North river, between Twenty-sixth and Twenty-seventh streets, in the city of New York. The facts are not much, if at all, in controversy. The state owned the land under the water where the orator's wharf is, and about it. The corporation of the city had full power derived from the state to establish wharves, and to cause them to be erected by the owners of the adjacent property, and to grant the right to receive and collect wharfage, but was restrained from conveying this land by the act of the legislature of March 13, 1855. This appears from various acts of the legislature and from the answer. Act of 1798, §§ 1, 2; Act of 1813, §§ 220–224; Valentine, Laws, 1286, 1292, 1294.

By the act of April 17, 1857, a bulk-head line of solid filling was established, beyond which it was enacted that it should not be lawful to fill with solid material, or to erect any structures except piers of certain length, with intermediate spaces of prescribed width. Val. Laws, pp. 1308, 1309, §§ 1, 2. By the act of April 19, 1858, the restriction upon conveying in the act of 1855 was repealed, with a proviso enacted that no grants should be made beyond the exterior line fixed by the act of 1857. Val. Laws, 771. By indenture made between the mayor, aldermen, and commonalty of the city and Conrad Long, the orator's grantor, dated October 22, 1858, the former, in consideration of $2,962.50, granted, bargained, sold, aliened, remised, released, and conveyed to the latter this land between Twenty-sixth and Twenty-seventh streets, and land of which he was riparian owner, and the exterior bulk-head line of the act of 1857, upon which, by the terms of the indenture, he was required and covenanted to build a wharf, and they covenanted that he should at all times thereafter receive and hold to his own use "all manner of wharfage, cranage, advantages, or emoluments growing or accruing by or from that part of said exterior line of said city;" and it was further therein agreed "that this present grant, and every word and thing in the same contained, shall not be construed to be a covenant or covenants of warranty or seizin of the said parties of the first part, their successors, or to operate further than to pass the estate, right, title, or interest they may have or may lawfully claim in the premises hereby conveyed, by virtue of their said charters and the various acts of the legislature of the people of the state of New York."

The wharf was built upon the established bulk-head line pursuant to the indenture, and has, with its incidents and rights, passed to the

orator. By letters patent of the state dated September 28, 1871, all the property, right, title, and interest of the people of the state of New York in the land covered by water of the North or Hudson river, lying within and easterly of an exterior line, which includes all these premises, was given, and granted unto the mayor, aldermen, and commonalty of the city, pursuant to the act of April 5, 1870, as amended by the act of April 18, 1871. The defendant corporation, and the other defendants composing the board of the department of docks of the city, under this provision of the act of 1871, were about to erect wharves and permanent structures outside of the orator's wharf, between it and the channels of the river, which would cut it wholly off from the navigable water of the river, and destroy the right to collect wharfage and cranage at his wharf, without making compensation therefor, until restrained pending this motion.

At the time of the grant to Long, the city did not own the land under water next to the bulk-head line which the indenture covered; but when it is conceded or shown that the city did have the right to locate wharves and to cause them to be erected by the riparian owners, and to collect or grant the right to collect wharfage, it follows that the grant of the city was good to pass the right to erect this wharf and to collect wharfage thereon. And what the city did not own the state owned, and could grant by any instrumentality which the legislature should see fit to make use of; and the repeal of the restriction of the act of 1855, with the proviso that conveyances should not be made extending beyond the bulk-head line, implied that those authorized to convey before the restriction should thereafter have the right to convey to the bulk-head line, as the city undertook to do. The state has, of itself, asserted no right there against Long, or against the grant of the city. The grantee made large expenditures under the grant, and the city cannot justly be heard now to say, in its own behalf, that it did not have the right to grant what it undertook to grant and was paid for granting.

The right of the orator to the wharf appears to be well established, so that he is the proprietor of it to all intents and purposes, subject, however, to the right of the law-making power to regulate it on account of its public character. This must include the right to collect wharfage and cranage, and to all the emoluments pertaining to the use and enjoyment of the wharf, as it was made and intended to be used, under such regulations as should be established for its use. The city did not own any land outside of the bulk-head line at that place, and had no right to convey any land there for wharf purposes; all

there was left belonged to the state or to Long. He took nothing but the right to the wharf and its emoluments. It is argued for the defendants that this was only the right to the wharf itself, and the right to collect wharfage while it could be used as a wharf; and that whenever the state, as owner of the soil under water in front of it, should make such use of that soil as to prevent the use of the wharf for wharf purposes, his rights in that direction would end. It is true that the grant was of nothing beyond the wharf. Long had no rights outside the wharf. But he had the right to the wharf as a wharf on navigable water, and the right to collect the wharfage upon it. The public had the right to come to his wharf and employ it. The character and usefulness of his property as granted to him would be taken away if they should be prevented from coming. They could not be prevented without derogating from his grant. This franchise is like that of a ferry or a turnpike or a railroad. The owners of a ferry take only the right to land. Their right to cross comes from the navigability of the water which is common to all. The grantors of the ferry could not shut the public out from it without infringing upon the rights of the grantees. The grantor of a right to a turnpike or railroad could not hedge it about so as to exclude the public from it without derogating from the grant. This grant of this right to build a wharf and take wharfage on it can be understood to mean no less than that the public should have the same right of access to it as then existed. The indenture, taken all together, is a quitclaim and not a warranty deed of the property, but it is a quitclaim of all that it assumes to cover, which includes the right to collect wharfage and cranage, and the right to the opportunity to have them to collect. The city cannot have the right to take away what it has so solemnly granted.

The transaction by which Long acquired the right to construct his wharf and receive his profits constituted a contract, and were participated in by the state, as well as by him and the city. The authority of the city to make this grant of this land and right was derived wholly from the state. It did not result merely from a grant of the land from the state to the city, for the city to grant as it should see fit, but it came from power to grant what was the state's property until the grant should be made.

Thus the state was a party to the grant, as if made by any other instrumentality. Then the state, by the act of 1857, fixed the exterior line and left the city with authority to grant wharves to that line, and expressly declared that there should be no solid filling beyond that

line. Act of 1857, §§ 1, 2. This act was a part of the transaction and entered into the contract for the wharf, and was a part of the consideration for purchasing the land and building the wharf. That act made the wharf an exterior wharf. The city, through its officers, is now professedly acting under the authority of the state, conferred by the act of 1871, and is undertaking to make the wharf an interior wharf. The object is not merely to create rival wharves, which merely draw away the custom from this one, but it is to cut this wharf entirely away from its custom. This the state could not do, if it undertook so to do, as has been with fairness fully conceded by the counsel for the defendant, if this would be the effect. The argument is that there was no private right which this course could cut off; not that it could in any manner be cut off if there was one. The legislature has not, however, undertaken to take away any private right without making compensation, but has carefully provided, in the acts of 1870 and 1871, under which the commissioners are acting, for making compensation for all such rights necessary to be taken.

The question is not, therefore, whether private rights can be taken without compensation, but whether there is a private right proposed to be taken. If the question was whether a rival wharf, which would merely draw away custom, could be erected, it would be like that in *Charles River Bridge* v. *Warren Bridge*, 7 Pick. 344, and 11 Pet. 420, which was so much considered by those courts. In that case, although it was held by a majority of each court that a merely competing bridge did not take away any right acquired by the grant of the right to build, and take tolls for passing over, the first bridge, against a strong minority who would hold that it did, no one of the judges of either the majority or minority of either court seems to have doubted but that the obstruction of all travel, for which toll was taken, would have taken away such a right. In that case the bridge might have been left intact, valuable as it could be for anything but a toll bridge, but valueless for that, the same as here the wharf would be left valueless as a wharf, for which it was built, although it might be valuable to some extent for other purposes.

These conclusions are supported by the decision in *Langdon* v. *The Mayor*, in the supreme court of New York, May, 1882, and *Van Zandt* v. *The Mayor*, 8 Bosw. 375.

There are many provisions in the charters of the city, acts of the legislature of the state, grants by the city, and courses taken and policies pursued by the authorities of the city, in relation to the

wharves of the city, which have been collected with great research and instructively presented by counsel, but none of them control or materially vary the principal facts which have been referred to in respect to this particular wharf, therefore it is not deemed to be needful or useful to further refer to them.

The motion is granted.

WESTERN STAR LODGE, No. 2, *v.* SCHMINKE, Postmaster.

(*Circuit Court, D. Nebraska.* January, 1883.)

1. POSTMASTERS—REMOVAL OF POST-OFFICES—POSTMASTER GENERAL.
   A postmaster is a subordinate officer of the post-office department, and bound to obey the orders of the postmaster general.
2. SAME.
   The power to remove the post-office in certain towns from one building to another is vested by law in the postmaster general, and can be exercised by him at his discretion.
3. SAME.
   A claim for rent of premises occupied, or leased to be occupied, by the government as a post-office, should be sued for in the court of claims.
4. SAME.
   The circuit court has no jurisdiction to grant relief against the government.

In Equity. On exceptions to answer.

MCCRARY, J. This is a bill in equity brought for the purpose of restraining the respondent, who is postmaster at Nebraska City, Nebraska, from obeying an order of the postmaster general of the United States, directing him to remove the post-office in that city from one building to another. This relief is sought upon the ground that a removal of the office, as proposed, would be in violation of a lease executed by the late postmaster general, Horace Maynard, whereby certain premises, in which the complainants have an interest, were leased for use as a post-office for a period of four years.

The relief sought cannot be granted for several reasons: (1) The respondent is a subordinate officer of the post-office department, and bound to obey the order of the postmaster general. (2) The postmaster general is not made a party, and cannot, therefore, be enjoined in this proceeding, even if it were within the power of the court to control his action in the matter of locating and removing post-offices. (3) The power to remove the post-office at Nebraska City from one place within the city to another, is vested by law in

the postmaster general, and can be exercised by him at his discretion. (4) If the lease executed by the late postmaster general to complainant is a valid contract, the complainant is entitled to the stipulated rent for the entire term, and may recover the same by suit in the court of claims; but I know of no other remedy. The law does not authorize the postmaster general to bind the United States by an agreement that a post-office shall not be removed from a particular building during a period of four years, or any other period. Besides, the lease in question does not show that the late postmaster general undertook to make such a contract, and the answer avers that the lease expresses the whole contract. (5) The contract, such as it is, is with the "United States, by Horace Maynard, postmaster general," and this court has no jurisdiction to grant any relief upon it or against the government.

The exceptions to the answer are overruled.

UNITED STATES v. MOYERS and others.

(Circuit Court, W. D. Tennessee. December 23, 1882.)

CRIMINAL LAW—WITHHOLDING PENSION—ILLEGAL FEES; REV. ST. § 5485.

Any scheme or contrivance by which, under the guise of a loan or other dealing, the claim agent or attorney retains more than his legal fee, is a violation of the statute against withholding pension money or taking illegal fees. And while the pensioner, who has unconditionally and without restraint or limitation received the money, may do with it what she pleases,—except to pay the attorney a larger fee for his services than allowed by law,—may lend it to him, or buy property from him with it, these transactions must be with the utmost good faith, and no use of them to evade the statute will be tolerated.

Criminal Information.

This was a criminal information against Gilbert and George C. Moyers, in which they are jointly charged with demanding, receiving, and retaining from a pensioner illegal fees as her attorneys in the prosecution of her claim, and also with unlawfully withholding from her a portion of her pension money in violation of the provisions of section 5485 of the Revised Statutes.

On motion of the defendant George C. Moyers, supported by affidavits, a severance was granted, and thereupon Gilbert Moyers was separately put upon his trial under a general plea of not guilty.

The trial of this case occupied six days, and was vigorously contested at every point, resulting in a mistrial. The witnesses examined on each side were numerous, and many questions were raised on objections to evidence, and by the efforts of both sides to impeach witnesses or their testimony. Only such features of the evidence are given in this report as will serve to explain that portion of the charge reported here, which relates to the construction of the statute and the character of the offense charged under it.

There was little or no contest on the proof showing that the claim of the pensioner, an old colored woman named Melvina Rogers, who can neither read nor write, was prepared in the claim office of the defendant Gilbert Moyers in this city, together with the proof in support of it, and was by him filed for allowance in the pension bureau at Washington, he being her attorney of record in the case there, and having also at the time an office in the latter city. Her pension was allowed, and the certificate thereof is dated December 12, 1881. Pensioners in this district are paid by the agency at Knoxville, Tennessee, and accordingly a voucher was sent from said agency to be executed by the pensioner for the arrears of pension money due her. This voucher was filled up at the defendant's office here by his brother, George C. Moyers, and executed by the pensioner, in which the agency was informed that the post-office address of the pensioner was "Care of 56 Court street, Memphis,"—that being the number and location of his office here. A check dated December 31, 1881, was thereupon issued by the United States pension agents at Knoxville, on the receipt of this voucher, for the sum of $1,674.13, and sent according to the above direction, and was received at the defendant's office from a letter-carrier. On Friday, January 6, 1882, the pensioner, on learning of the arrival of this check, went to the defendant's office to see about it, when and where she met both the defendants. After some conversation about getting the check cashed, George C. Moyers took it from the office and made an arrangement with a Mr. Lehman for his indorsement of the same in consideration of being paid 2 per cent. therefor, to which the pensioner assented, although there was some conflict in the proof as to why this assent was given. The money was then obtained from a bank here by Lehman, who retained his 2 per cent. (about $34) and handed the balance of the amount to George C. Moyers. During the most of this transaction the pensioner remained in the office with Gilbert Moyers in conversation with him about this pension matter, and on the arrival of George C. Moyers with the money it was all placed in her

hands, and she immediately handed back to one of them (the proof was conflicting as to which one) the sum of $400. The testimony was very conflicting as to the nature of the transaction about the $400; that of the government tending to show that it was exacted as compensation for the services of these men as her pension attorneys, and that of the defendant tending to establish that it was a voluntary loan. The pensioner then left the office with the balance of her money, but without receiving or requesting of either of these defendants any note, due-bill, receipt, or other written evidence whatever concerning this transaction about the $400, and without the same being tendered to her by either of them. The next day, Saturday, a son of the pensioner went to the office of these defendants and complained of his mother's dissatisfaction with what had occurred, and on the following day, Sunday, George C. Moyers went to the pensioner's house, when further talk about it was had, and thence George C. and this son went together to Gilbert Moyers' residence, where an angry conversation ensued, when finally Gilbert said he would have nothing more to do with it; his testimony tending to show that he directed his brother to return the money to the pensioner. The next day, Monday, January 9, 1882, Gilbert Moyers having that morning left Memphis for Washington, George C. Moyers paid back to the pensioner's son $100 of the money for his mother, and gave him for her his own individual promissory note payable to her, simply, for $300, and due one year from date, without interest. The note was antedated January 6, 1882. It was proven that Gilbert Moyers was wholly insolvent, and there was some conflict about the degree of George C. Moyer's solvency; the proof of the government tending to show that he had nothing in Tennessee subject to execution, and that of the defense, that he was amply good for the amount of the note.

After the institution of this case George C. Moyers paid the pensioner $300, the amounts of the above note, but no interest was paid thereon. The payment was publicly made in the office of the clerk of this court and in his presence, and the pensioner executed to Moyers a receipt for the $300 paid to her, the clerk attending to the matter for her, and preparing her receipt.

Wm. F. Poston, Dist. Atty., and *John B. Clough*, Asst. Atty., for the Government.

H. C. Young and *Geo. Gillham*, for defendant.

HAMMOND, J., (*charging jury orally.*) It is part of the history of this country that the government of the United States is more

liberal to its pensioners than any other government. I have seen it stated, and presume it is true, that the military pension roll of the government of the United States exceeds that of all the other civilized nations in the world. It is a matter which is known to you and to all of us that enormous sums are annually appropriated, amounting to many millions of dollars, to pay pensioners.

It is also a part of the history of these pension laws, that, owing to the depredations made upon the appropriations by parties who were not entitled to receive them, there came to be great scandals in the administration of the fund. Pension agents and parties who were interested in and about the collection and distribution of these funds, under the guise of collecting fees and being paid for their services in one way and another, pocketed a great deal of the money, so that it did not go to the purpose for which it was intended. In order to protect these pensioners congress enacted a series of laws, which have, from time to time, grown more rigid. They consist of two classes.

In the early administration of the law the checks and money were sent in the ordinary course of business to the attorneys engaged in collecting pensions. Congress subsequently enacted statutes which prohibited the sending of pension checks to the attorneys of the pensioners, and a system of laws and postal regulations which have been read and referred to in your hearing, making very stringent provisions against the delivery of these checks to agents and attorneys engaged in the collection of pensions. They cannot get possession of them except by some evasion of these statutes; and the books which contain the history of the prosecution of this class of offenses, show that there is always connected with these cases some method or scheme by which the laws protecting the delivery of the check are sought to be evaded, and the check diverted into the hands of the attorney or agent. To illustrate the strictness of those laws,—I am inclined to think when the postmaster of this city delivered the letter containing the check at the office of this defendant, he violated these statutes; and, if so, he could be prosecuted for delivering the letter at the office of Gilbert Moyers. He should have delivered it to the pensioner or some member of her family.

In addition to the laws which were designed to prevent the check from going into the hands of any other person than the pensioner, congress enacted others imposing penalties upon agents or attorneys for the violation of its policy, and its declared purpose that the money should go to the pensioner and not to the agent or attorney, except the small fee that was allowed for his services. At first that

fee might be fixed by agreement between the parties—the agent filing a duplicate copy of his contract with the pension-office—provided it did not exceed $25. Then the pensioner had some power to fix the amount within the limit. Congress ultimately repealed those provisions and enacted a more stringent law, that in all cases the agent or attorney should receive only $10 for his services. This may seem, and perhaps is, in some cases, a small compensation, but we have nothing to do with that; it is in the power of congress to do this, and it has said that in all cases the agent or attorney shall not receive a larger compensation for his services than $10. The object of this legislation was to fix a fee beyond which no one can go, and in order to enforce that statute, and see that it was not violated, congress has enacted this statute, (Rev. St. § 5485:)

"Any agent or attorney or other person instrumental in prosecuting any claim for pension or bounty land, who shall directly or indirectly contract for, demand or receive, or retain, any greater compensation for his services or instrumentality in prosecuting a claim for pension or bounty land than is provided in the title pertaining to pensions, or who shall wrongfully withhold from a pensioner or claimant the whole or any part of the pension or claim allowed and due such pensioner or claimant, shall be deemed guilty of a high misdemeanor, and, upon conviction thereof, shall, for every such offense, be fined not exceeding $500, or imprisoned at hard labor not exceeding two years, or both, at the discretion of the court."

On a former occasion, in the trial of one of these cases, I had occasion to say what I say to you now in the same way, about the policy of the government with regard to pension funds:

"The statute, you will perceive, prescribes the punishment for two offenses in relation to the prosecution of a claim for pension,—one, the contracting for, demanding, receiving, or retaining of a greater compensation for the agent's services than allowed by law; the other, the withholding by the agent of the whole, or any part, of the claim allowed. The plain purpose of all those stringent provisions of the pension laws which the district attorney has read in your hearing, is to secure *absolutely* to the pensioner the bounty of the government. It cannot, on any pretext, be lawfully diverted, directly or indirectly, while on its way to the pensioner. It is not assets for the payment of debts, and can be in no way pledged or impounded for that purpose, and all dealings in that direction are null and void. There is a somewhat analogous policy which protects the salaries of the officers of the state and federal governments, and it is generally recognized everywhere. But here congress has, by the most stringent special legislation, sought to protect these pensioners, so munificently indowed, against all possibility of being defrauded by the agents they employ to collect their dues from the government. Nothing less than the unconditional payment of the full amount, less the small fee allowed, will discharge the agent from the penalties of this statute, whenever, by any

contrivance of his, he comes into possession of the warrants or the money they represent. All else is a wrongful withholding under this statute. It is the duty of the courts and juries to so enforce these legislative commands that there shall be no evasion of them." *U. S.* v. *Ryckman*, 12 FED. REP. 46.

Now, gentlemen of the jury, it is perfectly plain from these statutes and from these cases—not only the one cited, but many others—that in the prosecution of claims like this there can be no scheme whereby this statute may be evaded; and any contrivance that the ingenuity of the agent or attorney can devise, even with the consent of the party entitled to the pension, to pay a larger fee than $10, violates the statute. It is immaterial whether the pensioner consents to it or not; nor how much he may be willing to waive this statute, and pay the agent or attorney more than the law allows him. Under no possible construction of any contract that they make, or any agreement that the pensioner makes, can the agent receive or retain more than $10; and by no sort of contrivance or device, either under the disguise of a loan or the purchase of property or a gift, or any other scheme, can he demand or receive or retain any more than the fee allowed by law. The law protects this pension fund as long as the relation of the agent or attorney exists; and it makes no difference what the relation is, or how it is created,—whether by the ordinary contract of an agent and attorney, or by any implied contract of an agent and attorney, which he holds or sustains in the case. Any person who becomes instrumental in the prosecution of the claim and the collection of the money is liable under the provisions of these statutes, if violated. If the pensioner carries one of these checks to the bank, and the bank takes it for collection and collects the money, the bank becomes a person instrumental in the prosecution of that claim, and if the bank fails to pay it over, irrespective of any discount, the bank would be liable under this statute. If a person should find one of these pension drafts in the road, and thereby become the possessor and holder of it, and should undertake to collect it, and kept the money, he would become an instrument in the collection of that pension claim and would be liable. I am justified in ruling this way by a decision of the supreme court of the United States: A man became, under the state laws, guardian of one of these pensioners. He executed a bond and filed it under the state law. A pension to which his ward was entitled came to him, and, he having a right to collect, it was paid him by the treasury of the United States. Many years afterwards he refused to pay that money over. He was prosecuted under this statute for wrongfully

retaining pension money, convicted, and the conviction was sustained by the supreme court of the United States. That establishes, beyond controversy, the policy of these statutes and the stringency with which they are enforced by the courts. *U. S.* v. *Hall*, 98 U. S. 343.

Something has been said in the argument about these laws being unconstitutional. I cannot agree to that. No man has any claim to this money as a matter of *right*—no pensioner. It is paid to every pensioner as a bounty from the government. Every man, as a matter of duty, owes his services as a soldier to the government, and thousands of men render those services and never receive any compensation except while a soldier; but the government has allowed and does allow these pensions and these rewards to the soldiers themselves while they are disabled, and to those who are dependent on them when they are deceased. Then it is not a right; it is a bounty; and if the government chooses to say that the money shall go absolutely to the pensioner, irrespective of the claims of any creditor or any one else, it has a right to say so; and there is no doubt that such is the policy of the legislation, and that this is the spirit in which it has been administered by both the state and federal courts, both of which have ruled upon these points just as I am ruling now.

After the pensioner receives his money it is his own, and he may do with it what he pleases, except to pay to his agent or attorney any greater sum than $10, directly or indirectly. An agent or attorney cannot receive such payment directly or indirectly; if he does, he becomes liable under this statute, whether it is paid out of the pension fund or not. Outside of this the pensioner may lend him money or buy property of him, paying him for the same, whether it be with pension money or any other money, if it be a transaction made in good faith and not a device to evade this statute. But under any such device, no matter what form it takes, if this be the object, the statute is violated.

We will now come to the particulars of this case. The defendant here is indicted under six counts, the first four of which charge him with demanding, receiving, and retaining a larger fee than $10. The first charges him with demanding; the second, with receiving; the third, with retaining; and the fourth, with demanding, receiving, and retaining a larger sum than $10. The fifth and sixth counts charge him with wrongfully withholding a portion of the money. It is not necessary that there should be any formal demand. This statute

means that any request, direct or indirect, made by the agent for a larger fee than $10, is a violation of the statute; and any receipt of it which is a receipt for the purpose of violating this statute, and retaining or getting more than the law allows for his services, is unlawful. Of course, if the defendant receives the money for the purpose of depositing it in the bank, and he does that with it, this is not a wrongful receipt of it. If he receives it for the purpose of paying debts that the pensioner wants him to pay, that is not a wrongful receipt; but if he receives it for the purpose of appropriating it to the benefit of himself, the law implies, from the fact that he appropriates it to his own use after he receives it, an intention on his part to violate this statute, unless he can show to you that he has received it for some other purpose and applied it to that purpose. The same may be said of "retaining" the pension money or a portion thereof. If a person kept the money, with the consent of the pensioner, for any other purpose than retaining it for his own use, such retention would be lawful; but whenever it takes the form of appropriating it to his own use, the law implies an *animus* to violate this statute, and the only way to negative that is to show that it was received with some other intention and appropriated according to that intention.

With reference to the subsequent payment of the money that was made: The fact that a man retains the money and subsequently repays it is a fact which depends for its value on the circumstances under which the payment was made. Of course, if he retains the money but subsequently does pay it over, and there was a misapprehension of some contract or other circumstance like that, and payment is voluntarily made as soon as the matter comes to his knowledge, that kind of payment may be a circumstance from which the jury might infer that it was not his intention to retain the money wrongfully and in violation of this statute. But after the offense has been committed in wrongfully withholding the money, the mere fact that he repents and agrees to pay it back, either under the stress of threatened prosecution or of some demand that is made of him, would not relieve the offense of its criminal character. The subsequent payment must be made under circumstances that convince you that the original withholding was not for a wrongful purpose. If the refunding was made under circumstances which are inconsistent with the idea the original holding was rightful, such as being coerced by threats or demands for the return of the money or of a prosecution, the return of it would not cancel the offense. That fact might be considered in mitigation of the punishment, but with that you have nothing to do.

Coming now to the testimony in this case, if you believe the government's witnesses there can be no doubt whatever of the defendant's guilt. They testify beyond all question that the defendant did demand, receive, and retain a larger compensation for his services than $10. If they tell the truth about it there can be certainly no doubt of his guilt, and the only question with you will be whether or not on that evidence you will convict the defendant. Did they speak the truth and do you believe them, or do you believe the testimony of the defendant, offered to show that the transaction was a loan to him in good faith of the money, and not a retention, receiving, or demanding more than his legal fees? That is a question with which this court has nothing to do. It is entirely for you to determine. It is a function of yours upon which I would not trench, and I do not propose to say anything which would in any way influence your decision, and I wish to be very careful not to say anything which shall interfere with your determination of that question. But it is my duty to give you in charge certain rules for your guidance in weighing and testing the evidence on which you act.

The court then proceeded to charge the jury upon the rules for testing evidence and applying them to the testimony in this case.

DOWELL *v.* APPLEGATE and others.

(*Circuit Court, D. Oregon.* January 5, 1883.)

1. VOLUNTARY CONVEYANCE TO CHILDREN.

A. was a surety on the official bond of M., and being liable thereon for defalcations of his principal, but without knowledge of the same, conveyed property to his children in consideration of their having remained at home and worked for him on the farm during their nonage, and in pursuance of a promise made by him to that effect, which conveyance left him without sufficient property to meet his existing liabilities under said bond. *Held*, that the services given to the father by the children were not a valuable consideration for the promise or the conveyances, as they only did what in law they were bound to do, and therefore the conveyances were voluntary, without a valuable consideration, and invalid as against the lien of a judgment subsequently obtained against A. on account of said defalcations, either by the obligee in the bond or a co-surety who had paid the full amount thereof.

2. SAME—GRANDCHILD.

But a conveyance to a grandchild under like circumstances, upon a promise to said child and its father to make the same, is not voluntary, but a conveyance for a valuable consideration, and therefore valid as against such lien.

3. ESCHEAT FUND.

The secretary of state, as such, is not authorized under the laws of Oregon (chapter 16, p. 582) to collect escheat funds from the treasurer of state; and if he does so without authority from the party entitled thereto, or fails to account to him for the same, his sureties are not holden therefor.

Suit in Equity in aid of a judgment creditor.

Addison C. Gibbs and the plaintiff in person, for plaintiff.

W. Carey Johnson, for defendants.

SAWYER, J. After a careful consideration of the pleadings, evidence, and arguments of counsel in this case, I have reached the following conclusions, which I shall announce without any elaborate discussion of the evidence, or the points presented.

I am not satisfied that Jesse Applegate, or the other defendants, had any actual knowledge of any defalcations of May, prior to the appointment of the investigating committee of the legislature in 1870, or at the date of the execution of the several conveyances sought to be set aside. On the contrary, the evidence largely preponderates in favor of the opposite conclusion. I think those conveyances were made and accepted in good faith, and without any intent to defraud the state, or to evade the payment of any liabilities of Jesse Applegate on the official bond of May, subsequently developed, and on which the judgment sought to be satisfied was afterwards recovered. There was, then, no actual fraud in making the conveyances, and they cannot be set aside on that ground.

The conveyances bearing date in April, 1867, I am satisfied were executed in that year. They bear date in April, 1867, and have certificates of acknowledgment appended thereto, which purport to have been made in May of that year, a few days after their dates; and all the direct testimony is that they were fully executed and delivered as early, at least, as the dates of acknowledgment; and that possession and control were taken in accordance with the conveyances. Conceding them to be voluntary conveyances from a father to his children for the purposes stated by them, they were made before any of the defalcations under the bond of 1866, and before any indebtedness accrued thereby to the state; and Jesse Applegate at the time owed no other debts than those arising upon the official bonds of May, 1862 and 1866, upon which judgments were subsequently recovered. The indebtedness on the bond of 1862 was comparatively small, being something over $1,300. If the defalcations on this bond had already arisen, it was not known to the defendants, and there was ample property of Jesse Applegate left after these conveyances were

made to satisfy this liability, as it was, in fact, afterwards satisfied out of other property of Jesse Applegate, without even resorting to any of the property subsequently conveyed to his other children by the remaining conveyances now in question. That judgment having been fully satisfied, the liability upon which the recovery was had, arising out of defalcations under the bond of 1862, cannot affect the questions now involved, either as to the conveyance of 1867 or those subsequently made, conceding them to be voluntary.

At the dates of the several conveyances in 1869, and subsequently, I do not think Jesse Applegate had sufficient property left, after making those conveyances, to reasonably satisfy the liabilities at that time accrued and existing on the bond of 1866, which have since passed into judgment against him and complainant, Dowell, and been paid by Dowell. Those conveyances made by Jesse Applegate of his rights to his children, I am satisfied were voluntary conveyances. The only consideration was a promise of the father to his several children that if they would remain at home with him, and work on the farm till they should, respectively, become of age, or marry, he would do by them as he had done by the older brothers—convey to them a part of his lands, putting them all upon an equality, without agreeing to convey any specific tract. This remaining with him was nothing more than they were bound to do under the law. They, therefore, neither gave nor promised any consideration. They remained, and the father simply fulfilled his promise, but the several conveyances can only be regarded in law as having been made upon consideration of love and affection—a worthy, proper, and lawful thing to do, when the father is free from debt, and able to do it without injury to third parties. But the law does not permit one to take that which really belongs, or ought to belong, to another, or is liable to satisfy another's demand, and give it to his children upon the consideration of love and affection. Some of these children, in fact, remained until after attaining their majority; but there is no independent additional agreement shown by the evidence, by which they were bound to so remain. There was no further contract for service, or further promise on account of their further services. I think, therefore, that these conveyances were taken subject to the rights of creditors existing at the time; and that the interest in the lands of Jesse Applegate attempted to be conveyed, is liable to be sold for the satisfaction of the judgment in favor of the state, which Dowell has paid; and that Dowell is subrogated to the rights of the state as to one-half of the amount of the judgment paid by him.

The conveyance to Charles Putnam, the grandson of Jesse Applegate, stands upon a different footing. He was under no obligation to serve Jesse Applegate, but he did continue in his service from 14 till over 21 years of age, on a promise made to him and to his father, some years before the execution of the official bond of May, 1866, that Applegate would convey to him a portion of land, in all respects, as he had done and agreed to do to his other children. This service formed a good and valuable pecuniary consideration, and the testimony shows that it was adequate to the value of the land. I think this conveyance valid as against the judgment now sought to be enforced. Jesse Applegate had only a life estate in the south half of the donation claim. The deed of Mrs. Applegate to her husband in the papers is not set up in the bill or pleadings, and is not relevant to any issue made. It cannot be known what defense might have been made to it, had it been alleged and relied on. It is not admissible, and cannot be considered. Mrs. Applegate's conveyances to her children are, therefore, valid as to her interest; and those interests are not liable to be applied to the satisfaction of the judgment in question.

A question arises on the record as to when the indebtedness to the state attached as against Jesse Applegate and complainant Dowell in consequence of the defalcations of May. Was it as to each embezzlement from the moment the funds were respectively appropriated, or from a demand on the part of the state and a failure to pay over the fund? Or at the close of the term when he failed to pay over on his retiring from office? Or when the amount was judicially ascertained by the judgment in the suit of the state against May and his sureties? These questions, though important, have not been argued by counsel, and no authorities have been cited on the questions. I do not see the bond in the record, but I suppose it contains the usual conditions in official bonds. If so, there must have been a breach at every time when May unlawfully appropriated the money of the state, as to the amount so appropriated, and I am disposed to think that this is the point of time as to each sum appropriated at which the liability or indebtedness of the sureties to the state attached.

Neither the state nor the complainant, Dowell, is entitled to any account of rents and profits of the lands from the dates of the several conveyances to the present time. Dowell has nothing in the land beyond a judgment lien, and this is neither a *jus ad rem* nor a *jus in re*, but simply a right to have his judgment satisfied out of the land. There is no trust in his favor, actual or constructive. Had

the property remained in Jesse Applegate, he would have been entitled to the use of it until an actual sale, as in the case of other real property sold on execution. His grantees are in no worse condition. The conveyances held valid I do not think void under the evidence in the case for want of stamps of greater value than the ones used. At all events, the complainant does not present a case of such superior equities as to entitle him to call upon a court of equity to grant him affirmative relief upon that ground.

A good deal has been said in the case about the money drawn out, ostensibly on behalf of an escheated estate, and used in the purchase of an organ for a church. That money seems to have been refunded by the church. I do not perceive that this matter in any way affects the case. I do not even see how the obtaining and use of this money by May, in the manner shown, could be an embezzlement of the funds of the estate for which his sureties are liable. I cannot find by the statute that he was in any way interested with that fund. It was to go into the treasury, and there remain until drawn out by some one authorized to draw it. It was got out by May in some way illegally, in the assumed character of agent for the parties legally entitled to receive the fund in a proper manner. May was not treasurer, and the fund was never intrusted by the state to his keeping for any purpose. He had no duties in connection with it. If, in his assumed character of agent for the parties, he unlawfully got hold of the money, he was doubtless liable to them, and perhaps to the state; but it was not an official act for which his sureties were liable. But I do not understand that this forms any part of the judgment paid by Dowell, or that it can in any view affect the rights of the parties in this case.

Upon the views taken, there must be a decree for the complainant subjecting the life interest of Jesse Applegate in those portions of the south half of the donation claim, and the whole of the remainder of the lands described in the bill embraced in all the conveyances made in 1869, or so much thereof as may be necessary to satisfy the judgment for all moneys and interest thereon arising from defalcations which had accrued at the date of the several conveyances respectively, and for costs.

DEADY, J. I concur in the conclusions reached by the circuit judge in the foregoing opinion and the reasons given therefor; and after hearing the counsel for the parties, as directed by him, have settled the terms of the decree in the case.

Before stating them, it may be well to call attention to some of the leading facts in the case. On September 6, 1862, Jesse Applegate and others became sureties on the official bond of Samuel E. May, secretary of state, for the term of four years, and on August 4, 1866, said Applegate and B. F. Dowell became such sureties on his second official bond for a like period thereafter. At both these dates Jesse Applegate's property consisted substantially of certain lands, including the donation claim No. 38, in township 22 S., of range 5 W. of the Wallamet meridian, and situate in Douglas county, which, with the exception of a tract of 880 acres on Mt. Yoncalla, he subsequently conveyed to his children and one grandchild, in consideration of services performed by them on the farm during their nonage, and in pursuance of a promise by him to that effect, as follows: To William H. Applegate, 160 acres of the N. ½ of the donation claim by deed dated April 6, 1867, and 80 acres of the same by deed dated April 19, 1869; to Daniel W. Applegate, 146 acres in the S. ½ of the donation claim, in which he had a life estate for his own life, by deed dated April 6, 1867, and 80 acres lying partly in the N. and partly in the S. ½ of the donation, but the larger part in the latter, by deed dated April 20, 1869; to Peter Applegate, 175 acres of the S. ½ of said donation and 41.31 acres in section 28 of the township aforesaid by deed of April 21, 1869; to Sallie Applegate, 160 acres in section 23 of township 23 S., of the range aforesaid, by deed of December 2, 1871, and to Charles Putnam, his grandson, 240 acres in township 22 S., of the range aforesaid. At the date of the conveyances, in 1867, May was a defaulter to the state under his first bond in the sum of $1,328.29, and under his second bond he became a defaulter in the sum of $8,524.25, of which amount $5,546 was incurred before January 1, 1869. In 1874 the state obtained judgments on those bonds for these defalcations, amounting, with costs and expenses, to $11,258.14. On June 27, 1878, Dowell obtained a judgment against Jesse Applegate in the circuit court for the county aforesaid for the sum of $4,882.19, the same being the one-half of the amount theretofore paid by him to the state on the judgment obtained by it against Dowell and Applegate on account of May's defalcations under the bond of 1866, together with $146.69 costs and disbursements, making in all the sum of $5,028.88; and on November 16, 1878, Dowell paid the state the remaining sum due on said judgment against himself and Applegate, to-wit, $1,385.64, and gave notice to the clerk of such payment, and his intention to claim contribution therefor, as pro-

vided in section 295 of the Code of Civil Procedure, and in pursuance of such notice and claim caused an execution to issue upon said judgment against Applegate, upon which the Mt. Yoncalla tract of land was sold, and the proceeds, less the costs of sale, applied upon said claim for contribution, so that upon May 31, 1879, there was only $284.61 due him from Applegate on that account.

After making the conveyances of 1867, Jesse Applegate had still sufficient property to discharge his obligations to the state growing out of May's defalcations up to that time, but at the date of the subsequent deeds the case was otherwise. The conveyances of 1869 left him without sufficient means to pay the defalcations which had then occurred under the second bond.

The decree of the court will be that the plaintiff has a lien upon the property of Jesse Applegate for the sum now due him on these judgments, to-wit, $7,488.48, and that the conveyances aforesaid, made since 1867, except the one to Charles Putnam, are, as against the lien of the plaintiff, invalid, and so far null and void; and that unless Jesse Applegate pay to the plaintiff the sum now due him, with his costs and expenses, within 20 days herefrom, the master of this court will proceed to sell, as upon an execution, all the interest of Jesse Applegate, on January 1, 1869, in the premises conveyed since 1867, except that portion conveyed to Charles Putnam, and after paying the expenses of the sale to bring the remainder of the proceeds into court for distribution or application, and that the purchaser at such sale have, if necessary, due process from the court to put him in possession.

No authorities need be cited to the proposition that a conveyance by a parent to his child, whether upon a valuable consideration or merely in consideration of love and affection, is valid, in the absence of creditors claiming the right to a satisfaction of their debts out of the property of the parent. But if the parent be in debt and make a voluntary conveyance of his property to his child or children with a view to insolvency, or intending that the property shall be held in secret trust for himself, or that the conveyance shall hinder, delay, or defraud his creditors, then it is void, and will be set aside by the courts. *Goodell* v. *Taylor*, Wright, (Ohio,) 82; *Carlisle* v. *Rich*, 8 N. H. 44; *Pepper* v. *Carty*, 11 Mo. 540; *Henry* v. *Fullerton*, 21 Miss. 631; *Wells* v. *Treadwell*, 28 Miss. 717; *Marston* v. *Marston*, 54 Me. 476; *Atkinson* v. *Phillips*, 1 Md. Ch. 507; *Clayton* v. *Brown*, 17 Ga. 217; *Mixell* v. *Lutz*, 34 Ill. 382; *Miller* v. *Thompson*, 3 Port. (Ala.) 198; *Gardner* v. *Booth*,

31 Ala. 186; *Benton* v. *Jones*, 8 Conn. 186; *Clayton* v. *Brown*, 17 Ga. 217; *Shepard* v. *Iverson*, 12 Ala. 97; *Parish* v. *Murphee*, 13 How. 92; *Jones* v. *Slubey*, 5 Har. & J. 372; *Kissen* v. *Edmundson*, 1 Ired. (N. C.) 180; *Ringgold* v. *Waggoner*, 14 Ark. 69; *Swartz* v. *Hazlett*, 8 Cal. 118; *New Haven Stm. Co.* v. *Vanderbilt*, 16 Conn. 420; *Steward* v. *Rogers*, 25 Iowa, 395; *Brady* v. *Briscoe*, 2 J. J. Marsh. (Ky.) 212; *Rucker* v. *Abel*, 8 B. Mon. (Ky.) 566; *Birdsale* v. *Lakey*, 6 La. Ann. 647; *Rousseau* v. *Lum*, 9 La. Ann. 325; *Hoye* v. *Penn*, 1 Bland, (Md.) 28; *Worthington* v. *Shipley*, 5 Gill, (Md.) 440; *Bullett* v. *Worthington*, 3 Md. Ch. 99; *Bryce* v. *Meyers*, 5 Ohio, 121; *Croft* v. *Arthur*, 3. Desaus. (S. C.) 223; *Chamberlayne* v. *Temple*, 2 Rand. (Va.) 384; *Coleman* v. *Cock*, 6 Rand. (Va.) 618; *Amy* v. *Young*, 15 N. H. 522; *Seward* v. *Jackson*, 8 Cow. 406; *Robinson* v. *Stewart*, 10 N. Y. 189; *Tripp* v. *Childs*, 14 Barb. 85; *Pell* v. *Treadwell*, 5 Wend. 661; *Sterry* v. *Arden*, 1 Johns. Ch. 261; *Waller* v. *Mills*, 3 Dev. (N. C.) Law, 515; *Jessup* v. *Johnson*, 3 Jones, (N. C.) Law, 335; *Smith* v. *Reavis*, 7 Ired. Law, 341; *Morgan* v. *McLelland*, 3 Dev. Law, 82; *O'Daniel* v. *Crawford*, 4 Dev. Law, 186; *Freeman* v. *Eastman*, 3 Ired. Eq. 81; *Black* v. *Caldwell*, 4 Jones, Law, 150; *Winchester* v. *Reid*, 8 Jones, Law, 377; *McGill* v. *Harman*, 2 Jones, Eq. 179; *Brown* v. *Godsey*, 2 Jones, Law, 417; *McKinnon* v. *Rogers*, 3 Jones, Eq. 200; *Edgington* v. *Williams*, Wright, (Ohio,) 439; *Greiger* v. *Welsh*, 1 Rawle, 349; *Miner* v. *Warner*, 2 Grant, Cas. 448; *Johnston* v. *Harvey*, 2 Pa. St. 82; *Nicholas* v. *Ward*, 1 Head, 323; *Hamilton* v. *Thomas*, 5 Hayw. (Tenn.) 127; *Dillard* v. *Dillard*, 3 Humph. 41; *Martin* v. *Oliver*, 9 Humph. (Tenn.) 561; *Redfield* v. *Buck*, 35 Conn. 328; *Chase* v. *McKay*, 21 La. Ann. 195; *Grimes* v. *Russell*, 45 Mo. 431.

It will be void though the conveyance be not directly from the father to the son, but from the father's vendor to the son, by the father's direction, he paying the vendor the purchase money for the property. *Doe* v. *McKinney*, 5 Ala. 719; *Patterson* v. *Campbell*, 9 Ala. 933; *Elliott* v. *Horn*, 10 Ala. 348; Ewell, Lead. Cas. 75; *Goodell* v. *Taylor*, Wright, (Ohio,) 82; *State Bank of Indiana* v. *Harrow*, 26 Iowa, 426. *Elliott* v. *Horn*, *supra*, is an interesting case illustrative of this rule.

So, although the son agree to pay the father's debts. *Swihart* v. *Shaum*, 24 Ohio St. 432; *Brady* v. *Briscoe*, 2 J. J. Marsh. (Ky.) 212. See, also, *Robinson* v. *Stewart*, 10 N. Y. 189. But see *Patteson* v. *Stewart*, 6 Watts & S. 72; *Preston* v. *Jones*, 50 Pa. St. 54.

But where A. advances money to B. to be paid as a part consideration of the purchase of a tract of land for A.'s grandson, C., a child of 12 years, on condition that the title be made to that child, and B. gives his note for the remainder of the consideration, and the title is made by the vendor to the child, who is the son of B., it will vest the title in C., and he will hold the land as against a subsequent purchaser at sheriff's sale under a judgment obtained on said note of B. *Roe* v. *Doe*, 32 Ga. 39.

The father's deed is void although made in compliance with a previous verbal promise to convey, made when unembarrassed. *Rucker* v. *Abell*, 8 B. Mon. (Ky.) 566. So, also, an antenuptial conveyance by a widow to her children, just prior to her second marriage, is a fraud upon the second husband. *Black*

v. *Jones*, 1 A. K. Marsh. (Ky.); *Petty* v. *Petty*, 4 B. Mon. (Ky.) 215. See, also, *Ramsey* v. *Joyce*, 1 McMull. (S. C.) Ch. 236; *Manes* v. *Durant*, 2 Rich. (S. C.) Eq. 404. But it has been held that an absolute voluntary conveyance of personalty by a husband to his children by a former wife is not a fraud on the rights of his wife which will avoid the transfer as to her. *Cameron* v. *Cameron*, 18 Miss. 394.

It need hardly be stated, so well settled is the law, that a voluntary conveyance is good between the parties, and the father may be compelled to deliver the property which he has conveyed. *Greenwood* v. *Coleman*, 34 Ala. 150. When the property has been delivered to the child, the father cannot recover possession of it. *Morris* v. *Harvey*, 4 Ala. 300. If the thing is conveyed to a son who lives at home and it remains in the family, possession of it is presumed to be in the son. *Humphries* v. *McCraw*, 9 Ark. 91.

Of course, if the conveyance from the parent is not voluntary, but is made upon a valuable consideration, it is good. Thus, the marriage of the child, contracted in consideration of the conveyance, is a valuable consideration which will sustain the transfer. *Verplank* v. *Sterry*, 12 Johns. 536; *Sterry* v. *Arden*, 1 Johns. Ch. 261; *Wood* v. *Jackson*, 8 Wend. 9; *Whelan* v. *Whelan*, 3 Cow. 537; *Mills* v. *Morris*, 1 Hoff. 419. But the rule that marriage constitutes a good and valuable consideration does not apply where a father makes a voluntary conveyance to his daughters, who afterwards marry, the father continuing in possession of the property after the conveyance, contracting debts and dying insolvent, so as to enable the daughters to hold the property against creditors of the father. *O'Brien* v. *Coulter*, 2 Blackf. (Ind.) 421. See, also, *Stokes* v. *Jones*, 18 Ala. 734.

Services rendered by minor children to parents do not constitute a valuable consideration for a conveyance by the parent to the children. *Stearns* v. *Gage*, 79 N. Y. 102; *Updike* v. *Titus*, 13 N. J. Eq. 151; *King* v. *Malone*, 31 Grat. 158; *Hack* v. *Stewart*, 8 Pa. St. 213; *Sanders* v. *Wagonseller*, 19 Pa. St. 248; *Miller* v. *Sauerbier*, 30 N. J. Eq. 71; *Bartlett* v. *Mercer*, 8 Ben. 439; *Griffin* v. *First Nat. Bank*, 74 Ill. 259; *Hart* v. *Flinn*, 36 Iowa, 366; *Zerbe* v. *Miller*, 16 Pa. St. 488; *Van Wyck* v. *Seward*, 18 Wend. 375.

Where a son, after he had attained the age of 21 years, continued for a few years to live with his father, support him, and to labor on his farm as he had previously done, no express contract as to the payment of wages by the father for the services of the son being proved to exist between them, it was held that the father could not, after he had became indebted and insolvent, create a debt in favor of the son which would sustain a conveyance from the father to the son. *Hack* v. *Stewart*, 8 Pa. St. 213.

A father agreed with two sons that if they would remain on his farm and assist in carrying it on and in educating their brothers, he would convey the farm to them, and in consideration of their services and their agreement to support him and their mother the remainder of their lives, he subsequently executed the conveyance, and it was held void against creditors. *Graham* v. *Rooney*, 42 Iowa, 567. See, also, *Griffin* v. *First Nat. Bank*, 74 Ill. 259. So a conveyance of real estate by parents to their daughter, the alleged consideration being a cow and its increase, given to her by her grandfather many years before and services performed by her while in the family during two or three

years after attaining her majority, and without any agreement that she was to receive compensation, is fraudulent. *Hart* v. *Flinn*, 36 Iowa, 366.

As to the decision in the principal case upon the first two points stated in the head-note, there can be no question as to its entire correctness, and the case affords an interesting and instructive application of well-settled principles.

M. D. EWELL.

Chicago, March 2, 1883.

WYLIE *v.* NORTHAMPTON NAT. BANK.

(*Circuit Court, S. D. New York.* 1883.)

1. NATIONAL BANK—STOLEN DEPOSITS—CONTRACT FOR RECOVERY OF.
   A national bank cannot enter into a valid contract to undertake the business of the recovery of the stolen property of special depositors.
2. SAME—LIABILITY OF DIRECTORS.
   The directors might be liable individually.
3. SAME—BONDS LEFT AS GRATIS BAILMENT—RECOVERY FROM BANK.
   To recover against a bank for bonds left with the bank as a *gratis* bailment, something more is needed than the mere fact that they were stolen from the bank.
4. SAME—COMPLAINT—PROOF ESSENTIAL TO SUPPORT ACTION.
   A complaint claiming that the bank recovered $1,500,000 back from the thieves, on an agreement that in consideration of such recovery the bank allowed the thieves to retain the property of plaintiff and other special depositors, states a valid cause of action; but here there is no proof sufficient to go to the jury as to this branch of this cause of action.
5. SAME—PROOF OF NEGLIGENCE ALLEGED.
   In such an action the plaintiff will be held to proof of the allegations made, and will not be allowed to rest on proof of other negligence.

The Northampton National Bank was robbed of the property of itself and of various special depositors, including the plaintiff, to the amount of about $1,600,000. Five years later, all but $130,000 of the property was recovered from the thieves. Among the property not recovered were bonds to the value of $10,180 belonging to the plaintiff. The other facts appear in the statements of counsel and the opinion of the court.

W. G. Peckham and *E. W. Tyler*, for the defendant, moved the court, at the close of the plaintiff's evidence, to direct a verdict for the defendant.

As to the first cause of action—negligence in the keeping of a *gratis* deposit—the mere fact that the goods were stolen does not establish negligence under the American decisions, (*Comp.* v. *Carlisle*

Bank, 94 Pa. 409; *Foster* v. *Essex Bank*, 17 Mass. 479,) and proof of gross negligence was required, even in *Nat. Bank* v. *Graham*, 100 U. S. 699. Furthermore, plaintiff may not plead a tort that amounts to a crime, and attempt to recover on proof of a trifling negligence, not set out in the complaint, viz, the not sending of notices of the robbery to Frankfort-on-the-Main, or the attempted proof that a director wrongfully recovered his own special deposit. *Dudley* v. *Scranton*, 57 N. Y. 424; *Parker v. Renns. & S. R. Co.* 16 Barb. 316; *Ross* v. *Mather*, 51 N. Y. 108; *Delevan* v. *Simonson*, 35 Super. Ct. 243. The directors and officers, all of them, acting as individuals, cannot bind the bank to such an undertaking as that in the complaint. They must, at least, have acted as a board in an official corporate capacity. *Alleghany Co. Work-house* v. *Morse*, 95 Pa. 408; *East Anglian R. Co.* v. *Eastern Co.* 21 Law J. (N. S.) 23; *Chem. Nat. Bank* v. *Kolmer*, 8 Daly, 532. Even in the 100 U. S. case the court says: "We do not mean, however, to say it [the bank] could convert itself into a pawnbroker's shop." Such an undertaking as this, a national bank has no charter or power to undertake. Judge WHEELER, in *Wylie* v. *Nat. Bank of Brattleboro*, 47 Vt. 550, and *Whitney* v. *Same*, 50 Vt. 389.

George H. Adams and *Artemas H. Holmes*, for the plaintiff, oppose the motion, on the ground that in New York practice the proof of the negligence as to notice sent abroad, and as to acts of the director H. are admissible and sufficient, and that proof of *dolus* is not essential in an action for negligence; citing Whart. Neg.; *Nat. Bank* v. *Graham*, 100 U. S. 699; and Abbott, (N. Y.) Forms of Pleading.

The director H. and the vice-president promised to undertake the recovery of the plaintiff's property. Their action was approved by the other officers. The bank made similar agreements with the other special depositors, and in fact with all the depositors, at a meeting.

WHEELER, J., (*orally.*) The constitution gives the right to trial by jury, not trial by the court in the presence of the jury, but trial by jury in fact. At the same time it is the duty of the court to decide whether there is any evidence to go to the jury tending to prove the fact. If there is not, why, then, the court is not in duty bound and has no right to submit to the jury what the facts may be, in order to make out a case. It requires proof, and proof of facts, and proof of facts tending to establish the ground of recovery.

The complaint goes for this: negligence about keeping the bonds in the first place. Then it goes on and alleges an agreement by the bank to act for the plaintiff in recovering her bonds from the thieves

or persons who had them, and for a breach of that agreement,—that is, neglect in not recovering the bonds for her,—and specifies as a ground of recovery in the complaint that in recovering their own property they traded away hers; that they agreed with the robbers that if they would let the bank have what they did return, they might keep plaintiff's bonds. Of course, if the plaintiff could make that out, she would have a good case; but the evidence not only does not show that the bank made that agreement with the robbers, but it shows they did not. The direct evidence upon the point of what the arrangement was, by which the bonds were finally recovered, shows that the bank did not agree to that. The witness on that point so testifies. The evidence shows that that was not a part of the agreement, so that part of the case is not made out.

Now, then, as to the agreement to act for her. In the first place, I do not think that the stockholders of a national bank could be bound by an agreement by their president or cashier or directors, or all of them together, to undertake the job of hunting up any stolen bonds, as a bank. It is no part of the purpose for which a bank is chartered; it is no part of the business of the bank. I do not think the bank would be bound by any such agreement. But suppose they could. Now, this complaint says that they agreed to act for her in negotiating for the recovery of these bonds. That would mean that they were bound to do the best they could in making those negotiations. The matter of advertising the bonds had all gone by when the agreement was made. Now, I think there is evidence sufficient to go to the jury that the plaintiff was fairly given to understand, by the officers of the bank, that they would act for her. They had lost their own securities, and lost the securities of a great many other depositors, and they were trying to get them all back. I think they gave her to understand that in trying to get theirs they would try to get hers, or would do the best they could. Now, if they were bound by that agreement, and did do as well as they could reasonably, they would not be liable. So we shall have to look at this evidence and see if it shows any act—anything—which we could see they did that they ought not to have done, or did not do which they ought to have done. Now, I am not able to see, after looking it all over, anything that they could do that they did not do. Now, here was Mr. Hinckley, a depositor who had $25,000, I believe, of bonds of a particular class, which he owned, which he got track of, which he negotiated for, and part of which he got back. Now, they say the bank ought not to have let him get back his without getting back hers. They

could not hinder him any more than they could her. The most they could do would be to act on any information that they got through him that the bonds were here—here in New York. They were all the while seeking information about that. There is nothing to show that they had anything definite that they could act upon, or that they didn't do as well as they could. When they came to a final negotiation by which they got $1,500,000, her bonds were not here; they were not with those they got. They did not agree that theirs should be given up and hers should be lost. Her bonds were on the other side of the water. They were not here at all. They were not dealing with those who had them.

Now, I could not say to the jury that here is anything that I submit to you as proof of neglect on the part of this bank as a bank. If I were to say that we would hear the defense, and go along with a large number of witnesses, no matter what they should testify to, it would come to this in the end. The plaintiff declared for a good case. If she could prove her complaint she would have an excellent case. If she could prove that this bank, having got track of these bonds, made an agreement with the robbers and thieves that they might keep hers if they would give up theirs, that would be a good case anywhere. That is not proved; it is disproved. They didn't do any such thing. They didn't trade her out; they didn't throw her stock overboard to get theirs; and notwithstanding the plaintiff's misfortune,—which all of us, of course, regret,—I don't think, as to that part of the case, that there is enough of it that tends to prove anything done or not done which ought to go to the jury; and I think, at the bottom of all of it, that the bank as a bank, to bind the stockholders so as to take a large sum out of their assets, could not undertake such a job; it is no part of its business. I should hold that such a bargain as that made with the directors was an individual thing, and bound them personally, if at all, and not the bank. I should say that, so far as this case rests on an agreement to do a thing and failure to do it, the bank was not competent in law to make such an agreement; and, so far as doing anything about the bonds, there is no proof that they ever could have got her bonds, ever had a chance to get them, or acted about them in a way that they could be charged with neglect.

Now, about the first part of the case, for the negligent keeping—actual keeping—of the bonds in the bank. The proof that stands here is that the Northampton National Bank received these bonds to keep; she signing, as she said she supposed she did, a certain paper

envelope in which the bonds were placed. We have no proof here except that the bonds were left there by her; that she called for them and didn't get them. They were gone; they were stolen. The pleadings say that, and I believe the witness says that the directors said that. I am inclined to rule on that, also, in favor of the bank. So you may take a verdict for the defendant.

The jury accordingly rendered a verdict for the defendant.

HILL *v.* NATIONAL BANK OF BARRE.

(*Circuit Court, D. Vermont.* February Term, 1883.)

1. USURY.

Section 5198, Rev. St., makes the receiving or charging "a rate of interest greater than is allowed" "a forfeiture of the entire interest." In case a greater rate of interest has been paid, the debtor may recover back "twice the amount of interest thus paid."

2. SAME—AMOUNT OF PENALTY—NOT LIMITED TO THE EXCESS.

The amount of penalty recoverable in an action against banks under section 5198, Rev. St., is twice the whole amount of the interest paid, and not merely twice the amount paid in excess of the legal rate.

W. Porter, for plaintiff.

E. W. Bisbee, for defendant.

WHEELER, J. This action is brought upon the second clause of section 5198 of the Revised Statutes of the United States, to recover back twice the amount of illegal interest paid. The lawful rate here is 6 per cent. and the plaintiff paid 8. The only question made is whether the plaintiff is entitled to recover the whole amount of this interest so paid, or only twice the amount in excess of the legal rate paid. The whole section must be read together to ascertain the meaning of this clause. The first clause provides that the taking, receiving, reserving, or charging a rate of interest greater than is allowed by law, shall be deemed a forfeiture of the entire interest. Here there is no distinction of the excess of the legal rate over the rest. Then the clause in question proceeds to provide that in case the greater rate of interest has been paid, the person by whom it has been paid may recover back twice the amount of the interest thus paid. The continuing the exaction till it had accomplished the payment of the amount exacted is a greater offense than the mere stipulating for the payment, and would be treated with the greater severity. The first clause seems to be intended for the punishment of

the latter offense, and the second for that of the former. The greater rate in the second clause is the same as a rate of interest greater in the first; and the amount of the interest thus paid in the second is the same entire interest mentioned in the first. The difference between the offenses is the difference between exacting an agreement to pay and exacting actual payment; and the difference between the consequences imposed is the liability to lose once the interest in the former case and twice the interest in the latter. This is in accordance with the great current of authorities. *Crocker* v. *Bank*, 4 Dill. 358; *Bank* v. *Davis*, 8 Bliss, 100; *Bank* v. *Moore*, 2 Bond, 174; *Brown* v. *Bank*, 72 Pa. 211; *Bank* v. *Karmany*, 12 Reporter, 540; *Oates* v. *Bank*, 100 U. S. 239.

Brown v. *Bank*, 72 Pa. 211, is relied upon as an authority for the defendant, and the head-note to the case in the reports indicates it to be such. An examination of the case at large, however, shows to the contrary. The question there was whether the plaintiff in error had the right to set-off in a suit by the defendant in error against him on notes double the amount of, or the simple amount of, interest at an illegal rate, paid on previous notes, instead of the excess over the legal rate allowed by the court below. The decision seems to have been that he could not, on the ground that double the amount paid at greater than the legal rate could only be reached by the action provided for to recover it; that the forfeiture of the entire amount stipulated for at a greater than the legal rate could be availed of only in defense to an action for the principal. SHARSWOOD, J., in delivering the opinion of the court, said:

"For if, on the payment, simple interest is forfeited, why not also provide for its recovery back by action as well as the penalty of double the amount? Nothing would have been easier than to have expressed the intention that the entire amount should be recovered back in all cases, but double the amount only by action instituted within two years. There may be good reasons for this, if it was the intention of congress to give the bank a *locus pœnitentiæ* so far as a penalty for double the amount was concerned, and allow them to save it by not actually taking it upon the maturity and payment of the debt."

The case is in accordance with the subsequent decision of the same court directly upon the question in this case of *Bank* v. *Karmany*, in the Reporter. The construction contended for would make the consequences of agreeing to take greater than the actual taking in most cases, for the loss of the entire interest would be greater than the loss of twice the excess, unless the excess should equal or exceed half the

rate stipulated for, which would not be usual. In every view, the plaintiff seems by law to be entitled to recover double the amount of interest actually paid in this action.

Judgment for plaintiff for $501.76 damages.

DALLINGER *v.* RAPALLO.*

(Circuit Court, D. Massachusetts. March 2, 1883.)

1. TAXATION—NON-RESIDENT EXECUTORS—ASSESSMENT OF PERSONAL PROPERTY HELD BY.

   The General Statutes of Massachusetts, *c.* 11, § 12, provide that property held by an executor residing out of the state, in trust to pay the income to persons within the state, is taxable to the latter, but does not authorize the taxation of personal property in the hands of an executor, residing out of the state, which is part of the estate of his testator and held by him in trust to pay the income for life to inhabitants of the state, but is not shown to be itself in the state.

2. SAME.

   The statute of 1878, *c.* 189, § 2, has for its only object to amend the provision of chapter 11, § 12, Gen. St., in the single point, that after the expiration of three years from the appointment of the executor, the property, whether distributed or not, should be assessed according to the provisions cited above.

J. W. Hammond, for plaintiff.

L. S. Dabney, for defendant.

Before GRAY and LOWELL, JJ.

GRAY, Justice. Since the decision in October last, sustaining the defendant's demurrer, the plaintiff, by leave of the court, has amended his declaration, so as to show that, among other bequests made by the will under which the defendant was appointed and acted as executor, the testator gave to each of three persons, who at the time of the probate and ever since were inhabitants of Cambridge, the income for life of a sum of $20,000, to be set apart and invested by the executor, and the principal, after the death of the beneficiary for life, to be paid to other persons who are not shown to be inhabitants of Massachusetts; and that the personal property of the testator coming to the hands of the executor was sufficient to provide for these three bequests. The case has now been argued upon a demurrer to the amended declaration.

We are of opinion that the facts thus alleged and admitted do not vary the result; that neither the seventh clause of the General Stat-

*See S. C. 14 FED. REP. 32.

utes, c. 11, § 12, nor the statute of 1878, c. 189, § 2, authorizes the assessment, to an executor residing out of the state, of an annual tax upon, or by reason of, personal property which is part of the estate of his testator, and is held by him in trust to pay the income for life to inhabitants of the state, but is not shown to be itself within the state; and that the whole object and effect of the later statute are to amend the earlier one in the single point, that, after the expiration of three years from the appointment of the executor, the property, whether distributed or not, should be assessed according to the provisions of the fifth clause of the General Statutes, c. 11, § 12; and by that clause property held by an executor residing out of the state, in trust to pay the income to persons within the state, is taxable to the latter only.

Demurrer sustained, and judgment for the defendant.

NICHOLS v. BEARD, Collector.

(*Circuit Court, D. Massachusetts.* January 31, 1883.)

CUSTOMS DUTIES—MEASUREMENT OF LIQUIDS.

All importations of liquids, including ale and porter, are to be estimated according to the standard of the wine gallon of commerce, containing 231 cubic inches of measurement.

In Equity.

Samuel W. Creech, Jr., for plaintiff.

George P. Sanger, Dist. Atty., for defendant.

NELSON, J. This is an action against the collector of the port of Boston to recover back duties paid under protest. At the trial by the court without a jury the following facts were proved or admitted: The plaintiff, a merchant and resident of New York, in February, 1880, imported into the port of Boston, from Liverpool, a quantity of ale and stout otherwise than in bottles, measuring 6,200 wine gallons of 231 cubic inches each, or 5,300 beer gallons of 282 cubic inches each. In the invoices and entry by the plaintiff the number of gallons was given in beer measure. The collector, taking the wine gallon as the standard of measure, assessed a duty of 20 cents a gallon on 6,200 gallons, and exacted the same from the plaintiff, who, claiming that the duty should have been assessed upon only 5,300 gallons, the number of gallons according to beer measure, protested against the payment of the duty upon the 900 gallons in excess of the number

of beer gallons, and paid the duty thereon—$180—under protest. He seasonably applied to the secretary of the treasury, and in due time, after an adverse decision of the secretary upon his appeal, brought this action. The proceedings at the custom-house were in due form of law.

The only gallon of liquid measure authorized by the treasury department, and distributed to the custom-houses for use therein, is the wine gallon of 231 cubic inches, which was adopted as the standard of liquid measure by the department in 1832.

By a resolution of congress, approved June 14, 1836, providing for the distribution of weights and measures, the secretary of the treasury was directed "to cause a complete set of all the weights and measures adopted as standards, and now either made, or in the progress of manufacture, for the use of the several custom-houses, and for other purposes, to be delivered to the governor of each state in the Union, or such person as he may appoint, for the use of the states respectively, to the end that a uniform standard of weights and measures may be established throughout the United States." The only gallon of liquid measure distributed to the states by the secretary of the treasury under this resolution was the wine gallon.

The wine gallon of the treasury department has, for many years, been the statute standard of liquid measure in most, if not in all, of the states. No other gallon than the wine gallon was ever used in the custom-house at Boston. In the New York custom-house, prior to 1871, the wine gallon was used in all cases, except that ale and beer were returned on the basis of the beer gallon. But in that year the attention of the secretary of the treasury having been called to the practice, he instructed the collector at New York, in a letter dated January 5, 1871, as follows:

"Your communication of the fourteenth instant has been received, inclosing a letter from the surveyor, stating that it is the practice at your port to return the measure of imported ale in beer gallons; and in reply you are informed that the department has this day decided, on the appeal of J. D. Richards & Sons, at Boston, that such practice is incorrect, and that all liquors subject to duty by the gallon should be returned on the basis of wine liquid gallons. This decision is the more readily arrived at in view of the repeal of the 103d section of the act of 1799, which originated the said practice at your port, and also by reason of the general commercial usage of the country in estimating all liquids by wine or liquid measure."

Since the date of this letter the wine gallon only has been used at the New York custom-house. The sale of ale and beer in this country, at retail, has for a long period of time been by wine measure.

Prof. Alexander D. Bache, United States superintendent of weights and measures, in his report to the secretary of the treasury, dated December 30, 1856, says that "the standard of liquid capacity measures should be the gallon containing 231 cubic inches." See Senate Ex. Doc. No. 27, 34th Cong. 3d Sess. Under the word "gallon," in Worcester's dictionary, it is said that the wine gallon of 231 cubic inches is the government or customs gallon of the United States; in Webster's dictionary, that the standard gallon of the United States contains 231 cubic inches; in Appleton's Cyclopedia, that the gallon of the United States is the standard or Winchester wine gallon of 231 cubic inches. Bouvier, in his Law Dictionary, defines a gallon as "a liquid measure containing 231 cubic inches, or four quarts." Heyl, U. S. Import Duties, Part 3, p. 53, states that "the United States standard gallon is to the British imperial standard gallon nearly as 5 is to 6," which gives our standard gallon as 231 cubic inches.

By Rev. St. § 2504, Schedule D, this duty is imposed "on ale, porter, and beer, in bottles, 35 cents per gallon; otherwise than in bottles, 20 cents per gallon." The question in the case is whether, under this clause, the duty is to be estimated on the wine gallon or on the beer gallon. Words and phrases found in the custom laws are to be understood in their commercial sense, and are to be interpreted according to the known usages of trade and business. This is the uniform rule in the construction of this class of statutes. *200 Chests of Tea*, 9 Wheat. 430; *U. S.* v. *112 Casks of Sugar*, 8 Pet. 277; *U. S.* v. *Breed*, 1 Sumn. 159. The act must therefore refer to the gallon of commerce. That this is the wine gallon is sufficiently evident from the facts found in the case, as well as from the known usages of the country, of which the court will take notice. This is in accordance with all the authorities. No authority has been produced, and it is believed that none exists, to show that the old beer gallon is the standard of liquid measure in any part of the country, whether in the measurement of ale and beer, or of any other liquids.

The practice in the New York custom-house prior to 1871, seems to have had its origin in the act of March 2, 1799, § 103, (1 St. 262,) which enacted that no beer, ale, or porter should be imported into the country "except in casks or vessels, the capacity of which shall not be less than forty gallons beer measure, or in packages containing less than six dozen bottles." But whatever sanction was given by this provision to the practice, was removed by its repeal by the act of eighteenth July, 1866, § 43, (14 St. 188.)

The plaintiff relies upon the act of first March, 1879, § 21, (20 St. 351,) which enacted that "the word 'gallon,' whenever used in the internal-revenue law, relating to beer, ale, porter, or other similar fermented liquors, shall be held and taken to mean a wine gallon, the liquid measure containing 231 cubic inches." But this act was plainly declaratory of the law as it then existed, and was not intended to establish a new standard of measurement in the customs and excise departments. Its object was to put a stop to an erroneous practice then prevailing in the internal-revenue department, of estimating domestic malt liquors by beer measure, and to require it to conform to the reorganized standard of the customs service and of the mercantile community. We are of opinion that the collector was right in estimating the plaintiff's importation by the wine gallon, and assessing the duty thereon accordingly.

The point was determined in the same way by Mr. Attorney General DEVENS, whose learned opinion is reported in 16 Op. Atty. Gen. 359. We fully concur both in his reasoning and conclusion.

Judgment for the defendant.

UNION NAT. BANK OF CHICAGO, ILLINOIS, *v.* CARR and others.

(Circuit Court, S. D. Iowa, C. D. 1883.)

OPTION CONTRACTS—VALIDITY OF.

Option contracts are not necessarily illegal, and the incident of putting up margins amounts to nothing unless the contract itself is illegal. The validity of such contracts depends upon the mutual intention of the parties as to the actual sale and delivery of the property, or a pretended and fictitious sale, to be settled upon differences.

On Exceptions to Master's Report.

Lehmann & Park, for complainants.

E. J. Goode, for defendants.

LOVE, J. There seems to be no serious question made in this case, except that of the legality of the contracts, which lie at the basis of the controversy. It is insisted that the contracts in question were illegal because they were "option" contracts, and because the defendant was charged with certain losses, by reason of his failure to put up "margins," etc. The evidence, however, falls far short of what is necessary to establish illegality in contracts of this kind. All "option" contracts are not illegal, and the incident of putting up

margins amounts to nothing, unless the contract itself is illegal. The validity of "option" contracts depends upon the mutual intentions of the parties. If it be not their intention in making the contract that any property shall be delivered or paid for, but that the pretended and fictitious sale shall be settled upon differences, the agreement amounts to a mere gambling upon the fluctuations of prices, and the contract is utterly void. But if it is the *bona fide* intention of the seller to deliver *or* the buyer to pay, and the option consists merely in the time of delivery within a given time, the contract is valid.

If the contract itself is lawful, the putting up of margins to cover losses which may accrue from the fluctuation of prices, and the final settlement of the transaction according to the usages and rules of the board of trade, are entirely legitimate and proper.

Nothing whatever appears in the present case to impeach the validity of the transactions in question, except that the defendant was dealing in options through his broker on the board of trade; that he failed to put up required margins; and that his transactions were settled at heavy losses, which were charged to him. This is entirely insufficient to invalidate the charges made in the account against him.

The exceptions to the master's report will be overruled and a decree entered for the complainant.

There is, at least, serious doubt whether a decree can be entered till the next term. Let the cause, therefore, stand over till that time.

THE "IOLANTHE" CASE.

CARTE *v.* FORD and another.

(*Circuit Court, D. Maryland.* February 21, 1883.)

1. DEDICATION OF OPERA BY PUBLICATION OF UNCOPYRIGHTED SCORE AND LIBRETTO.

   The non-resident alien authors of the comic opera of "Iolanthe," having sanctioned the publication in the United States of the libretto and vocal score, with a piano accompaniment, and having kept the orchestration in manuscript, *held*, that a person who had independently arranged a new orchestration, using for that purpose only the published vocal and piano-forte scores, could not be enjoined from publicly performing the opera with the new orchestration.

2. SAME—NEW ORCHESTRATION—INJUNCTION DENIED.

It appearing that the orchestration was a subordinate accessory of the opera, *held*, that the use of the composer's name and the title of the opera would not be enjoined, provided the announcements of the performance were not so worded as to mislead the public into believing that the original orchestration, of which complainant had exclusive use, was to be performed.

3. INJUNCTION GRANTED TO RESTRAIN MISLEADING ADVERTISEMENTS—FORM.

Boosey v. *Fairlie*, L. R. 7 Ch. Div. 301; *Goldmark* v. *Collmer*, Cir. Ct. Cook Co. Ill.; *Thomas* v. *Lennon*, 14 FED. REP. 849, commented on.

In Equity. Motion for preliminary injunction.

Causten Browne and *William F. Frick*, for complainant.

Thomas W. Hall, for respondents.

Before BOND and MORRIS, J. J.

MORRIS, J. The complainant, R. D'Oyly Carte, of London, claiming to be the owner by purchase from Gilbert & Sullivan of the exclusive right to give public performances in the United States of the comic opera of "Iolanthe, or the Peer and the Peri," files this bill asking, with other relief, an injunction restraining the respondents, who are citizens of the United States, from publicly performing with orchestral accompaniment, or giving any public operatic performance of, any opera containing the music, or any material or substantial part of the music, of said opera, or from announcing or advertising the public performance of any opera substantially as Gilbert & Sullivan's opera of "Iolanthe." The material facts involved in this controversy are substantially admitted, so that, although the motion now before us is for a preliminary injunction, it is practically a final hearing, and the question to be decided a naked question of law.

The facts are as follows:

Messrs. Gilbert & Sullivan, of London, are the composers of the opera of "Iolanthe," the subject of this controversy. It is a dramatic and musical composition, consisting of parts to be spoken and parts to be sung, with airs and harmonies for the voice parts, and an orchestral accompaniment for an orchestra or band of various musical instruments,—the words of the opera having been written by Gilbert and the music composed by Sullivan.

The authors caused the opera to be publicly performed for the first time in London on November 25, 1882, and the complainant having purchased the exclusive right to give public performances of it in the United States, produced the opera on the same date at the Standard theater, in New York.

The orchestration composed by Sullivan has been strictly kept in manuscript, copies having been furnished only to those employed or authorized either by the author or by the complainant to perform it. A full libretto of all the parts to be sung or spoken, with some indications of the proper action on the stage and a full score of all the voice parts to be sung, together with

an accompainment for the piano, and an arrangement of the overture for the piano, has been printed and sold to the public in the United States by J. M. Stoddart, to whom the authors have granted, so far as they could, the exclusive privilege of publishing this and certain others of their operas in this country.

Some weeks after the performance at the Standard theater, in New York, and after the publication of the printed score in this country, the respondent, Charles E. Ford, employed J. P. Sousa, leader of the Marine band, at Washington, to prepare for him an orchestral accompaniment for the published vocal score, which he did, relying solely upon his own skill as an arranger of orchestral music.

The respondent John T. Ford disclaims any connection with or interest in the matter, but the respondent Charles E. Ford admits that, using the orchestration so prepared, he has been for a month or more, and now is, giving public performances of the opera in many cities of the United States, and has advertised it as Gilbert & Sullivan's opera of "Iolanthe." He also states that he has in like manner obtained an orchestration of most of Gilbert & Sullivan's other comic operas as they appeared and were published, and has performed them with success in great numbers of places in this country.

The complainant charges that he has been injured in two ways: *First*, because Ford's company, by traveling ahead of the company authorized by him, and being the first to perform the opera in many places, forestall the performances licensed by him; and, *secondly*, because, as he alleges, the opera as given by Ford, without the original orchestration, is an inferior and incomplete performance, and the public being led to believe by Ford's advertisements that he is presenting the opera as played in London and New York, the reputation and success of the genuine work is injured.

From the admitted facts, then, it appears that every word of the libretto, the music for every voice part for every singer, including the choruses, and a piano-forte accompaniment for these, and a piano-forte arrangement of the overture, have been printed and are for sale to the public by the express authority of the authors. The only portion of the opera, as presented on the stage under the supervision of the authors, or those authorized by them, which has not been thus printed and published, is the orchestration composed by Mr. Sullivan, which he has retained in manuscript.

For the purposes of this motion it is conceded that the orchestration used by respondent was made by the musician employed by him for that purpose, who, taking the printed music, has, by his independent skill and labor, arranged the parts for the different instruments, which make up the orchestra employed by the respondent in the public performance of the opera as given by him. The respondent's orchestration not having been memorized or copied from the complainant's unpublished score, nor obtained from it in any surreptitious or

unauthorized manner, but having been arranged from an uncopyrighted published source, by the exercise of so much skill and labor as was required to make it, it is obviously so far an original work that it could itself be protected.

Under the copyright laws of the United States, (Rev. St. § 4952,) any citizen or resident of the United States who is the author of any dramatic composition (and doubtless this opera as an entirety would be held to be of that class) may copyright it, and he then has given him by the statute two distinct and separable rights,—one, the sole right to print and sell copies of the words and music, and the other, the sole right to publicly perform it; and, doubtless, he could assign to one person the right to print, and reserve to himself or grant to a different person the right to publicly perform his composition. But it is a proposition now so well settled as to be almost axiomatic, that, except so far as preserved to him by statute, when the composer of any work, literary, musical, or dramatic, has authorized its publication in print, his control over so much as he has so published, and of the use which others may make of it, is at an end. *Wheaton* v. *Peters*, 8 Pet. 591; Drone, Copyright, 101, 574, 577; *Boucicault* v. *Wood*, 2 Biss. 34; *Mark Twain Case*, 14 FED. REP. 728; *Tompkins* v. *Halleck*, 133 Mass. 32. And in the present case it could not be and it is not denied that it is the right of any one to publicly perform all that the book contains, which would in fact be the whole opera as composed by the authors, substituting the piano-forte accompaniment for the orchestra.

The complainant, however, contends that while the opera, as published, may be publicly performed with a piano-forte accompaniment, it must be with such an accompaniment *only*, and not with an orchestra; and that as some proper orchestration of the music, and its performance by an orchestra, are requisite to the successful public performance of the work as an opera, and as he has from Mr. Sullivan the sole right to use his unpublished orchestration in the United States, the opera practically cannot be publicly performed in the United States without his sanction.

It is earnestly contended in his behalf that the publication of the airs and harmonies with a piano-forte accompaniment is a dedication which is restricted to a performance with that accompaniment solely, and that it is a presumption of law that the authors intended to sell to the purchasers of the printed book only the right to use the contents as therein arranged, and not with an orchestration, because the orchestration was withheld; and that the use which the purchaser may

make of it should be restricted to what may be considered as reasonably within the contemplation of the parties—the one in selling and the other in buying the book. This, as a statement of the common-law doctrine of the restrictions imposed upon the use which may be made of an unprotected published composition, it must be admitted is novel. It would seem to be an attempt to extend and amplify the reasoning of the decision in the case of *Tompkins* v. *Halleck*, 133 Mass. 32, to reach this case.

In *Tompkins* v. *Halleck* the supreme court of Massachusetts held (overruling an earlier decision of that court) that the purchase of a ticket to witness the performance of an unpublished drama gave to the purchaser no right to publicly perform the drama, even if he should be able to carry away the whole of what he saw and heard by his unaided memory. And they so decided, because, as the public performance of a manuscript play had never been held to be a complete dedication of it to the public, and injunctions had always been granted to restrain the use of any copy of such a play, obtained surreptitiously from the manuscript, or by the abuse of any trust with regard to it, or of a copy taken down at the performance by a stenographer, the court was of opinion that the exception which had been allowed by judicial decisions to prevail in favor of a copy obtained by memorizing, was an unsatisfactory and illogical exception, not founded upon either reason or justice.

We have no inclination to doubt the entire correctness of the decision of the Massachusetts court, or that it will be generally accepted as an able and authoritative interpretation of the law, but we do not see the application of the decision or of any reasoning which supports it to a case like the present one. In that case the whole play was kept in manuscript—no part of it was in print and sold to the public—and the right to witness its performance could by no fair and reasonable implication be supposed to include the right to carry it away in the memory and set it up as a rival performance. But if a part of a play were printed and published without copyright, and certain parts considered essential to its entirety as a playing drama and to its success on the stage were kept in manuscript, *Tompkins* v. *Halleck* would not be an authority for holding that one could not take the published parts and by independent invention add what he thought suggested by them, and play what he had thus put together. On the contrary, the court distinctly adheres to the settled rule that the publication in print of a work of which no copyright has been ob-

tained, is a complete dedication of it for all purposes to the public. Page 36.

In the case before us, the right to publicly perform the opera with the piano accompaniment having been dedicated, why could not a violinist be employed to assist the piano, and so one by one be added all the instruments usually constituting an orchestra? At what point would the performance cease to be lawful and become piratical? Having enabled the purchaser of the book to publicly perform the opera, how can his manner of presenting it be restrained? Could not the words of the songs be set to other airs? Could not the opera be curtailed, the number of acts changed, or any other violence done to it? If so, why is it unlawful for any one to arrange an independent orchestration? The published libretto, airs, harmonies, and pianoforte score being now an unprotected source open to all who choose to take from it, how can Mr. Sullivan, in the absence of any statute applicable to his case, have any right to protection different from any non-resident alien who should independently make an orchestration and keep it in manuscript?

It is urged, and with force, that the orchestration of the composer is essential to the entirety of the opera as an artistic musical production, and that with the blundering or mechanical orchestration of another many of the musical conceptions and effects are frustrated, so that the opera presented to the public under the composer's name is not his, and is injurious to his reputation and to the success of his work. This may be good ground for restraining misleading advertisements and announcements, but is hardly an argument to support the doctrine of a restricted dedication, and an infringement by an independent orchestration. Cases may arise in which the printed publication may be so small a part of the whole musical composition that a court of equity might very properly restrain the use of the composer's name in connection with the proposed performance in any way calculated to deceive the public, and injure those having the right to perform the original score. To this ground of equitable jurisdiction and relief may, perhaps, be referred the case of *Thomas* v. *Lennon*, 14 FED. REP. 849, in which Judge LOWELL restrained a performance which was advertised as "Gounod's Redemption." But it seems to us that this is a ground of relief which would affect the advertisement rather the performance itself.

In this case the affidavits show that all the comic operas of Messrs. Gilbert & Sullivan, and noticeably "Pinafore," even when performed

in this country without the orchestration in which the genius of Mr. Sullivan has set them, have had a popularity and success quite unprecedented, and have been heard with enjoyment by thousands of persons; and that as enjoyed by the vast majority of these persons, the musical niceties of the orchestration are quite subordinate to the wit of the libretto and the airs and harmonies of the voice parts,—the orchestration being indeed a subordinate accessory.

Our attention has been directed by complainant's counsel to *Boosey* v. *Fairlie*, L. R. 7 Ch. Div. 301, and 4 App. Cas. 726, as a case directly in point, in which the right to the full orchestral score of an opera was protected against an independent orchestration made from a published score for the piano and voices. We think, however, that the report of that case discloses that the court of appeal and house of lords of England so held because the acts of parliament and the convention with France gave to Offenbach, the author of the opera then in question, the sole liberty of publicly performing his opera for a limited period, without regard to whether it had been published or not. The principal question in the case very obviously was whether the requirements of the statute with reference to registration had been complied with. If Offenbach had properly registered his composition as required by the British statute, then the statute gave him the monopoly of its public performance, although he had already published every note of it. 4 App. Cas. 727.

There had been published in Paris, with the sanction of Offenbach, the score for the voice parts of the opera, with an arrangement for the piano by Soumis; and the proof showed that the greater part of the music of the defendant's opera was taken from this publication. It was not merely that the defendant had attempted to make for himself an independent orchestration, or had from the piano-forte arrangement of Soumis reconstructed the music of the opera, but he had taken the airs and harmonies of the opera from the published score. He had taken, as the court finds the fact to be, a substantial and material part of the musical composition, which Offenbach, if he had complied with the statute, had the sole right to publicly perform.

Therefore, when the court decided that Offenbach's opera had been properly registered, and that he was entitled to the monopoly given by the statute, there was no question as to the infringement. If the defendant was not entitled to publicly perform the airs and harmonies of Offenbach's operatic composition, of course the fact that he had arranged a new orchestration for them, or had derived them

from an arrangement already published, did not help his case, for the court had decided that under the statute a publication by Offenbach himself would not affect his monoply of public performance. Even if the court is to be considered as having held that the defendant's composition would be an infringement, although derived exclusively from the piano arrangement of Soumis and not all from the vocal score, the decisions in the two cases of *Reade* v. *Conquest*, 9 C. B. (N. S.) 755 and *Toole* v. *Young*, L. R. 9 Q. B. 523, show that the English courts recognize that the right of public performance given by their statute may be infringed by a substantially-identical composition derived by independent labor from a source which, but for the statute, would be held unprotected; under their statutory protection that is held to be an indirect copying, which, but for the statute, would be held to be an independent work derived from a common source. Drone, Copyright, 456, 458.

It is conceded by complainant's counsel that the propositions of law upon which the complainant's case must rest have but very recently received any judicial recognition in this country. The case of *Goldmark* v. *Collmer*, decided by Chancellor TULEY in November, 1882, in the circuit court for Cook county, Illinois, is one of two cases cited. The facts of that case, however, were quite different from this. There, although the songs and music, as arranged for the piano, had been published, the libretto had been kept in manuscript. The respondents were, therefore, properly restrained from using the unpublished libretto of the complainants, of which, in some manner, they had obtained possession. The learned chancellor hesitated to say that the defendant should be enjoined from making from the published piano score an independant arrangement for an orchestra, and was inclined to think that was one of the uses any one might make of the published score; but he was clear that the defendant should be restrained from using such an orchestration in the production on the stage of that opera of which he had no right to the libretto. In the opinion filed by the learned chancellor he goes much further, and insists that by the common law a composer has the right to have his opera represented on the stage with just that orchestration or combination of musical instruments which he has arranged for it, notwithstanding he has published a partial score; but we think that to the extent stated in the opinion this doctrine will be found in direct conflict with authoritative decisions.

The other authority in this country relied upon is the opinion by Judge LOWELL in *Thomas* v. *Lennon*, already cited. So far as the

decision of the learned circuit judge in that case goes upon the ground of deceptive advertisements calculated to mislead the public and injure the licensed performance, we do not doubt its correctness; but, so far as it may be used as an authority for the doctrine of a restricted dedication, we are unable, for the reasons already expressed, to concur in it.

In the present case, if we look at the publications themselves for any evidence of an intention to reserve any rights as not dedicated, there does not appear a single fact which points in that direction. The librettos sold by the respondent to the audiences at his performances are supplied to him by Stoddart, who publishes them with the express sanction of the authors. The book containing the music and words, with the overture and accompaniment arranged for the piano, is entitled "Iolanthe, or the Peer and the Peri; written by W. S. Gilbert; composed by Arthur Sullivan,"—with no mention at all of its being merely an arrangement to be performed on the piano; and the authority from the authors to Stoddart, printed on the title page, is an authority "to publish our operas" in the United States.

A case more bare of facts indicating an intention to reserve any rights could not well occur.

While we are clear that the opera, as performed by the respondent, is not an infringement of the composition which the complainant has the exclusive right to perform, we are of opinion that the absence of the composer's orchestration makes it a sufficiently different performance from that which was given in London and at the Standard theater, in New York, and from that which the complainant alleges is being performed by the companies licensed by him, to entitle the complainant to an injunction restraining advertisements or notices reasonably calculated to mislead the public in that respect to the complainant's injury, or calculated to induce the belief that the respondent's orchestration is that composed by Sullivan. To what extent and in what manner relief of this character is to be given by injunction must depend very much on the facts and equities of each case, and in the present case is not of importance, as the respondent has in his answer declared his intention, since objection has been made to the wording of his advertisements and play-bills, to so change them as to give the public all reasonable opportunity of being informed that his orchestration is not that of the composer of the opera.

BOND, J., concurred.

Subsequently, on motion of complainant, and without objection on the part of respondent, the following decree was passed:

This cause coming on to be heard, on the motion of the complainant, for a preliminary injunction, upon the bill, answer, affidavits filed by the respective parties, and the said cause having been argued by counsel and fully considered by the court,—

It is this seventh day of March, A. D. 1883, by the court here adjudged, ordered, and decreed that the bill of complaint be, and it is hereby, dismissed as to the defendant John T. Ford; and that the complainant is not entitled to an injunction against the defendant Charles E. Ford to the extent prayed for in this bill, but that he is entitled to a limited injunction restraining the said defendant Charles E. Ford, his agents and servants, from announcing or causing to be announced any public performance of Gilbert & Sullivan's opera of "Iolanthe," unless coupled with a reasonably-conspicuous announcement that the orchestral accompaniment used in such performance is not that composed by Sullivan; and from announcing or causing to be announced any public performance of said opera to be similar to that given in London or New York, unless coupled with a like announcement in reference to the orchestral accompaniment; and from posting or distributing any placards or show-cards of the opera of "Iolanthe," in substantial imitation of that put in evidence for the complainant, and marked "W. F. Morse, Standard theater," until the further order of the court in the premises.

And it is further ordered, adjudged, and decreed that each party, complainant and defendant, shall pay his own costs, to be taxed by the clerk.

AMERICAN BELL TELEPHONE CO. *v.* DOLBEAR and others.

(*Circuit Court, D. Massachusetts.* January 24, 1883.)

1. PATENTS FOR INVENTIONS—WHAT NOT PATENTABLE—PROCESS PATENTABLE.
There can be no patent for a mere principle, nor can the discoverer of a natural force or a scientific fact obtain a patent therefor; but if he invents a process by which a certain effect of one of the forces of nature is made useful to mankind, and fully describes and claims that process, and describes a mode or apparatus by which it may be usefully applied, he is entitled to a patent for the process, and is not restricted to the particular form of mechanism or apparatus employed.

2. SAME—TRANSMISSION OF SOUNDS BY ELECTRICITY.
Where a party discovered that articulate sounds could be transmitted by undulatory vibrations of electricity, and invented the art or process of transmitting such sounds by means of such vibration, the mere fact that such art or process is the only way by which speech can be transmitted by electricity does not lessen the merit of the invention, or the protection which the law will give to it.

3. SAME—PROCESS—MODE AND APPARATUS—INFRINGEMENT.
Where a party avails himself of the prior discovery of a patentee, as well as of the process which he invented, and by which he reduced the discovery to practical use, and copies the mode and apparatus of the patentee, it is an infringement of the patent and should be restrained by injunction.

In Equity.

Chauncey Smith and *James J. Storrow*, for complainants.

Causten Browne and *James E. Maynadier*, for defendants.

Before GRAY and LOWELL, JJ.

GRAY, Justice. Few legal rules have been oftener misunderstood and misapplied than the maxim that you cannot patent a principle. But the confusion on this subject has been so effectually cleared up by the recent judgment of the supreme court, delivered by Mr. Justice BRADLEY, in *Tilghman* v. *Proctor*, 102 U. S. 707, that it will be sufficient for the purposes of this case to state the conclusions there announced. There can be no patent for a mere principle. The discoverer of a natural force or a scientific fact cannot have a patent for that. But if he invents for the first time a process by which a certain effect of one of the forces of nature is made useful to mankind, and fully describes and claims that process, and also describes a mode or apparatus by which it may be usefully applied, he is, within the meaning and the very words of the patent law, "a person who has invented or discovered any new and useful art;" and he is entitled to a patent for the process of which he is the first inventor, and is not restricted to the particular form of mechanism or apparatus by which he carries out that process. Another person, who afterwards invents an improved form of apparatus, embodying the same process, may indeed obtain a patent for his improvement, but he has no right to use process, in his own or any other form of apparatus, without the consent of the first inventor of the process.

It was decided by this court in *American Bell Telephone Co.* v. *Spencer*, 8 FED. REP. 509, and is not denied by the present defendant, that Bell is the first inventor of a speaking telephone. The only controversy is the extent of his patent. The draughtsman of the specifications has exhibited as clear and accurate a comprehension of

the rules of the patent law, as the inventor has of the force of nature with which he was dealing, and of the means by which he reduced that force to a practical use. The patent is clearly not intended to be limited to a form of apparatus, but embraces a method or process. This is apparent upon the face of the specification. The inventor begins by saying:

"My present invention consists in the employment of a vibratory or undulatory current of electricity in contradistinction to a merely intermittent or pulsatory current, and of a method of and apparatus for producing electrical undulations upon the line wire."

After describing the advantages of an undulatory current, resulting from gradual changes of intensity, over a pulsatory current caused by sudden changes of intensity, he says:

"It has long been known that when a permanent magnet is caused to approach the pole of an electro-magnet, a current of electricity is induced in the coils of the latter, and that, when it is made to recede, a current of opposite polarity to the first appears upon the wire. When, therefore, a permanent magnet is caused to vibrate in front of the pole of an electro-magnet, an undulatory current of electricity is induced in the coils of the electro-magnet, the undulations of which correspond, in rapidity of succession, to the vibrations of the magnet, in polarity to the direction of its motion, and in intensity to the amplitude of its vibration."

Or, as he afterwards repeats in fuller language:

"Electrical undulations, induced by the vibration of a body capable of inductive action, can be represented graphically, without error, by the same sinusoidal curve which expresses the vibration of the inducing body itself, and the effect of its vibration upon the air; or, as above stated, the rate of oscillation in the electrical current corresponds to the rate of vibration of the inducing body, that is, to the pitch of sound produced; the intensity of the current varies with the amplitude of the vibration, that is, with the loudness of the sound; and the polarity of the current corresponds to the direction of the vibrating body, that is, to the condensations and rarefactions of air produced by the vibration."

He further says:

"There are many ways of producing undulatory currents of electricity, dependent for effect upon the vibrations or motions of bodies capable of inductive action. A few of the methods that may be employed I shall here specify. When a wire, through which a continuous current of electricity is passing, is caused to vibrate in the neighborhood of another wire, an undulatory current of electricity is induced in the latter. When a cylinder, upon which are arranged bar magnets, is made to rotate in front of the pole of an electro-magnet, an undulatory current of electricity is induced in the coils of the electro-magnet.

"Undulations are caused in a continuous voltaic current by the vibration or motion of bodies capable of inductive action, or by the vibration of the conducting wire itself in the neighborhood of such bodies. Electrical undulations may also be caused by alternately increasing and diminishing the resistance of the circuit, or by alternately increasing and diminishing the power of the battery. The internal resistance of a battery is diminished by bringing the voltaic elements nearer together, and increased by placing them further apart. The reciprocal vibration of the elements of a battery, therefore, occasions an undulatory action in the voltaic current. The external resistance may also be varied. For instance, let mercury or some other liquid form part of a voltaic circuit, then the more deeply the conducting wire is immersed in the mercury or other liquid, the less resistance does the liquid offer to the passage of the current. Hence the vibration of the conducting wire in mercury or other liquid included in the circuit occasions undulations in the current. The vertical vibration of the elements of a battery in the liquid in which they are immersed produces an undulatory action in the current by alternately increasing and diminishing the power of the battery.

"In illustration of the method of creating electrical undulations, I shall show and describe one form of apparatus for producing the effect. I prefer to employ for this purpose an electro-magnet, A, figure 5, having a coil upon only one of its legs, *b*. A steel-spring armature, *c*, is firmly clamped by one extremity to the uncovered leg, *d*, of the magnet, and its free end is allowed to project above the pole of the covered leg. The armature, *c*, can be set in vibration in a variety of ways, one of which is by wind, and, in vibrating, it produces a musical note of a certain definite pitch. When the instrument, A, is placed in a voltaic circuit, *g*, *b*, *e*, *f*, *g*," (in which *b* represents the covered leg of the first electro-magnet; *f* represents the covered leg of another similar electro-magnet, I, whose uncovered leg is marked *h*; and *g* and *e* represent the two points of the voltaic circuit midway of the wire connecting the two magnets,) "the armature, *c*, becomes magnetic, and the polarity of its free end is opposed to that of the magnet underneath. So long as the armature, *c*, remains at rest, no effect is produced upon the voltaic current; but the moment it is set in vibration to produce its musical note, a powerful inductive action takes place, and electrical undulations traverse the circuit, *g*, *b*, *e*, *f*, *g*. The vibratory current passing through the coil of the electro-magnet, *f*, causes vibration in its armature, *h*, when the armatures, *c*, *h*, of the two instruments, A, I, are normally in unison with one another; but the armature, *h*, is unaffected by the passage of the undulatory current when the pitches of the two instruments are different."

Then, after showing how two or more telegraphic signals or messages may be sent simultaneously over the same circuit without interfering with one another, he adds:

"I desire here to remark that there are many other uses to which these instruments may be put, such as the simultaneous transmission of musical notes, differing in loudness as well as in pitch, and the telegraphic transmission of noises or sounds of any kind. When the armature, *c*, figure 5, is set in vibration, the armature, *h*, responds not only in pitch but in loudness.

Thus, when *c* vibrates with little amplitude, a very soft musical note proceeds from *h;* and when *c* vibrates forcibly, the amplitude of the vibration of *h* is considerably increased, and the resulting sound becomes louder."

He proceeds to say:

"One of the ways in which the armature, *c*, figure 5, may be set in vibration has been stated above to be by wind. Another mode is shown in figure 7, whereby motion can be imparted to the armature by the human voice or by means of a musical instrument. The armature, *c*, figure 7, is fastened loosely by one extremity to the uncovered leg, *d*, of the electro-magnet, *b*, and its other extremity is attached to the center of a stretched membrane, *a*. A cone, A, is used to converge sound-vibrations upon the membrane. When a sound is uttered in the cone, the membrane, *a*, is set in vibration, and the armature, *c*, is forced to partake of the motion, and thus electrical undulations are created upon the circuit, E, *b*, *e*, *f*, *g*. These undulations are similar in form to the air-vibrations caused by the sound, that is, they are represented graphically by similar curves. The undulatory current passing through the electro-magnet, *f*, influences its armature, *h*, to copy the motion of the armature, *c*. A similar sound to that uttered into A is then heard to proceed from L."

The reference to figure 7 will be better understood by repeating, slightly amplified, Judge LOWELL'S explanation in *Spencer's Case*. A cone of pasteboard or other suitable material, A, has a membrane, *a*, stretched over its smaller end; at a little distance is the armature, *c*, consisting of a piece of iron magnetized by the coil of the electro-magnet, *b*, through which is passing a current of electricity. When sounds are made at the mouth of the cone, A, the membrane, *a*, vibrates like the drum of a human ear; and the armature, *c*, which is directly in front of the magnet, *b*, vibrates with this membrane, and its movements cause pulsations of electricity like those of the air which excited the membrane to pass over the wire, *e*, which stretches to another similar magnet, *f*, and cone, L, with its membrane, and its armature, *h*. The second armature and membrane take up the vibrations and make them audible by repeating them into the second cone, L, which translates them into vibrations of the air. In practice, a metallic diaphragm or disk is often substituted for each membrane.

The inventor adds this explanation:

"In this specification the three words 'oscillation,' 'vibration,' and 'undulation' are used synonymously, and in contradistinction to the terms 'intermittent' and 'pulsatory.' By the term 'body capable of inductive action,' I mean a body which, when in motion, produces dynamical electricity. I include in the category of bodies capable of inductive action, brass, copper, and other metals, as well as iron and steel."

His fifth and final claim is of "the method of and apparatus for transmitting vocal or other sounds telegraphically, as herein described, by causing electrical undulations, similar in form to the vibrations of the air accompanying the said vocal or other sounds, substantially as set forth."

In this claim, as throughout the specification, the word "method" is evidently used, not as synonymous with "mode" or "apparatus," but as equivalent to "process;" just as it was used by Chief Justice TANEY, delivering the judgment of the majority of the court, in *Morse* v. *O'Reilly*, 15 How. 62, 117, as well as by Mr. Justice GRIER (who dissented in *Morse* v. *O'Reilly*) in delivering the unanimous judgment in *Corning* v. *Burden*, 15 How. 252, 267. And the invention claimed is not merely the apparatus described, but also the general process or method, by which the wind, or a musical instrument, or the human voice, produces in a current of electricity a succession of electrical disturbances, not sudden and intermittent or pulsatory, but gradual, oscillatory, vibratory, or undulatory, so as to give out at the further end of the conducting wire sounds exactly corresponding in loudness, in pitch, and in tone, character or quality, to the sounds committed to it at the nearer end.

The opinion in *Spencer's Case* clearly points out that "Bell discovered a new art—that of transmitting speech by electricity—and has a right to hold the broadest claim for it which can be permitted in any case," and "the invention is nothing less than the transfer to a wire of electrical vibrations like those which a sound has produced in the air;" and that his patent, while not covering the abstract principle, without regard to means, of transmitting speech by electricity, yet is not limited to a particular form of apparatus, but includes the process or method, (using the two words as equivalent,) the essential elements of which are "the production of what the patent calls undulatory vibrations of electricity to correspond with those of the air, and transmitting them to a receiving instrument capable of echoing them."

The evidence in this case clearly shows that Bell discovered that articulate sounds could be transmitted by undulatory vibrations of electricity, and invented the art or process of transmitting such sounds by means of such vibrations. If that art or process is (as the witnesses called by the defendants say it is) the only way by which speech can be transmitted by electricity, that fact does not lessen the merit of his invention, or the protection which the law will give to it. The mode or apparatus by which Bell effects his

purpose is by using an electro-magnet in the transmitter, and another electro-magnet in the receiver. But the essence of his invention consists not merely in the form of apparatus which he uses, but in the general process or method of which that apparatus is the embodiment. Dolbear likewise uses an electro-magnet in the transmitter; and both his method and his apparatus, as is admitted in his own affidavit, are substantially like Bell's, until he comes to the receiver. For the magneto-receiver, Dolbear substitutes a condenser-receiver, consisting of two thin metal diaphragms or disks, of about the size and thickness of those used in an ordinary Bell telephone, separated by a very thin air space, one or both disks connected with the conducting wire, and the speaking disk, if not so connected, otherwise charged with electricity; so that, as the varying currents flow into and out of this condenser, the two disks attract one another more or less strongly, and thereby vibrations are set up which correspond to the vibrations of the original sound.

The main difference on which the defendants rely is that Bell uses what is called dynamic electricity, producing by its motion an electric current; while Dolbear, in his receiver, uses what is called static electricity, producing, while at rest, electrical attraction. And the learned counsel for the defendants illustrate the distinction thus:

"It was known long before Bell's method that electricity had two properties, very much as water has two properties; namely, first, pressure or head or that property which tends to make it flow, and which can exist by itself only in the case of an insulated and charged body, or a reservoir of water; and, secondly, that dynamic property arising from its motion, and which can never exist by itself, but depends upon the quantity in motion and the rate of motion. This is not an absolutely exact way of expressing it, for the reason that electricity is not a fluid; but, were it a fluid, the statement would be entirely exact."

It does not appear to us to be important to determine whether, in scientific exactness, the varying influences of static electricity may properly be called currents; or whether the two properties of electricity differ in kind and in substance, or only in degree, or in the form of manifestation and application; or whether the force of the property which tends to make a fluid, when stationary, change its place and flow, is different in kind from that which it exerts when changing its place and flowing; in short, whether the power of the pressure of water in a reservoir is different in kind from water-power in a stream or current. Whatever name may be given to the property, or the manifestation, of the electricity in the defendants' re-

ceiver, the facts remain that they avail themselves of Bell's discovery that undulatory vibrations of electricity can intelligibly and accurately transmit articulate speech, as well as of the process which Bell invented, and by which he reduced his discovery to practical use; that they also copy the mode and apparatus by which he creates and transmits the undulatory electrical vibrations, corresponding to those of the air; and that in the plate charged with electricity, which they have substituted for the magnetic coil in the receiver, the charge constantly varies in accordance with the principle which Bell discovered, and by means of the undulatory current caused by the process, and in the mode which he invented and patented.

The defendants have therefore infringed Bell's patent by using his general process or method, and should be restrained by injunction from continuing to do so; and it is unnecessary, for the purposes of this decision, to consider whether the defendants' apparatus is a substantial equivalent of the plaintiff's, or whether it is an improvement for which Dolbear might himself be entitled to a patent. Temporary injunction ordered.

SINGER MANUF'G CO. *v.* GOODRICH.

(*Circuit Court, D. Massachusetts.* February 7, 1883.)

1. PATENTS FOR INVENTIONS—REISSUE—ENLARGEMENT OF CLAIM.
   Where the reissue covers only claims which do not appear on the face of the original, it is invalid.
2. SAME—UNREASONABLE DELAY.
   If an alteration and enlargement of the scope of a patent by reissue is in any case allowable, an unexplained delay of more than five years in taking out the reissue is an unreasonable delay.

In Equity.

Causten Browne, for plaintiff.

E. A. West, for defendant.

Before LOWELL and NELSON, JJ.

NELSON, J. This is a suit for infringement of reissue patent No. 4196, granted to the plaintiff as the assignee of James Bolton, the original inventor, for an improved tuck-marker or creaser for sewing-machines.

If the plaintiff's patent is valid, the defendant's tuck-marker is a plain infringement of it. But we are of opinion that the patent is

invalid under the rule established in *Miller* v. *Bridgeport Brass Co.* 104 U. S. 350.

The original patent, No. 46,871, was granted March 21, 1865; the reissue was granted December 13, 1870, five years and nine months after the date of the original. If any invention claimed or described in the reissue is identical with either of the claims in the original, it is to be protected, under the recent decision of Mr. Justice GRAY in *Gould* v. *Spicer*, *ante*, 344. But we are of opinion that the reissue covers only claims which do not appear upon the face of the original.

The specification of the original patent states:

"This invention consists in a novel mode of constructing and operating markers or creasers to be used on sewing-machines, being composed of only two pieces hinged together so as to make one instrument, and so attached to a presser-bar having a positive vertical motion as to be operated at every movement of the feeding devices. The drawing represents the marker in position on the table and attached to the presser-bar of a sewing-machine."

After describing further the device, the specification proceeds:

"The arm, *b*, [the upper arm of the marker,] carries an adjustable bracket, *k*, by passing through a vertical slot cut therein, as seen in figure 2, and in which it is free to slide. The bracket, *k*, extends at right angles from the arm, *b*, towards the plate of the presser-bar of a sewing-machine, and it is to be adjustably attached to the inside of the presser-bar by means of an open slot, *s*, in said bracket, fitting over the shank of a screw which takes into a threaded hole made in said presser-bar. The bracket, *k*, can be attached to the presser-bar in many cases by means of the same screw which secures the presser-foot to the bar. The open slot, *s*, in the bracket, *k*, enables me to fix it any desired height on the presser-bar, according to the lateral adjustment of the marker on the bed-plate for the width of tuck. When the bracket, *k*, is fixed to the presser-bar, the arm, *b*, of the marker, being carried in said bracket, reciprocates with the presser-bar; that is, when the marker is used on a sewing-machine which has a reciprocating feed, so-called, the said arm, *b*, moving freely in its pivot, *c*. The material being sewn lies upon and moves over the arm, *f*, [the lower arm of the marker,] and at every advance of the feed the shoe, *d*, of the marker is raised off the material with the rising of the presser-bar, and afterwards borne down by the said bar and pressed upon the material while the needle is making another stich, the material being crimped between the slot, O, in the shoe, *d*, and the raised edge, *n*, of the arm, *f*, thus marking the place for the tuck step by step, as the sewing or the perforation of the material proceeds on a line parallel with the seam or perforations, by means of the rising and falling of the presser-bar."

In describing the manner in which the width of the tuck is determined, the specification says:

"When a narrow tuck is to be made, the position of the joint, *k*, of the arm, *b*, is moved to the right a suitable distance, and the extent of the reciprocating movement of the shoe, *d*; or, in other words, the extent of its vibration is correspondingly lessened according to the distance of the shoe from the presser-arm. The movement given to the shoe when it is near the presser-bar, as when it is marking for a narrow tuck, is sufficient for successful operation, because the material which is being sewn is held and advanced smoothly beneath the shoe for a considerable distance to one side of the line of sewing, by the joint operation of the feeding devices and the needle. But when the tuck is to be wide, the extent of the vibrating movement of the shoe needs to be greater, because that portion of the material which lies at a considerable distance at one side of the seam has a tendency to drag or lag behind the advance of the seam, unless it is held extended and smooth by the hand of the operator, or by some other means. It is therefore necessary that the shoe be raised sufficiently at each movement of the feed to clear the material. This, it will be seen, is effectually accomplished by my invention; the extent of vibration of the shoe being increased and diminished by the adjustment of the jointed arm, and the consequent lengthening and shortening of the distance between the shoe and the presser-arm."

The specification contains this disclaimer:

"I disclaim marking a tuck or line on material being sewn on a sewing-machine by means of the needle-bar, as shown in the patent granted to H. W. Fuller on the fifth day of June, 1860."

The claims of the original patent are as follows:

"(1) The tuck-marker, A, for use with a sewing-machine, made and operated substantially as above described. (2) I also claim marking parallel lines for tucks, or for the seaming or perforating of material on a sewing-machine by means of a marker, which is operated by a presser-bar having a positive vertical motion, substantially as above described."

In the Fuller patent, the upper arm of the marker derives its motion from and vibrates with the needle-bar, and the invention is stated to consist "in a vibrating marking instrument or instruments that move in unison with the needle, so as to crease or mark the cloth at a given distance or distances from the needle." One of the claims of that patent is "forming one, two, or more creases in cloth by means of markers on opposite sides of the cloth, one of which is connected with the bed of the machine, and the other operates simultaneously with vibrations of the needle in a sewing-machine."

It is thus apparent from the foregoing that a material and essential part of Bolton's original invention consisted in operating the upper arm of the marker in unison with and by means of the movement of the presser-bar of a sewing-machine.

In the reissue the specification contains this statement:

"In order that the two creasing instruments may be intermittently separated and caused to approach each other, the upper one, *b*, is connected with some reciprocating part of the sewing-machine; and when said machine has a four-motion reciprocating feed, the part that I prefer to make the connection with is the shank, B, of the presser-foot, or the presser-bar, as it is sometimes called. In order that the tuck-marker may be readily adjusted to different positions, notwithstanding its connection with the reciprocating part of the sewing-machine, the connection is made by means of a slotted bracket, *k*, having a slot, *o*, of sufficient size to permit the arm, *b*, of the movable member, *d*, to slip readily through it."

The reissue contains two claims:

(1) The creasing tuck-marker hereinbefore described, consisting substantially of the spur, the fork, and the stock, all permanently connected, so as to constitute a removable attachment to sewing-machines. (2) The combination of the arm of the movable member of a tuck-marker with a movable bracket, by which the said arm may be connected with a reciprocating member of the sewing-machine, substantially as before set forth.

From a comparison of the specifications and claims of the two patents, it will be seen that the inventor, in the first claim of the reissue, either leaves out the presser-bar movement as an essential part of the improvement, and claims the movable attachment as a separate mechanism, or else, by reference to the specification, claims a tuck-marker moving in unison with, and by means of, any reciprocating part of the sewing-machine, including both presser-bar and needle-bar; while in the second he boldly lays claim to a combination of the movable arm with a movable bracket connected with any reciprocating part of the sewing-machine, whether presser-bar or needle-bar. The operation of the upper arm by the presser-bar movement thus ceases to be a material part of the invention, and the reissue claims and describes a different invention from the original. If such an alteration and enlargement of the scope of a patent by reissue is in any case allowable, an unexplained delay of more than five years in taking out the reissue must be deemed to be unreasonable, under the rule of *Miller* v. *Bridgeport Brass Co. supra;* and as neither of the claims in the reissue is identical with those of the original, the case is not brought within the rule of *Gould* v. *Spicer, supra.*

Bill dismissed, with costs.

DOANE & WELLINGTON MANUF'G CO. v. SMITH.

(Circuit Court, S. D. New York. December 27, 1882.)

1. PATENTS FOR INVENTIONS—NEW COMBINATIONS—REISSUE VOID—INTRODUCTION OF NEW MATTER.

   If the claim in a reissue of a patent for a new combination of known parts be substantially the same as that of the original, but expand the scope of the invention by assigning additional uses to certain parts which are prominent features of another patent, made subsequent to the original, so that one skilled in the art, constructing according to its terms, would exclude some things described in the original and substitute others, the reissue, not being a correction provided for and allowed by law, but an alteration, is invalid for showing a different invention; though if the terms were so changed as not to avoid it on this ground, it might be void for the enlargement after the lapse of time.

2. SAME—INFRINGEMENT.

   A suit for infringement cannot be maintained on such an invention against a party constructing a different arrangement, not involving all the parts the other used.

3. SAME—REISSUE NO. 8,784 VOID.

   Reissued letters patent No. 8,784, for an improvement in vapor-burners, *held* invalid.

Worth Osgood, for orator.

James P. Foster, for defendant.

WHEELER, J. This suit is brought upon reissued letters patent No. 8,784, dated July 1, 1879, granted to Christoph Wintergerst, assignor to Doane & Wellington, on an application, dated April 30 1879, upon the surrender of the original letters No. 82,262, dated September 15, 1868, for an improvement in vapor-burners. There are defenses set up that the reissue is too broad for the original and void; and that the defendant does not infringe. The original patent was for the arrangement of a reservoir for the fluid, a tube to conduct the fluid to the burner, a burner regulated by a needle-valve operated by a thumb-screw, a ring over the burner to hold a thumb-screw projecting into it over the flame to divide the flame, and a winged plate behind the flame and connecting with the burner, acting as a reflector, and as a generator of gas by conducting heat from the flame to the fluid by way of the burner. Each of these parts is conceded to have been old; and there was only one claim which was for the arrangement merely. There is no description of the ring except that it is over the hole in the burner for the escape of the gas to the flame with the thumb-screw in it, which divides the flame, and no office is assigned to it except to support the screw where it would divide the flame; and none of the plate, except

that it is a winged plate in the rear of the ring, extending upward, and to act as a reflector and generator. In the reissue the ring is described as a "protector, calculated to direct and steady the flow of fresh air which is to be mingled with the gas before burning," as a "ring opening at both ends, and affording a channel through which the gas-jet is directed, before being allowed to impinge against the plate," and as serving "to direct the mingled air and gas upon the plate," and preventing "currents of air from disturbing the continued uniform flow of the burning mixture by confining the air-currents to certain directions." And the plate is described as a "flame-plate," "against which the issuing gas is made to impinge as it flows from an orifice;" as serving "to spread the flame;" and as having "a burning at or very near the upper edge," "and the illuminating flame projects beyond this edge." And there are eight claims for different combinations of all or some of these parts.

It is obvious from this statement that the invention described in the original is not the same as that described in the reissue. The ring described in the original is a mere ring, not a tube. In the reissue this part is still called a ring; but when its uses are described, as being those of a protector, calculated to direct and steady the flow of fresh air, and as being open at both ends and affording a channel through which the gas-jet is directed, and as preventing currents of air from disturbing the flow, by confining the air currents to certain directions, a tube or conduit is described which is quite different from a mere ring, having no office shown but to hold the dividing screw; and a plate against which the gas-jet is to impinge, and on which the flame is to spread, and over and beyond which it is to burn and extend, is not the same as a reflector beyond the jet and flame.

These two are the most prominent features of the combination of the original, and of the various combinations of the reissue; and a flame-plate against which the gas-jet impinges, and over which, with the mingling currents of air it spreads, and over and beyond which it burns and the flame extends, and a shield on the opposite side of the jet affording a channel between the shield and flame-plate, through which the jet is directed, and by which the currents are protected from disturbance, are prominent features of the defendant's burner, which is claimed to be an infringement, and without which there could be no foundation for such claim. The original patent would not cover these devices of the defendant, and still the claim in the reissue, which is said to be infringed is substantially the same as the claim of the original.

The scope of the invention as well as of the claims is changed and expanded in the direction, too, of covering the defendant's invention made subsequent to the original patent. Such a reissue seems to be wholly invalid. *Gill* v. *Wells*, 22 Wall. 1; *James* v. *Campbell*, 104 U. S. 356. If the description of these parts had only been more full and particular in the reissue, or if distinct functions of the parts not before mentioned had been newly set forth, or functions before mentioned had been wholly omitted, so long as the devices and their mode of operation, as described, remained the same, the reissue might not be avoided for showing a different invention, although it might be for the enlargement of the claim after such a lapse of time. *Miller* v. *Bridgeport Brass Co.* 104 U. S. 350. The inventor was required by law to set forth a description of his invention in such full, clear, and exact terms as to enable any person skilled in the art to make and use it. Act of 1836, § 6. The description of the parts in the original consisted largely in stating what they were to do. The ring was to hold the dividing screw; the plate was to be a reflector. A person skilled in the art, following the patent, would construct them as such. The invention described consisted in these parts operating as such. The description in the reissue, to some extent, at least, excludes these things and substitutes different things. So the reissue is not a correction which the law provides for and allows, but an alteration which the law does not allow.

Further, Wintergerst was not the inventor of vapor-burners nor of any of these parts constituting such burners. His invention consisted merely in the new arrangement of these parts in a burner. His patent did not and could not cover any other arrangement. The defendant had no right to take that arrangement, even to improve upon, but all others were open to him. The defendant's arrangement is different from Wintergerst's. The defendant employs no rings or screw or reflector; Wintergerst's invention included all these. Leaving to Wintergerst all that he invented and patented, there was still room for the defendant's devices. Consequently there is no infringement. *Ry. Co.* v. *Sayles*, 97 U. S. 554.

Let a decree be entered dismissing the bill of complaint, with costs.

NATIONAL CAR-BRAKE SHOE CO. *v.* BOSTON & A. R. Co. and others.

SAME *v.* BOSTON & M. R. Co. and others.

SAME *v.* OLD COLONY R. Co. and others.

(*Circuit Court, D. Massachusetts.* February 7, 1883.)

PATENTS FOR INVENTIONS—COMBINATION—DIFFERENT ARRANGEMENT.

Where the arrangement of a patented combination, many of whose elements were in use before the patent was granted, has many advantages over the patented device and is an improvement thereon, *held*, a different combination and its use is not an infringement.

In Equity.

E. Banning and *H. A. Banning*, for plaintiff.

A. McCallum, for defendants.

NELSON, J. These three suits are for infringement of patent No. 45,106, granted to Joseph Wood, November 15, 1864, for an improvement in car-brake shoes, and assigned to the plaintiff. The brake-shoe in use by the defendants is the one covered by patent No. 49,948, granted to James Christy, September 12, 1865. The parties agree that the Wood patent is valid, and the question submitted is whether the first claim of the Wood patent is infringed by the Christy patent. Both patents relate to the manner of attaching the sole, or the part which bears against the rim of the car-wheel, to the shoe.

In the specification of the Wood patent, the invention is described as follows:

"A is the cast-iron shoe, between the portions, *a* and a^1, of which is an opening, X, two projections, *b* and b^1 forming part of the shoe and embracing the brake-beam, as shown by dotted lines in figure 2. B is the sole-piece, the face of which is curved to suit the periphery of the car-wheel, the shoe fitting to the sole-piece between two lugs, *c* and c^1, cast on the same. At the back of the sole-piece is a lug, *d*, which projects through an opening in the portion, *a*, of the shoe into the recess, X; and transversely through a hole in the lug passes a tapering pin, *i*, which, bearing against the inner side of the portion of *a* of the shoe, serves to secure the latter to the sole, while the two are retained in their proper relative position vertically by the lugs, *c* and c^1."

The first claim is thus stated:

"*Firstly*, the sole, B, its lugs, *c* and c_1, the lug, *d*, in combination with the shoe, A, the latter and the sole being constructed and adapted to each other so as to be secured by a simple pin, *i*, substantially as specified."

It is shown that prior to the date of the Wood patent the side lugs, *c* and c^1, and the central lug, *d*, had been in use, and the sole had been secured to the shoe by a pin passing through a lug projecting from the upper part or back of the sole into the shoe. The invention must then consist of the combination of the side lugs, *c* and c^1, the recess, X, the central lug, *d*, on the back of the sole projecting through the opening in part *a* of the shoe in the recess, X, the pin, *i*, passing through a hole in that part of the lug, *d*, which extends into the recess, X, and bearing against the inner side of part *a* of the shoe.

In the Christy brake-shoe, the side lugs, *c* and c^1, and the central lug, *d*, are present. But the recess, X, the part, *a*, of the shoe, with its orifice through which the lug, *d*, passes, and against which the pin, *i*, bears, are absent. The central lug is inclosed between two lugs extending upon either side from the frame of the shoe, and the sole is secured to the shoe by means of a curved pin, which passes longitudinally through the frame, the central lugs, and the two lugs which inclose and confine the central lug. This arrangement has many advantages over the Wood device. The pin is less likely to work loose and drop out from the motion of the car, the sole is more firmly and securely fastened to the shoe, and can be attached and detached by sliding it laterally on or off the shoe without moving back the brake-beam, which is not the case with the Wood device.

For these reasons we must hold that the Christy patent is for a different combination of parts from the Wood patent, and that its use is not an infringement of the latter.

The entry in each case will be, bill dismissed, with costs.

HALL and others *v.* STERN and others.

(*Circuit Court, S. D. New York.* October, 1882.)

PATENT LAW—INFRINGEMENT.

The accomplishment, by a patented article, of the same result as that produced by another patent, is not such an anticipation as will make it an infringement, unless the result is produced by the same means, and in substantially the same way.

Edmund Wetmore, for orators.

Delos McCurdy, for defendants.

WHEELER, J. This cause depends upon the valididy of letters patent No. 182,633, dated September 26, 1876, and issued to Pierre Leopold Brot, assignee of Ludger Tiburce Berton, for a compound mirror, consisting of a main mirror with side mirrors hinged within the frame of the main mirror on each side, and opening outward, so as when opened to present opposite reflecting surfaces at angle to the main reflecting surface, and so as to fold one over the other within the main frame and present outwardly only the covered backs of the outer mirrors. The defense is want of patentable novelty, in view of letters patent No. 62,526, dated March 5, antedated February 20, 1867, and issued to Robert H. Brown for an improved toilet-glass, and now owned by the defendants; letters patent No. 112,474, dated March 7, 1871, and issued to Richard Mason for an improvement in back-reflecting mirrors; and letters patent No. 132,633, dated October 29, 1872, and issued to John Vickery for an improvement in toilet-glasses. The object of all these inventions is to show different views of the person at the same time by direct and repeated reflections. Brown's is much more like the orators' than either of the others. The principal difference between them is that Brown's has only the two side mirrors hinged to a frame somewhat like the frame to the orators' main mirror. Mason's is a combination of hinged frames, levers, and cords for adjusting the mirrors from a stationary case. Vickery's is an attachment of toilet-glasses to the sides of the usual mirror to swing into various angles to it. Neither of the two latter is like the orators', except in the result produced. Brown's is not the equivalent of the orators'. Different views of the person can be obtained at the same time by Brown's two mirrors, but not so many, nor from so many different points of view, as can be by the orators' combination of three mirrors. It is said that the orators' patent includes Brown's invention without disclaiming it, and that, therefore, a material part of the invention, covered by the orators' patent, was patented before and avoided the patent. This objection to the patent does not appear to be well founded. The combination or arrangement of two mirrors is not the same as of three, and is not included in that of three any more than the arrangement of one would be the same as, or included in, that of two. The accomplishment of the same result is not an anticipation, unless it is done by the same means in substantially the same way. Obtaining different views of the person at the same time by mirrors was not new to any of these inventors. Brown invented a method of doing it by his arrangement of two mirrors, and, so far as appears now, he was enti-

tled to a patent upon his particular means of accomplishing so much as he did accomplish. So of Mason and Vickery. Berton took different means from either, and accomplished a more extensive result. His patent for his new method appears to be valid. The infringement appears to be an exact imitation of the orators' patented mirror, and no question has been made about that.

Let a decree be entered for the orator according to the prayer of the bill, with costs.

WILLIAMS and others *v.* THEOBALD and others.

(*District Court, D. California.* January, 1883.)

CHARTER-PARTY—DETENTION—LIABILITY OF CHARTERER.

Where the voyage described in the charter-party was a voyage "to San Francisco, or as near thereto as the vessel can safely get," and the cargo was to be delivered "along-side of any craft, steamer, floating depot, wharf, or pier, as may be directed by the consignees," and the consignees named a wharf to which, by reason of its crowded state, the vessel could not enter for a time greater than that within which, by other provisions in the charter-party, the discharge was to be effected after it had been commenced, *held*, that the charterer was liable for the detention.

In Admiralty.

Milton Andros, for libelants.

Edward J. Pringle, for respondents.

HOFFMAN, J. The libel in this cause was promoted by Thomas Williams and others, owners of the British ship Cambrian Princess, against the charterers of the ship, to recover demurrage consequent on the delay, occasioned by the fault of the latter, in discharging the cargo of the vessel at San Francisco.

By the terms of the charter-party the vessel was to be laden with coals at Sydney, New South Wales, "and being so laden shall therewith proceed to San Francisco, or so near thereto as she can safely get."

Having arrived at San Francisco, the cargo was to be delivered "along-side any craft, steamer, floating depot, wharf, or pier, * * * *as may be directed by the consignees*, to whom written notice is to be given of the vessel being ready to discharge." "The cargo is to be unloaded at the average rate of not less than 100 tons per working day, weather permitting, but, when required by the consignees, such

extra quantity is to be unloaded as may be practicable, etc., *or* charterers to pay demurrage at the rate of four-pence per registered ton *per diem*, except in case of unavoidable accident or other hindrance beyond charterer's control." These are the only provisions of the charter-party material to this cause.

The bill of lading contained the usual conditions, and in addition thereto the provision, "*and all other conditions as per charter-party.*" No consignee of the cargo was named in the bill of lading, but, by the terms thereof, the cargo was to be delivered "*to order.*" Previous to the arrival of the ship at San Francisco, which was on the twenty-first day of October, 1881, the cargo had been sold to the San Francisco Gas-light Company, to which the fact of her arrival was announced on that day.

On the twenty-second of October, the day after the arrival of the ship at San Francisco, the written notice required by the charter-party, of the ship's readiness to deliver the cargo, was given by the master to the charterers' agent at this port. The answer admits this fact, and avers "that immediately upon receiving notice from the master that the Cambrian Princess was ready to discharge cargo, the defendant directed the master to deliver the cargo in San Francisco at the wharf of the San Francisco Gas-light Company." The out-turn of the cargo was 1,808 1720-2240 tons, to discharge which, at 100 tons per day, would have taken 19 working days.

The ship was ready to discharge on the twenty-second of October, but, as that day was Saturday, the libelants exclude that day and the following Sunday—not being a working day—from the computation of the lay days, and claim only that they commenced on Monday, October 24th.

From October 24th to November 14th, inclusive of both of said days, there are 22 days, three of which were Sundays, leaving 19 working days, in which the cargo could have been fully discharged.

The discharge of the cargo was commenced on the eighteenth day of November and was finished on the first day of December following, a period of 17 days from and including the fifteenth day of November, two of which were occupied by the ship in taking "stiffening." As these two days would have been used by the ship for the same purpose had the discharge of the cargo been commenced on the twenty-fourth of October, they are excluded from the 17 days, leaving the actual number of days that the ship was on demurrage, 15. For these 15 days the libelants claim demurrage at the rate of four-pence

per ton per day on the registered measurement of the ship—1,350 tons—equal to £22 10s. per day; or, reckoning the pound sterling at $4.86 65-100, $109.50 per day, amounting to $1,642.44.

The charterers admit the fact that the cargo was not discharged as soon as it could have been if the ship had gone to the wharf on the twenty-fourth of October, but they attempt to excuse this delay:

(1) Because at the time the ship was ready to make delivery of the cargo "an unusual and extraordinary number of vessels had arrived at the harbor of San Francisco with cargoes of coal for the said company, and all the wharves owned or leased by said company, and all the wharves near its gas-works, were occupied, and it was impossible to receive the Cambrian Princess at any of said wharves until the eighteenth day of November, 1881." (2) "That the consignee was entitled, under the said charter-party, to a reasonable time to obtain a berth for said ship; that, by the custom of the port of San Francisco, five running days are allowed to the consignee for bringing ship from anchorage to dock before the days allowed by a charter-party for discharging cargo commence." (3) "That said ship was not detained by any neglect or refusal to commence receiving the cargo, as alleged in the seventh article in said libel, but by a hindrance beyond charterer's control."

It appears from the testimony of Mr. Crockett, the superintendent of the gas-light company, that, although the coal could not have been, prior to November 18th, delivered at any wharf south of Market street, it could at any time have been delivered at the sea wall; but, if landed there, the hauling it thence to the company's yards would have cost the company an additional 50 cents per ton.

It appears, also, from his testimony, that the quantity of coals purchased by the gas-light company to arrive and to be delivered on its wharves in the autumn of 1881, as well as the arrival of many coal-laden vessels together, or at about the same time, and to be there unloaded, was exceptional.

It appears to be well settled in England that where, by the charter-party, the ship is to be brought to a particular dock, or as near thereto as she can safely get, and she is prevented from getting to her primary destination by any permanent obstacle other than an accident of navigation, the ship-owner is entitled to damages for the detention by reason of the charterer's refusal to receive the cargo at the alternative place of delivery, although the obstacle which prevented her from getting into the docks (viz., their crowded state) was not an obstacle endangering her safety. *Nelson* v. *Dahl*, 12 L. R. Ch. Div. 568, 583; *Ford* v. *Cotesworth*, L. R. 4 Q. B. 127; *Cross* v. *Beard*, 26 N. Y. 85.

It is also settled that where the contract specifies a certain number of days for loading and unloading, and provides that for any detention beyond the lay days demurrage is to be paid at a fixed rate per day, the shipper is held very strictly to its terms; neither a municipal regulation of the port prohibiting the unloading for a limited period, nor delay occasioned by frost, tempest, or by the crowded state of the docks, will relieve him from the payment of demurrage. *Randall* v. *Lynch*, 2 Camp. 352. But where no particular period for loading or unloading is stipulated in the contract, the freighter is bound to receive the cargo within a reasonable time, and for the breach of his implied contract to that effect he is liable in damages. Thus, where the freighter was allowed "the usual and customary time" to unload the ship in her port of discharge, and the crowded state of the docks delayed the discharge, Lord ELLENSBOROUGH held that, as *the evidence showed that it was usual and customary* in the port of London for ships laden with wines to take their berths in the dock by rotation and to discharge into bonded warehouses, there was no breach of the implied covenant to discharge in the usual and customary time. *Rodgers* v. *Forrester*, 2 Camp. 483.

In a subsequent case, where the charter-party was silent as to the time for unloading, it was held by Sir JAMES MANSFIELD that "the law could only raise an implied promise to do what was usually stipulated for by express covenant, viz., to discharge the ship in the usual and customary time for unloading such a cargo, and that had been rightly held to be the time within which a vessel can be unloaded in her turn, into the bonded warehouses." *Burmester* v. *Hodgson*, 2 Camp. 488.

When there is no undertaking to unload the ship within a specified time, but it is agreed that she shall be discharged "with all possible dispatch,"or "with usual dispatch," or "with the customary dispatch of the port," or "within reasonable time," the freighter is bound "to use reasonable diligence to do his part towards the *unloading according to the terms and meaning of the charter-party.*" *Nelson* v. *Dahl*, *ubi supra*, 583.

What is a reasonable compliance with the terms and meaning of the charter-party will depend on the circumstances of the case, and on the usages of the trade in which the vessel is engaged.

In *Rodgers* v. *Forrester* and in *Burmester* v. *Hodgson*, which seem to be the leading cases on this subject, it appeared in evidence that the usual and customary time for discharging cargoes of the kind carried in those cases, was the time within which a vessel could get a

berth by rotation, and the wines could be discharged into the bonded warehouses.

In the present case no question arises, such as that presented in *Nelson* v. *Dahl*, as to whether the vessel was "an arrived vessel" before entering a particular dock designated in the charter-party. The terminus of the voyage mentioned in the charter-party is the port "of San Francisco, or as near thereto as she can safely get." She had undoubtedly arrived at San Francisco. No specified number of lay days, at the expiration of which demurrage is to run, is mentioned. The average rate at which the cargo is to be discharged is stipulated for, and the failure of the charterers to discharge at that rate renders them liable to a specified demurrage *per diem*, "except in case of unavoidable accident, or other hindrance beyond charterers' control." But this stipulation must, I think, be taken to apply merely to the rate at which the cargo shall be discharged when the discharge has been commenced. The present suit is for damages in the nature of demurrage for failure to designate a wharf where the discharge could be commenced. By the terms of the charter-party, the cargo, on arrival of the vessel at San Francisco, is to be delivered "along-side any craft, steamer, floating depot, wharf, or pier, * * * as may be directed by the consignees, to whom written notice is to be given of the vessel being ready to discharge;" and the only question in this case is whether the consignees, for their own convenience and profit, had a right to designate a wharf at which they well knew the discharge could not be commenced until after a considerable detention of the vessel.

In the case of *Nelson* v. *Dahl*, so often cited, JAMES, L. J., by way of illustration, supposes the case of a vessel to be discharged at a dock to be named by the charterer, and observes: "Now, could it be reasonably held that under such a charter-party as that the charterer could select and name a dock which he knew would not admit the ship for months, and so compel the ship to remain as a floating warehouse for him during those months?"

The case of *Davis* v. *Wallace*, 3 Cliff. 123, closely resembles the case at bar. The vessel was detained at the wharf designated by the charterer four days,—three because the berth was occupied, and one by lack of teams. The charterer was held liable for the detention. But the charter-party in that case provided for "*quick dispatch*" at the port of delivery; and this contract, it was held, "overrides any customary mode of discharging vessels by which they are to take their turn at the wharf. The naming of a wharf is a warranty that

a berth can be had there." *Thacher* v. *Boston Gas-light Co.* 2 Low. 362; *Keene* v. *Audenreid*, 5 Ben. 535; *Bjorquist* v. *Steel Rails*, 3 FED. REP. 717.

In *Dahl* v. *Nelson*, 6 L. R. App. Cas. 44, Lord BLACKBURN said: "If the charter-party had left it free for the merchant to select a dock, it may well be that he was bound to select one into which admittance could be procured." *Ogden* v. *Graham*, 1 Best & S. 773, is an authority for this position. But the case of *Ogden* v. *Graham*, to which his lordship refers, merely decides that where the vessel is to proceed to a "*safe port*" of discharge to be named by the charterer's agent, and the latter named a port closed by the order of the Chilian government, and to which the ship could not proceed without confiscation, and the ship was in consequence detained for some time at Valparaiso, after which, the port being opened, she proceeded thither and discharged her cargo, the charterer was liable for the detention.

In *Cross* v. *Beard*, 26 N. Y. 85, it was held that in the absence of express agreement a contract is implied that the consignee of goods will provide for discharging them within a reasonable time, to be judged of by the jury under all the circumstances; and that the refusal to admit evidence tending to show that it was in no respect his fault that there was a delay in loading or unloading the vessel, was error. But in this case there was no stipulation as to the time to be allowed for discharging the cargo, and the right of the respondent to receive it at his own wharf was conceded. It will also be noted that the court, though holding that evidence showing that the delay in providing a berth for the ship was owing to a break in the Erie canal and a storm on the lake was admissible, yet forbears to say that these facts would necessarily constitute a defense. "Whether," it says, "the defendant should be considered in fault in not providing means for unloading a greater number of vessels at one time, or whether under the actual circumstances he ought to have engaged another wharf to receive the coals, were questions for the jury to determine."

In *Esseltyne* v. *Elmore*, 7 Biss. 69, the general principle was recognized that in the absence of express stipulation it is the duty of the consignees to furnish, within a reasonable time after the arrival of the vessel was reported to them, a suitable place for her discharge, and also to complete it within a reasonable time; and that the fact that a considerable number of vessels, consigned to the defendants, had arrived with cargoes about the same time, and there was delay in consequence in assigning her a berth, was a circumstance for which

the ship-owner was not responsible. "It was a risk which the defendants themselves took when they agreed to freight the schooner."

It is, perhaps, not easy to reconcile these cases, but it ought to be observed (1) that the New York case does not decide that the defendant's inability to furnish a berth, by reason of the crowded state of the docks in consequence of a storm, is an absolute excuse for the detention, but only that evidence of that fact may be given to the jury, leaving them to judge whether, under all the circumstances, he ought not to have provided additional means or furnish another wharf; (2) that the authorities chiefly relied on are the cases of *Rodgers* v. *Forrester* and *Burmester* v. *Hodgson*, already cited in this opinion, within the reasons of which the case under consideration by the court was supposed to fall. But we have seen that in each of those cases it was proved that the customary time for discharge in the port of London, of the cargoes in question, was the time within which the vessel "could obtain a berth by rotation, and the cargo be discharged into bonded warehouses." No such proof was offered in that case or in the case at bar, and if it had been in the latter, it would probably not have materially altered the case.

If, then, the implied stipulation, where no specific time for discharge is mentioned, is that it shall be effected within a reasonable time, it appears to me that the case in Bissell lays down the more reasonable doctrine, and that the consequences of the inability of the consignee to furnish a place where the discharge can be effected within such reasonable time ought not to fall upon the vessel.

Although the charter-party in the present case does not specify a certain number of lay days, at the expiration of which demurrage is to run, it indicates the rate at which the discharge, when commenced, shall be effected. The cargo is to be unloaded at the average rate of not less than 100 tons per day, weather permitting, or charterers to pay demurrage at the rate of four-pence per "registered ton *per diem*, except in case of unavoidable accident or other hindrance beyond charterer's control."

As the discharge, when commenced, was not interrupted by any accident or hindrance whatever, but was conducted with dispatch, this clause may be left out of consideration. *Thatcher* v. *Boston Gaslight Co.* 2 Low. 363.

The cargo actually delivered at San Francisco was 1,808 tons. Dividing this by 100, the least number of tons to be secured daily, and we have 19 working days for the period within which the cargo

was to be discharged; and this period is fixed with as much certainty as though 19 working days had been originally written in the charter-party as the number of lay days. *Sanguenette* v. *P. S. Nav. Co.* L. R. 2 Q. B. Div. 238.

The vessel was reported ready to discharge on the twenty-second of October. It is only claimed, however, that the lay days began to run on the 24th.

The discharge was not commenced until November 18th, and was finished on December 1st. Excluding the Sundays which intervened between October 24th and November 18th, the vessel was thus detained for a period greater by several days than the whole time allowed by the charter-party for her discharge.

It has already been observed that there is no evidence to show that by the customs of the port or the usages of this particular trade vessels are required to await their turn to unload at the dock which may be specified in the charter-party or designated by the consignee, so as to bring this case within the reasons of the *nisi prius* cases reported in 2 Campbell. If such usage had been shown, and a particular dock had been mentioned in the charter-party, a reasonable detention while awaiting a berth might be deemed within the contemplation of both parties, but not even then, as we have seen, any permanent or protracted detention. *Nelson* v. *Dahl, ubi supra.* But in this charter not only is no particular dock mentioned, but the vessel is required to discharge "along-side any craft, steamer, floating depot, wharf, or pier, as may be directed by the consignees." It may, perhaps, be doubted whether it was contemplated by either of the parties that a dock might be selected by the consignees into which, by the usage of the port, (if such usage had been shown,) vessels could only enter in their turn. If a usage had in fact existed requiring Australian coal vessels to discharge in their turn at particular wharves, the parties do not seem to have contracted with reference to it, for the charterer reserved the right to designate "any craft, steamer, floating depot, wharf, or pier" he might select. Some reliance is placed on a regulation of the Merchants' Exchange of San Francisco, to the effect that for vessels with coal from the Atlantic or Australian ports the lay days shall commence five running days after arrival, providing that discharging berth can be procured. But there is no proof that this regulation was known to the parties, or that they acted with reference to it, nor that it is or has been acted on by any one. Its mere existence, perhaps as a dead letter, is

clearly insufficient to prove a usage in conformity to it. 10 B. & C. 770. Even if it were allowed as fixing the time when the lay days began, viz., five days after the vessel's arrival, it would only make a difference of three days. The vessel arrived October 21st. The libelants only claim that the lay days began to run on the 24th. If, by a well-established and generally-recognized custom of the port, the charterers in this trade were allowed a certain number of days to find a berth for the vessel, (*e. g.*, three days, as in New York,) the lay days would be reckoned (in the absence of a special contract) from their expiration. But no such usage is shown, and the detention was not caused by the consignee's inability to procure a berth, but by this selection of a dock where he well knew that no berth could be obtained.

It seems to me that the fair and reasonable interpretation of the contract is that the charterer was, unless in case of unavoidable accident or other hindrance beyond his control, to receive the cargo at the rate per working day mentioned, and therefore within the time thereby indicated, and that he had no more right to select a wharf at which the discharge could not be commenced until the twenty-seventh day after the vessel's arrival, than he had to designate a "craft, steamer, or floating depot" which would not be ready to receive the cargo until after a similar delay, or which had not the capacity to take on board the number of tons per day agreed to be received; and for the detention caused by this selection he is liable.

We have already seen if the charter-party had contained a provision for "quick dispatch," "the utmost possible dispatch," or the like, any custom of the port by which vessels in the trade are required to discharge at particular docks, and to await their turn for a berth, would be overridden by the express agreement of the parties.

In the entire absence of proof of any such custom, and in presence of the stipulation fixing the rate at which the discharge should be effected, I think that, even under a provision for "customary dispatch," the delay in commencing the discharge in this case would, in view of its duration and its causes, have been wholly unjustifiable. The libelants claim that the vessel was detained 15 days. I think she was, in fact, detained for at least that number of days. The demurrage agreed upon for the detention of the ship by reason of the charterer's failure to discharge at the rate *per diem* specified in the charter-party would seem to afford a *prima facie* rule of damages for delay in commencing the discharge.

It is suggested that this is not, in fact, an accurate measure of the damages actually sustained. A reference will therefore be had to the commissioner to take testimony and report the actual damages sustained by the 15-days' detention.

THE MONTICELLO, etc.

(District Court, S. D. New York. March 6, 1883.)

1. EAST-RIVER NAVIGATION—RULE 21.
   Steamers navigating the East river are bound to keep as near the middle of the river as may be, and under rule 21 must stop and reverse, if necessary, to avoid a collision. The steamer J. O. *held* liable in this case for disregarding both these obligations.
2. SAME—FERRY-BOAT—VIGILANCE REQUIRED.
   Ferry-boats, in crossing the East river, are bound to maintain a vigilant watch before leaving their slips to avoid danger from vessels which may be passing near. The ferry-boat M. *held* liable for a collision occurring about 140 feet outside of her slip, where she started without any lookout upon her bows, it being *held* that the steamer J. O., approaching within 50 feet of the wharf next above her, might have been seen by such lookout, or by the pilot, shortly after starting.
3. BOTH IN FAULT—DAMAGES DIVIDED.
   Where both vessels are guilty of independent faults contributing to the collision each is liable and the damages are divided.

In Admiralty.

L. Ullo, for libelant.

B. D. Silliman, for claimant.

BROWN, J. The libel in this case was filed to recover damages to the British steamer Jenny Otto from a collision with the ferry-boat Monticello a little outside of the Hamilton ferry slip, in the East river, on the Brooklyn side, on the sixteenth of January, 1879.

The Jenny Otto was an iron steamer 275 feet long, and about 941 tons measurement. She left her dock at Columbia stores, at the foot of Atlantic avenue, Brooklyn, at 2:40 P. M., about half an hour before high water. She was proceeding out to sea, intending to go by way of Buttermilk channel. About 300 feet out from the wharf at the Columbia stores there is a sand-spit or shoal in the East river, which extends to the south-westward, and which it is unsafe for vessels such as the Jenny Otto, drawing 20 feet, to attempt to pass. The shoal recedes from the Brooklyn shore to the southward, so that in the vi-

cinity of Hamilton ferry it is from 500 to 600 feet outside of the slip. About 140 feet above the upper pier of the ferry slip is a pier termed the shed pier, which extends about 40 feet further out into the stream than the piers above or below, and is covered by an elevator and a shed 22 feet high, extending to within 13 feet of its outer end.

The witnesses on the part of the Jenny Otto testify that upon leaving the Columbia stores she proceeded down the stream at least 250 feet off the end of the piers, as near as it was safe to go to the sandbar, at the rate of not over three knots; that she had got to the Union stores, about 300 feet above the Hamilton ferry slip, when, seeing a bark coming up the Buttermilk channel, her engines were stopped; that a few seconds afterwards the Monticello was seen coming out of the slip, when the steamer starboarded her helm so as to go astern of the ferry-boat, but struck her abaft the wheel, whereby two holes were stove in the steamer's port bow, which detained her six days for repairs.

On the part of the steamer it is claimed that she was in full view from the pilot-house of the ferry-boat before the latter left the slip; that the ferry-boat had no proper lookout; and that the collision was solely the result of her negligence.

On the part of the ferry-boat several witnesses testify that the steamer came close to the wharves and passed the shed pier not more than 25 or 50 feet distant therefrom; and the respondent contends that the collision is, therefore, due solely to the faulty navigation of the steamer in going so close to the shore, and also in giving no whistle signaling her approach. For the steamer it is alleged that whistles were sounded.

One piece of testimony, the correctness of which I see no reason to doubt, serves to fix pretty accurately the place of collision and its distance outside of the ferry slip nearly in accordance with the other testimony for the respondents; and this goes far to resolve the other doubts in the case arising from the usual conflict of testimony. The Baltic, companion boat of the Monticello, had crossed from the New York side, and was waiting about 100 feet outside of the lower end of the slip for the Monticello to come out. The pilot, in crossing, had observed the Jenny Otto coming down the stream, and says that as he lay waiting the Jenny Otto appeared to be designing to pass astern of his boat. As the Monticello came out, the Baltic proceeded ahead to enter the slip, and when about half way in the slip the force of the collision, the pilot says, carried the stern of the Monticello down the stream, so that she struck about 10 feet of the stern of

the Baltic. None of the three boats were stopped in their course, and the Jenny Otto passed down between the sterns of the two ferry-boats. The latter were each 174 feet long; and as the Baltic was half way inside of the lower slip when struck by the stern of the Monticello, it follows that the stern of the Monticello was about 77 feet outside of the end of the lower pier of the slip and her stem about 250 feet outside of it, and that the stem of the Jenny Otto, when she struck the steamer, could not have been more than 130 or 140 feet outside of the lower pier, and that, consequently, to reach this position she must have passed within about 50 feet of the end of the shed pier, as an inspection of the map will show.

From this determination of the place of collision and the course of the Jenny Otto within 50 feet of the end of the shed pier next above the ferry slip, she must necessarily be held in fault, because she had no right to be navigating in that part of the stream so close to the wharves. The state statute which requires steamers to proceed in the middle of the stream, the local rules, and repeated decisions of the courts, all unite in condemning navigation so near to the slips as dangerous and unjustifiable. The matter has been so repeatedly discussed, and the obligation of steamers to keep away from the ends of wharves and ferry-slips so forcibly stated, that it is wholly unnecessary to repeat it here. *The Ferry-boat Relief*, Olc. 104, 108–9; *The Favorita*, 18 Wall. 598, 601–2; 8 Blatchf. 539, 541; 1 Ben. 30, 39.

In this case there is no excuse or palliation for the Jenny Otto's proceeding so near the wharves. She drew less than 21 feet, the tide was high, and she could have proceeded with perfect safety at least 400 feet further out in the stream at that point. Had she been half that distance further out the collision would have been avoided. On this ground alone, therefore, she would be held chargeable with fault. She is also chargeable with fault because she did not "stop and reverse," under rule 21, § 4233, Rev. St., when it was clearly "necessary" to avoid the collision. Her pilot testified that he saw the ferry-boat coming from the time she left her slip; that his engines were already stopped; and that he did not reverse because he considered it unsafe to do so, from the peculiarities of the steamer's propeller. This excuse cannot possibly be accepted. There was plenty of room for the propeller to have reversed and checked her speed to some extent. She backed out of her position on starting from the Columbia stores in a channel-way of one-third the width, and her log shows her engines repeatedly reversed. A slight checking of her speed, sufficient to have allowed the ferry-boat five or six sec-

onds more time, would have avoided the collision. There was no difficulty in reversal at low speed; and for her fault in not doing so, as required by rule 21, the steamer is chargeable. If it were true that the propeller could not safely reverse at all, then her fault in proceeding along near the wharves becomes only the more gross; for, if under that disability, she should have taken the principal channel on the New York side of the sand-pit, as other vessels often do on leaving the same stores, and as she might have done, instead of proceeding down the narrower passage on the Brooklyn side.

As respects the Monticello, I think the proofs show conclusively that the approach of the Jenny Otto could have been seen from the bow of the Monticello before she started from her slip, and also by the pilot in the pilot-house, 36 feet back from the bows, in ample season to have avoided the collision, had any proper lookout or watch been maintained. The statute, the local rules, and the decisions of the courts, which require steamers to keep away from the wharfs and slips, are designed for the greater security of life and property only; they are not designed to relax in the slightest degree the obligation on the part of the ferry-boats to maintain all that care and watchfulness against danger which the lives in their keeping demand.

There are frequent cases where of necessity, in the busy traffic of this region, water-craft of various kinds are passing up and down in the immediate vicinity of the wharfs and slips, to which the general rule requiring them to keep off is not applicable. Moreover, it appears, from the testimony of the pilot of the Monticello, that vessels were in the habit of going from one to two hundred feet off from the shed pier; while the pilot of the Jenny Otto speaks of it as a constant practice to keep as near to the wharfs as possible, illegal and dangerous as that practice clearly is. The practical necessity, therefore, for constant vigilance against danger in leaving the slips is manifest; and a ferry-boat must be held in fault if she leaves her slip at the full speed of her engines, as in this case, when another vessel within view is crossing her path just outside of the slip.

In the case of *The America*, 10 Blatchf. 155, 159, the court say:

"Whatever be the rule respecting the duty of ferry-boats to keep a lookout from the forward deck, one thing is certain, that in the navigation across this crowded channel a most vigilant lookout from some place on the boat is required; and I can hardly conceive of any navigation in which, in view of the interests of life and property and the dangers of inadvertence, it is more imperatively demanded."

This general duty is not denied by the learned counsel for the claimant; nor is it denied that one of the deck-hands, whose duty it was to act as lookout, was on the after part of the boat and did not reach the bows at the time of starting from the slip, nor, indeed, up to the time of the collision. But it is contended that the absence of this deck-hand from the bow as lookout in no way contributed to the collision, because the Jenny Otto could not have been seen if he had been there. The principle invoked is unquestionable, but I cannot hold it applicable upon the facts in this case. On the contrary, it seems to me very clear that the Jenny Otto could have been seen from the bow of the boat before she started.

From all the testimony, as well as from the necessities of the case, the place of collision being fixed, as I have above determined, the stem of the Jenny Otto must have been less than 300 feet from the place of collision when the Monticello started at the full speed of her engines. The latter was at full speed, as her pilot testifies, by the time she had moved 60 feet, or about one-quarter part of the way, out of the dock, and she had moved hardly more than 300 feet up to the time of the collision; most of the way, therefore, being at her full speed of seven to eight knots, while the speed of the Jenny Otto is not estimated by the pilot of the ferry-boat at over five knots, and her own witnesses place it at only two or three knots. The steamer, therefore, could not have moved more than about 200 or 250 feet between the time when the Monticello started and the collision; and this agrees well with the position of the steamer as given by several of the witnesses. This would bring the steamer's amidships about in front of the Union stores and her stem nearly down to the shed pier, as several witnesses also testify, so that her bows could not have failed to be observed by a lookout stationed on the bow of the Monticello and looking along a line either forward of or crossing the end of the shed pier, outside of the sheds, where the wharf was but four feet above water; and this is confirmed by the pilot of the Jenny Otto, who says he saw the ferry-boat when she started; nor could the pilot of the Monticello also, after moving outward a very little,—less than 50 feet,—have failed to observe the steamer if he had been on the lookout. His testimony on the subject of his own observation at the time of starting to leave the slip is so loose that it would seem designed to avoid any direct testimony on the subject. He was asked:

"*Question.* Was any object visible above you as you came out of the slip? *Answer.* The shed of the elevator pier was visible. *Q.* Well, sir, did you see any vessel? *A.* No, sir. *Q.* What did you first see, and how did it occur? Just describe what occurred. *A.* As we were going out of the slip I saw the covered shed above, and a ship was lying in along the pier, and when I came out I saw the Jenny Otto coming close in, and I could not back. I went right out, and she hit me on the starboard side."

On cross-examination he says:

"*Question.* Were you alone in the pilot-house on that day? *Answer.* Yes, sir. *Q.* Had you any other person besides yourself that would look out? *A.* The lookout had not time to get there; he was coming forward."

He testifies that he could not see over the top of the shed at high water; but I look in vain in his testimony for any statement or intimation that before starting he made any careful observation to see what vessels, if any, were coming, or that from the time of starting out of the slip he kept any definite watch for that purpose; while it is admitted that there was no other lookout on duty at that time. The distance from the bow to the pilot-house is put at 37 feet. He is asked:

"*Question.* Had you seen the Otto when you were there, 57 feet out of the slip, could you then have stopped and avoided a collision? *Answer.* No, sir."

This is undoubtedly true when they were 57 feet "out of the slip;" but if it were meant as a statement (which it is not) that he could not have stopped after having gone 57 feet from the start, it is manifestly untrue; for her bows were then not outside of the lower pier, and she plainly could have been stopped in the same further distance, or about the same as she had then made, which was less than one-third of the distance to the place of collision. It is impossible to excuse any remissness in the duty of keeping a vigilant watch against danger on the part of ferry-boats laden with precious lives. I am satisfied in this case that there was such remissness in not observing the steamer as she might and ought to have been observed in season to avoid the collision.

The faults of the Monticello do not excuse the steamer for her own independent faults, nor serve to charge the former alone for the damages, as contended by the counsel for the libelant. It was no more the duty of the ferry-boat to be watchful before starting and in coming out of the slip, so as not to run into visible danger ahead, than it was the duty of the steamer to keep further out in the stream, and to reverse her engines when a collision was seen to be probable. And so,

though the Jenny Otto was navigating close to the wharf where she had no right to be, that did not authorize the Monticello to run into her, nor to leave her slip without the exercise of that vigilance and nautical skill in avoiding danger which the law imposes upon ferry-boats as much as upon other vessels in order to secure the safety of life and property. *The Continental*, 14 Wall 345, 359; *The Louisiana*, 2 Ben. 371, 380; *The Vim*, 12 FED. REP. 906, 913, and cases there cited. Had either performed its own legal duty, the collision would have been avoided. Each is, therefore, chargeable with contributory negligence, and the damages in such cases in admiralty are divided.

An order of reference is directed to compute the damages, with costs.

THE SECRET.

(*Circuit Court, S. D. New York.* December 1, 1879.)

CHARTERERS' POWER TO BIND VESSEL FOR COAL.

It was held in this case that the charterers of a vessel had no authority to bind her owners or the vessel, for a supply of coal in a foreign port, and that the vendor was put upon inquiry to ascertain the fact of authority.

H. E. Tremain, for libelant.

T. E. Stillman, for claimants.

BLATCHFORD, J. Although the Secret was in a foreign port, and although Murray, Ferris & Co., when ordering the coal, stated to Russell & Hicks that it was for the Secret, yet the circumstances were such that the libelant's agents, Russell & Hicks, were put on inquiry, from which they could easily have learned this, notwithstanding the above facts. Murray, Ferris & Co. were the charterers of the vessel, and had no power to bind the claimant or the vessel to pay for coal bought for her. If they had used due diligence they would have ascertained such want of power. *The Lulu*, 10 Wall. 192; *The Pátapsco*, 13 Wall. 329.

Moreover, I concur with the district judge in the view he took of the case, in the opinion delivered by him.

STACKHOUSE v. ZUNTS.*

(Circuit Court, E. D. Louisiana. January, 1883.)

JURISDICTION—REMOVAL.

A suit was instituted in a Louisiana court by a citizen of that state against a citizen of Mississippi, and a preliminary writ of injunction issued, enjoining the defendant from proceeding under an execution issued upon a judgment obtained in that court, on the grounds that said judgment had been extinguished by compensation, and had been rendered by reason of error both of fact and law, and was therefore null and void. On the application of the defendant the suit was removed to this court, and the plaintiff moved to remand on the ground that the federal court had no jurisdiction, these proceedings being merely incidental and auxiliary to the original action in the state court, and so within the decisions in *Bank* v. *Turnbull*, 16 Wall. 190, and *Barrow* v. *Hunter*, 99 U. S. 80; *held*, that the proceeding instituted and removed is not only "tantamount to a bill in equity to set aside a decree for fraud in obtaining it," but really amounts to "a new case arising on new facts, although having relation to the validity of a judgment," as laid down in *Barrow* v. *Hunter*, 99 U. S. 83.

Bondurant v. *Watson*, 103 U. S. 281, followed.

On Motion to Remand to State Court.

E. D. White, *H. B. Magruder*, and *F. L. Richardson*, for complainant.

A. C. Lewis and *T. M. Gill*, for defendant.

PARDEE, J. This case comes up on a motion to remand to the state court, where it was instituted, on the ground—

"That this court has no jurisdiction of a suit seeking to enjoin the execution of a judgment rendered by a state court, neither to pass upon, dissolve, nor perpetuate such an injunction granted by a state court, and more especially where the complainant or plaintiff obtaining said injunction is now, and was at the time of the rendition of the judgment enjoined or sought to be enjoined, a citizen of this state, and within the jurisdiction of said state court."

The transcript shows that the suit was instituted by filing in the state court a petition of the following substance:

"The petition of Herbert W. Stackhouse, a resident of the parish of Plaquemines, respectfully shows that James E. Zunts, a resident of Harrison county, and a citizen of the state of Mississippi, claiming and pretending to be the subrogee of one Ruggles S. Morse, a citizen of Maine, resident in the city of Portland, has caused to be issued out of this honorable court two writs of *fieri facias* in the suits entitled *R. S. Morse, James E. Zunts, subrogated*, v. *Herbert W. Stackhouse*, and numbered 371 and 372 of the docket of this hon-

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

orable court; and under said writs the sheriff of the parish of Plaquemines has seized, advertised for sale, and will sell, on the first day of April, 1882, the following-described property, to-wit."

Then follows a description of the property and advertisement.

"Unless restrained by the order and injunction of this court."

Then follow matters set out at great length, called reasons, summarized by the pleader as follows:

"As grounds for injunction, petitioner, therefore, alleges compensation, error of fact and of law, the nullity of the judgments sought to be enforced."

The errors of fact and of law, as set forth in the petition, constitute a case of constructive, if not actual, fraud. And the compensation of the judgments, as pleaded, amounts to about the same charge. The relief sought is an injunction restraining the sale of the property said to have been seized and advertised, and for general relief. That the case, as made by the record, shows "a controversy between citizens of different states;" and "a controversy which is wholly between citizens of different states, and which can be fully determined as between them," cannot be disputed with any show of reason. And if it is such a controversy, then the suit was removable to this court.

If a case is properly removable, and is properly removed, to this court, then, as we have had occasion to hold several times, this court is vested with the jurisdiction to grant any proper relief the case may demand, to as full an extent as the state court could have granted had the case not been removed. And it seems clear that the supreme court have so settled the law. See *Gaines* v. *Fuentes*, 92 U. S. 10.

"A party, by going into a national court, does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality." *Davis* v. *Gray*, 16 Wall. 231.

The point is urged in argument that the proceedings, removed to this court, are merely incidental and auxiliary to the original action in the state court, and so within the decisions in *Bank* v. *Turnbull*, 16 Wall. 190, and *Barrow* v. *Hunton*, 99 U. S. 80; but the petition in the case does not make such a showing. The proceeding, instituted and removed, is not only "tantamount to a bill in equity to set aside a decree for fraud in obtaining it," but really amounts to "a new case arising on new facts, although having relation to the validity of a judgment." The case of *Barrow* v. *Hunton*, *supra*, fully supports the right to remove in this case. The case of *Bondurant* v. *Watson*,

103 U. S. 281, cited by counsel for defendant, does not conflict with the conclusions reached here; it is in full accord, and it seems to me would be conclusive authority for this court to retain and hear this cause, if the court had any doubt in the case.

The motion to remand is denied, with costs.

STANLEY v. BOARD SUP'RS ALBANY CO.

(*Circuit Court, N. D. New York.* February, 1883.)

1. TAXATION—NATIONAL-BANK SHARES—OVERASSESSMENT.

   It is not sufficient to invalidate the taxation of national-bank shares to show that in the case of a single state bank, the shares of which are subject to a like taxation, the assessors, either by mistake or intention, have shown favor. The system of assessment of bank shares, owing to the fact that the shares of different banks are differently rated, must necessarily be imperfect, and the law does not require absolute accuracy. It was the intention of congress to prevent the state by hostile legislation, and the taxing officers by a hostile rule, from discriminating against national banks; to place all bank shares, state and national, on a common level. Where the shareholders have the same rights as other individuals taxed for moneyed capital, they should look to the statutes of the state for relief.

2. TRANSFER OF CAUSES OF ACTION.

   Where a party, who is entitled to sue in the federal courts, transfers his cause of action to another who has the same right, the fact that the transfer was made for an inadequate consideration will not invalidate it, so long as the legal title is transferred.

3. SAME—RIGHT TO SUE IN FEDERAL COURTS, WHERE CLAIM IS MADE UP OF ITEMS OF LESS THAN $500 EACH.

   If a party is the honest owner of a claim which he is entitled to enforce in the federal courts, his right should not be defeated by proof that the claim was at one time composed of several separate and distinct items of less than $500 each.

Matthew Hale, for plaintiff.

Rufus W. Peckham and *Simon W. Rosendale*, for defendants.

COXE, J. The plaintiff, a citizen of Illinois, seeks to recover of the defendants certain moneys alleged to have been illegally exacted as taxes from various shareholders of the National Albany Exchange Bank. The demands in suit were first assigned to Mr. C. P. Williams, a citizen of this state. Williams thereafter assigned to the plaintiff, in circumstances which would probably require a dismissal of the suit, pursuant to the fifth section of the act of March 3, 1875, were it not for the fact that the court had jurisdiction prior to and irrespective of the assignment. That the plaintiff's immediate as-

signor might have maintained this action, because the controversy is one arising "under the laws of the United States," was directly decided on the former trial, and is *res adjudicata* in this court.

The assignment was not made for the purpose of "creating a case" within the jurisdiction of the court, for such a case was already in existence. As the court must, in any event, retain jurisdiction, an inquiry into the relations existing between the plaintiff and his assignor can lead to no tangible result. Where a party, who is entitled to sue in the federal courts, transfers his cause of action to another who has the same right, of what moment is it that the transfer was for an inadequate consideration, or was wholly without consideration, so long as the legal title is transferred? The defendant has no reasonable ground for complaint, and the court, for whose advantage the statute was framed, has not been imposed upon or burdened with an improper or collusive controversy. Regarding the other point—that the court cannot retain jurisdiction where the amounts assigned were less than $500—there is more doubt. The assignments were made without any other consideration than that contained in the agreement, viz., the assignee was to bring suit, pay all expenses, and, in case of recovery, account for half the net proceeds.

It is very certain that a shareholder, whose claim against the defendants amounted to less than $500, could not maintain an action in this court. It would also seem clear that Mr. Williams was not prohibited from making a *bona fide* purchase of all the claims. Being the absolute owner of all, he could institute suit in this court for the whole amount. "The matter in dispute" would then be the property of one man. In other words, if a party is the honest owner of a claim which he is entitled to enforce in the federal courts, his right should not be defeated by proof that the claim was at one time composed of several separate and distinct items of less than $500 each. It would be otherwise if the amounts were transferred solely to make a case; such a transaction would come within the inhibition of the act of 1875, and the rule as laid down in *Williams* v. *Nottawa*. But the proof being clear that, before a single shareholder assigned, Mr. Williams was the owner of a claim sufficient in amount to give the court jurisdiction, it can hardly be said that the transfers were collusively or improperly made.

In view of the conclusion reached upon the merits in favor of the defendants, the foregoing considerations are, perhaps, unnecessary; but it is thought that every question should be passed upon in order that the case, should it again reach the supreme court, may there be

finally disposed of. Upon the merits, the main question which presents itself is the following: Did the assessors, in the language of the supreme court, "habitually and intentionally, or by some rule prescribed by themselves, or by some one whom they were bound to obey, assess the shares of the national banks higher in proportion to their actual value than other moneyed capital generally?" The amended complaint contains a broad allegation, designed to meet the suppositive case suggested by the supreme court. As originally drawn, however, the averment was, in substance, that the assessment was at a greater rate than that imposed upon the shares of a local state bank and other moneyed capital in the hands of individuals. Regarding this allegation the supreme court says:

"We have, however, much difficulty in finding a solid ground of recovery in this statement. * * * We are quite clear that the shares of the plaintiff are not relieved from taxation because a single bank of the state has been favored by mistake or by intention. For errors of this kind the statutes of New York provide the correction, which should be taken in time, and we should be very reluctant to hold that, when it has been shown that a single bank or a single individual has been taxed less than he should be, all other taxes, however just, are thereby invalidated."

Do the proofs in this case show more? Does not the language just quoted apply with great force and directness to the present *status* of the case? The evidence shows that in the years 1873, 1874, and 1875, there were in Albany seven national and two state banks—the Albany County and the Mechanics' & Farmers'. All of the nine banks were located in the Sixth ward of that city. The stock of each was assessed at par. There were then no "individual bankers"—within the meaning of the law—in the city. There was no evidence of other moneyed capital, disconnected from personal property, in the ward. The assessors denied that there was ever any intent to assess national bank shares at a higher rate than other moneyed capital, and that any rule having such a result in view was ever prescribed or followed. They further assert that the assessment at par was satisfactory to all the banks except the Exchange Bank, and to the shareholders generally, except Mr. Williams and a few others. It is contended on behalf of the plaintiff that because other bank stock was worth more than that of the Exchange Bank, the latter was, within the meaning of the act of congress, assessed at "a greater rate" than other moneyed capital.

The plaintiff submits various statements and estimates, from which it appears that the rate of assessment of the shares of the Exchange

Bank, in proportion to their actual value, was 77 per cent., and of the two state banks 100 per cent. and 35 per cent., respectively; one state bank being assessed at a less and the other at a greater rate. All of the national banks were assessed at a less rate than one of the state banks—the Albany County Bank—and at a greater rate than the other—the Mechanics' & Farmers' Bank. The assessment of bank shares at par is, in the circumstances developed here, not only unequal and inequitable, but unnecessary and indefensible. And yet, even though a more perfect system were devised, it would be impossible to maintain it long, if the contention of the plaintiff is correct. Where the shares have no market value, there being no sales; where bank officials, who have the best means of observation, are reticent; where intelligent men differ widely in their estimates,—how are the taxing officers to ascertain the true, the actual, the exact value of bank stock? Even though sales are numerous and open, no safe criterion is furnished.

A recent instance is recalled where the shares of a national bank were eagerly purchased at 175, though at the time the bank was insolvent, its failure occurring a few weeks later. But the inevitable deduction from the argument of the plaintiff would seem to be that if the system is imperfect, if it result in placing a higher tax—even though the difference be infinitesimal—upon his shares than upon the shares of a few other stockholders, state and national, the rule which produces this result is radically vicious, an infraction of the act of congress, and void, everywhere and at all times.

If this be true, taxation of national-bank shares must cease, for there must always be a system of assessment, and it must be fallible and full of imperfections. It is thought that the law does not require such absolute accuracy. If there are hardships, do they not fall on state and national banks alike? If errors are to be corrected, should it not be done in the manner pointed out by the state statutes? Or, if relief is there refused, by the selection of better and more competent men to act as assessors? After the budgets have been made up, and the taxes levied and paid, it is too late to take advantage of what, in its legal aspect, is little more than a mistake of judgment on the part of the officers charged with judicial functions. This would seem to be so in any case, and especially where it is sought to recover, not the excess alleged to be illegal, but the whole amount of the tax.

It was the intention of congress to prevent the state by hostile legislation, and the taxing officers by a hostile rule, from discriminat-

ing against national banks. But was the law intended to apply where all bank shares, state and national, are placed on a common level? It is thought not. While the administration of the law depends upon human agency, there necessarily must be imperfections and unjust discriminations.

Assessments are made by men residing in different localities and entertaining opinions regarding property totally at variance with each other. While this is so, and it must be so always, it will be found impossible to devise a system of taxation which is absolutely equitable and fair,—which is entirely free from partialities and mistakes. To use the language of Mr. Justice MILLER in the *State Railroad Tax Cases:*

"Perfect equality and perfect uniformity of taxation as regards individuals or corporations, or the different classes of property subject to taxation, is a dream unrealized. * * * But the most complete system which can be devised, must, when we consider the immense variety of subjects which it necessarily embraces, be imperfect; * * * must inevitably partake largely of the imperfection of human nature, and of the evidence on which human judgment is founded."

No authority has been cited, and it is thought none can be found, where a recovery has been had upon facts at all approximating those developed here. There is not proof sufficient to induce the court to say that the assessment was made pursuant to a uniform rule deliberately adopted by the assessors for the purpose of discriminating against the shares of national banks; there is no proof which would justify a conclusion that the taxing officers habitually and intentionally, or by an obligatory and potential rule, assessed the shares in question higher in proportion to their actual value than other moneyed capital generally.

It follows, therefore, that the plaintiff is entitled to judgment on the fourth count and the defendants on all the other counts.

SOCOLA, Ex'r, *v.* GRANT and Wife.*

(*Circuit Court, E. D. Louisiana.* January, 1883.)

1. EQUITY PLEADING.

To allege that a sale is simulated, and if not simulated is fraudulent, meaning thereby that it is a sham sale, and if not a sham then a real sale, but fraudulent, may be consistent, but it is not certain; and certainty is a requisite in equity pleading as well as consistency.

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

2. EQUITY PRACTICE.

Where, on demurrer, exception was taken to a bill for repugnancy, and but one clause in the bill was subject to such imputation, and said clause was unnecessary, the court ordered that clause to be stricken out, and overruled the demurrer.

In Equity. On demurrer.

E. Howard McCaleb, for complainant.

John D. Rouse and *William Grant,* for defendant.

PARDEE, J. The bill is brought in this case to annul an alleged fraudulent simulation. In the courts of the state from which it came the action was a revocatory action. See *Willis* v. *Scott,* 33 La. Ann. 1027.

The demurrer to the bill is general, but the ground assigned in argument is repugnancy, in that it is averred in the bill that the transfer in question was a simulation, and that it operated a preference, and that the price was inadequate. A careful examination of the bill shows that the complainant sought only to charge a fraudulent simulation; and there is only one clause contained in it that looks to any other view of the case, to-wit:

"That no price is stated in said agreement, and the moneys advanced and to be advanced as mentioned therein were in fact, as your orator is informed and verily believes, never advanced, and if any money was advanced as claimed by Mrs. Catherine G. Grant, *and which your orator denies,* the sum thereof was far below the real value of said property, which was at the time fully worth $5,000."

This clause does not aver that there was a sale of the property; on the contrary, it denies it. And as the bill is complete without this clause, it had been better, perhaps, if the clause had been omitted.

The charge of redundancy, however, is more appropriate than that of repugnancy. The most that can be made out against the bill, on the ground of repugnancy, is that, in effect and scope, it charges that the transfer in question is simulated, and, if not simulated, is fraudulent. If we take this as the correct view of the bill, and yet follow the Louisiana law, which gives the action, and under which the rights of the parties must be determined, there is no inconsistency in complainant's position.

In the case of *Johnson* v. *Mayer,* 30 La. Ann. 1203, the supreme court of Louisiana declares:

"We see no inconsistency in saying that a sale is simulated, and, if not simulated, that it is fraudulent. * * * When sales are attacked by a direct action, there is no reason why the party may not demand relief from them by alleging simulation or fraud, or both."

In an equity case in this court I am not prepared to hold that a pleader may take such apparently antagonistic positions. He may allege a sale to be simulated and fraudulent, for it may be both; but a sale cannot be both *real* and simulated. To allege that a sale is simulated, and, if not simulated, is fraudulent, meaning thereby that it is a sham sale, and, if not a sham, then a real sale, but fraudulent, may be consistent, but it is not certain; and certainty is a requisite in equity pleading as well as consistency.

It seems to me that, if there is doubt as to the nature of the transaction, the creditor, who has "to strike in the dark," should charge a fraudulent simulation, and, on discovery, amend if necessary. In this case there is no uncertainty except what may arise from the clause above quoted, and as that clause was unnecessary, and adds nothing to the force of the bill, I will direct that it be expunged from the bill, but the demurrer should be overruled.

LACROIX FILS *v.* SARRAZIN.*

(*Circuit Court, E. D. Louisiana.* January, 1883.)

PUBLIC TREATIES—PLEADING.

The court takes judicial notice of the public treaties between the United States and foreign countries, and a citizen of such a foreign country, in bringing a bill against a citizen of Louisiana, need not allege that there is such a treaty in force.

In Equity. On demurrer.

R. King Cutler, for complainants.

Andrew J. Murphy, for defendant.

PARDEE, J. This court takes judicial notice of the public treaties between the United States and foreign countries. Where a citizen of France has, in compliance with the trade-mark laws of the United States, duly registered a trade-mark, he need not, in bringing an action against a citizen of Louisiana for violation of his rights in such trade-mark, allege that there is in force a treaty between the United States and France affording privileges in France to citizens of the United States similar to those given by the trade-mark laws of the United States.

Let demurrer be overruled.

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

BIERBACH *v.* GOODYEAR RUBBER CO.

(*Circuit Court, E. D. Wisconsin.* January 17, 1883.)

1. NEGLIGENCE—PERSONAL INJURIES—COLLISION ON HIGHWAY.

Where teams have a right in the ordinary course of business to follow each other, turn about, pass and repass, that degree of care and caution must be exercised by parties using such highways, when in proximity to each other, to avoid doing each other injury, as might be expected of a person of ordinary care and prudence; and it is not enough to exonerate one from a charge of negligence, that after a collision had become inevitable he did all that he could to avoid it, when it appears that if he had exercised the proper degree of care and prudence in keeping at a safe distance behind the plaintiff's vehicle the accident never would have happened.

2. SAME—CONTRIBUTORY NEGLIGENCE.

The law does not impose upon the driver of a vehicle in a crowded city thoroughfare the duty of giving a signal to the vehicles behind him of his intention to turn; it is the duty of the driver in the rear of such vehicle to be on the lookout for such a deviation from the course by the driver in the advance. Although both parties are bound to use ordinary prudence and care, yet ordinary care on the part of a driver of a team following another team in the streets of a city may mean, in the circumstances in which the parties are placed, a higher degree of care then would be exacted from the driver of the team in advance.

3. SAME—EXCESSIVE DAMAGES—PRACTICE IN THE FEDERAL COURTS.

The court will not, as a rule, disturb a verdict in an action for damages resulting from negligence, unless it is apparent that the verdict was the result of passion, or prejudice, or partiality on the part of the jury. It is the practice of the federal courts, where excessive damages are believed to have been awarded, to give to the recovering party an option to remit a part of the verdict, and, if a remission is made, then to refuse a new trial.

At Law.

Austin & Runkel and *Geo. B. Goodwin*, for plaintiff.

E. P. Smith, N. Pereles & Sons, and *Jas. G. Jenkins*, for defendant.

DYER, J. This action, to recover damages for personal injury occasioned by a collision between a vehicle owned by the plaintiff and in which he was riding, and a vehicle in charge of the defendant's servant, was tried at the last term of this court,* the trial resulting in a verdict for the plaintiff of $4,500. A motion to set aside the verdict was duly made, has since been argued, and is now to be decided. The motion is based on three grounds: *First*, that sufficient proof was not made of the alleged negligence of the defendant's driver; *second*, that the evidence showed contributory negligence on

*See 14 FED. REP. 826.

the part of the plaintiff; *third*, that the damages awarded by the jury are excessive.

After a careful review of the case I am satisfied that the motion ought not to prevail on either of the two grounds first stated. The collision occurred on one of the thoroughfares of this city. The horse and wagon of the defendant were following the plaintiff's horse and wagon. They were from 10 to 15 feet apart, and both going at a moderate rate of speed. The place between the plaintiff's wagon and the right margin of the street was sufficient to enable the defendant's vehicle to pass the plaintiff's. While in the respective positions stated, the plaintiff's driver undertook to turn his horse and wagon about—their movement being to the left—and while thus turning, the left fore wheel of the defendant's wagon struck the right hind wheel of the plaintiff's wagon and overturned it. The plaintiff was thrown violently to the ground, and, as I think the evidence shows, was seriously injured.

I concur without hesitation in the finding of the jury that the defendant's driver was guilty of negligence. It is true that after a collision was imminent he made energetic effort to avoid it. But it was then too late. And I am convinced he did not observe with needful attention the proximity of the two vehicles, and was not sufficiently watchful of the movements of the horse and wagon in advance of him before a collision was unavoidable. He seems to have been thoughtless of the comparatively slight space there was between the two vehicles. He kept directly in the rear of the plaintiff's wagon, and evidently without regard to the possibility of any change in its position or movement; and at last, as an unavoidable result, the two wagons came in violent contact. I think that with the seasonable exercise of prudence on his part the collision would not have occurred. The plaintiff had a right to turn his horse and wagon around at that place. It is matter of common observation that in the streets of a city like this, where teams are constantly coming and going from and to almost every locality, passing, repassing, following, and meeting each other, the demands of business often require them to suddenly stop, to turn about, or otherwise change their course, and this they have a right to do.

If the plaintiff was guilty of contributory negligence, that negligence consisted in the act of turning his horse and wagon about when the defendant's horse and wagon were in his rear, without giving some signal in advance that he was about to turn. And if that was contributory negligence, *per se*, then it was the duty of the court

to take the case from the jury on that ground. But I do not think the law imposed upon the plaintiff, in the locality where he was, and in the circumstances of his situation, the duty of giving to the defendant's driver previous warning of his intention to turn about. The latter had no right to act upon the presumption that the plaintiff would or might not deviate from the course upon which he was going up to the time when he turned his vehicle. Both were bound to exercise ordinary prudence; but ordinary prudence on the part of a driver of a team, following another team in the streets of a city, may mean, in the circumstances in which the parties are placed, a higher decree of care than would be exacted from the driver of the team in advance. While ordinary care is the universal rule, it is not to be understood that in such cases what would be ordinary care on the highways of the country, or in the streets of a village, would, of necessity, be a degree of care that would exonerate from liability in the thoroughfares of a city, where the needs and courses of wagon transportation are as manifold and varied as are the requirements of business.

If there was contributory negligence in this case, it arose from the mere act of turning about at that time and place; nothing more—nothing less. I cannot give legal sanction to such a conclusion. It behooves a person, situated as the defendant's driver was, to take into account the liability of a vehicle immediately in advance of him to suddenly change its course, rather than to thoughtlessly act upon the presumption that it will continue in a given course without deflection or change. The whole question of negligence of the defendant's driver, and of contributory negligence on the part of the plaintiff's driver, was, I think, fairly submitted to the jury, and the court cannot say that it disagrees with the jury in the conclusions they reached upon that branch of the case.

The collision occurred in July, 1880. It was proven on the trial that in January, 1876, the plaintiff accidentally received a dangerous wound in the neck just below the jaw from a pistol shot. As shown by the evidence, the injury was one that, in consequence of the course of the ball, to some extent affected the vertebra, and its locality appears to have been, in part at least, the very seat of the injury claimed to have been sustained by the fall from the wagon. It was claimed by the plaintiff that he was entirely cured of the pistol-shot wound, and that the disabilities from which he is now suffering are wholly attributable to the wagon accident. On the part of the defendant it was contended that the present weaknesses and suffering of the plain-

tiff arise from the first and not the second injury. Much testimony was adduced in support of these conflicting theories. The jury were instructed that the plaintiff's recovery, if entitled to recover, must be limited to such damages as were purely compensatory, and that it was not a case for exemplary damages; and this proposition was considerably emphasized by the court. They were also told that the extent of the plaintiff's recovery should be limited strictly to compensation for injuries and losses occasioned by the wagon accident, and that the prior injury should not be made an element of recoverable damage, except that if that injury and its effects were shown to have been aggravated by his fall from the wagon, damages for the aggravation thereof might be allowed. The jury awarded $4,500.

After careful consideration of all the facts of the case I am constrained to think that this verdict in its amount is not warranted by the evidence. Many authorities have been cited to show that the court will not disturb a verdict in such a case as this unless it is apparent that the verdict is the result of passion or prejudice or partiality on the part of the jury. Admitting this to be the general rule, I suppose, in a case where only compensatory damages are allowable, if the court is satisfied that by mistake or from any cause the jury have given what is equivalent to exemplary damages, the right of the court to set the verdict aside would be hardly debatable. Having heard the testimony as the witnesses gave it, and having considered it in all its bearings, although the court would by no means unjustly disparage the plaintiff's claim, it is difficult to reconcile the verdict with the belief that the jury were governed only by the principle of compensation. The case was one calculated to arouse the feelings and sympathies of a jury. Although one of the physicians testified that, after prolonged treatment of the pistol-shot wound, he regarded the plaintiff as pratically restored, it was apparent that he meant to speak guardedly upon that point; and, after all the evidence was in, it seemed to the court to be very well established that a considerable part of the plaintiff's present disability is really attributable to the pistol-shot injury. It is, of course, quite impossible to draw the line between the effects of the original injury and the effects of the second injury, or to discover the extent to which the last injury may have aggravated the first. But on the whole, and with such light as the entire evidence throws upon the question, I have a strong conviction that this verdict exceeds what the plaintiff has shown himself entitled to recover.

It is the practice in this court, where excessive damages are believed to have been awarded, to give to the recovering party an option to remit a part of the verdict, and, if a remission is made, then to refuse a new trial. It has been decided by the supreme court of this state that in a case where a verdict includes damages which a party is entitled to recover, with those which he should not recover, and they are not clearly severable, then the only correct course is to grant a new trial. It is said that for the court in such a case to fix the amount of damages to which the party is entitled, and to permit the balance of the verdict to be remitted, is to usurp the functions of the jury. It has long been the practice of the circuit judge of this circuit, in cases of personal injury, where he was of the opinion that the verdict was excessive, to indicate the amount to which the party was justly entitled, and to permit the plaintiff to remit the remainder of the verdict as a condition upon which a motion for a new trial would be refused. However, I will not undertake to state just what amount the court would award to the plaintiff as damages, if the question were submitted to it for its sole determination; but will say only this: that if the jury had returned a verdict for $3,000 the court would not deem it within its province to disturb it. And so, if the plaintiff chooses to remit $1,500 and to let judgment be entered for $3,000, the motion for a new trial will be refused; otherwise, it will be granted.

Scott and another *v.* Pequonnock National Bank of Bridgeport, Connecticut.

(*Circuit Court, S. D. New York.* January 15, 1883.)

1. Transfer of National-Bank Stock—How Regulated—Effect of Decisions of State Courts.

   The rules which regulate the transfer of the stock of national banks are to be found in the statutes of the United States. The national banking act prescribes no exclusive method of transfer, but authorizes every association to do so. The decisions of the courts of the state in which the bank may be located do not control it.

2. Same—Precedence over Attachment of Vendor's Creditor Given to Unrecorded Transfers.

   Precedence should be given to unrecorded transfers of shares of stock of a national bank, which had passed no by-law on the subject, located in a state whose courts leaned strongly against such transfers, but whose statutes gave the attaching creditor no peculiar rights, by delivery of certificates and a writ-

ten assignment with power to transfer, both executed in blank, over subsequent attachment of a creditor of the original vendor in whose name the shares still stood on the books of the bank.

3. SAME—GROUNDS.

Where no specified acts are by positive requirement made prerequisite to the vesting of a valid new title, creditors without notice take their debtor's property subject to all *bona fide* liens and equitable transfers. No registry being required, non-recording was not evidence of fraud. The tendency is to regard state certificates, attached to an executed blank assignment and power to transfer, as approximating to negotiable securities and to favor attaching creditors less than when attachment and sale on execution alone could compel payment of a claim out of debtor's property. Federal courts have so decided.

4. LEGAL RATE OF INTEREST IN NEW YORK—ACTION ON TORT FOR UNLIQUIDATED DAMAGES.

In an action of tort to recover unliquidated damages, if interest as a part of damages is to be added to the principal sum found to be due, the rate in New York is 6 per cent.

5. UNRECORDED TRANSFER OF STOCK—RIGHT OF ATTACHING CREDITOR—RULE IN CONNECTICUT AND MASSACHUSETTS.

The courts of Connecticut and Massachusetts have quite rigidly maintained that where a statute or charter prescribes an exclusive manner of transfer of the stock of a corporation, an unrecorded transfer shall not be valid against the attaching creditors of vendor; and the courts of the former have strongly leaned towards a construction of the charters of its corporations compelling record of such transfers.

Agreed Statement of Facts, Admission of Documents, etc.

The following is hereby agreed upon and admitted as a statement of the facts of the above-entitled case, and the said facts are hereby admitted to be true for the purposes of the trial of this action:

On the twentieth day of May, 1863, one Samuel Wilmot was the owner of 10 shares of the capital stock of the Pequonnock National Bank, the above-named defendant, a corporation created by and under the laws of the United States relating to national banking, and located and doing business as a national bank in the city of Bridgeport, state of Connecticut; the said 10 shares standing in his name on the books of the said bank, and he was the lawful holder and owner of a stock certificate of the said 10 shares duly and regularly issued therefor by the said bank, and marked Plaintiffs' Exhibit No. 2.

On or about the said twentieth day of May, 1868, the said Samuel Wilmot assigned in the usual mode the said 10 shares of capital stock to one George C. Dunbar, who carried on a banking business in the city of New York, by delivering in the said city, to the said George C. Dunbar, the said certificate and a written assignnent of and a power of attorney to transfer the said 10 shares; the said written assignment and power of attorney being executed in blank and marked Plaintiffs' Exhibit No. 1.

Subsequently, on or about the first day of January, 1869, in the said city of New York, the said George C. Dunbar, in the usual course of business, assigned for full and valuable consideration the said 10 shares to William B. Scott and Albert E. Scott, composing the firm of William B. Scott & Co., who

were and still are residents of and domiciled in the state and city of New York, and carried on a general banking business in the said city, under the firm name of William B. Scott & Co., by delivering to the said William B. Scott & Co. the said certificate, written assignment, and power of attorney.

Subsequently, on the thirteenth day of August, 1869, the said William B. Scott & Co. made demand upon the said bank, at its place of business in the said city of Bridgeport, state of Connecticut, to transfer the said 10 shares from the name of the said Samuel Wilmot, in which name the said 10 shares still stood, to their own names on the books of the said bank. and to issue a new certificate therefor in their names; and at the same time the said William B. Scott & Co. presented the said written assignment and power of attorney, and the said certificate, and offered to surrender the same for the purpose of having such transfer made.

The said bank, however, upon the ground that the said 10 shares had, on the twenty-sixth day of July, 1869, been levied upon by virtue of a writ of attachment, as hereinafter mentioned, refused to issue a new certificate, or to transfer the said 10 shares, as requested.

Prior to the said thirteenth day of August, 1869, the said William B. Scott & Co. had not made any demand for transfer upon the said bank, nor given notice to the said bank of the assignment to them as aforesaid, nor of their possession of the said stock certificate, and the said 10 shares of stock still stood in the name of the said Samuel Wilmot on the books of the said bank.

On the twentieth day of July, 1869, one Ethan F. Bishop commenced an action in the superior court of the state of Connecticut, in and for the county of Fairfield, against the said Samuel Wilmot, and on the twenty-sixth day of July, 1869, the sheriff of the said county of Fairfield levied upon the said 10 shares, under and by virtue of a writ of attachment issued out of said court in said action against the property of the said Samuel Wilmot.

On the thirteenth day of August, 1869, the said Ethan F. Bishop duly recovered judgment against the said Samuel Wilmot, and within the time prescribed by law, for the purpose of perfecting the lien of an attachment, to-wit, on September 4, 1869, execution issued upon the said judgment to the said sheriff of the county of Fairfield, and on the first day of October, 1869, the said 10 shares were seized by the said sheriff under the said execution, and on the twenty-second day of October, 1869, the said 10 shares were sold at public auction, by the said sheriff, to one Robert T. Clark, to whom the said sheriff issued his certificate, and thereupon the said bank, upon the presentation of the said certificate, transferred the said 10 shares on the books of the said bank from the name of the said Samuel Wilmot to the name of the said Robert T. Clark, and delivered to him a new certificate therefor, and has since paid and continued to pay the dividends accruing on the said 10 shares to the said Robert T. Clark or his assigns, instead of the said William B. Scott & Co., the holders of the old certificate heretofore mentioned.

It is hereby further agreed and stipulated that the statutes of Connecticut, and the decisions of the supreme court of the state of Connecticut, as reported in its regular series of reports, which decisions are hereby made part of this statement, may be referred to as evidence of the law of the state of Connecticut.

It is hereby further agreed and admitted that if the court should find that the plaintiffs are entitled to recover judgment of the said defendant upon the facts of this case, the amount of damages to be awarded by the said judgment, exclusive of costs, is the sum of $1,030, the amount realized at the said auction sale of the said 10 shares, plus the lawful interest on the same from August 13, 1869, to date.

It is hereby further agreed and stipulated that the following documents may be admitted without further proof, and read at the trial of this action as evidence of the facts herein recited; namely, the exemplified copy of the judgment roll in the above-mentioned action of *Ethan F. Bishop* v. *Samuel Wilmot*, marked Defendant's Exhibit No. 1, and the above-mentioned written assignment and power of attorney and certificate of stock, marked, respectively, Plaintiffs' Exhibit, No. 1 and No. 2.

It is hereby further agreed and stipulated to waive a jury trial, and to submit to the honorable court all the issues of fact, as well as the issues of law, in this action.

Dated New York, October 23, 1882.

GEORGE F. CANFIELD,
Attorney for the Plaintiffs, W. P. SCOTT & Co.
L. B. BUNNELL,
Attorney for Defendant.

It is hereby further admitted that the bank has no by-laws; that the practice of the bank from its organization has been uniformly to require the transfer, or to authorize the transfer, on the transfer books of the bank, either in person or by attorney, on the surrender of the outstanding certificate.

It is hereby further stipulated that the two letters from the secretary of the state of New York, marked Plaintiffs' Exhibit No. 3, may be admitted and read as evidence of the facts therein recited.

GEORGE F. CANFIELD,
Attorney for the Plaintiffs.
L. B. BUNNELL,
Defendant's Attorney.

SHIPMAN, J. This is an action at law to recover damages from the defendant corporation for a refusal to allow a transfer upon its books to the plaintiffs of 10 shares of its stock. By written stipulation of the parties the case was tried by the court upon the hereto prefixed agreed statement of facts, and a jury was waived. Said facts are also found to be true. In the absence of a statute or of a provision in the charter, or of a by-law passed in pursuance of authority conferred by the charter, prescribing the exclusive manner in which the stock of a corporation shall be transferred, the stock-owner has a right to transfer such property to a purchaser by the delivery of the stock certificate, with a written assignment thereof. The title of a *bona fide* purchaser, to whom such certificate and assignment have

been delivered, will not be divested by the subsequent attachment of the stock at the suit of a creditor of the vendor. *Boston Music Hall* v. *Corey*, 129 Mass. 435.

In some of the states statutes have been passed, or provisions have been inserted in the charters of the corporations, prescribing, either expressly or by implication, an exclusive method of transfer. The courts of Connecticut and of Massachusetts have been quite rigid in maintaining the doctrine that when such statutes or charter provisions exist, an unrecovered transfer of stock shall not be valid as against attaching creditors of the vendor, and the courts of the former state have strongly leaned towards a construction of the charter of Connecticut corporations that shall compel a record of the assignment.

The Connecticut decisions, especially the earlier ones, which were made at a time when the rights of attaching creditors were strongly favored in that state, were to the effect that "in cases where the legislature in the act of incorporation either prescribe the mode of transferring stock, or authorize the company to do it in their by-laws, and the company do in their by-laws prescribe a mode as the only one to be pursued, that mode must be followed, or the legal title will not pass by an assignment which would be good at common law had no particular and exclusive mode of transfer been prescribed." *Colt* v. *Ives*, 31 Conn. 25. The reason of the rule is stated by the court in *Colt* v. *Ives* as follows:

"In regard to chattels there must be a substantial change of possession accompanying and following the sale, or it will, unexplained, be conclusive evidence of fraudulent trust, which will render the sale void as to creditors. * * * And in the case of the purchase of stock in a corporation, there must be such a transfer of it as the legislature in the charter or by statute prescribes; and notice of the assignment of choses in action, and the transfer required by statute of corporate stock, stand in lieu of the taking and retaining of the possession of personal chattels sold, being the only possession the nature of the property admits of."

In *Fisher* v. *Essex Bank*, 5 Gray, 373, Chief Justice SHAW, after saying that whatever common-law rules, in the absence of any express rule of law, courts have adopted to determine what act constitutes the actual transfer of shares, when the transfer is so regulated such law must govern, held that an express provision in the act of incorporation of a bank that the stock should be transferable only at its banking house and on its books, made a transfer at the bank imperative as against an attaching creditor without notice of the pre-

vious assignment and delivery of the certificates to a purchaser. Judge SHAW's reasoning was to the effect that it is necessary to fix some act and some period of time at which the property changes and vests in the vendee," and that by the charter the transfer at the bank is made "the decisive act of passing the property—the legal, transferable, attachable interest."

The defendant claims the benefit of this series of decisions in the present case, and especially insists that as the defendant corporation is located in Connecticut the decisions of the courts of that state should have a controlling effect.

The defendant having been incorporated under the national banking act, the rules which regulate the transfers of its stocks are to be found in the statutes of the United States. The twelfth section of the act of 1864 (13 St. at Large, 102) provided that the shares of the stock of a national bank shall be "transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of the association." In the eighth section of the same act the directors were empowered "to define and regulate by by-laws, not inconsistent with the provisions of the act, the manner in which its stock shall be transferred." These provisions are continued, in substantially the same terms, in sections 5139 and 5136 of the Revised Statutes. The construction of the statute, and the question of title as between the assignee and the attaching creditor, are not controlled by the tenor of the decisions of any one state.

The construction which has been more generally placed upon those provisions in charters which require that the transfer shall be made only upon the books of the corporation, or upon provisions of a similar character, is that this regulation is designed for the security of the bank and of *bona fide* purchasers who take transfers of the stock and possession of the certificates, without notice of any prior equitable transfer; and that, as between the parties to the sale, a transfer not in conformity to such provisions passes the equitable, though not the legal, title, and vests the right to the shares in the purchaser. *Black* v. *Zacharie*, 3 How. 483; *U. S.* v. *Cutts*, 1 Sumn. 133; *N. Y. & N. H. R. Co.* v. *Schuyler*, 34 N. Y. 80; *McNeil* v. *Tenth Nat. Bank*, 46 N. Y. 325. The New York decisions are to the effect that such a transfer conveys the legal title.

In *Johnston* v. *Laflin*, 103 U. S. 800, a case involving the transfer of shares in a national banking association, which, like the defendant, had made no by-laws on the subject of transfers of its stock, the court say:

"Shares in the capital stock of associations, under the national banking law, are salable and transferable at the will of the owner. They are, in these respects, like other personal property. The statute recognizes this transferability, although it authorizes every association to prescribe the manner of their transfer. * * * It is not necessary, however, to consider what restrictions would be within its (the bank's) power, for it had imposed none. As between Laflin and the broker, the transaction was consummated when the certificate was delivered to the latter, with the blank power of attorney indorsed, and the money was received from him. As between them, the title to the shares then passed. Whether there be deemed a legal or equitable one, matters not; the right to the shares then vested in the purchaser. The entry of the transaction on the books of the bank, where stock is sold, is required, not for the translation of the title, but for the protection of the parties and others dealing with the bank, and to enable it to know who are its stockholders, entitled to vote at their meetings and receive dividends when declared. It is necessary to protect the seller against subsequent liability as a stockholder, and perhaps also to protect the purchaser against proceedings of the seller's creditors."

From this recent decision of the United States supreme court it appears that no exclusive method of transfer of stock in a national banking association is imposed by the provisions of the national banking act in regard to transfers, when no by-laws on the subject have been passed by the bank whose stock is in controversy, and that an unrecorded transfer is good as between the parties, and that the question of the rights of an attaching creditor to stock transferred by an unrecorded assignment, was regarded by the learned judge who wrote the opinion as one not definitely settled.

In holding that the unrecorded transfer has preference over the attachment, I am influenced by the following considerations:

First. In the absence of positive provisions of law or rules of evidence, either statutory or by decisions of courts, whereby transfers of property, made without notice to the public or without registry, are declared fraudulent or void as against attaching creditors without notice, or whereby certain specified acts are made prerequisite to the vesting of a new title, creditors take their debtor's property subject to all honest and *bona fide* liens and equitable transfers. *Boston Music Hall* v. *Cory*, 129 Mass. 435; *Continental Nat. Bank* v. *Eliot Nat. Bank*, 7 FED. REP. 369. In this case there is no statutory provision, and no by-laws, which require that a transfer of the stock must be recorded, and, in the absence of such provision, the non-recording of the transfers is not evidential of fraud, as is the case when the vendor retains possession of chattels after a sale. The delivery of

the certificate and the assignment and the power to transfer is a sufficient delivery at common law.

The statutes of Connecticut, in regard to the attachment of stock and the levy of executions thereon, do not give to attaching creditors any peculiar right in stock which has been transferred by the unrecorded transfer. The extent of the rights which the attaching creditor would have in such stock of a Connecticut corporation is to be determined by other statutes than those which relate to attachment and levy of execution. *Boston Music Hall* v. *Cory*, 129 Mass. 435.

Second. The tendency of modern decisions is to regard certificates of stock attached to an executed blank assignment, and power to transfer, as approximating to negotiable securities, though neither in form or character negotiable. *Bank* v. *Lanier*, 11 Wall. 369; *Railroad Co.* v. *Bank Bridgeport*, 30 Conn. 270.

Third. The courts of these states, which have most strongly upheld the superior rights of attaching creditors of the vendor as against the unsecured equities of purchasers, regard the attaching creditor with less favor than formerly, "when attachments and sales on execution were the only compulsory mode of securing an appropriation of a debtor's property to the payment of his debts." *Colt* v. *Ives*, 31 Conn. 25.

Fourth. Decisions of high authority in the federal courts have given unrecorded transfers of stock for value precedence over subsequent attachments in behalf of creditors of the vendor, or over the claims of creditors. *U. S.* v. *Cutts*, 1 Sumn. 133, approving *U. S.* v. *Vaughan*, 3 Bin. 394; *Continental Nat. Bank* v. *Eliot Nat. Bank*, by Judge LOWELL, 7 FED. REP. 369.

In the agreed statement of facts it is agreed that, if the plaintiffs are entitled to judgment, the amount of damages is the sum of $1,030, plus the lawful interest on the same from August 13, 1869, to October 23, 1882. In an action of tort to recover unliquidated damages, if interest as a part of the damages is to be added to the principal sum found to be due, the rate of interest is now, in this state, 6 per cent. *Salter* v. *Railroad Co.* 86 N. Y. 401.

Let judgment be entered for the plaintiffs in the sum of $1,845.41, and costs of suit.

UNION CEMENT CO. *v.* NOBLE and another.

(*Circuit Court, W. D. Michigan, S. D.* June 30, 1882.)

1. PLEADING—EXISTENCE OF CORPORATION.
   In an action brought by a corporation it is not necessary to allege that it is a corporation; it is sufficient if the name be stated at the commencement of the narration, since the plaintiff need only prove the material allegations of his declaration. *Non constat* why there should be required proof of the existence of plaintiff corporation, not averred and not challenged by the defendant.
2. SAME—DENIAL—RULE IN FEDERAL COURTS.
   In federal courts the existence of foreign and domestic corporations alike can be denied only by a special plea in abatement or bar, or notice.
3. SAME—GENERAL ISSUE.
   The pleading of the general issue in an action of *assumpsit* by a foreign corporation admits the corporate existence, and evidence should be received to establish the cause of action without proof, but not to show want of corporate capacity to sue.

Assumpsit.

James B. Petes and *John E. More*, for plaintiff.

Hughes, O'Brien & Smiley, for defendants.

WITHEY, J. This case is here by removal from a court of the state upon defendants' petition, and has been tried without a jury. The declaration consists of the common counts, and a notice that four promissory notes, of which copies are annexed, constitute the cause of action. Plea, general issue. At the outset the notes were offered in evidence, and their admissibility objected to on the ground that under the general issue plaintiff must prove corporate existence to entitle the notes to be read. They were admitted, subject to the objection and the opinion of the court. Then plaintiff rested, and defendant offered evidence to prove that plaintiff was not a corporation at the time the notes were made, nor at any time since. Objection was made to the introduction of the evidence on the ground that the plea of the general issue admits the corporate existence of plaintiff.

The declaration, in the commencement, merely states that "the Union Cement Company, of Buffalo, New York, plaintiff herein," by attorney, "complains," etc., and does not otherwise aver the fact that plaintiff is a corporation. Was the objection to the admission of the notes well taken? I am of opinion that it was not, and that the notes were properly admitted.

It is not necessary for a plaintiff corporation to allege that it is a corporation in the pleading; it is sufficient to state in the commence-

ment of the declaration the name of the corporation, as was done here, just as the name of a natural person suing is stated. 2 Ch. Pl. (16th Ed.) p. 13, form 22; *Woolf* v. *Steam-boat Co.* 7 C. B. 103; 2 Ld. Raym. 1535; 4 Black, 267; 16 Ind. 278; 14 Johns. 245.

It is a general rule that a plaintiff need prove only the material allegations of his declaration; therefore, in the absence of an averment of being a corporation, it is not plain why proof should be necessary that the plaintiff is such, unless defendant challenges the fact by plea or notice. But the courts are far from uniform upon the question, and this does not seem to arise from a consideration whether the declaration avers or omits to aver that the plaintiff is a corporation.

In several states the courts hold that a corporation instituting suit upon contract, or to recover land, must, upon the trial under the general issue, prove the fact of incorporation. Ang. & A. Corp. § 632, note 3. In many other states the courts hold that a plea of the general issue admits or waives proof of the plaintiff's corporate existence. Ang. & A. § 633, note 1. There is a collection of cases in the notes referred to in Angel & Ames, and also in note *g'*, 1 Ch. Pl. (16th Ed.) 464. Some of the courts hold one rule as to domestic corporations, and another as to foreign corporations. 12 Ohio, 132; 8 Vt. 445; 2 N. H. 310; 6 N. H. 198.

The supreme court of the United States, as early as 1828, in *Conard* v. *Atlantic Ins. Co.* 1 Pet. 450, held that by pleading the general issue the defendant necessarily admitted the capacity of the plaintiff corporation to sue, as that is a plea to the merits only. The suit was by a corporation, created under the laws of a state other than Pennsylvania, where it was tried, and was, therefore, a foreign corporation as to Pennsylvania, though in the federal court it would be regarded as a domestic one. In the *Society for the Propagation of the Gospel* v. *Powlet*, 4 Pet. 500, the same court said:

"The general issue is pleaded, which admits the competency of the plaintiff to sue in the corporate capacity in which they have sued. If the defendant meant to have insisted upon the want of corporate capacity in the plaintiff to sue, it should have been insisted upon by a special plea in abatement or bar."

The Society for the Propagation of the Gospel was organized under the laws of Great Britain. The two cases lead to the conclusion that in the federal courts the rule is the same whether the corporation is domestic or foreign. Judge STORY cites 1 Peters, and other American and English decisions.

A statute passed in the state as early as 1846, copied from the statutes of New York, declares that corporations "created by or under the laws of this state" shall not be required to give evidence of being a corporation unless the question is raised by plea or notice, supported by affidavit. Comp. Laws 1871, § 6547. The courts in New York, prior to such statute there, held that when the general issue was pleaded a plaintiff suing as a corporation must prove corporate existence. The New York statute was enacted in Michigan, manifestly, because it was supposed that, under the plea of general issue, without the statute, it was necessary for a plaintiff corporation to make the proof which the New York courts held to be necessary, prior to the passage of said statute. As early as 1844 the supreme court of Michigan said:

"It is well settled that under a plea of the general issue a corporation must prove all it would be required to prove under a plea of *nul tiel* corporation." 1 Doug. (Mich.) 464.

The suit was by a New York corporation.

In 1850 the same court declared that at common law a plaintiff corporation must make proof of its existence under a plea of the general issue. 1 Mich. 498. It is singular that in neither case did the court take notice of the many cases opposed to the view it asserted to be unquestioned law. But in a suit brought by a corporation organized under the national banking law, and where the general issue was pleaded, the supreme court of Michigan, in 1876, disregarded its former utterances by saying in that case that for the purposes of the action the corporate existence of the plaintiff stood admitted; and they cite 4 Pet. 480, *supra*, in support of the view expressed. *Garton* v. *Union City Nat. Bank*, 34 Mich. 279. In that case the court also refers to two state statutes. One I have referred to; the other is now section 5959, Comp. Laws; but, as neither have any possible application to the case, they did not aid the conclusion reached by the court.

Section 5959 enacts that "whenever it shall become necessary or material" for a corporation to prove corporate existence, evidence of user shall be *prima facie* evidence of the fact. There was no question of user in the case. The other statute relates exclusively to corporations "created by or under the laws of this state," and the corporation suing was created under a law of congress. Again, the supreme court of Michigan, as early as 1858, promulgated law rule 78 for the circuit courts, which provides, in substance, that in actions

by foreign corporations the plaintiff may, with his declaration, file with the clerk an affidavit stating the plaintiff is a corporation under the laws of some other state, territory, or country, and serve a copy, which shall be *prima facie* evidence of the existence of such corporation. This rule is not alluded to in *Garton* v. *Nat. Bank.* The bank was not entitled to the benefit of the statute relating to corporations "created by or under" the state law, and hence the court seems to have adopted the views expressed in 4 Pet. 480, cited in its opinion; leaving the inference that law rule 78 has no practical effect, except, possibly, when a plaintiff wishes to make a *prima facie* case, in anticipation of a plea or notice denying that plaintiff is a corporation.

I hold that the notes were properly admitted in evidence.

The other ground of defense rests upon the right of defendants, under the plea of the general issue, to prove that plaintiff is not a corporation. The views already expressed control the decision of this question, viz., such plea admits plaintiff's capacity to sue, and that, as its name imports, it is a corporation. See Bos. & P. 40; 3 Camp. 29; 32 N. H. 472; 10 Mass. 360; 1 Ch. Pl. 467, notes *h*[1] and *i*. In the *Bank of Havana* v. *Magee*, 20 N. Y. 355, 362, (COMSTOCK'S opinion,) it was held that the matter of name in which the suit is brought, if brought in behalf of the real party, is mere irregularity, not affecting the right of recovery or the validity of the judgment. Judge COMSTOCK'S view lacks narrowness, is comprehensive, and sensible. The Bank of Havana was not a corporation, but the name adopted by an individual under which to carry on a banking business, and in which name suit was brought, judgment recovered, and, on a writ of error, the judgment sustained.

Defendant cited *Schuetzen-Bund* v. *Agitations-Verein*, 44 Mich. 313. The declaration in that case averred that the plaintiff was a corporate body, the defense rested upon whether the plaintiff had been incorporated, and the issue was found against the plaintiff. It is not seen how the case is opposed to the views in the *Bank of Havana* v. *Magee*.

It has also been held in this class of cases that a defendant will not be permitted to deny the corporate existence of the plaintiff, or its capacity to sue in the name by which defendant dealt with it and made obligations payable to. 2 Ld. Raym. 1535; 8 East, 487; 10 East, 104; 4 Maule & S. 13; 4 Bos. & P. 206; Field, Corp. § 385.

The amount due and unpaid upon the notes declared on February 12, 1882, the day of trial of the cause, is eighteen thousand six hundred and sixty-nine dollars and forty-nine cents, ($18,669.49,) ex-

cluding protest fees not allowed. The plaintiff is entitled to judgment for that sum, with interest from February 12th, last. The rate of interest on $500.54 will be 7 per cent. per annum, and on the balance, $18,168.95, will be 10 per cent., such being the rates stipulated in the contracts touching the respective sums.

In re ROTH.

(*District Court, S. D. New York.* March 14, 1883.)

1. EXTRADITION—COMPLAINT, WHEN SUFFICIENT.
   In extradition proceedings the complaint is sufficient from which it clearly appears that a treaty offense is meant to be charged. Where the form used in the complaint was that the accused "is charged," and the complaint contains other statements alleging a treaty offense, *held* sufficient.
2. SAME—TREATY WITH SWISS CONFEDERATION—PRIOR CHARGE—HABEAS CORPUS.
   Under the treaty with the Swiss confederation it is immaterial what prior charges have been made in Switzerland against the accused if the complaint here presented charge a treaty offense; and if the commission of the offense be duly established before the commissioner, he cannot be discharged on *habeas corpus*, though it should appear that a proceeding for a different and less offense, not included in the treaty, had been previously taken against him in Switzerland.
3. DOCUMENTARY PROOFS IN FOREIGN LANGUAGE — CERTIFICATE — ERRORS IN, IMMATERIAL.
   Documentary proofs being in German, and describing proceedings in Switzerland as for "*unterschlagung*," which may mean embezzlement, ("*soustraction*,") or only abuse of trust ("*d'abus de confiance*,") the latter not being a treaty offense, and the certificate to the authentication of the documents stating, in French, that they were for a proceeding "*d'abus de confiance*." *Held*, that the error in the certificate, if it was such, was immaterial, and that it was to be presumed that the requisition for the accused was for a trial upon the treaty offense.

L. G. Reed, for F. Roth.

Condert Brothers, for Swiss Government.

BROWN, J. The prisoner having been held by Commissioner Osborn for extradition under the treaty with the Swiss confederation, articles 13, 14, (11 St. at Large, 593, 594,) has been brought before me upon *habeas corpus*, and the record of the proceedings under a *certiorari* is also produced. The crime charged is that of embezzlement by Roth, as a public officer, of moneys collected by him as such, from a military tax, in the canton of Berne, Switzerland. The record shows abundant proof of the commission of the offense.

The first objection presented on behalf of the accused is that there was no proper complaint to give the commissioner jurisdiction. Section 5270 of the Revised Statutes requires a complaint to be "made under oath charging any person, etc., with having committed" one of the treaty crimes. It is objected that this complaint does not charge any crime, because the language of the complaint is "that the complainant is informed and believes that one Frederick Roth, etc., is charged with the crime of embezzlement of public funds," etc., without making the charge in direct language. In another part of the complaint it is stated that "the precise amount of the moneys so embezzled and appropriated by the said Roth is not yet ascertained, but, as complainant is informed and believes, it was about 14,000 francs," etc. If the complaint were required to be as precise, technical, and formal as an indictment, it should perhaps be held insufficient; but that is not the case, and there is no reason for applying to it such a rule. It is only necessary that the substance of the offense be clearly set forth, so that the court can see that one or more of the crimes enumerated in the treaty is alleged to have been committed. *In re Farez*, 7 Blatchf. 48; *In re Henrich*, 5 Blatchf. 414, 426. Taking this complaint altogether, it plainly answers this requirement.

The only other objection which it seems to me necessary to notice is that, upon the proofs, the crime with which the accused appears to be charged in Switzerland is not a treaty offense. The proofs submitted to the commissioner were largely documentary, showing proceedings against the accused taken in Berne. These documents, with the proofs attached, are all in the German language, and the offense referred to is throughout described by the word "*unterschlagung;*" the ordinary meaning of which, as testified to before the commissioner, is embezzlement, but which may also mean "fraud" or "breach of trust;" and the facts stated in the documents themselves also show very clearly that the offense was embezzlement of public funds by a public officer, within the language of article 14 of the treaty. The chancellor, however, who certified to the proceedings before the Swiss magistrate, gives his certificate of authentication in the French language, and certifies that the magistrate "was competent to entertain a proceeding of this nature, having for its object *le crime d'abus de confiance* above mentioned." By the French Code, which is in force in Switzerland, there is a crime designated "*d'abus de confiance,*" which is embraced in the chapter pertaining to crimes against private persons only; while the embezzlement of public funds is a different

crime, designated as "*soustractions commises par les depositaires publics*" in the chapter on crimes against the commonwealth. Code Penal, § 406, § 169. In the French text of the treaty between the United States and the Swiss confederation, section 14 provides for the crime of "*soustraction*," etc., but not for the private offense of "*d'abus de confiance*."

It is contended by the counsel for the accused that the certificate affixed to the documentary proof shows that the proceedings in Switzerland are for the private offense of "*d'abus de confiance*," and not for the crime of "*soustraction*," etc.; that, therefore, the accused cannot be extradited for trial of the former, which is not a treaty offense. An examination of the record shows that the use of this phrase in the certificate was either an inadvertence, or else that it was used in its general sense, and not intended as a technical description of the crime with which the accused was charged; for the papers certified to show clearly that the offense was committed by the accused as a public officer, and in the embezzlement of public moneys, and not the abuse of a private trust; nor does the proof of the treaty offense rest upon these certified documents alone; and it would be unreasonable to hold that the effect of these clear proofs in the documents certified to should be controlled by an inadvertence of this kind in the certificate of authentication. Moreover, it is immaterial what the particular charge made in Switzerland is, inasmuch as it is not essential to extradition that there should have been any previous criminal proceedings instituted there as a prerequisite to the institution of extradition proceedings here.

The same objection seems to have been raised and overruled in the *Case of Farez*, 7 Blatchf. 346, and in the *Case of Herman Thomas*, 12 Blatchf. 370, 380. Even if proceedings upon a lower grade of offense had been instituted in Berne, I do not see how that would prevent a subsequent complaint and requisition here for the extradition of the accused upon a higher offense within the treaty, if such an offense were proved, as has been proved in this case. All that the treaty requires is that a requisition be made "in the name of the respective governments, through the medium of their respective diplomatic or consular agents;" and if the commission of the crime be properly established, as has been done in this case, the treaty declares that the accused "shall be delivered up to justice." There is no condition in the treaty requiring any previous criminal charge in Switzerland; nor can the fact—if it be a fact—that a less offense, not covered by the treaty, has been previously charged there, annul

the treaty obligations or justify a refusal to surrender the accused, if a treaty offense is charged and proved upon a subsequent requisition here. In such a case it is to be presumed that new proceedings are designed to be instituted there for the higher offense which is here charged, and for which the accused is claimed.

In the complaint presented to the commissioner in this case the complainant makes oath that he is the consul of the Swiss confederation at this port, duly recognized as such by the president of the United States; and, in conclusion, the complainant, as such consular agent, and "in the name of the Swiss confederation, requests a warrant, etc., for the delivery of said Roth to the authorities of the Swiss confederation, in accordance with the terms of said treaty."

All the conditions of the stipulations of the treaty have, in my opinion, been fully met; and the writ, therefore, should be dismissed, and the prisoner remanded.

See *In re Fowler*, 4 FED. REP. 303; *Ex parte Lane*, 6 FED. REP. 34.

MORAN *v.* SECORD.

(*Circuit Court, S. D. New York.* 1883.)

IMPRISONED DEBTOR—DISCHARGE UNDER NEW YORK CODE—ESCAPE.

The defendant, an imprisoned debtor, petitioned for a discharge. The plaintiff opposed on the ground that the application was premature, the defendant not having been imprisoned on the execution issued from this court for a period of three months, as is required by section 2202 of the New York Code of Civil Procedure. *Held*, that such objection was well taken. The statute in such cases must be strictly followed to give the court jurisdiction, and a discharge granted before a strict compliance with the statute in this respect would render the marshal liable in an action for an escape.

Robert Mazet, for motion.

E. W. Searing, opposed.

COXE, J. The defendant, an imprisoned debtor, petitions for a discharge. The plaintiff opposes on the ground, among others, that the application is premature, the defendant not having been imprisoned on the execution issued out of this court for a period of three months, as required by section 2202 of the Code of Civil Procedure. After careful consideration it is thought that this objection, though technical, is well taken. Unless the statute is strictly followed the court does not acquire jurisdiction, and a discharge then granted would

render the marshal liable in an action for an escape. The defendant was originally imprisoned by virtue of an order of arrest issued out of the state court. While he was still in the custody of the sheriff the case was removed to this court, where judgment was subsequently rendered in favor of the plaintiff for $6,582.71. The judgment was docketed February 24, 1882. On the fifteenth day of May thereafter an execution against the person of the defendant was issued to the marshal. The defendant being still in the custody of the sheriff, the marshal was unable to execute his process until the twenty-ninth day of December, 1882, when the prisoner was transferred to him by an order of this court. On that day the following return was indorsed on the execution:

"I certify that on the twenty-ninth day of December, 1882, at the city of New York, in my district, I arrested the within-named defendant, David P. Secord, and have committed him to the jail of the city and county of New York, as I am within commanded.

"*Dated December* 29, 1882.

"HENRY E. KNOX, U. S. Marshal."

The petition in this matter was presented to the court on the twelfth day of January, 1883, 14 days thereafter. It was thought on the argument—the execution having superseded the order of arrest—that the defendant was, constructively at least, imprisoned by virtue of the execution, but a careful reading of the statute leads to the conclusion that imprisonment must be actual and not constructive. Where the amount exceeds $500, the language of the statute is: "A person so imprisoned * * * cannot present such a petition until he has been imprisoned, *by virtue of the execution,* * * * for at least three months." It is not necessary to inquire here who was to blame for the defendant's detention by the sheriff for seven months and more after the execution had been placed in the hands of the marshal. The fact cannot be controverted that the imprisonment on the marshal's execution had lasted but 14 days when this petition was presented. In *Dusart* v. *Delacroix,* 1 Abb. Pr. (N. S.) 409, note, the precise question was decided, the court holding that the statute contemplated an actual imprisonment, under the execution, for a period of three months. See, also, *In re Rosenberg,* 10 Abb. Pr. (N. S.) 450.

It follows that the application must be denied on the ground stated, but with leave to renew on the payment of $10 costs, at any time after the expiration of three months from December 29, 1882.

In re WATSON.

(*District Court, D. Vermont.* December 1, 1882.)

1. LICENSE—PEDDLERS—STATE LAW UNCONSTITUTIONAL.

A state statute requiring all persons engaged in peddling to procure a license for the privilege of selling their goods within the state, and discriminating against goods, wares, and merchandise manufactured without the state, and which further provides that no person shall be licensed as a peddler who has not resided in the state one year next preceding his application for a license, thereby discriminating against non-residents, is in violation of that clause of the constitution of the United States which gives to congress the power to regulate commerce among the several states, and of that clause which secures to citizens of each state all the privileges and immunities of citizens in the several states.

2. STATUTORY OFFENSE—EFFECT OF UNCONSTITUTIONAL PROVISION.

Where, by a state law, peddling without a license is made an offense, and non-residents are expressly prohibited from obtaining a license, the part discriminating against non-residents cannot be taken away and leave enough to render a non-resident guilty, or support a prosecution and conviction for the offense.

On *Habeas Corpus*.

S. C. Shurtleff, for relator.

Joseph A. Wing, for the State.

WHEELER, J. The Revised Laws of the state of Vermont define who shall be deemed a peddler, and provide that "no person shall be deemed a peddler by reason of selling articles of goods, wares, or merchandise, which are the manufacture of the state, except plated or gilded wares, jewelry, clocks, and watches;" that no person shall be licensed as a peddler who has not resided in the state one year next preceding the application for a license; what the license fees shall be; and that a person who becomes a peddler without a license in force shall forfeit not more than $300, nor less than $50. Revised Laws, §§ 3951, 3952, 3954, 3955. The relator is a citizen of Massachusetts, and has not resided in this state, and is prosecuted for becoming a peddler by selling plated wares, jewelry, and watches, manufactures of Massachusetts, without a license, and is restrained of his liberty under those proceedings. The only question made upon the hearing is whether these statutes of the state are sufficiently constitutional and valid to support such proceedings. The constitution of the United States provides that "the congress shall have power" "to regulate commerce" "among the several states," and that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Article 1, § 8; art. 4, § 2.

The natural state of mankind is that of freedom to trade with one another, whether in the same or different communities; and as congress, which alone, under the constitution, has the power to change this freedom of trade among the states, has not done so, the freedom still exists. *The Passenger Cases*, 7 How. 283; *Ward* v. *Maryland*, 12 Wall. 418. This would require that the commodities of one state should be sold in another as freely as the commodities of the other. *Welton* v. *Missouri*, 91 U. S. 275; *Webber* v. *Virginia*, 103 U. S. 344. These statutes discriminate against the sale of the manufactures of other states, except plated or gilded wares, jewelry, clocks, and watches, and as to the sale of such manufactures not excepted could not be upheld; but as to those which are excepted, the manufactures of other states are left upon the same footing as the manufactures of this. The relator is prosecuted for selling excepted articles only, and there is no discrimination against that. This part of the statutes might be separated from the part which does discriminate against the origin of goods, and be upheld, although the rest could not be, if there was no discrimination against the citizenship of the relator. But as to that, these statutes, if upheld, would effectually exclude him from that class of trade, which would come within the definition of peddling, as made by the statute, within this state. The residents of the state would have the privilege of peddling within the state by paying the required license fee. The relator, not being a resident, would be prohibited from obtaining a license, and from peddling anything but manufactures of the state other than plated or gilded wares, jewelry, clocks, and watches, without a license. He would be wholly cut off from selling the articles he was selling in this state. The citizens of the state have the privilege of peddling those articles by obtaining a license therefor. He could not have that privilege, and would be denied the privilege in this state of a citizen of this state, although he is a citizen of another state. This is a privilege within the meaning of this clause of the constitution. *Ward* v. *Maryland*, 12 Wall. 418.

The only material difference between this case and that of *Ward* v. *Maryland* is that there the discrimination consisted only in an increase of license fees for persons not residents of Maryland, and the prohibition of selling without a license extended only to the city of Baltimore; while here the prohibition is absolute to non-residents as to the whole state. In that case Mr. Justice CLIFFORD, in delivering the opinion of the court, said that, "inasmuch as the constitution provides that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states, it follows

that the defendant might lawfully sell, or offer or expose for sale, within the district described in the indictment, any goods which the permanent residents of the state might sell, or offer or expose for sale, in that district without being subjected to any higher tax or excise than that exacted by law of such permanent residents." According to these principles the relator is protected by this provision of the constitution of the United States from prosecution for exercising the privilege of peddling within the state, as the citizens of the state might exercise it.

The relator is not prosecuted for peddling within the state when not a resident, but for peddling within the state without a license; and as a resident of the state so peddling like wares would be liable to similar prosecution, it is argued that there is no discrimination against his citizenship by this prosecution, and that to the extent of upholding the prosecution the statute is constitutional and valid, although beyond that it may not be; that he could not be prosecuted for selling without a license if he had a license, and that to avoid such a prosecution he should pay for and obtain a license as a resident of the state would. This argument would be better founded if there was any mode provided by which he could obtain such a license. But not only is no such mode provided, but, further, his obtaining one is expressly prohibited. It is said that it is this prohibition which makes the discrimination, and that the prohibition only is not constitutional. The offense is peddling without a license. Without the provisions requiring a license there could be no wrongful lack of a license, and no offense resting in the want of one. These provisions exclude non-residents, and there can be no wrongful lack of a license as to them. These provisions all stand together to make up the offense, and the part discriminating against the relator cannot be taken away, and leave enough to make him guilty of the offense prosecuted for. The statute says to him that he shall not peddle without a license, and shall not have a license. This is equivalent to saying to him that he shall not peddle at all. It is not even claimed on behalf of the state that such a direct provision could be upheld.

In *Ward* v. *Maryland,* the respondent was prosecuted for selling without a license. The discrimination consisted in requiring a larger license fee of non-residents. If only that part of the statute requiring the larger license fee has been held unconstitutional, he would have been left to obtain a license on the same terms as residents, and

been guilty for selling without so obtaining one. Still, no attempt was made to so divide the statute and uphold a part of it. After taking out the void part there was not enough left to support the prosecution, and the conviction was held bad. There is no view of the case in which this prosecution, in view of the provisions of the constitution of the United States, can be upheld, consequently the relator is restrained of his liberty contrary to the constitution of the United States, and is entitled to be discharged by this court.

Relator discharged.

STATE POWER TO REGULATE TRADE. A state may regulate its own internal commerce,(*a*) and may regulate the person and thing within its own jurisdiction, notwithstanding the regulation may have a bearing on commerce.(*b*) The power to tax all the property, business, or persons within the state is an essential attribute of sovereignty,(*c*) and is not affected by the provisions of the federal constitution,(*d*) nor repugnant thereto.(*e*) When this power is exercised for revenue purposes it is a tax, but when for regulation purposes it is not a tax;(*f*) and the authority of the state to regulate business and privileges may be exercised under its police powers.(*g*) The constitution has not deprived the legislature of the power of dividing the objects of taxation into classes; it merely requires that the burden shall be equal upon all included in the same class.(*h*)

AUTHORITY OF MUNICIPAL CORPORATIONS. A municipal corporation has no inherent power to tax,(*i*) but the legislature may confer on municipal corporations the power to tax employments as well as property;(*j*) on persons carrying on a particular vocation or traffic;(*k*) or it may restrict its power of taxation.(*l*) This power may be extended over all persons plying the vocation within the corporate limits, whether they reside there or not.(*m*) A license tax imposed on a wagon of an outside resident coming into and going out of the city is void,(*n*) but it is subject to the limitations implied in the commer-

(*a*) Wilson v. Kansas C. & St. J. R. Co. 60 Mo. 184; Wheeling Bridge Case, 18 How. 432; The Daniel Ball, 10 Wall. 557; The Montello, 11 Wall. 411; Pelk v. Chicago, etc., Co. 94 U. S. 164; Pensacola T. Co. v. Western U. T. Co. 96 U. S. 1; New Bedford Bridge Case, 1 Wood. & M. 410; People v. Platt, 17 Johns. 195; Scott v. Willson, 3 N. H. 321; Canal Com'rs v. People, 5 Wend. 448; People v. Rensselaer & S. R. Co. 15 Wend. 113.

(*b*) Passenger Cases, 7 How. 548; Sherlock v. Alling, 93 U. S. 99; St. Louis v. McCoy, 18 Mo. 238; Lewis v. Boffinger, 19 Mo. 13; Wilson v. Kansas C., St. J. & C. B. R. R. 60 Mo. 198; Williams v. Bank of Michigan, 7 Wend. 539.

(*c*) Ex parte Robinson, 12 Nev. 26; Duer v. Small, 17 How. Pr. 201.

(*d*) Railroad Co. v. Peniston, 18 Wall. 27.

(*e*) Howe Mach. Co. v. Cage, 9 Baxt. 518.

(*f*) New York v. Second Avenue R. Co. 32 N. Y. 261; Louisville City R. Co. v. Louisville, 4 Bush, 478.

(*g*) Ex parte Marshall, 64 Ala. 266.

(*h*) State v. Ogden, 10 La. Ann. 402; State v. Lathrop, Id.; New Orleans v. Kaufman, 29 La. Ann. 283.

(*i*) Vance v. Little Rock, 30 Ark. 435; Matt. of Second Avenue, etc., Church, 66 N. Y. 395.

(*j*) Fretwell v. Troy, 13 Kans. 271; Ex parte City Council of Montgomery, 64 Ala. 463; Gilman v. Sheboygan, 2 Black, 510; Lonte v. Allegheny Co. 10 Pittsb. L. J. 241.

(*k*) Durach's App. 62 Pa. St. 491. See Hodgson v. New Orleans, 21 La. Ann. 301.

(*l*) Goodale v. Fennell, 27 Ohio St. 426.

(*m*) Com'rs of Edenton v. Capehart, 71 N. C. 166.

(*n*) Charles v. Nolle, 51 Mo. 122.

cial clause of the federal constitution.(o) Giving a license by a municipal corporation for a fee is not a regulation of commerce.(p)

A municipal corporation can impose no tax on any occupation unless authorized so to do by its charter.(q) The limitation in a charter, to the power to tax real and personal property, does not affect the right to tax business and exact a fee for the privilege;(r) and clauses in a charter, requiring the rates of license to be proportionate to the business, only require that the sum exacted from each person shall be fixed by the amount of his business.(s) When the power to license occupations is given, it involves the determination of the extent or duration and the sum to be paid, and it must be exercised exclusively by the common council;(t) its power should be exercised only for public objects in which the people of the municipality have a general interest.(u) Courts will not review municipal discretion in imposing license fees where it has not been abused.(v) As a general rule, a municipal corporation cannot delegate its power to regulate any business or calling;(w) and, in the exercise of its power, it cannot unreasonably restrict trade.(x) An ordinance requiring a heavy license fee is a legitimate means of taxation, and is valid unless the fee charged is unreasonable.(y) The fee for a license regulating occupations or business should be limited to the necessary expense of the regulation.(z) A city may exact a fixed sum for the privilege of doing business, such license not being a tax on property.(a) Under the authority to require a license, a municipal corporation may tax the business of such as have already obtained a state license.(b) Auctioneers are commonly taxed a specific sum, or a sum measured by the amount of their sales;(c) and a general authority to levy taxes on taxable property supports a tax on the gross sales and commissions received;(d) and such tax is an occupation or privilege tax.(e) Such a tax is not unconstitutional unless expressly prohibited;(f) but a provision of a town charter authorizing a tax of 5 per cent. upon all sales made by auctioneers, except such as are made by citizens of the town or county who are *bona fide* owners of the property sold, discriminates against citizens of other states and is unconstitutional.(g) Where an incorporated town has power to regulate and license auction sales, etc., it may authorize the mayor to fix the amount of the license within a specified sum.(h) An auctioneer in a city is not an itinerant trader.(i) The sureties on an auctioneer's bond are

(o) Goodale v. Fennell, 27 Ohio St. 426.

(p) Chilvers v. People, 11 Mich. 43.

(q) Mayor of Plaquemine v. Roth, 29 La. Ann. 261.

(r) Johnston v. Macon, 62 Ga. 645.

(s) Ex parte Hurl, 49 Cal. 557.

(t) Darling v. St. Paul, 19 Minn. 359.

(u) Loan Ass'n v. Topeka, 20 Wall. 655.

(v) Van Baalen v. People, 40 Mich. 258.

(w) East St. Louis v. Wehring, 50 Ill. 28. See Kip v. Patterson, 26 N. J. Law, 298.

(x) Hayes v. Appleton, 24 Wis. 542.

(y) Kitson v. Ann Arbor, 26 Mich. 325.

(z) St. Louis v. Boatmen's Co. 47 Mo. 150.

(a) Home Ins. Co. v. Augusta, 50 Ga. 543; Walcot v. People, 17 Mich. 68; Kitson v. Mayor, 26 Mich. 325; Gilkerson v. Justices, 13 Grat. 577; Slaughter v. Com. 13 Grat. 767; Ould v. Richmond, 26 Grat. 464; Carter v. Dow, 16 Wis. 298; Municipality v. Dubois, 10 La. 199; Bright v. McCullough, 27 Ind. 223.

(b) Wright v. Mayor of Atlanta, 51 Ga. 645.

(c) Moseley v. Tift, 4 Fla. 202; Padelford v. Savannah, 14 Ga. 438; State v. Lee, 38 Ala. 222.

(d) Pearce v. Augusta, 37 Ga. 597.

(e) De Witt v. Hays, 2 Cal. 468; Moseley v. Tift, 4 Fla. 202; State v. Stephens, 4 Tex. 137; State v. Bock, 9 Tex. 369; Nathan v. Louisiana, 8 How. 80.

(f) Washington v. State, 13 Ark. 752; Strand v. Gordon, 27 Ark. 625; Mabry v. Tarver, 1 Humph. 94; Lewellen v. Lockhart, 21 Grat. 170.

(g) Joyce v. Woods, 78 Ky. 386.

(h) Decorah v. Dunstan, 38 Iowa, 96, distinguishing 6 N. Y. 92; 12 Wheat. 40; 50 Ill. 28.

(i) Gould v. Mayor of Atlanta, 55 Ga. 678.

liable for a failure of the principal to renew the license when it expires.(*j*) The lessee of a stall in a market-house who furnishes meals to the public does not keep an "eating-house" within the meaning of the revenue act.(*k*) A butcher is not a dealer, within the North Carolina law, providing for licensing occupations.(*l*) In Georgia a license tax may be exacted from vendors of fresh meat in a market.(*m*) In Tennessee butchers must take out a license to sell meats by retail, but a failure to do so is not a misdemeanor.(*n*) In Virginia a city butcher who goes into the country and buys cattle, etc., butchers them and sells the meat at his own stall, must take out a license.(*o*) A charter giving the right to license, tax, or regulate hackney coaches, carriages, etc., does not authorize or grant the exclusive right to one person.(*p*) An ordinance exacting a license from street-car owners is valid.(*q*) A city ordinance requiring measurement of coals to be made by an inspector is not in violation of the constitution, although it allows a fee to be paid therefor.(*r*) A party who has a grant by city ordinance of the right to supply water to the city for 20 years cannot be required to pay for a license to carry on the business.(*s*) A city ordinance prohibiting negroes from keeping a cook shop is not in conflict with the Virginia act of assembly providing that such shops should be licensed and taxed.(*t*)

EQUALITY AND UNIFORMITY. The provisions of the constitution as to equality and uniformity apply to property alone, and not to taxation on privileges or occupations.(*u*) Where a license is required as a condition precedent to the pursuit of an occupation, and not with reference to revenue, the provisions of the constitution as to equality and uniformity in taxation do not apply.(*v*) The constitutional requirement that taxation shall be uniform does not apply to license taxes;(*w*) and so especially when the license required is imposed with reference to the purposes of police.(*x*) The provisions of the state constitution as to equality and uniformity do not apply to counties, cities, or villages.(*y*) They do not prevent municipal corporations from imposing taxes on one class of business and not on another.(*z*) Where the state constitution authorized the legislature to tax specified business

(*j*) Com. v. Daly, 9 Phila. 67.

(*k*) State v. Hall, 73 N. C. 252.

(*l*) State v. Yearby, 82 N. C. 561.

(*m*) Davis v. City of Macon, 64 Ga. 128. See Ash v. People, 11 Mich. 347.

(*n*) State v. Manz, 6 Cold. 557

(*o*) Shedd v. Com. 19 Grat. 813.

(*p*) Logan v. Payne, 43 Iowa, 524.

(*q*) Allerton v. Chicago, 9 Biss. 552.

(*r*) City Council v. Rogers, 2 McCord, 495; State v. Stokes, 14 Wend. 87. See Collins v. Louisville, 2 B. Mon. 134.

(*s*) Stein v. Mayor of Mobile, 49 Ala. 362, following 32 N. Y. 261. See, as to gas-light companies, Cincinnati G. L. Co. v. State, 18 Ohio St. 243.

(*t*) Mayo v. Jones, 12 Grat. 17.

(*u*) People v. Coleman, 4 Cal. 46; Bohler v. Schneider, 42 Ga. 195; Home Ins. Co. v. Augusta, 50 Ga. 530; Slaughter's Case, 13 Grat. 767; Eyre v. Jacob, 14 Grat. 422; Adams v. Somerville, 2 Head, 363; Aulanier v. Governor, 1 Tex. 665; Texas B. & I. Ins. Co. v. State, 42 Tex. 636; Wiggins Ferry Co. v. East St. Louis, 102 Ill. 560; Walker v. Springfield, 94 Ill. 364; St. Louis v. Green, 7 Mo. App. 468; Ex parte Robinson, 12 Nev. 263; Gatlin v. Tarboro, 78 N. C. 119; Boyle v. Girardey, 28 La. Ann. 717; Walters v. Duke, 31 La. Ann. 663; Western U. T. Co. v. Mayer, 28 Ohio St. 537; Glascow v. Rouse, 42 Ohio St. 479. See Young v. Town of Henderson, 76 N. C. 420.

(*v*) Addison v. Saulnier, 19 Cal. 82; Thomasson v. State, 15 Ind. 449; Id. 449; New Orleans v. Turpin, 13 La. Ann. 56; Baker v. Cincinnati, 11 Ohio St. 534.

(*w*) Ottawa Co. v. Nelson, 19 Kan. 234; and see Francis v. Atchison, etc., R. Co. 19 Kan. 303.

(*x*) Addison v. Saulnier, 19 Cal. 82; Thomasson v. State, 15 Ind. 449; New Orleans v. Turpin, 13 La. Ann. 56; Baker v. Cincinnati, 11 Ohio St. 534.

(*y*) Douglass v. Town of Harrisville, 9 W. Va. 162.

(*z*) Cutliff v. Mayor of Albany, 60 Ga. 597.

classes, the power to tax was not limited to the classes named.(*a*) A tax on business fixing different rates of taxation for different avocations is not in conflict with the constitution.(*b*) To be uniform, taxation need not be universal. Certain occupations may be taxed, and others be exempted, but as between the subjects of the same class there must be equality.(*c*) When imposed on business or occupation, it must be uniform on all business of that kind.(*d*) So the duty imposed by statute on goods sold at public outcry by licensed auctioneers is not in violation of the uniformity clause of the constitution.(*e*) A tax upon every keeper of a warehouse is valid, being on all of a class;(*f*) and on every keeper of a billiard table;(*g*) so of a tax on wholesale dealers in liquor.(*h*) A tax imposed on a keeper of gunpowder who keeps more than 50 pounds on hand is illegal for want of uniformity, as others in the same calling were exempt.(*i*)

STATE AUTHORITY OVER CORPORATIONS. The legislature has the same right of control over corporations that it has over natural persons.(*k*) Corporations of other states are not citizens, "entitled to all the privileges and immunities of citizens in the several states," within the meaning of the constitution. They can exercise none of their powers or franchises within the state except by comity, or under legislative consent.(*l*) A state has power to impose on foreign corporations terms and conditions on which they may transact business,(*m*) and it is not prohibited from taxing the franchise and business of a corporation;(*n*) and a grant to a foreign corporation to exercise part of its franchise within the state, and laying a tax on it at the time of the grant, does not preclude the right of further taxation.(*o*) A state statute to regulate and tax foreign insurance companies, banking, express, and exchange corporations, cannot, under the provisions of the state constitution, be construed as a provision in relation to any foreign corporations other than those expressed in its title.(*p*) An occupation tax imposed on a telegraph company, which is graduated according to the business done wholly within the state and in part within the state, is free from the objection that it regulates interstate commerce.(*q*) Under a state statute which imposes on a resident merchant a county tax, the agent of a foreign sewing-machine corporation is liable for a county as well as a state tax.(*r*) A license fee may be

(*a*) State v. County Com'rs, 4 Nev. 537; S. C. 19 Amer. Rep. 641.

(*b*) State v. Columbia, 6 Rich. 1.

(*c*) State v. Poydras, 9 La. Ann. 165; New Orleans v. Fourchy, 30 La. Ann. 910.

(*d*) Sacramento v. Crocker, 16 Cal. 119.

(*e*) Wintz v. Gerardy, 31 La. Ann. 381.

(*f*) Hodgson v. New Orleans, 21 La. Ann. 201.

(*g*) Merriam v. New Orleans, 11 La. Ann. 740.

(*h*) Straub v. Gordon, 27 Ark. 625.

(*i*) Parish v. Cochran, 20 La. Ann. 373.

(*k*) Benson v. New York, 10 Barb. 223; Galena, etc., R. Co. v. Loomis, 13 Ill. 548; Ohio, etc., R. Co. v. McClelland, 25 Ill. 140; N. W. Fert. Co. v. Hyde Park, 70 Ill. 634; New Albany, etc., R. Co. v. Tilton, 12 Ind. 3; Gorman v. Pac. R. Co. 26 Mo. 441; Burlington, etc., R. Co. v. State, 32 N. H. 215; Nelson v. Vermont, etc., R. Co. 26 Vt. 717; Thorpe v. Burlington, etc., R. Co. 27 Vt. 140.

(*l*) West. U. Tel. Co. v. Mayer, 28 Ohio St. 539; Bank of Augusta v. Earle, 13 Pet. 519; Lafayette Ins. Co. v. French, 18 How. 404; Paul v. Virginia, 8 Wall. 168; Ducat v. Chicago, 10 Wall. 410; Liverpool Ins. Co. v. Massachusetts, Id. 567; Fire Dept. v. Noble, 3 E. D. Smith, 440; De Groot v. Van Duzen, 20 Wend. 390; Com. v. Milton, 12 B. Mon. 212; Fire Dept. v. Helfenstein, 16 Wis. 136.

(*m*) West. U. Tel. Co. v. Mayer, 28 Ohio St. 533.

(*n*) Society for Sav. v. Coite, 6 Wall. 594; Provident Inst. v. Massachusetts, Id. 611; Hamilton Co. v. Massachusetts, Id. 632.

(*o*) Erie R. Co. v. Pennsylvania, 21 Wall. 492. See Walker v. Springfield, 94 Ill. 364; People v. Naglee, 1 Cal. 232; Home Ins. Co. v. Augusta, 93 U. S. 116.

(*p*) Singer Manuf'g Co. v. Graham, 8 Or. 17.

(*q*) West. U. Tel. Co. v. State, 55 Tex. 314.

(*r*) Webber v. Com. 33 Grat. 893.

imposed on an English joint-stock association doing business in the state, although not a technical corporation by the English law.(*s*)

FOREIGN INSURANCE COMPANIES. A tax on premiums of a foreign corporation is not unconstitutional.(*t*) So an act taxing the entire amount of premiums received by an insurance company, whether within or without the state, is not repugnant to the commercial clause of the federal constitution.(*u*) In classifying the subjects of taxation, the legislature may place foreign insurance companies in a class by themselves, as distinct from domestic insurance companies, and the former may be taxed differently from the latter.(*v*) The Pennsylvania act imposing a tax of 3 per cent. on foreign insurance companies is constitutional, although discriminating between foreign and home companies.(*w*) A tax on gross premiums of insurance is a tax upon the receipts of money or its representative in notes and bills, and not on property or any article of commerce; it touches only a fund in the treasury of the company.(*x*) An act taxing every insurance company and every agent of a foreign company, doing business in a particular city, was held void where it did not include all in the state of the same class.(*y*) The discretion of city authorities in granting or refusing to license insurance companies will not be interfered with;(*z*) but their authority to license and tax such companies for a specific purpose does not justify taxation for a general purpose.(*a*) A license tax imposed on a foreign insurance company, for the privilege of doing business within the state, is not a regulation of commerce.(*b*) A domestic mutual fire insurance company is bound, like any other company, to pay a license for doing business;(*c*) but the statute may make the license different between a fire and life assurance company;(*d*) and may discriminate as to foreign companies.(*e*) A territorial act requiring an annual license tax for each and every insurance company, agent, or agency transacting business in the territory makes the agent, and not the company, liable therefor.(*f*)

RAILROAD COMPANIES. The ordinance of Mobile, providing that every express or railroad company doing business within the city, and whose business extends beyond the state, must pay a license fee under a penalty, does not conflict with the constitution of the United States.(*g*) A railroad is doing business in the state in which a portion of its road is located.(*h*) A tax imposed on the gross receipts of an express company is properly collected from the gross earnings, without deduction for expenses incurred in conduct-

(*s*) Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566.

(*t*) Ex parte Cohn, 13 Nev. 424; Ins. Co. v. Com. 85 Pa. St. 513.

(*u*) Ex parte Cohn, 13 Nev. 424; Ins. Co. v. Com. 85 Pa. St. 513; Ins. Co. of North America v. Com. 87 Pa. St. 173.

(*v*) Germania L. Ins. Co. v. Com. 85 Pa. St. 513; State v. Fosdick, 21 La. Ann. 434.

(*w*) Com. v. Germania L. Ins. Co. 11 Phila. 553.

(*x*) Ins. Co. of N. A. v. Com. 87 Pa. St. 173; Com. v. Standard Oil Co. Pa. St. 1882, not reported; St. Tax on Gross Receipts, 15 Wall. 294; Erie R. Co. v. Pennsylvania, 21 Wall. 497.

(*y*) State v. Merchants' Ins. Co 12 La. Ann. 802; New Orleans v. Home Ins. Co. 23 La. Ann. 449.

(*z*) Burlington v. Putnam Ins. Co. 31 Iowa, 102; Fire Department v. Helfenstein, 16 Wis. 136.

(*a*) Alton v. Ætna Ins. Co. 82 Ill. 45.

(*b*) Paul v. Virginia, 8 Wall. 168; Ducat v. Chicago, 10 Wall. 410; Liverpool Ins. Co. v. Massachusetts, Id. 566; Louisiana v. Lathrop, 10 La. Ann. 398; Louisiana v. Ogden, Id. 402; Louisiana v. Fosdick, 21 La. Ann. 434. See Nathan v. Louisiana. 8 How. 73.

(*c*) Illinois, etc., Ins. Co. v. Peoria, 29 Ill. 180.

(*d*) Leavenworth v. Booth, 15 Kan. 627.

(*e*) Leavenworth v. Booth, 15 Kan. 627.

(*f*) Taylor v. Ashby, 3 Mont. 248.

(*g*) Osborne v. Mobile, 44 Ala. 493.

(*h*) Erie R. Co. v. Pennsylvania, 21 Wall. 492.

ing the business.(*i*) It may be taxed even though it is owned by a private corporation.(*j*) Corporations chartered by the United States are not taxable as foreign.(*k*)

LICENSES IN GENERAL. A license is a contract, but revocable at the will of the licensor, unless otherwise provided in the state constitution.(*l*) If no bonus is given for the right, a subsequent levy of a tax is valid.(*m*) So a license to sell liquor is issued as a part of the police system of the state, and is subject to modification or revocation.(*n*) The license to practice law or medicine may be modified in any manner which the public welfare may demand, and a tax on the license is not unconstitutional.(*o*) If the license to erect a dam in a navigable river is defeasible by the terms thereof, it may be modified or revoked.(*p*) License fees imposed for revenue are taxes, and should not be so heavy as to be prohibitory.(*q*) A license is a privilege granted by statute, usually on payment of a valuable consideration,(*r*) the object being to confer a right that does not exist without it;(*s*) and it cannot be revoked except on a return of the fee;(*t*) but they are subject to termination by a law prohibiting sales of the article.(*u*) So a city, in the exercise of its police powers, may provide for the revocation of a license;(*v*) but the repeal of an act under which a license was granted cannot take away the privilege till the license expires.(*w*) A license does not protect the holder from reasonable police regulations affecting the trade—as a town ordinance requiring dealers to close at dark;(*x*) and one holding a license receives it subject to the right of eminent domain.(*y*) A person accepting a license thereby assents to the terms imposed, both in the license and the ordinance under which it is issued.(*z*) A license may be authorized and yet not be taken out.(*a*) A license issued to a person is not equivalent to proof that he was licensed.(*b*) Payment of a license tax and a receipt therefor amount, in substance, to a license from the

(*i*) Amer. Union Express Co. v. St. Joseph, 66 Mo. 675.

(*j*) Olcott v. Supervisors, 16 Wall. 678.

(*k*) Com. v. Texas & Pac. R. R. 25 Alb. Law J. 18.

(*l*) Phalen v. Virginia. 8 How. 163; 3 Harring. 441; Calder v. Kirby, 5 Gray, 597; Adams v. Hackett, 27 N. H. 289; Hirn v. Ohio, 1 Ohio St. 21; Metrop. Bd. of Excise v. Barrie, 34 N. Y. 667; Bass v. Mayor, Meigs, 421; Gregory v. Shelby, 2 Metc. (Ky.) 539; Freligh v. State, 8 Mo. 606; State v. Sterling, Id. 697; State v. Hawthorn, 9 Mo. 389.

(*m*) Wendover v. Lexington, 15 B. Mon. 258.

(*n*) Fell v. State, 42 Md. 71; Calder v. Kirby, 71 Mass. 597; State v. Holmes, 38 N. H. 225; Metrop. Bd. of Excise v. Barrie, 34 N. Y. 657; Com. v. Intox. Liquors, 115 Mass. 153.

(*o*) State v. Fellowes, 12 La. Ann. 344; State v. Waples, Id. 343; New Orleans v. Turpen, 13 La. Ann. 56; Simmons v. State, 12 Mo. 268; State v. Gazlay, 5 Ohio, 14.

(*p*) Rundle v. Del., etc., Can. Co. 14 How. 80; 1 Wall. Jr. 275; Pratt v. Brown, 3 Wis. 603; Monongahela Nav. Co. v. Coons, 6 Watts & S. 101; Susquehanna Can. Co. v. Wright, 9 Watts & S. 9. And see Glover v. Powell, 10 N. J. Eq. 211; Cranshaw v. State R. Co. 6 Rand. 245.

(*q*) Ex parte Burnett, 30 Ala. 432; Craig v. Burnett, 32 Ala. 728; Burlington v. Ins. Co. 31 Iowa, 102; Kitson v. Ann Arbor, 26 Mich. 325; Mason v. Lancaster, 4 Bush, 406; Kuiper v. Louisville, 7 Bush, 601. When imposed for revenue they are, in effect, taxes, People v. Martin, 9 Pac. C. Law J. 96.

(*r*) Heise v. Columbia, 6 Rich. 404.

(*s*) Chilvers v. People, 11 Mich. 43.

(*t*) See Adams v. Hackett, 7 Fost. 289; State v. Phalen, 3 Harr. 441; Boyd v. State. 46 Ala. 329.

(*u*) Calder v. Kirby, 5 Gray, 507; Brummer v. Boston, 102 Mass. 19; Com. v. Brennan, 103 Mass. 70; Baker v. Boston, 12 Pick. 183; Brick Presb. Church v. New York, 5 Cow. 538; Vanderbilt v. Adams, 7 Cow. 585; People v. Morris, 13 Wend. 325; Board of Excise v. Barrie, 34 N. Y. 657; State v. Holmes, 38 N. H. 225; Hirn v. State, 1 Ohio St. 15; Freleigh v. State, 8 Mo. 606; State v. Sterling, Id. 697; Gatzweiler v. People, 14 Ill. 142; Phalen v. Virginia, 8 How. 163; Baxter v. Pennsylvania, 10 How. 416.

(*v*) Schwuchow v. Chicago, 68 Ill. 444.

(*w*) Boyd v. State, 46 Ala. 329.

(*x*) Maxwell v. Jonesboro, 11 Heisk, 257.

(*y*) Branson v. Philadelphia, 47 Pa. St. 329.

(*z*) Schwuchow v. Chicago, 68 Ill. 444.

(*a*) Schlict v. State, 31 Ind. 246.

(*b*) Schlict v. State, 31 Ind. 246.

time of payment.(c) A license to a partner individually confers no authority on his partner over the firm.(d) One taking a license towards the end of the year must pay the full fee for the whole year, where the state provides that a certain sum per annum shall be paid, whether he loses or gains in his business.(e) A license taken out and paid for after the first of the year is no protection against an indictment afterwards found for acts done prior to its issue.(f) Where the state provides for different sorts of licenses to be taken out, a person cannot sell an article not included in the terms of his license.(g) Where the town clerk had authority to issue blank licenses, he has no power to grant a license to any one until directed by the town council.(h) A license tax is, in effect, a tax on the goods themselves;(i) but licenses are not, therefore, taxes.(j) A license to keep a grocery is not assignable.(k)

PRIVILEGE TAX—OCCUPATIONS. The grant of a privilege must confer authority to do that which, without the grant, would be unlawful.(l) Where an act confers a privilege merely it may be repealed.(m) The privilege tax on occupations, measured by the extent of the business, is not a tax on the capital invested and it does not exempt purchases made from those having already paid taxes, from the necessity to obtain a license;(n) or by the amount of business done, whether within or without the state.(o) The tax on a privilege will commonly take the form of a license,(p) and may be graduated by the supposed value of the privilege.(q) There is no restriction on the power of the government to tax occupations unless expressly imposed by the constitution;(r) but the following of an ordinary employment is not to be regarded as a privilege unless made so by statute.(s) Any occupation which is not open to all, but can only be exercised under license from some constituted authority, is regarded as a privilege.(t) Where a municipal corporation is empowered to tax a particular occupation, it cannot by definition bring persons within the power who do not in fact follow such occupation.(u)

PRIVILEGE TAXES—PRACTICE OF PROFESSIONS. A tax on the privilege of practicing a profession is not a poll tax, and it may be levied even when poll taxes are forbidden.(v) States may regulate the practice of a profession, as the law,(w) and may impose a penalty for not taking out a license imposed, to be recovered by indictment as for a misdemeanor;(x) or the practice of medicine.(y) A license of a court to practice law vests no right beyond legislative control, nor does it confer any immunity from the occupation tax.(z)

(c) Galloway v. Stewart, 49 Ind. 156.
(d) Long v. State, 27 Ala. 32.
(e) Hart v. Beauregard, 22 La. Ann. 238.
(f) Elsberry v. State, 52 Ala. 8.
(g) State v. Holmes, 28 La. Ann. 765.
(h) State v. Bezoni, 51 Mo. 254.
(i) Welton v. State, 91 U. S. 275.
(j) East St. Louis v. Wilder, 46 Ill. 351.
(k) Lewis v. U. S. 1 Morr. (Iowa,) 190.
(l) Chilvers v. People, 11 Mich. 43; Home Ins. Co. v. Augusta, 50 Ga. 530.
(m) Thomas v. Farm. Bank of Maryland, 46 Md. 43.
(n) Albertson v. Wallace, 81 N. C. 479.
(o) West. U. Tel. Co. v. State, 55 Tex. 314.
(p) License Tax Cases, 5 Wall. 472.
(q) Simmons v. State, 12 Mo. 268; Ould v. Richmond, 23 Grat. 464.
(r) Butler's Appeal, 73 Pa. St. 448; Durach's Appeal, 62 Pa. St. 491. See Loughborough v. Blake, 5 Wheat. 317.
(s) Columbia v. Guest, 3 Head, 413.
(t) French v. Baker, 4 Sneed, 193.
(u) Mays v. Cincinnati, 1 Ohio St. 268.
(v) Egan v. County Court, 3 H. & McH. 169.
(w) Bradwell v. State, 16 Wall. 130; U. S. v. Anthony, 11 Blatchf. 201; Munn v. Illinois, 94 U. S. 113; Young v. Thomas, 17 Fla. 167; Stewart v. Potts, 49 Miss. 749; Jones v. Page, 44 Ala. 657.
(x) State v. Hayne, 4 S. C. 403.
(y) Ex parte Spinney, 10 Nev. 323.
(z) Languille v. State, 4 Tex. Ct. App. 312.

A statute which imposes a license tax on trades, occupations, and professions, does not authorize the imposition of a tax on notaries public.(*a*) Clergymen are sometimes subjected to an occupation tax.(*b*) So of college professors.(*c*) The authority to tax trades, occupations, and professions does not authorize a tax for notaries public.(*d*)

BUSINESS LICENSES. The distinction between a tax on property and a tax on business which may employ part of that property in its industry is well defined.(*e*) A business is not necessarily licensed or protected because of its being taxed, nor does taxing imply an approval of it.(*f*) It is no objection to a tax on the business that it operates indirectly as a tax on the consumer.(*g*) A tax on business should be levied where the business is carried on, irrespective of residence of the dealer.(*h*) Residents are not subject to taxation in respect to business or interests beyond the territory and jurisdiction of the state,(*i*) and business carried on without the license will be illegal, and contracts made in the course of the business cannot be enforced.(*j*) An ordinance which has the effect of permitting some persons to engage in a particular business while it excludes others is void.(*k*) So a city ordinance which discriminates against a class or race of people is invalid.(*l*) A party must pay in proportion to the whole stock of goods he has for sale, notwithstanding he purchased a part of them from a firm in which he was a partner, and a tax had been already paid on them by the firm.(*m*) That property used in business is taxed, does not interfere with the right to impose a license tax;(*n*) and a party may be required to take out a license tax whether he derives a profit from his business or not.(*o*)

A statute imposing on a resident merchant a state tax for the privilege of conducting his business, a county tax also for taking his goods to another county and selling them there, does not contravene the United States constitution.(*p*) Merchants may be subjected to privilege taxes, notwithstanding they also pay taxes on their stock in trade;(*q*) and, in the absence of any exemption act, a retail merchant may be compelled to pay three licenses, namely: state, parish, and corporation.(*r*) One who takes out a license as storager and also as tobacco auctioneer, must, in addition, take out a license as commission merchant where he receives tobacco for sale.(*s*) A party dealing in the selling of goods at a store is a merchant, and must procure a license;(*t*) but a trustee

(*a*) New Orleans v. Brennan, 23 La. Ann. 710.
(*b*) Miller v. Kirkpatrick, 29 Pa. St. 226.
(*c*) Union Co. v. James, 21 Pa. St. 525; Walters v. Duke, 31 La. Ann. 668.
(*d*) New Orleans v. Brennan, 23 La. Ann. 710.
(*e*) Johnston v. Mayor of Macon, 62 Ga. 645.
(*f*) Youngblood v. Sexton, 32 Mich. 406.
(*g*) Wiley v. Owens, 39 Ind. 429.
(*h*) Bates v. Mobile, 46 Ala. 158; Miner v. Fredonia, 27 N Y. 155; Gardner Co. v. Gardner, 5 Me. 133: Simmons v. State, 12 Mo. 268; St. Louis v. Laughlin, 49 Mo. 456.
(*i*) Fisher v. Rush Co. 19 Kan. 414.
(*j*) Koff v. Dumas, 2 Vt. 456; Alexander v. O'Donnell, 12 Kan. 608.
(*k*) Tugman v. Chicago, 78 Ill. 405.
(*l*) In re Quong Woo, 13 Fed. Rep. 229.
(*m*) Mayers v. Irwin, 8 Humph. 290.
(*n*) St. Louis v. Green, 6 Mo. App. 590; Davis v. City of Macon, 64 Ga. 128.
(*o*) Weil v. State, 52 Ala 19.
(*p*) Webber v. Com. 33 Grat. 898. See Ex parte Thornton, 12 Fed. Rep. 538, and note, 551.
(*q*) Woolman v. State, 2 Swan, 353; State v. Stephens, 4 Tex. 137; State v. Bock, 9 Tex. 369; State v. Whittaker, 33 Mo. 457; State v. West, 34 Mo. 424; Wilmington v. Roby, 8 Ired. 250; Commissioners v. Patterson, 8 Jones, L. 182; Cousins v. Com. 19 Grat. 807; French v. Barber, 4 Sneed, 193.
(*r*) Iberia Parish v. Chiapella, 30 La Ann. pt. 2, 143.
(*s*) Neal v. State, 21 Grat. 511.
(*t*) State v. Whittaker, 33 Mo. 457.

to whom goods are assigned, and who sells without replenishing the stock, is not a merchant so as to require a license.(u) Permanent merchants in Mississippi are not subject to the same taxes as transient traders.(v) A farmer is not a dealer within the merchant tax law.(w) The merchants' tax, or privilege tax on merchants, is a burden on that part of their capital used in buying goods to be sold to non-residents.(x)

MANUFACTURERS. A business tax may be imposed on manufacturers.(y) Upon grounds of public policy manufacturers of beer may be required to take out a license.(z) A manufacturer or mechanic is not required to take out a license under Pennsylvania act, unless he keeps a store.(a) A state statute forbidding cities to tax sales of certain manufactures within the state sustained.(b) Manufacturers and dealers in liquors may be subjected to occupation taxes for federal, state, and municipal purposes;(c) and such taxes may discriminate as between different localities.(d) A gas company is a manufacturing company.(e) An aqueduct company is not.(f) One who carries on the business of buying timber and converting it into lumber is a manufacturer and not a trader.(g) An ice-cream confectioner is not a manufacturer.(h) Where the federal constitution and statutes give a patentee an exclusive right to sell and manufacture his patented articles, the state has no right to impose a license or privilege tax thereon.(i) One who manufactures and supplies goods alone to previous orders of customers, although he keeps on hand the material from which they are produced, is not a merchant.(j) A person engaged in selling goods of his own manufacture, and also articles of domestic manufacture of others is liable to a duty.(k)

DEALERS AND TRADERS. A law imposing a license tax on transient persons doing business within the state, does not violate the provisions of the federal constitution,(l) and imposing a fine for not obtaining a license is not in violation thereof.(m) To authorize a person to sell foreign merchandise without a license, he must have received it in exchange for articles of his own manufacture, or for productions of his own agriculture.(n)

A state law imposing a license fee upon merchants who go from place to place soliciting orders is not unconstitutional, as involving a duty or impost on imports, or a regulation of commerce, or unequal taxation. It is a legit-

(u) Ayrnett v. Edmundson, 9 Baxt. 610.
(v) Bangle v. Holden, 52 Miss. 804.
(w) Barton v. Morris, 10 Phila. 360.
(x) Merchants of Memphis v. Memphis, 9 Baxt. 76.
(y) Sebastian v. Ohio Candle Co. 27 Ohio St. 459.
(z) Keller v. State, 11 Md. 525. See Perdue v. Ellis, 18 Ga. 586; Thomasson v. State, 15 Ind. 449; Aulanier v. Governor, 1 Tex. 653; Smith v. Adrian, 1 Mich. 495; Gardner v. People, 20 Ill. 43; License Cases, 5 How. 504; License Tax Cases, 5 Wall. 472.
(a) Com. v. Camp, 33 Pa. St. 380.
(b) N. O. v. Lusse, 21 La. Ann. 1.
(c) Durach's App. 62 Pa. St. 491; Aulanier v. The Governor, 1 Tex. 653; Baker v. Panola Co. 30 Tex. 86; Kitson v. Ann Arbor, 26 Mich. 325; Black v. Jacksonville, 36 Ill. 201; Com. v. Byrne, 20 Ga. 165.
(d) East St. Louis v. Wehrung, 46 Ill. 392.
(e) Com. v. Lowell Gas-light Co. 12 Allen, 75.
(f) Dudley v. Jamaica Pond Aq. Co. 100 Mass. 183.
(g) State v. Chadbourn, 80 N. C. 479.
(h) New Orleans v. Mannessier, 32 La. Ann. 1075.
(i) State v. Butler, 3 Lea, 222; People v. Russell, 14 N. W. Rep. 568.
(j) State v. West, 34 Mo. 424.
(k) Osborne v. Holmes, 9 Pa. St. 333.
(l) Cole v. Randolph, 31 La. Ann. 535; State v. Smith, 27 Mo. 464; State v. Shossleigh, 27 Mo. 344; Biddle v. Com. 13 Serg. & R. 405.
(m) Beall v. State, 4 Blackf. 107.
(n) Colson v. State, 7 Blackf. 590.

imate tax upon a business.(o) Cutting wood in one state, selling it in another, and there purchasing products of that state and bringing them back to the state of one's domicile, is within the prohibition of selling foreign goods without a license.(p) Dealers in pistols, bowie-knives, and dirk-knives, include a dealer in either.(q) Booksellers who deal in second-hand books only incidentally to their business, are not dealers in second-hand books.(r) The North Carolina statutes require tradesmen to take out licenses.(s)

KINDS OF BUSINESS TAXED. The constitution does not prohibit the state legislature to tax occupations, nor to authorize municipal corporations to tax them for revenue;(t) brokers and bankers;(u) cattle-brokers;(v) or other brokers.(w)

Municipal corporations, if authorized, may tax banks;(x) and the fact that a bank has paid a state license fee does not exempt it from liability for municipal taxes.(y) In Louisiana a savings institution is a bank of deposit, and liable to the payment of the annual license tax imposed by the city of New Orleans.(z) A license for banking does not authorize broking.(a)

The provisions of a statute concerning money-brokers and exchange dealers apply only to moral agents, capable of taking an oath and suffering the penalties imposed;(b) and a tax imposed on money of exchange brokers is not void for repugnance to the constitutional power of congress.(c)

A dealer in real estate is a broker, and may be required to take out a license;(d) and one who has not procured a license cannot recover his commissions(e) on sale of arms.(f) One may recover for procuring a sale of real estate under a special contract without showing that he had a broker's license.(g) Acting in a single transaction does not constitute one a ship-broker.(h)

A license to keep a livery stable authorizes sending out a two-horse wagon to haul in lumber without a license to own a dray.(i) So one who has paid a state license as livery-stable keeper need not pay an additional license on his hacks and buggies;(j) and livery-stable keepers who have a license are not liable to double taxation for hiring out buggies.(k) The business carried on by omnibuses and stage-coaches may be subject to a license tax.(l) A regulation of bakers regulating the weight and price of bread, is unconstitutional.(m) The vocation of booking emigrants may be licensed.(n)

The state legislature may require a license to be obtained by persons en-

(o) Ex parte Robinson, 12 Nev. 263; Sledd v. Com. 19 Grat. 813.
(p) Fugate's Case, 6 Grat. 693.
(q) Porter v. State, 58 Ala. 66.
(r) Eastman v. Chicago, 79 Ill. 178.
(s) State v. Cohen, 84 N. C. 771.
(t) San Jose v. S. J. & S. C. R. Co. 53 Cal. 476.
(u) Northrup v. Shook, 10 Blatchf. 243; U. S. v. Cutting, 3 Wall. 441; U. S. v. Fisk, 3 Wall. 445.
(v) U. S. v. Kenton, 2 Bond, 97.
(w) Young v. The Governor, 11 Humph. 147; Chicago v. Lunt, 52 Ill. 414.
(x) Farmers' Bank v. Fox, 4 Cranch, C. C. 330.
(y) State v. Columbia, 6 Rich. 1.
(z) New Orleans v. N. O. Sav. Inst. 32 La. Ann. 527.
(a) New Orleans v. Metr. Loan Ass'n, 31 La. Ann. 10.
(b) State v. Field, 49 Mo. 270.
(c) Nathan v. State, 8 How. 93.
(d) City of Little Rock v. Barton, 33 Ark. 436.
(e) Costello v. Goldbeck, 9 Phila. 153, contra.
(f) Justice v. Rowand, 10 Phila. 623.
(g) Shepler v. Scott, 85 Pa. St. 329.
(h) Woody v. Com. 29 Grat. 837.
(i) Mayor of Griffin v. Powell, 64 Ga. 625.
(j) Williams v. Garrigues, 30 La. Ann. pt. 2, 1094.
(k) Bell v. Watson, 3 Lea, 328.
(l) Com. v. Stodder, 2 Cush. 562.
(m) Mobile v. Miller, 3 Ala. 137.
(n) People v. Perry, 13 Barb. 206.

gaged in hiring laborers for employment outside the state.(o) Inspectors of bark, whether appointed by the governor or not, must procure a license.(p) A license to keep a cotton-press applies equally where the owner of the pickery uses it for cotton purchased by him or the cotton of others for which he charges a commission.(q) A license fee may be imposed on hackmen, draymen, etc.(r) A tax on the business of drayage, scaled according to the number of drays employed and the capacity of the drays, is uniform.(s) An ordinance of a city imposing license fees on vehicles in proportion to the number of vehicles permitted, and number of horses required to draw them, is unconstitutional.(t) The authority of a city to license carriages may be limited to those of common carriers.(u) The purpose and object of licensing hackmen and others is to impose a tax upon a business, calling, or occupation, and not on one who occasionally hauls a load.(v.)

POLICE POWERS OF STATE. Occupations requiring special regulations are subject to the police power of the state.(w) The thing to be done need not necessarily be in itself unlawful: it is sufficient if for the good order of the municipality the regulation of a particular branch of business is required.(x) A license may be imposed on all transient persons keeping "stores" in the town imposing it as a police regulation, though called a tax in the statute.(y) So a license may be imposed on street railways,(z) or on ferry-keepers.(a) So, under the general police powers, the keepers of a junk-shop, as buyers and shippers of old metals, old ropes, and other odds and ends, may require a license.(b)

The authority to regulate by requiring a license, does not authorize a special tax or impost under the name of a license, the same not appearing to be designed to meet the expenses of adjusting the regulating law.(c) The police powers include all those general laws of internal regulation necessary to secure peace, good order, health, and comfort to society.(d) So state laws may impose reasonable police regulations for the protection of markets against the sale of commodities unfit for commerce,(e) but such regulations must not be unreasonable, oppressive, or against public policy.(f) So it may regulate the sale of any commodity, the use of which would be detrimental to the morals of the people.(g)

A municipal corporation may require liquor sellers to close at a prescribed

(o) Shepperd v. Sumter Co. 59 Ga. 535.
(p) Davis v. State, 7 Md. 151.
(q) State v. Hemard, 23 La. Ann. 263.
(r) Bennett v. Birmingham, 31 Pa. St. 15; Com. v. Stodder, 2 Cush. 562; St. Charles v. Nolle, 51 Mo. 122; Gartside v. East St. Louis, 43 Ill. 47; Snyder v. North Lawrence, 8 Kans. 82; Cincinnati v. Bryson, 15 Ohio, 625.
(s) Johnston v. Macon, 62 Ga. 645.
(t) Cullinan v. New Orleans, 38 La. Ann. 102.
(u) Joyce v. East St. Louis. 77 Ill. 156.
(v) Collinsville v. Cole, 75 Ill. 114.
(w) Cincinnati v. Bryson, 15 Ohio, 625; Nightingale's Case, 11 Pick. 168; White v. Kent, 11 Ohio St. 550; Adams v. Somerville, 2 Head, 363; State v. Crawford, Id. 460; Buffalo v. Webster, 10 Wend. 99; Brooklyn v. Breslin, 57 N. Y. 591.
(x) Brooklyn v. Breslin, 57 N. Y. 591.
(y) Wilmington v. Roby, 8 Ired. 250.
(z) Frankford, etc., R. Co. v. Philadelphia, 58 Pa. St. 119; Johnson v. Philadelphia, 60 Pa. St. 445; State v. Herod, 29 Iowa, 123.
(a) Chilvers v. People, 11 Mich. 113.
(b) Hirsh v. State, 21 Grat. 785; State v. Hemard, 23 La. Ann. 263; City Council v. Goldsmith, 12 Rich. 470.
(c) New York v. Second Av. R. Co. 34 Barb. 41.
(d) Ex parte Shrader, 33 Cal. 279; Phila., etc., R. Co. v. Bowers, 4 Houst. 506; Beer Co. v. Massachusetts, 97 U. S. 25.
(e) State v. Fosdick, 21 La. Ann. 256; N. H., etc., T. B. Co. v. Bunnell, 4 Conn. 59; Fertilizing Co. v. Hyde Park, 97 U. S. 669.
(f) Bowling Green v. Carson, 10 Bush, 64.
(g) State v. Gurney, 37 Me. 156.

hour.(*h*) An ordinance cannot provide that retailers close while a particular class of worshipers are holding divine service, being silent as to all other worshipers.(*i*)

The police powers of a state cannot obstruct interstate commerce.(*j*) So an act of the legislature of a state imposing a license fee on all traveling agents from other states, offering merchandise for sale and selling the same, violates the clause of the constitution guarantying to the citizens of each state equal privileges and immunities.(*k*)

The state has a right to adopt a general regulation in reference to its affairs which shall include imported goods equal with those of domestic origin.(*l*) Corporations created without the state are amenable to the police power of the state to the same extent as natural persons.(*m*) The legislature may forbid an individual from undertaking a dangerous employment except at his own risk, or it may prohibit a hazardous or pernicious business, although it affects prior contracts. So it may regulate the sale of naphtha or inflammable oils.(*n*) It may establish reasonable regulations for the operation of mines,(*o*) and under the police power may require qualifications for professional graduates.(*p*)

PEDDLERS. Carrying goods about and offering them for sale is trading, dealing, and trafficking.(*q*) Peddling is the selling from place to place,(*r*) even though it be within the same town,(*s*) and a city ordinance may restrain peddling within the city limits, and punish for its violation, if duly authorized.(*t*)

Selling goods from a canal-boat is within the statute punishing for hawking and peddling.(*u*) Hawkers and peddlers are itinerant or traveling traders who carry goods about to sell.(*v*) The term embraces one who is a foot trader, or who travels from place to place and carries about with him, on his back or on horseback or in a vehicle, articles or merchandise for sale.(*w*) A peddler is one who supplies the same customers regularly and continuously in a city.(*x*) He is one who deals in small or petty things, and the term embraces a person engaged in going through the city from house to house and selling milk in small quantities to different persons,(*y*) or meat cut up and

(*h*) Platteville v. Bell, 43 Wis. 488.

(*i*) Gilman v. Mills, 64 Ga. 192.

(*j*) Railroad Co. v. Huzen, 95 U. S. 473, disapproving Yeazel v. Alexander, 58 Ill. 254.

(*k*) McGuire v. Parker, 32 La. Ann. 832. See Ex parte Thornton, 12 Fed. Rep. 551, note.

(*l*) Smith v. People, 1 Park. C. C. 583.

(*m*) Ruggles v. People, 91 Ill. 25; Ohio & Miss. R. Co. v. McClelland, 25 Ill. 660; Galena, etc., R. Co. v. Loomis, 13 Ill. 548; Same v. Dill, 22 Ill. 204.

(*n*) Kirby v. Pennsylvania R. Co. 76 Pa. St. 506; People v. Hawley, 3 Mich. 330; U. S. v. De Witt, 9 Wall. 41.

(*o*) Daniels v. Hilgard, 77 Ill. 640; Dougman v. People, 51 Ill. 277. See Ex parte Ah Pong, 19 Cal. 106; People v. Naglee, 1 Cal. 232; Trinity Co. v. McCammon, 25 Cal. 117.

(*p*) Regents v. Williams, 9 Gill & J. 365; State v. Hayward, 3 Rich. 389; Logan v. State, 5 Tex. Ct. App. 306.

(*q*) Merriam v. Langdon, 10 Conn. 461.

(*r*) Cook v. Pennsylvania, 97 U. S. 566; Freight Tax Cases, 15 Wall. 272; Henderson v. New York, 92 U. S. 268; Fisher v. Patterson, 13 Pa. St. 336.

(*s*) Andrews v. White, 32 Me. 388.

(*t*) Huntington v. Cheesbro, 57 Ind. 74.

(*u*) Fisher v. Patterson, 13 Pa. St. 335.

(*v*) Alcott v. State, 8 Blackf. 61; Colson v. State, 7 Blackf. 500: Merriam v. Langdon, 10 Conn. 160; State v. Belcher, 1 McMill. 40; Com. v. Ober, 12 Cush. 493; Wynne v. Wright, 1 Dev. & B. 10; Page v. State, 6 Mo. 205; Cincinnati v. Bryson, 15 Ohio, 625; Mays v. Cincinnati, 1 Ohio St. 268; Fisher v. Patterson, 13 Pa. St. 338; Com. v. Willis, 14 Serg. & R. 398; State v. Hodgdon, 41 Vt. 139; Whitfield v. Longest, 6 Ired. 268; Plymouth v. Pettijohn, 4 Dev. 591; State v. City Council, 10 Rich. 240; State v. Pinckney, Id. 474; City Council v. Ahrens, 4 Strob. 241; Keller v. State, 11 Md. 525.

(*w*) Higgins v. Rinker, 47 Tex. 402.

(*x*) Davis v. City of Macon, 64 Ga. 128.

(*y*) Chicago v. Bartee, 100 Ill. 61.

delivered from a cart.(z) A lightning-rod man is a peddler.(a) A person who stopped a year at one place, sold there under a license, then removed to another place and sold through an auctioneer, and then to another place, where he stopped for a short time, is a peddler.(b) One who has tinware, manufactured in the state, may peddle it under certain restrictions.(c)

A drummer or commercial traveler is not a peddler, because he does not carry with him the goods sold.(d) Mere solicitors of orders for others, who do not usually carry and deliver the good sold, are not peddlers.(e) So going from place to place to solicit by sample and fill orders for sewing-machines is not a violation of the statute forbidding unlicensed hawking and peddling, although occasionally an order was filled by delivery of the sample,(f) as selling goods by sample is not peddling.(g)

A law imposing an annual tax on "all peddlers of sewing-machines and selling by sample" is a tax on all peddlers of such machines, without regard to the place or production of the material, and is constitutional.(h) So an act imposing a tax on itinerant dealers in jewelry is constitutional,(i) and plain gold rings and ear-knobs are comprehended in the specification of the term "jewelry."(j) The Kentucky statute prohibiting sales by sample in the city of Louisville by non-residents without license, is not unconstitutional,(k) but where a state statute creates a fiction in the definition of a peddler, and founds a penalty on such fiction, it is void.(l)

A statute imposing a penalty and forfeiture for traveling from town to town, and offering goods for sale in whole or by sample, without taking out a license, does not apply to goods forwarded from without the state upon order of a purchaser, although such order was procured by the agent of the seller.(m) A merchant importing cloth manufactured out of the state, which he makes into clothing, cannot sell the clothing in any county as a peddler without a license;(n) but a single shipment of goods sold at auction or private sale for the benefit of the shipper is not hawking or peddling.(o) Candy made in another state is not "foreign goods," requiring a license for hawking and peddling.(p)

An act concerning hawkers and peddlers is not in violation of the commercial clause of the constitution of the United States.(q) The usual method is to tax them a specific sum by the year.(r) The constitution authorizes the general assembly to tax peddlers, and does not prevent the legislature from authorizing municipal corporations to tax for such purposes.(s) An act relative to licensing peddlers, and prescribing a penalty for peddling without a license, will be considered repealed by a later act with which it is inconsistent.(t)

(z) Davis v. City of Macon, 64 Ga. 128.
(a) State v. Wilson, 2 Lea, 28.
(b) Mabry v. Bullock, 7 Dana, 337; Hirschfelder v. State, 18 Ala. 112; Jones v. Barry, 33 N. H. 209; Wolf v. Clark, 2 Watts, 298; State v. Hodgdon, 41 Vt. 139.
(c) Wolf v. Clark, 2 Watts, 298.
(d) Ex parte Taylor, 58 Miss. 478.
(e) Taylor's Case, 58 Miss. 479.
(f) Com. v. Farnum, 114 Mass. 267. Contra, Morrill v. State, 38 Wis. 423.
(g) Com. v. Jones, 7 Bush, 502.
(h) Howe Mach. Co. v. Gage, 100 U. S. 676.
(i) Wynne v. Wright, 1 Dev. & B. 19.
(j) Com. v. Stephens, 14 Pick. 370.
(k) Com. v. Smith, 6 Bush, 303; Mork v. Com. Id. 397.
(l) Welton v. State, 91 U. S. 275.
(m) Burbank v. McDuffee, 65 Me. 135.
(n) Woolman v. State, 2 Swan, 353.
(o) State v. Belcher, 1 McMull. 40.
(p) Hart v. Willetts, 62 Pa. St. 615.
(q) Com. v. Ober, 12 Cush. 493.
(r) Wynne v. Wright, 1 Dev. & B. 19; Cowles v. Brittain, 2 Hawks, 204; Wilmington v. Roby, 8 Ired. 250.
(s) Wiggins v. Chicago, 68 Ill. 372.
(t) Hirschfelder v. State, 18 Ala. 112.

A license is a special personal privilege, and where a peddler employs another to drive his wagon the servant will be liable for the penalty provided by the statute.(*u*) So the privilege to sell clocks under a license is personal, and can be exercised only by the person named therein.(*v*) The fact that the peddler only carries his parcels on his person is no defense to his not conspicuously posting his name, residence, and number of his license on his parcels.(*w*) Under the Mississippi Code, imposing a license tax on hawkers and peddlers of goods, it is the occupation that is to be taxed, and not the goods, and it is incumbent on the owner or agent to take out the license.(*x*) A peddler, not having a license and selling from house to house anything, however small, is liable in Pennsylvania to a penalty of $50;(*y*) but a traveling peddler without a license, when not engaged in that business, may make a valid sale and delivery of his goods.(*z*) A warrant directing a seizure of property of two persons as partners for peddling "by their agent" certain sewing-machines, "without having obtained a license," is upon its face illegal; it must be issued against the actual peddler.(*a*)

INNKEEPERS AND RETAILERS. A state license imposed by law on innkeepers and retailers is not unconstitutional;(*b*) but such tax should be limited to the rights imposed by charter.(*c*) Where county commissioners are made the agents of the state, the license issued by them is a state license.(*d*) The state license to a tavern keeper, etc., should be paid to the clerk of the county court if granted by the court, and to the clerk of the trustees if granted by them.(*e*) The distinction between inns and taverns does not exist in this country.(*f*) The payment of a tax by innkeepers may be made a condition precedent to issuing the license,(*g*) and before an innkeeper can establish a lien on his guest's property he must procure a license.(*h*) Does a license to keep a tavern include authority to sell liquors?(*i*) To grant or refuse a license to keep an inn, in Pennsylvania, is in the discretion of the court of quarter sessions.(*j*)

REGULATION OF LIQUOR TRAFFIC. A state may tax liquor dealers(*k*) or the right to sell intoxicating liquors,(*l*) and may require payment of a license fee for retailing liquors.(*m*)

An act imposing a tax on occupations, and a penalty for the non-payment thereof, is constitutional as to retail dealers.(*n*) An objection that it is unequal and invidious, because those in other business are not required to pay

(*u*) Gibson v. Kenfield, 63 Pa. St. 168.
(*v*) Stokes v. Prescott, 4 B. Mon. 37; Maybey v. Bullock, 7 Dana, 387.
(*w*) Com. v. Cusick, 120 Mass. 100.
(*x*) Temple v. Sumner, 51 Miss. 13.
(*y*) Com. v. Willis, 14 Serg. & R. 398.
(*z*) Brett v. Marston, 45 Me. 401.
(*a*) Howard v. Reid, 51 Ga. 328.
(*b*) Bancroft v. Duncan, 21 Vt. 456.
(*c*) Freeholders v. Barber, 7 N. J. Law, 64.
(*d*) State v. Dobson, 65 N. C. 346.
(*e*) Williams v. Com. 13 Bush, 304.
(*f*) St. Louis v. Siegrist, 46 Mo. 593.
(*g*) Sights v. Yarnalls, 12 Grat. 292.
(*h*) Stanwood v. Woodward, 38 Me. 192.
(*i*) Hirn v. State, 1 Ohio St. 15; Page v. State, 11 Ala. 849; Commissioners v. Jordan, 18 Pick. 228; State v. Chamblyss, 1 Cheves, 220; Commissioners v. Dennis, Id. 229; State v. Prettyman, 3 Harr. 570; Bonner v. Welborn, 7 Ga. 296; Hannibal v. Guyott, 18 Mo. 515; St. Louis v. Siegrist, 46 Mo. 593; Com. v. Thayer, 5 Metc. 246; Overseers v. Warner, 3 Hill. 150.
(*j*) Toole's Appeal, 90 Pa. St. 376.
(*k*) Sinclair v. State, 67 N. C. 47.
(*l*) Bartemeyer v. Iowa, 18 Wall. 129.
(*m*) Thompson v. State, 15 Ind. 449; Com. v. Byrne, 20 Grat. 165; Staub v. Gordon, 27 Ark. 625; Falmouth v. Watson, 5 Bush, 660.
(*n*) Harris v. State, 4 Tex. Ct. App. 131; Tonella v. State, 4 Tex. Ct. App. 312; Carr v. State, 5 Tex. Ct. App. 153.

license fees, has no force.(o) Nor has the objection that those taxed are not assessed according to the business done.(p)

A license to retail liquors is not a contract, and is annulled by a law passed within the life of the license;(q) it is neither a contract nor a grant, but a mere permit, and the person receives it on the tacit condition and knowledge that it is at all times within the control of the legislature.(r) The fee is part of the police regulations and is not a tax, but is intended rather to prevent such establishments than to raise revenue,(s) and will not be held excessive unless manifestly more than a fee for regulation.(t)

A fee of $250 required of retailers of liquors was sustained as being a police regulation and not a tax;(u) and an annual tax imposed on persons, etc., pursuing the business of selling intoxicating liquors, except such as are manufactured within the state, held void, but sustained on rehearing as to violation of the commercial clause, and the clause on imposts or duties on imports.(v) A bond for a liquor license must be made to the county, and comply strictly with the state requirement.(w)

MUNICIPAL REGULATIONS OF LIQUOR TRAFFIC. The legislature may give power to municipal corporations to license the liquor traffic, (x) although its charter contains a prohibitory clause.(y) So it may authorize a city or county to demand a license for such traffic.(z)

A municipal corporation empowered to impose license fees may make a failure to take out a license and pay the fee subject the offender to fine and imprisonment.(a) That a city has exclusive power to license liquor dealers therein, raises no implication of exemption from the general state laws taxing them.(b) A charter authority to license, regulate, tax, or suppress tippling-houses does not give authority to prohibit all sales of liquors within the municipal limits;(c) but where by law the sale of liquor within two miles of the university is illegal, it cannot be licensed.(d) Under a power to "tax" and to "restrain" the liquor traffic a town may license it.(e) The corporate authorities of towns, when empowered by their charters to suppress the sale of intoxicating liquors, may declare the unlicensed selling a nuisance.(f)

A municipal corporation may revoke a liquor license.(g) The board of

(o) Durach's App. 62 Pa. St. 491.

(p) Youngblood v. Sexton, 32 Mich. 406.

(q) Calder v. Kirby, 5 Gray, 597.

(r) McKinney v. Town of Salem, 77 Ind. 213. The license takes effect from the date of its issue, and does not relate back to the order of the board granting it. Vannoy v. State, 64 Ind. 447; State v. Wilcox, 66 Ind. 557. Overruled in Keiser v. State, 78 Ind. 430.

(s) Burch v. Savannah, 42 Ga. 596.

(t) Johnson v. Philadelphia, 60 Pa. St. 445; Ash v. People, 11 Mich. 347; Burlington v. Ins. Co. 31 Iowa, 102.

(u) Baker v. Panola Co. 30 Tex. 86.

(v) Higgins v. Rinker, 47 Tex. 381; Id. 393.

(w) Faxson v. Kelley, 3 Neb. 104. See Wood v. Stirman, 37 Tex. 584.

(x) Tuck v. Town of Waldron, 31 Ark. 462. Robertson v. Lambertville, 38 N. J. Law, 69.

(y) Dingman v. People, 51 Ill. 277.

(z) Hetzer v. People, 4 Colo. 45; Wiley v. Owens, 39 Ind. 429.

(a) Cincinnati v. Buckingham, 10 Ohio, 257; White v. Kent, 11 Ohio St. 550; Vandine's Petition, 6 Pick. 187; Nightingale's Case, 11 Pick. 167; Shelton v. Mobile, 3 Ala. 540; Chilvers v. People, 11 Mich. 43; Brooklyn v. Cleves, Lalor, 231; Buffalo v. Webster, 10 Wend. 99. Contra, Butler's App. 73 Pa. St. 448.

(b) Decker v. McGowan, 59 Ga. 805.

(c) Tuck v. Town of Waldron, 31 Ark. 462.

(d) De Bois v. State, 34 Ark. 381.

(e) Mount Carmel v. Wabash Co. 50 Ill. 69. See Burlington v. Bungardner, 2 Iowa, 603.

(f) Goddard v. Jacksonville, 15 Ill. 588; Byers v. Olney, 6 Ill. 35; Jacksonville v. Holland, 19 Ill. 275; Pekin v. Smalzil, 21 Ill. 464; Block v. Jacksonville, 36 Ill. 301.

(g) Hurber v. Baugh, 43 Iowa, 514. See Ex parte Whittington, 34 Ark. 394; Hennepin Co. v.

license has a discretion, and cannot be compelled by *mandamus* to issue licenses.(*h*) The licenses issued by the federal government do not supersede state regulations.(*i*)

AMUSEMENTS AND PUBLIC EXHIBITIONS. The legislature may require places of amusement to be licensed by proper authority, as a legitimate exercise of the taxing power and part of the police regulation,(*j*) and such fee is not a tax on property.(*k*) So public amusements may be prohibited, except when licensed.(*l*) A license to keep a theater will not protect one who exhibits feats of legerdemain.(*m*)

Exhibitions may be regulated or restrained.(*n*) Only those shows and exhibitions named in the title to the act are included, and concerts are not included.(*o*) Impromptu characterizations, if performed on successive nights, require a license,(*p*) but prohibiting the setting up of any public show, amusement, or exhibition, does not include a dancing-school.(*q*) Letting a small room in the upper part of a building for petty dramatic exhibitions, does not constitute the carrying on the business of a theater.(*r*)

GAMBLING AND GAMING HOUSES. Games of chance or hazard, when made lawful, are usually made so under licensed regulations.(*s*) An act licensing gaming-houses simply operates as a permission, and does away with the misdemeanor, but does not alter the character of contracts with gamblers.(*t*) The failure to obtain such license leaves the gambler a public wrong-doer and liable to indictment,(*u*) but the license fee cannot be recovered from one who has failed to take out the license.(*v*) A city ordinance licensing gaming is null and void, and is no protection against an indictment for the offense.(*w*)

BILLIARD TABLES. A statute requiring the keeper of a billiard table to take out a license is constitutional,(*x*) and the municipal corporations of cities and towns have the exclusive right to issue the license.(*y*) The power to suppress and restrain billiard tables implies the power to license them.(*z*) In Alabama the owner of a billiard table is required to take out a license where the loser pays for drinks at the bar.(*a*).

Where a tax is laid on all "pursuing any occupation, trade, or profession," a person keeping a billiard table for profit is included, but not one who keeps

Robinson, 16 Minn. 331. As to appeal from decision of commissioners refusing a license, see State v. Commissioners, 15 Ind. 501.

(*h*) Schlandecker v. Marshall, 72 Pa. St. 200.

(*i*) McGuire v. Com. 3 Wall. 387; Purvear v. Com. 5 Wall. 72; Com. v. Thornily, 6 Allen, 445; Com. v. Holbrook, 10 Allen, 300; Com. v. Keenan, 11 Allen, 262; Black v. Jeffersonville, 36 Ill. 301; State v. Carney, 20 Iowa, 82; State v. Stutz, 20 Iowa, 488.

(*j*) Wallack v. Mayor of N. Y. 3 Hun, 84; Mabry v. Tarver, 1 Humph. 94; Trapp v. White, 35 Tex. 387; Germania v. State, 7 Md. 1.

(*k*) Orton v. Brown, 35 Miss. 425.

(*l*) Sears v. West, 1 Murphy, 291; Hodges v. Nashville, 2 Humph. 61; Mabry v. Tarver, 1 Humph. 94; Eldridge v. Heneger, 5 Sneed, 257; Orton v. Brown, 35 Miss. 426.

(*m*) Jacks v. State, 22 Ala. 73.

(*n*) Boston v. Schaffer, 9 Pick. 506; Baker v. Cincinnati, 11 Ohio St. 534.

(*o*) State v. Bowers, 14 Ind. 195.

(*p*) Soc. for Reform. v. Diers, 10 Abb. Pr. 216.

(*q*) Com. v. Gee, 6 Cush. 174.

(*r*) Gillman v. State, 55 Ala. 248.

(*s*) Washington v. State, 13 Ark. 752; Lewellen v. Lockharts, 21 Grat. 570; Tanner v. Albion, 5 Hill, 121; State v. Hay, 29 Me. 457; State v. Freeman, 38 N. H. 426; Com. v. Colton, 8 Gray, 488.

(*t*) Carrier v. Bramman, 3 Cal. 328.

(*u*) People v. Raynes, 3 Cal. 366.

(*v*) People v. Raynes, 3 Cal. 366.

(*w*) State v. Lindsay, 34 Ark. 372.

(*x*) Lewellen v. Lockharts, 21 Grat. 570.

(*y*) Metz v. Com. 2 Metc. (Ky.) 14.

(*z*) Burlington v. Lawrence, 42 Iowa, 681. See Winooski v. Gokey, 49 Vt. 282.

(*a*) Clark v. State, 49 Ala. 37.

it for amusement merely.(b) Such license takes effect from delivery and not from its date.(c)

ENFORCEMENT OF STATUTORY OBLIGATIONS. Where a license is required by statute, the imposition of a penalty amounts to a positive prohibition of a contract made in violation of the statute.(d) The provision in a bond that the licensee will pay all fines and costs assessed against him for violation of the act is constitutional.(e) No one can keep a dram-shop or drinking-saloon without being amenable to the penalty of the act.(f) The penalties of the Alabama act of 1848 are not repealed by the subsequent acts.(g)

A *qui tam* action for the penalty incurred by selling without a license can only be maintained against the person selling, and not against his partner;(h) and it is no defense that he carried on the business on account of his employer and not for himself.(i) In such actions the declaration must aver that defendant was such peddler, etc., as is required to have a license, and that he did sell.(j) The grant of a license from a day past releases the penalties for retailing without a license after that day, though before the taking out of the license.(k) The statute may authorize any person to institute suits, either in his own name or in the name of the state, to recover the penalty for its violation.(l) An information for pursuing a taxable occupation without a license must aver whether the amount due is a state or a county tax; for, if the latter, the levy should be alleged and proved.(m) The information must allege that the sale was for profit, or on commission, or for other compensation,(n) and the amount of the tax due at the dates of the occupation must be alleged and proved.(o)

In Tennessee a remedy by distress warrant is provided against those exercising a privilege without the required license.(p) In New Hampshire the price of goods sold may be recovered back in a civil suit, but the act of peddling is not illegal.(q) An action for the violation of the peddlers' act must be brought in the name of the county or the informer.(r) In such action it is necessary not only to prove a sale, but such a sale as the law forbids by one obviously a peddler.(s) Judgment may be given on presentment and information for the forfeiture inflicted by the statute.(t)

REMEDY BY INDICTMENT. The indictment for doing business without a license must allege whether it is brought under a statute requiring a state license, or under an ordinance requiring city license.(u) It must specify the par-

(b) Washington v. State, 13 Ark. 572, denying Stevens v. State, 2 Ark. 291; Tarde v. Benseman, 31 Tex. 277.

(c) State v. Pate, 67 Mo. 488.

(d) Taliafero v. Moffett, 54 Ga. 150.

(e) Kane v. State, 78 Ind. 103. Where a general obligation exists, the legislature may give it local effect, Lycoming v. Unwin, 15 Pa. St. 266.

(f) Erb v. State, 35 Ark. 631. The punishment for keeping a saloon or dram-shop without a license is different from that for failure to pay taxes requ[illegible] those who sell in quantity, State v. Clayton, 32 Ark. 486.

(g) Sterne v. State, 20 Ala. 43.

(h) Martin v. McKnight, 1 Tenn. 330.

(i) Winter v. State, 30 Ala. 22.

(j) Prigmore v. Thompson, Minor, 420. See Greer v. Bumpass, Mart. & Y. 94; State v. Aikin, 7 Yerg. 268.

(k) City Council v. Corties, 2 Bailey, 186.

(l) Wallack v. Mayor of New York, 3 Hun, 84.

(m) Crews v. State, 10 Tex. Ct. App. 292.

(n) Cousins v. Com. 17 Grat. 807.

(o) Archer v. State, 9 Tex. App. 78.

(p) State v. Manz, 6 Cold. 557.

(q) Jones v. Berry, 33 N. H. 209.

(r) Higby v. People, 5 Ill. 165.

(s) Bacon v. Wood, 3 Ill. 265.

(t) Collins' Case, 9 Leigh, 666.

(u) Com. v. Fox, 10 Phila. 204.

ticular act or acts intended to be relied on.(*v*) Charging that defendant did on, etc., and at the place occupied for that purpose, unlawfully deal as a merchant, without having a license authorizing him to deal as such, by then and there selling, etc., is sufficient.(*w*) It is not necessary to charge that the goods were sold by retail.(*x*) Nor is it a defense that the accused applied to the proper officer for a license and tendered the fee.(*y*) Nor is it a ground for quashing, that the price or person to whom the goods were sold is omitted.(*z*) Circulating any other license than those properly issued is a felony,(*a*) and the indictment in such case must directly charge that the license circulated was not properly issued.(*b*)

An indictment against a peddler for selling without a license must allege facts which constitute hawking and peddling, as the gist of the offense is being engaged in such business.(*c*) It must allege that accused has not first obtained a license therefor,(*d*) and must set forth to whom the sale was made.(*e*) If it avers merely a sale made, it is bad.(*f*) It should allege that accused made peddling his business or occupation.(*g*)

An indictment which alleges that defendant at a certain time and place was a hawker and peddler and petty chapman, and did then and there go from place to place exposing goods for sale, and did then and there sell certain goods, is insufficient for want of an allegation that he sold the goods as a hawker, peddler, or petty chapman, or while going about as such.(*h*) On such indictment the burden of proof is on the prosecution.(*i*) Where the indictment alleged that defendant did keep a restaurant, etc., it is sufficient.(*j*)

In an indictment for an unlawful exhibition it is not necessary that the exhibition was for profit;(*k*) if it is alleged that defendant did set up and promote an exhibition, designating it, without being first duly licensed therefor, and contrary to the form of the statute, it is sufficient.(*l*) Whether or not the selling without a license will warrant a conviction is a question for the jury.(*m*)—[ED.

(*v*) Com. v. Dudley, 3 Metc. (Ky.) 221.
(*w*) State v. Willis, 37 Mo. 192.
(*x*) Tracy v. State, 3 Mo. 2.
(*y*) State v. Myers, 63 Mo. 324.
(*z*) State v. Miller, 24 Mo. 532; Page v. State, 6 Mo. 205.
(*a*) People v. Logan, 1 Nev. 110.
(*b*) People v. Logan, 1 Nev. 110.
(*c*) Sterne v. State, 20 Ala. 43.
(*d*) May v. State, 9 Ala. 167.
(*e*) State v. Powell, 10 Rich. 513.
(*f*) Com. v. Smith, 6 Bush, 303; Mork v. Com. Id. 397.
(*g*) Alcott v. State, 8 Blackf. 6.
(*h*) Com. v. Bouckheimer, 14 Gray, 29.
(*i*) State v. Hirsch, 45 Mo. 429. Compare State v. Richeson, 45 Mo. 575.
(*j*) Huttenstein v. State, 37 Ala. 157.
(*k*) Pike v. State, 35 Ala. 147.
(*l*) Com. v. Twitchell, 4 Cush. 274.
(*m*) Merritt v. Shaw, 59 Ala. 46.

UNITED STATES *v.* TREADWELL and others.

(*District Court, S. D. New York.* March 17, 1883.)

COSTS—IN COMMON-LAW ACTIONS.

The prevailing party in actions at common law in the United States courts, under section 823 of the Revised Statutes, has a right to recover costs in all cases, except where otherwise provided by some law of congress; the laws of the states no longer affect either the right to costs or the rates.

John Proctor Clarke, Asst. Dist. Atty., for plaintiff.

Thomas J. Rush, for defendants.

BROWN, J. In an action upon an official bond with sureties, the plaintiff has recovered a verdict for $1,589.02 against one surety, and the administratrix of another surety. The counsel for the administratrix appeals from the taxation of costs against her, on the ground that there had been no presentment of the claim to her or demand of payment prior to the suit, as required by the Revised Statutes of New York, (2 Rev. St.*90, § 41,) and by sections 1835, 1836, of the New York Code of Procedure. The plaintiff admits this fact, and that no costs could be recovered in the state courts for that reason; but it claims that the right to costs in the United States courts is not dependent upon or limited by the state practice. The question here presented was carefully considered by DEADY, J., in the case of *Ethridge* v. *Jackson*, 2 Sawy. 598, where, following the case of *Hathaway* v. *Roach*, 2 Wood. & M. 68, and, upon the United States statutes as they then stood, he held that a state statute denying costs, when the recovery was under $50, was applicable to common-law actions in the United States district courts. The plaintiff relies upon the decision of NELSON, J., as reported in 1 Blatchf. 652.

The only essential difference between the opinion of Judge NELSON and the case above cited, is in regard to the application of section 34 of the judiciary act of 1789 to the question of the right to costs. 1 St. at Large, 92.

That section provides that "the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in courts of the United States, in cases where they apply." Section 721, Rev. St. Although there was then no statute of the United States determining when costs shall be allowed in common-law actions, Judge NELSON considered that this section did not affect the question of the right to recover costs; while in the

other cases above quoted, the right to costs was regarded as a substantial right, and, therefore, like other rights of property or of the person, the rules of evidence and statutes of limitation, to be determined by the laws of the several states, under the section above quoted, in the absence of any express law of congress governing the matter. The principal question considered by Judge NELSON was the rate of costs, when taxable. But all further discussion of that question was superseded by the act of February 26, 1853, passed by congress in the year following Judge NELSON'S opinion; and this act is now embodied in sections 823, 824, of the Revised Statutes, with some important changes, to which reference will presently be made. Since the decision of Judge NELSON, moreover, a further change has been made by the act of congress passed June 1, 1872, (17 St. at Large, p. 197, § 5,) by which the "practice, pleading, and forms and modes of proceedings" in common-law actions, it is declared, "shall conform, as near as may be, to that of the several states in like actions, any rule of court to the contrary notwithstanding." Section 914, Rev. St.

The right to recover costs is either a substantial right, in which case it would fall within the "rules of decision," according to the laws of the state, under section 34 of the judiciary act, (section 721, Rev. St.,) if there were no law of congress applicable; or, if not a substantial right, then it would be a question of "practice or proceeding" of the courts, as held by Judge NELSON; and in the latter case, since the adoption of the state "practice" in common-law actions, it would be quite immaterial to which head the right to costs should be referred; for, if it were a question of "practice," still, under section 914, it must conform to the law of the state, as there is no possible difficulty in following the state practice on that subject; and section 914 would, in that case, be imperative.

If the provisions of the United States laws as to costs were still the same as in March, 1874, when the case of *Ethridge* v. *Jackson*, above cited, was decided, I should hold, therefore, that the right to tax costs in common-law actions was still left subject to the provisions of the state laws. But in the Revision of the United States Statutes an important change is made, as it seems to me, which directly affects the right to tax costs. In the fee-bill of February 26, 1853, (10 St. at Large, 161,) it was provided (section 1) "that in *lieu* of the compensation *now allowed* by law to attorneys, solicitors, and proctors in the United States courts, United States district attorneys, etc., the following, and no other, compensation shall be taxed and allowed." This lan-

guage, it is to be observed, does not purport to give costs in any case where they were not previously taxable, for it is expressly said to be in lieu of the compensation now allowed; therefore, the right to recover and tax costs remained as before; while, if taxable, the rates were to be such as were specified by that act.

In the Revision of the Revised Statutes a different provision is made. Section 823 declares:

"The following and no other compensation *shall be taxed and allowed* to attorneys, solicitors, and proctors in the courts of the United States for district attorneys, etc., except in cases otherwise *expressly* provided by law."

The only point left undetermined by the express language of this section is, to which attorneys, etc., costs are to be allowed. Section 983 definitely determines that point in providing that—

"The bill of fees of the clerk, marshal, attorney, etc., on trials in cases whereever by law costs are recoverable *in favor of the prevailing party*, shall be taxed by a judge or a clerk of the court, and be included in and form a portion of a judgment or decree against the losing party."

This section is taken without change from the act of 1853. By section 823, above quoted, it is provided that the fees following, "shall be taxed, except in cases otherwise expressly provided by law;" *i. e.*, by some law of congress, not of the several states. Taking the two sections together, therefore, it would seem to follow necessarily that the fees referred to in section 823 must be taxed in favor of the "prevailing party," and "against the losing party," in all cases, "except where otherwise expressly provided by law."

The language of section 823, by its natural meaning and import, seems to me plainly to cover the whole question of the right to costs; for it declares that the following fees "*shall*" be allowed to attorneys, etc., except in cases expressly provided by law; *i. e.*, the attorneys of the prevailing party shall be entitled to costs in all cases, "unless otherwise expressly provided by law."

I cannot perceive any reason for the change in the phraseology of section 823 from the language of the act of February 26, 1853, § 1, except for the purpose of making this definite provision as to the right to costs, which the act of 1853 did not do. If such is the proper interpretation and construction of section 823, then it supersedes the laws and the practice of the states in reference to the right to recover costs, since those laws are applicable only in the absence of any law of congress on the same subject. Section 721.

The New York Code of Procedure contains various special provisions affecting the right to recover costs. The most important of

these are contained in section 3228, which provides that in an action of replevin, if the plaintiff recovers less than $50 value and damages, he can recover no more costs than the value and the damages; in an action for an assault and battery, false imprisonment, libel, slander, etc., if he recover less than $50, his costs cannot exceed the damages; while in an action for a money demand on contract, if he recovers less than $50, he recovers no costs at all; and in that case the defendant recovers costs.

By section 894 of the United States Revised Statutes a docket fee of $20 is allowed, "provided, that in cases of admiralty and maritime jurisdiction, where the libelant recovers less than $50, the docket fee of his proctor shall be but $10." This proviso, reducing the docket fees to $10 where the libelant recovers less than $50, in admiralty cases only, affords the strongest presumption that no such reduction was intended in common-law actions on the mere ground that the recovery was less than $50; while the previous section, declaring that "the following compensation shall be allowed, unless otherwise expressly provided," makes it impossble to apply the state statutes without a direct conflict with the plain and direct language of section 823. For these various reasons, therefore, I conclude that the state practice is no longer applicable, either in respect to the right to recover costs or to the rate of costs.

There is no United States law exempting executors and administrators from costs, as in the state practice; and under the general provisions of sections 823, 824, and 983, the taxation against the administratrix in this case should, therefore, be affirmed.

In re McKINNEY.

(*District Court S. D. New York.* March 16, 1883.)

1. BANKRUPTCY—LIFE INSURANCE—INSURABLE INTEREST—ASSIGNEE.

An assignee in bankruptcy has no insurable interest in the life of a bankrupt, at least after his discharge. Upon a policy on the life of the bankrupt, payable at his death to his executors, administrators, or assigns, with an equal premium payable annually during the bankrupt's life, the only beneficial interest which passes to the assignee in bankruptcy is its surrender value or net reserve at the time of the bankruptcy. Beyond that interest the policy, so far as respects any future insurance under it, would be a burden rather than a benefit, which the assignee is not authorized to continue, and the assignee takes the legal title to the policy for the purpose of making the surrender value or net reserve available to the estate.

2. POLICY KEPT ALIVE BY WIFE OF BANKRUPT—SURRENDER BY ASSIGNEE—SURRENDER VALUE.

Where the bankrupt, holding such a policy at the time of his bankruptcy, was afterwards discharged from his debts and died several years after, his wife having kept the policy alive by payment of premiums subsequent to the bankruptcy, supposing that the policy was for her benefit, *held*, that the assignee should be authorized to surrender the policy on payment of the full net reserve or surrender value at the time of the bankruptcy.

In Bankruptcy.

Kent & Auerbach, for assignee.

Evarts, Southmayd & Choate, opposed.

BROWN, J. This is an application by the assignee of Andrew McKinney, the bankrupt, for leave to transfer to the bankrupt's widow whatever interest the assignee may have in a life-insurance policy of $3,000, issued by the Berkshire Life Insurance Company of Massachusetts, upon the life of McKinney, dated July 23, 1856. The policy is made payable to his "executors, administrators, or assigns," in consideration of the payment of an annual premium of $62.70 during his life. The matter was referred to Commissioner Osborn, as referee, to take proof of the facts, who reports that the entire net value of the policy on the twenty-third of July, 1877, was $686.42, although that is more than would have been paid for the surrender at that time. The policy provided that "no assignment or transfer of this policy shall be valid without the written consent of the company, and, in case of death, the claim of any assignee shall be subject to proof of interest."

At the time of taking out the policy, in 1856, Andrew McKinney was 28 years of age. The last annual premium paid by him was that of July, 1876. On February 5, 1877, he filed his petition in bankruptcy and was adjudicated a bankrupt. On April 6, 1877, the usual assignment was executed to the petitioner as his assignee, and on January 9, 1878, he was duly discharged as a bankrupt. This policy was mentioned in his schedule of assets. The assignee took no steps in reference to the policy, and never paid any premiums upon it. The bankrupt's wife, having another small policy for her benefit, and supposing that this policy was also for her benefit, paid the annual premiums on this policy, six in number, out of her own funds, until the death of the bankrupt on October 31, 1882.

Due proofs of death have been made to the company, and it is understood that they are ready to pay to whoever is legally entitled to the money, though they have never assented to any assignment to the assignee in bankruptcy, and do not admit his legal right to it.

On the part of the creditors it is contended that the policy passed to the assignee in bankruptcy for all purposes whatever, and that he is legally entitled to the whole proceeds, although the assignee did nothing to preserve the policy; and, although it did not become payable by the death of the bankrupt until between five and six years after the assignment in bankruptcy, and between four and five years after the bankrupt's discharge, and after the widow had paid six annual premiums; while, in behalf of the widow, it is claimed that the assignee is entitled to no interest in it whatever. Looking at this policy as it stood at the time of the bankruptcy, it presents two entirely different elements,—(1) its cash surrender value at that time; (2) its character as an executory contract, whereby the bankrupt or his representative was to pay an annual premium during his life, and observe numerous other conditions specified in the contract; and the company, if all these conditions were observed, was to pay the sum of $3,000 at his death.

The first of these elements, the surrender value of the policy, arises from the fact that the fixed annual premium is much in excess of the annual risk during the earlier years of the policy, an excess made necessary in order to balance the deficiency of the same premium to meet the annual risk during the latter years of the policy. This excess in the premium paid over the annual cost of insurance, with accumulations of interest, constitutes the surrender value. Though this excess of premiums paid is legally the sole property of the company, still in practical effect, though not in law, it is moneys of the assured deposited with the company in advance to make up the deficiency in later premiums to cover the annual cost of insurance, instead of being retained by the assured and paid by him to the company in the shape of greatly-increased premiums, when the risk is greatest. It is the "net reserve" required by law to be kept by the company for the benefit of the assured, and to be maintained to the credit of the policy. So long as the policy remains in force the company has not practically any beneficial interest in it, except as its custodian, with the obligation to maintain it unimpaired and suitably invested for the benefit of the insured. This is the practical, though not the legal, relation of the company to this fund.

Upon the surrender of the policy before the death of the assured, the company, to be relieved from all responsibility for the increased risk, which is represented by this accumulating reserve, could well afford to surrender a considerable part of it to the assured, or his representative. A return of a part in some form or other is now

usually made; and by the provisions of this policy, under the law of Massachusetts, four-fifths of this reserve or surrender value was applicable on default as a single premium for a paid-up policy.

To any person, moreover, having an insurable interest in the life of the assured, and desirous of maintaining the policy, to whom it might be assigned, this surrender value would be worth its full tabular amount. To the extent of its actual cash surrender value, therefore, this policy, at the time of the bankruptcy, was "property" and "effects" of the bankrupt within sections 5044, 5046, of the Revised Statutes, and as such passed to the bankrupt's assignee. So far as necessary to make the cash surrender value available, the title to the policy also passed to the assignee, so that he might thereafter either surrender it to the company, or assign it over, either to the bankrupt, or to any other person having an insurable interest in his life, on receiving payment of the surrender value at that time, or so much of it as the assignee might be able to obtain.

Beyond this interest in the surrender value I think nothing passed to the assignee in bankruptcy save the naked title to the policy in order to make that interest available. As an executory contract, aside from its surrender value, the policy had no pecuniary value whatever. Assuming that the bankrupt had the average expectation of life, as a mere contract for future insurance it would be a burden rather than a benefit to the estate; for, whatever might be afterwards obtained from it, (beyond the present surrender value,) a still greater sum must presumably be paid out in the shape of future premiums and interest in order to keep the policy alive, since these premiums, with interest on the average, not only equal the amount ultimately payable, but all the company's expenses and profits in addition. As an executory contract, therefore, aside from its surrender value, the policy was not "property" or "effects," but an incumbrance which the assignee would be bound to reject, like leases at an unfavorable rent. *Streeter* v. *Sumner*, 31 N. H. 542, 557–559; Bump, Bankr. 507. In such cases the assignee has at least an election to reject the contract; and if, knowing its terms, he does nothing to avail himself of it, and allows third persons to acquire an interest in it, he must, as against the latter, be deemed to have rejected it, except in so far as the law itself casts it upon him; which, in this case, is to the extent of the surrender value only. In the language of WARE, J., "it would be highly inequitable to allow the assignee to stand by and await the issue and then to wrest all the fruits of it" from those who had secured it. *Smith* v. *Gordon*, 6 Law Rep. 313, 317, 318; 2 N. Y. Leg. Obs. 325,

328; *Copeland* v. *Stephens*, 1 Barn. & Ald. 594, 604; *Hanson* v. *Stevenson*, Id. 304, 307; *Lewis* v. *Burr*, 8 Bosw. 140; *Journeay* v. *Brackley*, 1 Hilton, 447. .

The assignee, moreover, could have no right to use the moneys of the estate to pay premiums during the bankrupt's life, and thus keep the estate unsettled for an indefinite period, for the mere purpose of speculating upon the chances of the bankrupt's early death. *In re Newland*, 7 N. B. R. 477. The speedy settlement of the estates of bankrupts, as contemplated by law, is incompatible with such dealings.

But not only was the executory part of this policy, *i. e.*, everything beyond its surrender value, not assets of the bankrupt, but the assignee in bankruptcy had no such insurable interest in the life of the bankrupt as rendered him an assignee legally capable of continuing the policy for his own benefit, and ultimately recovering the whole amount under it. An assignee in bankruptcy has no interest, that I can perceive, in the continuance of the bankrupt's life; at least, after his discharge in bankruptcy. The bankrupt's debts, so far as he is concerned, are canceled by the discharge. As the representative of creditors, the assignee can take nothing by the future earnings or acquisitions of the bankrupt, and has no pecuniary interest dependent upon whether the bankrupt lives or dies.

The nature of an insurable interest, such as will support an assignment of a life-insurance policy and enable the assignee to recover under it, has been recently fully considered by the supreme court in the case of *Warnock* v. *Davis*, 104 U. S. 775. It was there held that an assignment to a company having no pecuniary interest in the life of the assured was void. In the opinion delivered the court say:

"It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated, however, generally to be such an interest arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation, for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful, as operating more efficaciously, to protect the life of the insured than any other consideration. *But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the as-*

sured. Otherwise the contract is a mere wager by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are, therefore independently of any statute on the subject, condemned, as being against public policy."

In the present case there is no ground upon which the assignee could expect any benefit or advantage from the continuance of the life of the assured after his discharge in bankruptcy. There would be no consideration, either of kindred or pecuniary benefit, to offset the direct interest under the policy in the early death of the assured; and hence, under the above decision, the only beneficial interest which would pass to the assignee, or which he could insure or protect by the further payment of premiums, would be the surrender value at the time of the bankruptcy.

The condition in the policy, that a transfer "shall not be valid without the consent of the company," is another impediment. The company is directly interested in preventing any assignment to persons whose only pecuniary interest is in the speedy death of the assured; and any assignment, it is further provided, shall be subject to proof of interest. Both of these provisions are obviously valid conditions, and would limit the assignee's recovery in any event to the surrender value, and any premiums subsequently paid to protect it.

As the surrender value at the time of the bankruptcy was its whole pecuniary value at that time, and was the only beneficial interest which could then pass to the assignee, and as he had no interest in the continuance of the bankrupt's life after his discharge, which could make valid any further insurance for his benefit as assignee, it follows that the receipt of the surrender value is all that he ever became legally entitled to; and that the report should, therefore, be confirmed, and an order entered allowing the transfer on payment of the ascertained value as reported.

JUDSON, Assignee *v.* THE COURIER CO.

(*Circuit Court, S. D. New York.* February 21, 1883.)

1. BANKRUPTCY—FRAUDULENT TRANSFER—PRIMA FACIE EVIDENCE OF.
   Where a transfer of property is made outside of the usual course of one's business, by one who is insolvent and who is known to be so by the parties to whom he transfers, and with whom he has confidential business relations, it will be considered as *prima facie* evidence against the parties to the transfer that a fraud upon the bankrupt act was intended, and the facts and circumstances surrounding such transfer impose upon the party to whom the transfer is made, the active duty of inquiring into the debtor's financial situation, and the number of his creditors.
2. SAME—NON-JOINDER.
   All the parties to a transfer, such as the above, are necessary parties to an action brought to invalidate the transfer, without whose presence the court could not proceed to a decree.

In Bankruptcy.

E. H. Benn, for appellant.

Hamilton Cole, for respondent.

WALLACE, J. This is an appeal from a decree of the United States district court for the southern district of New York, dismissing the bill.

The complainant is the assignee of one Queen in bankruptcy, and seeks by the bill to set aside a transfer of certain menagerie property alleged to have been made to the defendant by the bankrupt and others within four months of the filing of a petition in bankruptcy by the bankrupt. The allegations of the bill are that on the third day of November, 1877, the bankrupt, being then insolvent and in contemplation of insolvency, executed a bill of sale of the property for the purpose of paying or securing an indebtedness to the defendant; that shortly prior thereto, and on the twenty-seventh day of October, 1877, the defendant and certain other creditors entered into a tripartite agreement in reference to said property, in which one Dinegar was the party of the first part, the defendant was the party of the second part, and Calvin and Cole, in behalf of themselves and certain other creditors of the bankrupt, were parties of the third part, whereby it was agreed that the title to the menagerie should vest in the defendant, divested of all liens held thereon by the other parties to the agreement, reserving to Dinegar the right to purchase the property at any time within 90 days, and providing that upon his failing to do so the defendant should sell the property and apply the proceeds to the payment of the debts of the several parties; that on the third

day of November, 1877, the bankrupt consented and agreed to all the terms of said tripartite agreement. The bill further alleges that neither Dinegar nor Calvin and Cole had any valid title to or lien upon the property, but that their title and liens were fraudulent and void as to the creditors of the bankrupt, and were known so to be to all the parties to said tripartite agreement; that the said tripartite agreement was void as against the creditors of the bankrupt, and was executed and assented to by the bankrupt when he was insolvent, and when all the parties thereto knew him to be insolvent and in contemplation of bankruptcy and insolvency, and the same was executed and accepted with the intent of giving the beneficiaries a fraudulent preference over all other creditors of the bankrupt; all of which facts were known to the parties and to the bankrupt when the same was executed. After alleging that the defendant took possession of the property under such transfer, and the filing by the bankrupt within four months of his petition in involuntary bankruptcy, the bill prays that the transfer and the tripartite agreement be set aside, all the stipulations thereof and all the title and interest of all the parties in the property be adjudged fraudulent and void, and the defendant adjudged to transfer the property to the complainant or pay the value of the same.

None of the parties to the tripartite agreement, except the defendant, have been made parties to the suit, and the bill does not contain any allegations for the purpose of excusing their non-joinder.

The proofs show that at the time the tripartite agreement was made Dinegar claimed to be the owner of the property by virtue of a bill of sale thereof executed by the bankrupt to one Howe, on the ninth day of October, 1877, and a transfer from Howe to Dinegar. The consideration of this bill of sale was $35,000, of which $25,000 was an antecedent indebtedness owing by the bankrupt to Howe. At the time of its execution, Howe and the bankrupt entered into a collateral agreement by which the latter was to be permitted to repurchase the property upon the payment of $35,000, at any time within 30 days, and was to be permitted to have possession of the property so long as Howe should so elect.

The proofs also show that, at the time the tripartite agreement was made, Calvin and Cole, the parties of the third part in the agreement, had a chattel mortgage upon the property, executed to them by the bankrupt on the fifteenth day of October, 1877, to secure an indebtedness, owing to them and several other creditors by the bankrupt, of $13,145. This mortgage was conditioned to be void upon

the payment of that sum within 60 days, and provided that the bankrupt should be permitted to retain possession of the property in the mean time, unless the mortgagees should deem themselves unsafe or unless the property should be taken on attachment or execution against the mortgagor.

The bankrupt was indebted to the defendant in about the sum of $18,000 upon a running account for printing, and immediately after the execution of the chattel mortgage to Calvin and Cole he notified the president of the defendant, in substance, that he had been compelled to give this mortgage, but he had 60 days in which to pay it and would be able to do so, and asking the defendant not to take any hostile action. The president of the defendant, however, proceeded to St. Louis, where the menagerie then was, brought suit against the bankrupt, and attached the property. In this position of affairs the tripartite agreement was entered into, all the parties apparently deeming it for their interest to waive their respective rights to the property as against each other, and influenced in part, probably, by the consideration that a large expense in maintaining the property would have to be incurred, and the defendant was willing to advance the necessary funds. Upon the execution of the agreement the defendant took possession of the property. The value of the property at that time was about $30,000.

The decree of the district court dismissing the bill, as appears from the opinion of the district judge, was reached upon the theory that the proofs did not warrant the conclusion that the defendant knew that the transfer was made in fraud of the provisions of the bankrupt act, because it was not chargeable with knowledge that there were any creditors of the bankrupt except those who were parties to the tripartite agreement. This conclusion cannot be accepted as satisfactory. Without amplification, it must be determined that inasmuch as the transfers made by the bankrupt were not made in the usual and ordinary course of his business, they were *prima facie* evidence that a fraud upon the bankrupt act was intended; and the facts and circumstances imposed upon the president of the defendant the active duty of inquiring into the debtor's financial situation. He knew that all the available property of the debtor was included in these transfers. He knew that the debts of the creditors present largely exceeded in amount the value of the debtor's property. He knew that all the creditors present occupied intimate or confidential relations with the debtor. If he had made reasonable inquiries and been informed that the posture of affairs was attributable only to the efforts

of rival creditors to obtain precedence as between themselves, and that there were no other creditors, a different case would be presented. Not having done so, the defendant is chargeable with knowledge of what its president might have ascertained.

There is, however, a fatal difficulty in the way of any decree for the complainant which does not seem to have been suggested in the district court. Dinegar, Calvin, and Cole, are indispensable parties to the controversy, without whose presence the court could not proceed to a decree. They were not only parties to the tripartite agreement, which is now assailed as fraudulent, and under which the defendant acquired the title now sought to be invalidated, but they claimed rights in the property in hostility to the bankrupt, and which authorized them to transfer the property to the defendant independently of any co-operation of the bankrupt. Assuming the tripartite agreement to be void as to the complainant because in contravention of the bankrupt act, it was good as between the defendant and Dinegar, Calvin, and Cole; and if they had title to the property the defendant acquired it, and the complainant has no interest in it. If they had valid liens upon it, the defendant acquired those liens, and should be permitted to retain them. As they are not parties, the validity of their title or liens, as between themselves and the defendant, cannot be finally determined. If it should be adjudged that their titles or liens were void as to the complainant, they would not be concluded, and could still insist, as to the defendant, that the transfer was valid, and that defendant must account for the proceeds of the property according to the tripartite agreement. Assuming that their rights would not be affected by a decree, it would deliver over the rights of the defendant and the question of its liability to these parties to a new and independent litigation. The tripartite agreement constituted the property transferred by it a trust fund for the benefit of all the parties to it. The bill seeks to reach this fund and appropriate it to the complainant without giving those who created the fund and are its equitable owners an opportunity to defend their interests. If this bill were framed to reach only the interest of the bankrupt, that interest could only be ascertained by ascertaining the interests of Dinegar, Calvin, and Cole, and as a decree would not bind them, the defendant would be turned over to a fresh controversy with them, in which a different determination might result.

In any aspect of the controversy, Dinegar, Calvin, and Cole have such an interest in the subject-matter that a decree could not be made without affecting their interests, or leaving the controversy in

such a condition that complete and final justice to the defendant will not have been done. Story, Eq. Pl. § 83; *Shields* v. *Barrow*, 17 How. 130; *Coiron* v. *Millaudon*, 19 How. 113; *Barney* v. *Baltimore City*, 6 Wall. 280; *Ribon* v. *Railroad Companies*, 16 Wall. 446; *Gray* v. *Schenck*, 4 N. Y. 460; *Vanderpool* v. *Van Valkenburgh*, 6 N. Y. 190.

The decree is reversed, without costs to either party, and the case remanded to the district court with directions to enter an order requiring the complainant to bring in the necessary parties defendant by amendment of the bill and proper process within a time to be limited; and, if such parties are brought in, to take such further proceedings in the cause as may be proper, but in default thereof to dismiss the bill.

McCONNOCHIN and others *v.* KERR and others.

(*Circuit Court, S. D. New York.* February, 1883.)

SALVAGE—CO-SALVORS.

The receipt by the owner and captain of a vessel of the whole compensation awarded as salvage would necessarily import its receipt for the benefit of all other co-salvors interested in the same service, and so exonerate the owners of the vessel, to which the service was rendered, from any liability to others of the saving crew.

In Admiralty.

On July 14, 1880, about 2 o'clock A. M., the iron steam-ship Pomona, while on a voyage from New York to Montego bay, was attracted by signals from the iron steam-ship Colon, which was lying nearly in her course, and bore towards her. As she approached she was met by a small boat from the Colon, bearing a request from the latter's captain for an interview. The Pomona's captain thereupon went aboard the Colon, and was informed by the latter's captain that he wished to be towed to Fortuna island to repair his machinery. The after crank-pin of the shaft of the Colon's engine was broken, and the columns above the engine; the forward crank-shaft bent; and the condenser and low-pressure cylinder were cracked. The high-pressure engine could have been repaired without outside assistance in about seven days, but the low-pressure engine could not have been at all. The Colon was provided with a full set of sails, and with favorable winds, could have made anchor. She was in the track of vessels going through Crooked Island passage, and could have made

anchor at Castle island, 31 miles off. There was a light easterly wind at the time, with which the Colon could have made about a knot an hour, but there were periods of calm. Fortuna island was the nearest safe anchorage, and was 57 miles distant, and directly behind the Pomona's course. The gales incident to that locality were northers and hurricanes, and the Colon's captain felt that the situation involved danger. The Colon's captain desired to agree with the Pomona's captain for the price of the service, but the latter declined, and it was agreed that the compensation should be left to the owners to adjust. The Colon was of about 2,700 tons, and was tight, staunch, and strong, and in good condition, except her disabled machinery, and well supplied.

The Pomona was of 391 tons, and not calculated for towing; of the value of about $60,000, with a full cargo, value not stated. A hawser was passed from the Colon to the Pomona. The vessels got under way about 4 A. M., and arrived at Fortuna bay about 3:30 P. M. of the same day, without difficulty. They sighted two other vessels on the way; and before reaching Fortuna island the wind had died away and become a dead calm. The Pomona was detained about a day on her voyage. The extra labor imposed on her crew was very light.

About two weeks after the occurrence the Colon reached New York, and was libeled by the owner and captain of the Pomona for salvage. The suit was settled by the payment of $3,000 by the owner of the Colon, and the costs of suit. This sum was received by the owner and captain of the Pomona with the understanding, as between them and the owner of the Colon, that the payment should cover the whole service rendered to the Colon; and it was received in behalf of themselves and all others entitled to share in any salvage reward.

Upon the facts, one-fifth of the sum received is a sufficient compensation for the officers and crew of the Pomona for the services rendered. The Pomona had a crew of 15 officers and men.

Butler, Stillman & Hubbard, proctors for libelants and appellants.

Jas. K. Hill, Wing & Shoudy, proctors for respondents and appellees.

WALLACE, J. The appellants, members of the crew of the steam-ship Pomona, filed their libel against Kerr, the owner, and Mahlman, the captain of the steam-ship, to recover their share of $3,025.75, alleged to have been received by Kerr and Mahlman for salvage services rendered by the Pomona to the steam-ship Colon. The district

court dismissed the libel for the reason that the sum received by the appellees was not paid to or received by them for salvage services rendered by the Pomona, but for towage services.

If the payment was received as salvage compensation for the entire service rendered by the Pomona, the libelants are entitled to recover. As is tersely stated by the learned district judge in his opinion, "the receipt of the whole compensation as salvage would necessarily import its receipt for the benefit of all the other co-salvors interested in the same service."

That the service was a salvage service, though of an inferior order of merit, seems very clear. Such was the conclusion of the district judge, and, as will hereafter appear, such was the theory of the appellees and of the owner of the Colon when the former made claim against the Colon for compensation. That the payment received by the appellees was intended to be in full for the services rendered by the Pomona, is not disputed.

The case, then, is narrowed to the single question whether the parties to the payment regarded it as a payment for salvage or as one for towage only. If it was intended to cover towage only, then, of course, the crew of the Pomona have no interest in it, because their rights as salvors were not in controversy and could not be affected by any settlement without their consent, and because neither of the parties to the payment contemplated the adjustment of the rights of the crew.

Whether the parties to the payment regarded it as made for salvage depends upon the force of evidence, which may be briefly stated: About a fortnight after the services were rendered by the Pomona to the Colon, the latter arrived at New York, and a libel was filed against her by the appellees, "for themselves and all others entitled," for salvage. Process was issued, and the Colon was taken into custody by the marshal. Thereafter the owner of the Colon answered the libel. The answer alleged that "the services rendered were only towage, and should not be ranked as salvage services of peculiar merit." The answer also alleged that $1,000 would fairly compensate for the services, and that such sum was tendered and paid into the registry of the court.

Shortly after the filing of the answer, in order to settle the controversy without litigation, negotiations took place between the owner of the Pomona and the owner of the Colon, which resulted in an agreement that a Mr. Dennis, the vice-president of a marine insurance company, should act as arbitrator, and fix the sum to be paid

by the Colon. Informal statements were made to the arbitrator in behalf of both sides, and he made an award stating that he did not regard the service as anything more than in the nature of a towing service, and should consider $3,000 a very liberal compensation, and his decision was to award the sum of $3,000 in full for the service, besides the legal expenses incurred by the Pomona, which he directed to be paid by the owner of the Colon. The terms of the award were complied with by the owner of the Colon, and thereupon a receipt was delivered to the owner of the Colon, entitled in the pending suit between the appellees and the Colon, and signed by the proctors for the libelants in that suit, reciting the payment of $3,025.75 as the amount agreed upon in settlement of the action, exclusive of the fees of the officers of the court, which were to be paid by the claimant.

Mr. Dennis testifies that he understood he was to decide whether the service rendered by the Pomona was a salvage service, as well as the amount of compensation which should be paid; but neither of the parties to the arbitration so testify, and the captain of the Colon, who was present when the arbitration was agreed upon, states that it was agreed that Mr. Dennis should make an award as compensation for the salvage.

Inasmuch as the claim made against the Colon by the appellees was for salvage, and was in behalf of themselves and all others entitled; as the owner of the Colon did not seriously dispute the theory that the service was salvage, but insisted that it "should not be ranked as salvage of peculiar merit;" as the paramount question between the parties to the suit against the Colon was as to the amount to which the libelants were entitled; and as the amount finally paid was paid in settlement of the suit, and was receipted for as so paid by the appellees,—the conclusion is reached that the payment was understood by the parties to it as relieving the owner of the Colon from all further responsibility for the service rendered by the Pomona, and as shifting upon the appellees the duty of satisfying all others who might be entitled to a share in the reward. If this was the contemplation of the parties it would be manifestly unjust to subject the owner of the Colon to liability to the appellants; and yet such would be the result if the conclusion of the district court should be approved, because the service was, in fact, a salvage service.

The circumstance that the arbitrator incidentally decided that the service rendered by the Pomona was only in the nature of a towage

service, is not controlling. The real inquiry is, what did the parties to the payment understand it was intended to satisfy? If they believed the payment to be the reward of a salvage service, and as such was to include the claims of every person entitled to share in the reward, then the appellees received it with the obligations which that understanding impressed upon the transaction. The only importance of the arbitrator's decision consists in the effect it may have produced upon the understanding of the parties. If it led them to suppose that the crew of the Pomona had no interest in the adjustment, then the decision was controlling; otherwise, not. If, notwithstanding, they understood that the rights of the crew were represented by the owner and captain, the libelants in the action, and that the owner of the Colon was to be absolved from all further responsibility for the services rendered, whatever their nature may have been, the decision of the arbitrator was not of the least importance. It is quite evident that, whatever the arbitrator may have thought, neither of the parties to the arbitration regarded the services as mere towage services. What the parties believed is apparent from the statements in their pleadings in the pending action, and the recitals in the receipt by which the action was acknowledged to be satisfied. Moreover, the sum awarded was utterly inconsistent with the theory of a mere towage reward.

The question whether the crew had any claim growing out of the service, was not suggested by the parties, or considered by the arbitrator. As the crew could not be bound by his decision, and as he was to decide what compensation should be paid for the whole service rendered, and as the paramount object of the arbitration was that this decision should exonerate the owner of the Colon from the claim for salvage made in their libel by the appellees, the presumption is cogent, if not irresistible, that both parties intended that the latter should be exonerated completely; and if, incidentally, that should require the satisfaction of the claims of the crew, that liability should rest upon the appellees.

The large compensation awarded seems to have been given upon the theory that, although the value of the Pomona's services to the Colon was of great value to the latter, in view of the exigency of her situation, the efforts of the Pomona involved no appreciable danger, hardships, or labor to herself or to her crew; nothing but the delay of a day, with its attendant expense, and the risk assumed by a deviation on her voyage. She probably sustained the chance of loss by the derangement of her business engagements which a day's delay

might cause; and this seems to have been estimated as an element of the compensation to which she was entitled. The extra labor imposed on the crew was quite inconsiderable.

Upon all the facts, one-fifth of the whole salvage will adequately reward the officers and crew. The decree is that $600, with interest at 6 per cent. from October 4, 1880, be deposited in the registry of the court, to be distributed to the officers and crew in the proportion their monthly wages bears to the whole monthly pay-roll. The libelants are entitled to costs of the appeal, and in the district court.

The Annie Henderson.

(*District Court, D. Connecticut.* February 23, 1883.)

1. Salvage—Reward for.
   The reward given for salvage is based upon the danger to life and property incurred by the salvors, the value of the property saved, and the skill, labor, and duration of the services.
2. Same—Amount of Salvage when Vessel is Derelict.
   The present state of the law does not allow a too-close discrimination, in regard to the amount of salvage, between property which has become derelict, and that which is not: the true principle is adequate reward, according to the circumstances.

In Admiralty.

Samuel Park and *Augustus Brandegee*, for libelants.

John C. Dodge & Sons, for claimants.

Shipman, J. This is a libel against the schooner Annie L. Henderson and her cargo for salvage.

On Sunday evening, September 10, 1882, the three-masted schooner Annie L. Henderson, owned by the claimants, on her voyage from Apalachicola to Boston with a full cargo of yellow-pine boards, struck on the Great rip, about 10 or 11 miles east of Sancotty head, Nantucket. She filled with water and lay on the bottom, unmanageable. About 275,000 feet of boards were under deck and about 100,000 feet were on deck. By order of the captain a part of the deck-load was thrown overboard. About half past 5 o'clock on the morning of September 11th, the captain, being of opinion that a storm was coming on, that the vessel would go to pieces, and that it was dangerous to life to remain on board, ordered the sails furled, and with all his crew, eight in number, left the vessel in a boat, and landed on Nantucket about

8 o'clock on the same morning, and reached the town of Nantucket about 11 o'clock A. M. The crew immediately went on board the steam-boat which left Nantucket about 12 o'clock, and went to Boston. The captain and crew took from the vessel their clothing, the signal lanterns, the log, the marine instruments, charts, and chronometers.

By the assistance of Mr. Macy, the underwriters' agent at Nantucket, the captain procured a schooner and about 15 men to go to and rescue, if possible, the wreck, when the weather would permit. On Monday, the 11th, there was a good strong breeze, and it rained very hard part of the day. On Tuesday morning, the 12th, it blew heavily from the north-east, and it was unsafe to leave the harbor. On Tuesday afternoon a watchman, who had been placed with a glass in the Nantucket town-clock tower to descry the vessel, reported that she was adrift and drifting to sea. The wind was too heavy to permit the chartered schooner to leave till 12 o'clock at night. During Tuesday night the Henderson drifted out of sight of Nantucket. On Wednesday morning the weather moderated and soon went into a calm. The chartered vessel made an ineffectual attempt about 7 o'clock to get out of the harbor. That afternoon the captain learned that the fishing smack of the libelants had started early in the morning for the Henderson, and as the rescuing expedition had had an eight or ten hours' start, he abandoned the idea of going in quest of his vessel, and on Thursday noon he went to Boston, thinking that if she had been picked up he could there receive prompt information of her recovery. On Thursday the weather was rough and the wind from the south made a heavy sea, so that it would have been difficult for a vessel from Nantucket to have reached the Henderson if she had not been found by the Osprey.

On Tuesday morning, September 12th, the fishing schooner Osprey, owned by the persons named in the libel, was lying inside of the fishing rip at Nantucket shoals. She was fishing for cod and had been away from Noank, Connecticut, about a week, and had some 1,300 or 1,400 fish on board. About 7 or 8 o'clock in the morning the wind commenced to rise from the north-east and the smack was obliged to start for a harbor. Inside the Great rip she found drifting lumber, and about 11 o'clock saw, among the shoals, a schooner about one and one-half miles away, drifting to the south-west, and towards the South shoals, and went near enough to see that her crew had left her. There was a heavy sea, and it was blowing too hard for the

Osprey to board her. The Osprey got to land under the south side of the island about 4 P. M. on Tuesday. Wallace Brown was captain; Robert Machet was mate; Robert F. West, James Shirley, Robert Brown, and Moses Chapman were the crew of the smack. About 2 o'clock P. M. on this Tuesday, William James Burgess, of Nantucket, one of the libelants, having heard that a vessel was in distress off the island and the captain was in town, went to the town-clock tower with his glass and discovered the Henderson drifting off the south shore, and, at the same time, saw the smack Osprey. He immediately organized a party, consisting of Frederic Marvin, Francis A. Mitchell and James Ramsdell, who furnished his whale-boat, and all went in a wagon or other conveyance to the south shore. John P. Tabor followed on the railroad. When the weather became quiet, they launched the boat from the beach and reached the Osprey about 5 o'clock. They left Nantucket in haste, because they wanted to get ahead of any expedition which anybody else might organize.

The next (Wednesday) morning, between 4 and 5 o'clock, the Osprey, with her own crew and the five Nantucket men, and towing the whale-boat, started for the Henderson, and sailed till 10 o'clock A. M., when the wind entirely went down. Capt. Brown, Machet, and the Nantucket men took the whale-boat and rowed 18 or 20 miles, till 3 o'clock, when they reached the vessel and found that the mate and four or five men from the schooner Sullivan Sawin were on board and were stripping the drifting schooner and had cut off the mizzen sail. The mate told Capt. Brown that he must see the Sawin's captain, and if he (the Sawin's captain) said keep on, they would; if not, they would leave. The seven libelants then rowed about six miles, to the Sullivan Sawin, saw her captain, who gave directions that his mate and crew should leave the Henderson, whereupon the libelants returned to the schooner and obtained possession. They found that she was listed to the starboard and was down by the head, the chain-plates were broken, the mainmast was only held by the topmast back-stay, and was swinging to and fro, the halyard and sheets were afoul of the lumber, her starboard rail was a foot out of water, her deck was under water. They secured the mainmast, set up the rigging, disentangled the lumber, got out two hawsers, and lighted oakum dipped in a barrel of oil which was on board, so that the Osprey could find them. About 10 o'clock at night the Osprey came up, and the rescuing party got something to eat for the first

time since morning. Five men staid on board the Henderson, Capt. Brown being in command, and the remainder, Robert West being in command, managed the Osprey. She towed the Henderson all night, with an increasing E. S. E. breeze. At 5 o'clock A. M. on Thursday there was a strong breeze, which increased till 11 o'clock A. M., when there was a high wind. At this time the vessels were S. S. E. of Block island. The hawsers parted off Block island about 11 o'clock. The Osprey made fast to the Henderson again at Montauk. They continued together seven or eight miles, till they parted again in the Race about 6 o'clock. The vessels reached New London about half-past 8 o'clock on Thursday evening. Soon after they arrived there was a very heavy thunder-storm.

The small boat which the Osprey sent on Thursday morning to the Henderson to provision her was upset, the provisions were lost, and her crew had nothing to eat until they reached New London. The Henderson was full of water; the only dry place on her was aft; her masts swayed to and fro; and she steered very hard. When the wind was strongest she carried foresail and jib. The wind was south-east until 3 o'clock P. M. on Thursday, when it changed to south. The most difficult part of the voyage was in the Race. Without the aid of another vessel the Henderson could not have been brought to port. The Osprey could not have done it without the aid of the Nantucket men.

The testimony was substantially concurrent that it was better to go to New London than to New Bedford or Nantucket. The point in dispute was whether it would not have been better seamanship to go to Newport rather than to New London, which is confessedly the more distant port from the point where the Henderson was found. The Osprey did not start for New London, but kept away from the land, so that if the wind shifted she might be in readiness to go to the Vineyard or to New Bedford or to New London. When she made Block island, Capt. Brown thought of going to Newport, but at that time, certainly, New London was the safest harbor to make. I am of opinion that the captain exercised good judgment in the course which he pursued from the beginning of the voyage.

The Henderson was 3 years old, rated A 1, cost $27,354, and, before the accident, was worth $23,000. To repair and provide her with furniture and an equipment cost $7,137.11. In her disabled condition, when she reached New London, she was worth $16,000. Her cargo was worth $5,000. The Osprey was worth $1,500. The

danger from which the Henderson was rescued was very serious. It is impossible to tell whither she would have drifted,—whether to sea, as is the theory of the claimants, or to Martha's Vineyard or Muskeget channel, as is the opinion of the libelants. But, when she was found, she was in the hands of those who were stripping her. She would then have been turned adrift, without sails or rigging, and, if found by a passing vessel, would have been unable to help herself in the violent weather of Thursday and the following days. Her ultimate fate would have been very problematical.

The services of the salvors were prompt, energetic, untiring, laborious, and skillful. They started between 4 and 5 o'clock in the morning. The captain started about 7 o'clock, and could not get out on account of a calm. When the wind died away the salvors rowed 18 or 20 miles for 5 hours, and found the vessel in the hands of wreckers, then rowed 12 miles more, without food, and got peaceable possession. From that night till the next night the men on board the Henderson were without food, and the men on both vessels were without sleep. They were at constant and hard work for two entire days, and on Thursday in a work of danger. The cargo of the Henderson was so buoyant that she could not sink, but in the violent weather of Thursday the chances which her crew took of the vessel's tripping, and of being themselves sent overboard, are not to be overlooked. The contrast between their promptness and energy and the captain's somewhat leisurely movements, is apparent. The libelants worked under the spur of the hope of unusual reward, while the captain felt no such goad. Their promptness saved the vessel and cargo from great danger.

The vessel was by the captain's order abandoned by her crew, with no expectation of return. The master engaged a vessel and crew to go after the wreck, and had more than a mere intention of saving his vessel. He took steps to return himself, and to endeavor to save her. I do not think it material to find whether she was not technically a derelict, because, in the present state of the law in regard to the amount of salvage, it seems to me that the question is not one of substantial importance. *Post* v. *Jones*, 19 How. 150; *The Florence*, 20 Eng. Law & Eq. 607. The vessel, at least, came near to being a derelict, and was a *quasi* derelict.

Under all the circumstances of the case, I think that the libelants are entitled to the sum of $4,950, and their costs. The salvage is to be divided in the following manner:

To the owners of the vessel,	$1,000 00
To Capt. Wallace Brown,	600 00
To Robert F. West,	500 00
To Robert Matchet, the mate,	400 00
To each one of the other three smacksmen, $300, amounting to	900 00
To James Ramsdell, the owner of the whale-boat,	350 00
To each one of four other Nantucket men, $300, amounting to	1,200 00
	$4,950 00

I should have allowed to the Nantucket men more than to the smacksmen, on account of their extra expenses at New London, and in returning home, but I cannot avoid the idea that there was a flavor of unfairness in their hurrying away from Nantucket, without communicating with the captain, who, they had good reason to suppose, was organizing an expedition for the relief of his vessel. On the other hand, the captain would not probably have found his vessel. He would not, in all probability, have got away in his chartered vessel from Nantucket, either in the day-time on Wednesday or on Thursday.

MUNTZ and others *v.* A RAFT OF TIMBER.*

(*Circuit Court, E. D. Louisiana.* January, 1883.)

1. JURISDICTION.
   A raft of timber is subject to the jurisdiction of the admiralty court in the matter of salvage.
2. SALVAGE.
   If part of a salvage service is performed by one set of salvors, and the salvage is afterwards completed by others, the first set are entitled to reward *pro tanto* for the services they actually rendered, and this even though the part they took, standing by itself, would not, in fact, have effected the salvage.

In Admiralty.

R. King Cutler, for libelants.

E. Warren, for claimants.

PARDEE, J. On a very foggy morning in February, 1880, a large raft of logs broke loose in the upper part of the port of New Orleans. It was discovered by the steam-tug Margaret, a little steam ferry-boat then plying across the river from Louisiana avenue, in the city of New Orleans, to Harvey's canal. The men on the raft called to the ferry-boat to assist in landing the raft. The Margaret went to the assist-

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

ance of the raft at considerable peril to herself, and with her steam-power and crew rendered more or less service in getting the raft towards the right bank of the river, where she could be landed in safety to herself and the other shipping in the port; but before the landing was accomplished the large tow-boats Continental and Wasp came up, and, taking charge of the raft, towed it to a safe landing-place in the lower district.

The owner, captain, and crew of the Margaret libeled the raft for salvage. The district judge allowed $51 for the boat and crew. In this court on appeal it is urged—*First*, that a raft of timber is not subject to the jurisdiction of the admiralty court in the matter of salvage; *second*, that the Margaret was too small and weak to be able to render salvage services to a large raft; *third*, that no salvage services can be allowed compensation where the property is not saved, and that the raft in this case was saved by the large tug-boats and not by the Margaret; *fourth*, that the services of the Margaret were of no value to the raft.

A few undisputed principles taken from the text-books settle this case:

"Salvage is compensation for maritime services rendered in saving property or rescuing it from impending peril on the sea, or on a public navigable river or lake, where interstate or foreign commerce is carried on." Marvin, Salvage, § 97. "Salvage may be shortly described as an allowance made for saving a ship or goods, or both, from the damages of the seas, fire, pirates, or enemies." Jones, Salvage, 1. "It is absolutely essential that the salvors should have rendered actual assistance to vessel in distress." Jones, *supra*, 4. "If part of a salvage service is performed by one set of salvors, and the salvage is afterwards completed by others, the first set are entitled to reward *pro tanto* for the services they actually rendered, and this even although the part they took, standing by itself, would not, in fact, have effected the salvage." Jones, *supra*, 9. "Salvage constitutes an important subject of the admiralty jurisdiction, and this jurisdiction may be exercised as well *in personam* as *in rem*." Conkl. Adm. 273. "The district courts shall have jurisdiction as follows: * * * *Eighth*, of all civil causes of admiralty and maritime jurisdiction." Rev. St. § 563.

The district judge was of the opinion from the evidence, that the services of the Margeret and her crew were more or less valuable in saving the imperiled raft, and allowed $51 as compensation.

This judgment should be affirmed, and a decree having that effect will be entered.

MUNTZ and others *v.* A RAFT OF TIMBER.*

(*Circuit Court, E. D. Louisiana.* January, 1883.)

JURISDICTION—RAFT—SALVAGE.

In a case where a raft is adrift in a fog on the Mississippi river, in peril of loss and great damage to itself and to other property, where the persons on the raft in charge called for assistance, and services of a maritime character were rendered, and the court entertained and maintained jurisdiction of a libel for salvage, its decision need not be taken as holding that a raft is a vehicle of navigation, or can commit a maritime tort.

Tome v. *Four Cribs Lumber*, Taney, 536, distinguished.

In Admiralty. On petition for a rehearing.

R. King Cutler, for libelant.

E. Warren, for claimants.

PARDEE, J. A rehearing is applied for on the authority of *Gastrel* v. *Cypress Raft*, 2 Woods, 213; *Jones* v. *Coal Barges*, 3 Wall. Jr. 53; *Tome* v. *Four Cribs Lumber*, Taney, 536. The case in Woods' Reports was a claim made for the ownership of logs cut by trespassers on lands in Mississippi, and incorporated with other logs in the raft in controversy. The case in Wallace, Jr., was one of collision between two barges. Neither of these cases touches the question before the court. The case in Taney, while it may declare the doctrine claimed by claimants' proctor in this case, seems to have been decided more upon the merits than upon the jurisdiction of the court. The court says, however:

"The result of this opinion is that rafts anchored in the stream, although it may be a public navigable river, are not the subject-matter of admiralty jurisdiction in cases where the right of property or possession is alone concerned."

It is not necessary to dispute this conclusion or any other in the Taney case, in order to maintain jurisdiction in this case. Instead of a raft anchored, or one afloat, according to the usage of the trade, this case showed a raft adrift in a fog, in peril of loss and great damage to itself and to other property, where the persons on the raft and in charge called for assistance, and services of a maritime character were rendered. The decision in this case need not be taken as holding that a raft is a vehicle of navigation, or can commit a maritime ort, or as being subject to any other obligations and responsibilities han a bale of cotton would be subject to under the same circumstances.

The petition for rehearing is refused.

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

The J. C. Williams.

(*District Court, S. D. New York.* January, 1883.)

1. Vessel—Ship's Husband—Lien for Advances—Subrogation.

Although, ordinarily, the general agent of a ship, or the ship's husband, has no maritime lien for advances made in the usual course of his employment about the business of the ship, because made presumably on the credit of the owners, yet when the circumstances show that his agency was an attendant upon his situation as mortgagee of the vessel, and for the purpose of further security, his advances in the management of the ship's business should be held to be made, not upon the personal credit of the mortgagor, but upon the credit of the vessel, and for the protection of his mortgage; and a maritime lien should, therefore, be sustained in his favor for such necessary payments and supplies as would be liens in favor of other persons, and he should be deemed equitably subrogated to the liens paid by him.

2. Same—No Lien for Commissions.

The agent's own commissions for advances and for obtaining freights should not, however, be allowed as liens.

In Admiralty.

W. R. Beebe, proctor for libelant.

John B. Whiting, proctor for claimant.

Brown, J. This cause, having been tried before a commissioner to whom it was referred, comes before me upon exceptions to his report in favor of the libelants for the sum of $4,150.10. The libelant is the receiver of Brett, Son & Co., who, in March, 1875, took a mortgage upon five-eighths of the bark, to secure $10,000 from John C. Williams, to whom they advanced that money to aid in the construction of the vessel. The bark was built at Shelbourne, Nova Scotia, and was a British vessel. At the time of the advances it was agreed that Brett, Son & Co., for their security, should have this mortgage, and also be the agents of the ship in New York.

The libel was filed in October, 1882, to recover a balance due to Brett, Son & Co. for various advances and payments on account of the ship from February 24 to May 31, 1882; and a supplementary libel was afterwards filed for additional charges and payments.

During several years after the bark was finished, Williams was in charge of her navigation as master and as owner of five-eighths, Brett, Son & Co. being her general agents in New York. Prior to the charges for which the libel is brought, however, Williams had left the vessel, and was succeeded by the first mate, Smith, as master, who is not a part owner; and the business of the bark remained under the management of Brett, Son & Co., as before. So far as appears from

the evidence, the bark seems to have run from New York to various ports and back, and the entire business management, procuring charters, attending to her outfit, repairs, payment of bills, and the collection of freights, seems to have been wholly in the hands of Brett, Son & Co. The owners of the other three-eighths, who appear as claimants of the vessel, received their share of dividends from Brett, Son & Co. as profits were made, while the proportion due to Williams, as owner of the remaining five-eighths, was applied on the mortgage debt.

Upon the hearing before the commissioner, some proof in regard to various items having been given, the correctness of the libelant's charges and credits were admitted by the claimants, reserving only the question whether they constituted a maritime lien which could be enforced *in rem* against the vessel.

If the situation of Brett, Son & Co., and their relation to the ship and her owners, were merely that of general agents, or ship's husband, making the advances here sought to be recovered merely in the ordinary course of their duties as such, I should be compelled to hold, upon the authorities, that they have no lien upon the ship therefor, although the owners would be personally liable to them for their several shares. In such cases the agent, or ship's husband, is presumed to act upon the personal responsibility of the owners only. He represents them in advancing moneys or in paying charges. His act is their act, and, ordinarily, must be presumed to be designed to discharge the ship from burdens, not to charge her, or to retain liens upon her, through any presumed equitable assignment or subrogation. *The Larch*, 2 Curt. 427; *The Sarah J. Weed*, 2 Low. 555, 562; *The Tangier*, 2 Low. 7. But in this case the agency of the vessel was evidently attendant upon the mortgage, and designed as a further security for the payment of the money advanced. When Capt. Williams left the vessel, no considerable part of the mortgage had been paid, and from that time, at least, Brett, Son & Co. had exclusive management of the business of the ship for the purpose of working off the mortgage debt.

Under such circumstances, it seems to me that it cannot be presumed that the advances and payments made by Brett, Son & Co., in the business of the ship, were made upon the personal credit of the owner. On the contrary, they were charges and payments necessarily made by Brett, Son & Co. in their endeavor to realize something to the credit of their mortgage on five-eighths of the vessel, and, in my judgment, should be deemed to be made upon the credit of the ves-

sel. This, it seems to me, would be clearly so, as respects Williams, owner of the five-eighths, and as respects the three-eighths owned by the claimants. I think the same inference should be drawn from the fact that the claimants clearly acquiesced in the management of the vessel by Brett, Son & Co., and must have known the circumstances, their situation as mortgagees, and the object of the management of the ship by them. As all these payments and advances were made with the claimants' knowledge and acquiescence, they would be, clearly, personally liable to Brett, Son & Co. for their shares of these necessary payments and disbursements. To them it does not appear to have been of any practical account whether the advances, as respects the three-eighths, are considered to have been made upon the credit of the vessel or upon their own personal credit. The former was clearly the case as to the five-eighths, and from that, I think, a similar intention should be inferred as to the three-eighths.

All the evidence points to the credit of the vessel and the recovery of the mortgage debt as the grounds of all the advances and payments by Brett, Son & Co.; and such, I think, must, in this case, be considered as the understanding of all the parties. Liens arising in the course of the business of the ship in favor of other persons would have priority over the mortgage lien, and in paying the amounts of such prior liens for the protection of their mortgage interest, Brett, Son & Co. should be deemed equitably subrogated thereto. *The Cabot*, Abb. Adm. 150; *The Tangier*, 2 Low. 7; *The Sarah J. Weed*, Id. 562.

For these reasons I think the present case should be held to be an exception to the ordinary rule as respects a ship's husband or general agent, and that the claim of a maritime lien by Brett, Son & Co. should be sustained for such necessary charges and payments for supplies or other necessaries furnished in the business of the ship as would have constituted liens if furnished by other persons, as being made in this case upon the credit of the vessel, and upon an equitable subrogation to the liens paid. Their own commissions, however, on the charter procured by them, should not be allowed as a maritime lien, nor commissions on their own advances, amounting together to $243.90. With this deduction the report should be confirmed, and a decree entered accordingly for the libelant, with costs.

WELLS and others v. OREGON RY. & N. CO.

SAME v. OREGON & C. RY. CO.

(*Circuit Court, D. Oregon.* March 19, 1883.)

1. EXCEPTIONS FOR IMPERTINENCE.

Exceptions to a bill for impertinence will not be allowed, unless it is clear that the matter excepted to cannot be material to the plaintiffs' case; and matters which may be so material are not necessarily impertinent because they are such as the court may judicially take notice of; nor is it necessarily impertinent in a bill for an injunction to refer to recent adjudications of the question involved, in similar cases in other courts.

2. ACT OF INCORPORATION—CHANGE OF CORPORATE NAME.

By an act of the legislature of Colorado of February 5, 1866, certain persons were incorporated as the "Holladay Overland Mail & Express Company," with the privilege and power of changing its name by an "order" of its directors "approved" by the stockholders; and the bill alleges that the stockholders, in pursuance of said act, duly changed the name of the corporation to "Wells, Fargo & Co.," which change was afterwards approved by the legislature by the act of January 26, 1872. *Held*, (1) that until the contrary appears, it should be presumed that the final action of the stockholders was had in pursuance of the order of the directors; (2) that the essential act in the proceeding was the vote of the stockholders, to which the order of the board was only preliminary, and therefore that portion of the act providing for such order ought to be considered merely directory; and (3) *semble*, that the act of 1872, approving the change, is not in conflict with section 1889 of the Revised Statutes, forbidding the legislature of Colorado from granting "private charters or especial privileges."

3. EXPRESS FACILITIES.

This term is probably a sufficient description of the accommodation or service which a railway or other transportation company is expected and may be required to furnish a person or corporation engaged in the express business.

4. EXPRESS BUSINESS.

This business has come to be a recognized branch of the carrying trade, of which the court will take notice; and a railway or other corporation created by the state to serve the public as a common carrier, is bound to furnish the usual and proper facilities to persons engaged in such business, who are so far the agents, bailees, and representatives of the public.

5. DECISIONS OF THE UNITED STATES CIRCUIT COURTS.

The circuit courts of the United States are co-ordinate tribunals, constituting a single system, and the decisions of one of them, deliberately made, ought usually to be regarded as decisive of the question involved, until otherwise determined by the supreme court.

6. COMPENSATION OF A RAILWAY CORPORATION.

Section 36 of the incorporation act, (Or. Laws, 532,) which declares a railway corporation formed thereunder to be a common carrier, and empowers it "to collect and receive such tolls or freights for transportation of persons or property thereon as it may prescribe," authorizes such corporation to take rea-

sonable toll, not inconsistent with its character and obligation as a common carrier, and no more; and, so far, it constitutes a contract between the corporation and the state, the obligation of which the latter cannot impair nor any court disregard.

7. REASONABLE COMPENSATION.

What is reasonable compensation under said section 36, when the parties cannot agree thereabout, is a question to be determined by the court; but in allowing a provisional injunction requiring a railway corporation to furnish an express company with the facilities theretofore enjoyed by it, over and upon its road, the court will assume that the compensation paid for such past facilities is reasonable, and require them to be furnished under the injunction at the same rate.

In Equity. Suits for injunction.

Clarence A. Seward, *M. W. Fechheimer*, and *J. R. Lewis*, for plaintiffs.

Joseph N. Dolph and *J. F. McNaught*, for defendants.

DEADY, J. These suits were commenced on December 11, 1882, and on the same day an order was made in each requiring the defendant therein to show cause why a provisional injunction should not issue, as prayed for in the bill; and also that in the mean time the defendants be so restrained. On January 25–6 the motions for provisional injunctions were heard at length—all the questions which can or may arise in the cases being argued by counsel with much zeal and ability. Contemporaneous with those, a similar suit was commenced by the plaintiff in Washington territory against the Northern Pacific Railway Company, and by an understanding between court and counsel a motion for an injunction was heard in that case at the same time with the Oregon cases—Mr. Chief Justice GREENE of that territory, in whose court the case is pending, being present at the hearing.

It appears from the bill in each case that the plaintiff is a corporation organized under the laws of Colorado, and engaged in the express business on the Pacific coast and elsewhere to the eastward of the Rocky mountains, including the country traversed by the lines of the defendants' railways, steam-boats, and steam-ships in Oregon, Washington, Idaho, California, and British Columbia; and has been such corporation and so engaged since February 5, 1866, when it succeeded to the express business carried on by Henry Wells, William G. Fargo, and four others, between New York and San Francisco, and elsewhere on the Pacific cost, since March, 1852.

The defendants, the Oregon Railway & Navigation Company and the Oregon & California Railway Company, are corporations formed under the laws of Oregon, with their principal places of business in

Portland, and engaged in the business of a common carrier of freight and passengers; and as such corporation the former owns and operates certain lines of railways, steam-boats, and steam-ships in Oregon, Washington, California, and British Columbia, and the latter owns and operates certain lines of railway in Oregon.

It is alleged in the bills that heretofore the plaintiff has been furnished by the defendants with all the necessary facilities for doing its express business over and upon their said lines of transportation, for which it has paid them a stipulated price, but that now the defendants refuse to furnish such facilities any longer, and have notified the plaintiff that hereafter they intend to do the express business on their lines of transportation themselves; and that such refusal would work an irremedial injury to the plaintiff.

The defendants filed exceptions to the bills for impertinence, which were heard and submitted at the same time with the motions for the injunctions. They are numerous, and include a large portion of the allegations contained in the bills, such as (1) matters which the court can judically know; (2) the extent, value, and importance of the express business in the United States, and the circumstances under which it has grown up and been transacted; (3) the usage and past conduct of railway companies in relation to the same; (4) the citation and quotation of acts of congress concerning or recognizing the express business; and (5) the averments concerning prior injunctions allowed by the courts in similar cases.

An allegation will not be expunged from a bill as impertinent unless its impertinence clearly appears; for if it is erroneously struck out the error is irremedial. Story, Eq. Pr. § 267.

Consistently with this rule I do not think these exceptions ought to be allowed. It may be material to a full and proper presentation of the plaintiff's case to allege the existence of facts within the judicial knowledge of the court, and, if so, they are pertinent thereto. The fact that they may be proved by reference to the judicial knowledge does not dispense with the averment of them, or render such averment impertinent. So, in regard to the allegations concerning the business in which the plaintiff is engaged and is seeking by this means to protect, the facts concerning its origin, growth, value, importance, and relation to the public and transportation companies, such as the defendants, may all be material to a proper understanding of the plaintiffs' case, and, if so, they may be stated with reasonable fullness in the bill. And this rule is more especially applicable to cases like these, which, although not exactly of first impression, involve the ap-

plication of established rules and principles to new and important instances arising out of comparatively recent but radical changes in the methods and circumstances attending the transit, receipt, transportation, and delivery of a very large amount of the valuable personal property in trust over the country.

Concerning the injunctions alleged to have been recently allowed in several of the United States circuit courts in similar cases, the matter is undoubtedly a proper one for the consideration of the court, as the adjudication of co-ordinate tribunals, and my impression is that it may as well be brought to the attention of the defendants and the knowledge of the court in this way, as similar adjudications, to which the plaintiff is a party, commonly are, in suits for infringement of patents. Curt. Eq. Prec. 30; Curt. Law of Pat. 544.

In answer to the applications for the injunctions the defendants filed the affidavits of their respective managers; but neither of these contradict or qualify the facts here stated, except in one particular. The affidavit of the manager of the Oregon & California Railway Company denies that the plaintiff has been notified that it would no longer be allowed express facilities on its lines of railway, but, on the contrary, avers that the plaintiff has a contract with said defendant for said facilities until November 1, 1883, as far south as Roseburg, but not over the extension being constructed to the southern boundary of the state, and then completed to Riddle's station, some 26 miles south of Roseburg. But it appears from the affidavit of the president of the plaintiff that he was informed by the president of the Northern Pacific Railway Company, and both the defendant corporations, in November, 1882, that the notice to the plaintiff from the Oregon Railway & Navigation Company, to the effect that it would not be allowed express facilities on its lines of transportation after December 31, 1882, except upon the steam-ships running between Portland and San Francisco, would lead to the same result in the case of the Oregon & California Railway Company, and that his board had determined to conduct the express business on the lines of the Northern Pacific Railway Company and those of the defendants for themselves.

Upon the facts, then, I think it may be concluded that the defendants intend and will, unless restrained therefrom, withdraw from the plaintiff on their lines of transportation all the express facilities heretofore afforded it, for the small portions of such lines which may not be included in that purpose at present would be of no benefit to the plaintiff if excluded from the remainder.

But, upon the case made by the bills, counsel for the defendants object to the allowance of the injunctions, because (1) it does not appear that the plaintiff is a corporation or has capacity to sue; (2) the statement as to the facilities heretofore afforded the plaintiff, and which will hereafter be required for the transaction of its business, is insufficient; (3) the defendants cannot be required, under their articles of incorporation and the laws of the state, to afford the plaintiff the facilities demanded, or to give it a preference over other shippers in the transportation of freight; (4) if the plaintiff is entitled to a continuance of the facilities heretofore afforded it over existing lines, it is not as to future extensions of such lines; and (5) the court has no power to determine the compensation to be paid by the plaintiff to the defendants for express facilities.

It is admitted that the plaintiff was, on February 5, 1866, duly incorporated, by an act of the legislature of Colorado of that date, as "The Holladay Overland Mail & Express Company," but it claimed that the subsequent attempt—November 12, 1866—to change its name to "Wells, Fargo & Company" failed of its purpose, and therefore there is no corporation of that name.

It appears that section 11 of the act incorporating the Holladay Overland Mail & Express Company contained a provision that "said company may change its name whenever the same shall be ordered by the vote of a majority of the board of directors thereof, at a meeting duly convened for that purpose: provided, such change is approved also by a majority of the stockholders in interest at a meeting duly convened for that purpose by a call from the president of the company."

The bills allege that "on November 12, 1866, and pursuant to the power conferred by section 11 of said act of incorporation, the stockholders of the said 'Holladay Overland Mail & Express Company' duly changed its said corporate name to the name of 'Wells, Fargo & Company;' and such change was duly approved by an act of the legislature of Colorado, passed January 26, 1872." The argument for the defendant upon this point is that a stockholders' meeting could not change the name of the corporation, because the act provided that the change should take place by the act of the directors, with the approval of the stockholders. In support of this construction of the act counsel cites *Wallamet Falls Co.* v. *Kittridge*, 5 Sawy. 48, in which case this court held that under section 19 of the Oregon corporation act, (Or. Laws, 528,) which provides that a meeting of the stockholders of

a corporation may "*authorize* the dissolution" thereof, that such vote did not dissolve the corporation, but only empowered the directors, by whom all the powers of the corporation were exercised unless otherwise specially provided, (Or. Laws, p. 526, § 9,) to take the necessary steps for its dissolution and winding up of its affairs. But the cases, so far from being parallel, are just the reverse. The Colorado act gave the preliminary action in the matter to the directors and the final effective action to the stockholders, while the Oregon act gives the initiative to the stockholders and the actual determination of the question to the directors. My impression is that upon the facts stated the the name of the corporation was duly changed.

And, *first*, it is alleged to have been done by the stockholders "pursuant to the power conferred" on them by the act authorizing the change,—that is, according to it; and to have been "duly" done by them,—that is, according to law. Upon these allegations, and until the contrary appears, I think it ought to be presumed that the action of the stockholders was taken after the preliminary order of the directors, rather than without it.

And, *second*, taking into consideration the whole provision on the subject of changing the name and the reason of it, the act ought to be construed as practically giving the power to make the change to the stockholders absolutely, with or without the preliminary order of the directors. The latter are not authorized to change the name, but to make an order that it may be done by the "company," and then comes the proviso and gives the final power over the subject to the "stockholders." The directors are the mere agents of the stockholders, and the clause giving them authority to order the change becomes a mere regulation of convenience concerning the method and order in which the thing is to be done, and not the essence of it. It is, therefore, merely directory. *Sprigg* v. *Stump*, 7 Sawy. 286, and cases there cited.

In *Rex* v. *Loxdale*, 1 Burr. 447, Lord MANSFIELD said: "There is a known distinction between the circumstances which are of the essence of a thing required to be done by an act of parliament and clauses merely directory."

It is not necessary, therefore, to consider what was the effect of the act of January 26, 1872, purporting to legalize the alleged change of name. For the defendants, it is contended that the act is invalid as being in conflict with section 1 of the act of March 2, 1867, (14 St. 426; section 1889, Rev. St.,) forbidding the legislature of a territory

"to grant private charters or special privileges," but permitting it to provide for the formation of corporations by "general corporation acts."

This argument assumes that a legislative act naming or changing the name of a corporation is so far an act authorizing the formation of a corporation,—a calling it into existence or conferring upon it a special privilege,—and *Newly* v. *Oregon Cent. Ry. Co.* 1 Deady, 616, is cited as showing that "the corporate name is a necessary element of the corporation's existence," without which "a corporation cannot exist." But this remark must be considered as made with reference to a corporation formed under the corporation act of Oregon, section 4 of which (Or. Laws, 525) expressly provides that the articles of incorporation "shall specify the name assumed by the corporation and by which it shall be known." And yet the law might provide that A., B., and C. should constitute or be formed into a corporation for any lawful purpose without any special name or designation. From the necessity of the case it would have to be described, rather than named, as A., B., and C., a corporation duly created or formed at a certain date for a certain purpose, and in time it might acquire the name of "the A., B. & C." railway or steam-boat company, as the case might be.

I doubt, then, if section 1889 of the Revised Statutes does prohibit a territorial legislature from naming or changing the name of an existing corporation, because such act is not a "charter" creating a corporation, or one conferring a "special privilege," within the meaning of the section. To name a corporation is not to create it any more than a person. Nor does it confer on it a special privilege. The privilege of having a name is not thereby monopolized or exhausted, but may be enjoyed by every corporation that has wit enough to devise one, upon the same terms. See *Southern Pac. Ry. Co.* v. *Orton*, 6 Sawy. 185.

But the attempt to legalize the change of name may be said to be an admission of its invalidity. Yet it must be considered that the matter of the change is lumped in the legalizing act with changes in the capital stock, and other "acts and proceedings of the corporation;" and therefore the validation of the change of name may have had very little to do with the passage of the act. And this suggestion gets force from the recital in the preamble to the act, to the effect that the name had been changed to Wells, Fargo & Company by "the board of directors and stockholders."

As to the insufficiency of the statement of the facilities allowed the plaintiffs on the defendant's lines, and which will hereafter be

required thereon for the transaction of its business, my impression is that the bills are probably explicit enough, though I think they might well have been made more so. But "express facilities" is a term which, from the nature of things, must by this time be pretty well understood between the parties most interested—the express company and the railway company.

As interpreted by the customs and usages of these parties, and sanctioned and adopted by the decisions of the courts, these facilities may be said to include the right to enter depots and stations with loaded and empty wagons; the use of the platforms and space for the loading and unloading of express freight; sufficient space in suitable cars, drawn in passenger or quick trains, for the transportation of such freight; and a messenger in charge thereof, with room for its assortment while in transit, and a sufficient delay at stations for the delivery and receipt of express matter. *Southern Exp. Co.* v. *Iron, etc., Ry. Co.* 10 FED. REP. 213, 869; *Southern Exp. Co.* v. *Memphis, etc., Ry. Co.* 8 FED. REP. 802.

"Express facilities," from the nature of the business, cannot be limited to a definite space, but must correspond in this and other particulars to the public want and convenience to which the express company ministers.

In these cases there can be no difficulty for the present in ascertaining the facilities required by the plaintiff. For the purposes of this application they are such as it has heretofore been allowed. Under the restraining orders allowed on the filing of the bills, the defendants are now furnishing and the plaintiff is receiving just such facilities without any inconvenience to either party. But the third objection, that the defendants cannot be required under their charter and the laws of the state to afford the plaintiff the facilities demanded, or to give it a preference over shippers in the transportation of freight, is the one principally relied on by the defendants to defeat these applications for injunctions. Upon this point, the arguments and brief of counsel for defendants have left nothing unsaid in their behalf. Briefly, the argument is this: At common law, while a common carrier must carry for all at a reasonable compensation, which must be settled by the courts if not agreed on by the parties, still he may discriminate in his charges by carrying in some instances for less than a reasonable compensation, if he chooses. There is no statute in Oregon changing this rule of the common law, or requiring a corporation to transport freight in a passenger train, and in the custody or under the control of the shipper, therefore, the defendants cannot be

required to carry freight for the plaintiff at the same rate they may for others, or to furnish it any such facilities. In short, it is denied that either under the laws of Oregon or the past dealings between the parties, "it is the duty of the defendants to permit an express business to be done over their lines of transportation at all, in the manner required by the plaintiff," and therefore they may refuse to do so if they please.

In passing upon this question, at this preliminary stage of these cases, I do not deem it necessary to do more than to state my impression of the law as applicable thereto.

In the case of the *Southern Ex. Co.* v. *St. Louis, etc., Ry. Co.; Same* v. *Memphis, etc., Ry. Co.; Dinsmore* v. *Missouri, etc., Ry. Co.; Same* v. *Atchison, etc., Ry. Co.; Same* v. *Denver, etc., Ry. Co.*, 10 FED. REP. 210, arising in Missouri, Arkansas, Kansas, and Colorado, and lately heard together at St. Louis before Mr. Justice MILLER, of the supreme court, and Circuit Judge MCCRARY, the defendants were perpetually enjoined from refusing or withholding the usual express facilities from the plaintiffs. In the opinion delivered by Mr. Justice MILLER it is stated that "the express business is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized," and sufficiently so "to require the court to take notice of it as distinct from the transportation of the large mass of freight usually carried on on steam-boats and railroads;" and "that the object of this express business is to carry small and valuable packages rapidly in such manner as not to subject them to the danger of loss and damage which to a greater or less degree attends the transportation of heavy or bulky articles of commerce, as grain, flour, iron, ordinary merchandise, and the like." And also that "it has become law and usage, and is one of the necessities of this business, that these packages should be in the immediate charge of an agent or messenger of the person or company engaged in it," without any right on the part of the railway company "to open and inspect" them; that it is "the duty of every railroad company to provide such conveyance by special cars or otherwise, attached to their freight or passenger trains, as are required for the safe and proper transportation of this express matter on their roads, and that the use of these facilities should be extended on equal terms to all who are actually engaged in the express business at fair and reasonable rates of compensation," to be determined by the court where the parties cannot agree thereon; and that a court of equity "has authority to compel the railroad com-

panies to carry this express matter and to perform the duties in that respect" as indicated.

Substantially the same conclusion had been reached by several other judges in the United States circuit courts in the same and similar cases reported in 2 FED. REP. 465; 3 FED. REP. 593; Id. 775; 4 FED. REP. 481; 6 FED. REP. 426; 8 FED. REP. 799.

The only case cited from the decisions of the federal courts to the contrary of these is *Chamblos* v. *Pa., etc., Ry. Co.* 4 Brewst. 563, in which a preliminary injunction was refused by Judge MCKENNAN in a similar case; and also the case of *New England Exp. Co.* v. *Maine, etc., Ry. Co.* 57 Me. 194, and *Seargent* v. *Boston, etc., Ry Co.* 115 Mass. 416, in which the right of an express company to what are known as express facilities on the defendants' roads was denied. But the very decided weight and number of these authorities recognize the existence of the express business and the right of those engaged in it to have the proper facilities therefor allowed them by the defendants, and to secure the same by injunction in case they are refused. Until this question is settled by the supreme court, these deliberate decisions of co-ordinate tribunals, like the circuit courts, ought, except in an extreme case, to furnish a guide for the decision of this court. This is the rule that has been followed by justices of the supreme court on the circuit, (*Washburn* v. *Gould*, 3 Story, 133; *Brooks* v. *Bicknell*, 3 McLean, 250; *American, etc., Co.* v. *Fiber, etc., Co.* 3 Fisher, 363,) and in *Goodyear, etc., Co.* v. *Milles*, 7 O. G. 40, Judge EMMONS examines the question at some length, and concludes that "if one system of co-ordinate courts more than another calls for the application of these general principles, it is that of the circuit courts of the United States. * * * Although divided in jurisdiction, geographically, they constitute a single system, and when one court has fully considered and deliberately decided a question, every suggestion of propriety and fit public action, demand that it should be followed until modified by the appellate court."

However, my own impressions of the law are in harmony with these rulings. If the defendants were merely private common carriers, and the fact being admitted, which is manifest, that within the last 30 or 40 years persons or organizations known as expressmen or express companies have grown up in the country and introduced and are conducting the business of transporting a class of comparatively small but valuable packages over railway lines in special cars attached to passenger trains in the charge of an agent, the same being collected and delivered by said companies at points beyond the line or *termini*

of the railway, it would be their duty to furnish the usual facilities for such transportation over their lines. The obligation of a common carrier, as that of others who serve the public, may vary with the condition and circumstances of society. What is suitable and convenient in one age is not in another. The individuals who constitute the public have found it convenient to employ the express companies to transport certain articles for them instead of attending to it in person. So far, then, these companies represent the public, and as it has become an established usage and common method in the carrying trade to transport such packages in the charge of the shipper in a special car, on passenger time, they have the same right to demand and receive these facilities at the hands of the defendants as would any one of the individuals whom they represent. But the defendants are common carriers, and more. They are also corporations created by the state for the public use, and may be compelled to perform their corporate functions accordingly. True, the stock of the defendants is private property, and their business is directly managed by private persons of their own selection. But, nevertheless, the prime purpose of their creation and existence is to furnish the public suitable and convenient facilities for transportation of freight and passengers. It is the business of the state to establish and maintain highways, as means of transportation and communication within its borders, and to this end it created these defendants, authorized them to condemn private property to their use, to construct and operate their roads, and to take tolls for carrying freight and passengers thereon. *Talcott* v. *Township of Pine Grove*, 1 Flippin, 144; *People* v. *N. Y. Cent. Ry. Co.* (N. Y. Sup. Ct.) Daily Register, Feb. 10, 1883; *Ry. Co.* v. *Maryland*, 21 Wall. 470.

The defendants having been created by the authority of the state to serve the public as common carriers, cannot lawfully omit or refuse to perform their duty in this respect. They exist to do the business of a common carrier, and to do it in that way and manner which the law directs or the well-established usage of the country requires. For this service they are entitled to a reasonable compensation. But it can make no difference to them whether such compensation is paid directly by the owner of the package transported, or by the plaintiff as his bailee and agent. Neither is the business of the plaintiff in any sense or degree a burden or tax upon the corporate facilities or resources of the defendants. On the contrary, it is, from the very nature of things, of benefit to them; for, by reason of the special

means it uses to collect, care for in transit, and deliver the freight confided to its custody on and beyond the line of the railway, it must contribute materially to the volume and value of the business done thereon.

In considering this phase of the question I have laid out of view the allegation that the plaintiff has expended time and money in building up its express business on and over the defendants' lines of transportation, which it would be unjust and inequitable now to deny it the further use and benefit of. And I rest my conclusions on the fact, as stated by Mr. Justice MILLER, that the express has become a recognized branch of the carrying trade, and therefore the defendants, being corporations required and authorized by the state to serve the public as, and transact the business of, common carriers, are bound to furnish the plaintiff, as the agent, bailee, and representative of the public, so far, with the proper and usual facilities for doing this branch of such trade.

This makes it unnecessary to consider the fourth objection of the defendants, that the plaintiff is not, by reason of the facilities heretofore afforded it on existing lines of transportation, entitled to the relief sought as to any future extensions thereof. And this brings me to the consideration of the fifth and last objection, that the court has no power to determine the compensation to be paid by the plaintiff to the defendants for the services demanded. Counsel for the defendants rest this objection on the ground that the state, in and by section 36 of the corporation act, has contracted with the defendants that they may charge such tolls as they may see proper, and that, therefore, they cannot be required to carry freight for the plaintiff on any other terms or conditions.

Section 2 of article 11 of the state constitution is also cited. It provides that corporations, except municipal ones, shall not be created by special laws; and "all laws passed pursuant to this section may be altered, amended, or repealed, but not so as to impair or destroy any vested corporate rights."

Section 36 of the corporation act (Or. Laws, 532) provides:

"Every corporation formed under this chapter for the construction of a railway, as to such road, shall be deemed common carriers, and shall have power to collect and receive such tolls or freights for the transportation of persons or property thereon as it may prescribe."

It is not apparent that this constitutional provision has any bearing on the question under consideration. The legislature has not undertaken to repeal or modify section 36 of the corporation act, and

this court is bound in the mean time to allow it full force and effect. If it constitutes a contract between the state and the defendants, by which they are absolutely and perpetually authorized to fix their own charges for transportation, as claimed by their counsel, it is protected from hostile legislation by section 10 of article 1 of the federal constitution. But if it is not a contract at all, but a mere permission for the time being, then it is not a vested right, but a matter subject to the power of the legislature. However this may be, it is in the mean time a law of the state applicable to the subject of the right of the defendants to take tolls, which this court must construe and give effect to accordingly.

And, first, the right to take tolls on a highway is an attribute of sovereignty, and cannot be exercised by the defendants without the authority of the state. It may be said that the authority to form a corporation to construct and operate a highway, as a common carrier, impliedly gives the right to take reasonable tolls for traffic thereon. But this has not always been conceded, and it is probable that the clause concerning tolls was inserted in this section primarily to authorize the taking of tolls at all, and then, for the time being at least, only in such amount as the corporation might *prescribe;* that is, fix and set down beforehand, and not according to the whim or caprice of each occasion. *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 544. Again, the legislature, in enacting this section, is presumed to have acted with knowledge of and reference to the fact that by the common law a common carrier was only entitled to a reasonable compensation for his services.

The reasonable inference from the circumstances is that the legislature, in consideration of the premises, intended to confer upon the corporation, so long as it maintained and operated its road as a highway, conducted by a common carrier, at least the authority to take reasonable tolls; in other words, the duty and obligation of a common carrier being imposed on the defendants, they were granted the corresponding privilege of charging a reasonable compensation for their services. And so far, I think, this section is a contract between the state and the defendants, the obligation of which it is beyond the power of the latter anywise to impair, (section 10, art. 1, U. S. Const.,) or any court to disregard. But, in my judgment, the section was not intended to do more than this, and ought not to be otherwise construed. It is a license or grant to the defendants upon sufficient consideration to take such tolls for freight and passengers as are consistent

with the duty and obligation they owe to the public as common carriers.

It is well settled that a grant of this kind is never to be construed beyond its plain terms, or contrary to the manifest reason of it; and if there is a reasonable doubt as to its scope or meaning, that doubt must be resolved in favor of the public or state. *Charles River Bridge* v. *Warren Bridge*, *supra*, 544, 600; Cooley, Const. Lim. 394, and the cases there cited. And this question seems in effect to have been similarly disposed of by Mr. Justice MILLER in the case of the *Southern Express Co.* v. *St. Louis, etc., Ry. Co.* 10 FED. REP. *supra*. For, in the answer of the defendant, as appears from a quotation therefrom in the brief of counsel for the plaintiff, it is stated that under its charter it was authorized to transport all articles usually carried on railways, and "to charge and receive such tolls and freights" therefor "as shall be to the interest of the same, and that the directors of the defendant are therein authorized to establish such tolls, and to alter the same from time to time;" and in the opinion allowing the final injunction he says, (10 FED. REP. 215:) "I am of the opinion that neither the statutes nor constitutions of Arkansas or Missouri were intended to affect the right asserted in these cases; nor do they present any obstacle to such decrees as may enforce the rights of the express companies." Under the circumstances, this language can only be understood as a decision that the grant to the Missouri corporation to take tolls in similar if not stronger language than the Oregon one, is to be taken and considered as a grant to take only reasonable tolls.

The question of the power or right of the defendants to engage in the express business at all, at least the accessorial service of collecting and distributing packages off their lines of transportation, has been argued also, but it is not necessary now to consider it. The plaintiff does not ask to exclude the defendants from the business, but only that it may be permitted to carry it on as heretofore.

On the whole, I am of the opinion that the plaintiff is entitled to the relief sought, and therefore ought to be secured by injunction, until the final hearing, in the use of the facilities for conducting its business heretofore allowed it by the defendants.

A special reason for allowing the provisional injunction is also found in the fact that by exacting the proper security from the plaintiff, the defendants will not be injured, even if it should be finally determined that the plaintiff is not entitled to relief; while if the in-

junction is not now allowed, its business will be like water spilled on the ground—irredeemably destroyed. Kerr, Inj. 212.

The defendants being secured by the operation of section 36 of the corporation act, as now construed, in the right to take reasonable tolls, the question of what is reasonable must, unless the parties can agree about it, be determined by the court. But, for the purpose of the provisional injunction, the court will assume that the compensation heretofore paid by the plaintiff to the defendants for express facilities, is reasonable, and will require the defendants to furnish them during the pendency of the suit, or until further order of the court, upon their lines of transportation, and the extensions of them, at the same rates.

Let an injunction issue commanding and restraining the defendant in each case, as prayed for in the bill; the plaintiff first giving bond, with sufficient sureties, to be approved by the master of this court, in the sum of $20,000, conditioned to pay the defendant a reasonable compensation from time to time for such facilities as heretofore, and all damages which the defendant may sustain by reason of this injunction, if the same shall be adjudged wrongful, to be ascertained by a reference or otherwise, as this court may direct. *Russell* v. *Farley*, 105 U. S. 443.

NICKALS and others *v.* NEW YORK, L. E. & W. R. Co. and others.

(*Circuit Court, S. D. New York.* January 1, 1883.)

1. CORPORATIONS—DIVIDEND ON PREFERRED STOCK—DEPENDENT ON DECLARATION OF PROFITS.

   The dividend on preferred stock may judiciously be conditioned on the declaration of profits by the board of directors of a corporation; and when such intention appears from the juxtaposition of terms, and an examination of the agreement of the shareholders, it will be sustained.

2. SAME—NATURE OF PROFITS.

   That a board of directors has determined to apply all profits made by a road to its improvement does not take away their present character. In this respect net earnings and profits are alike; and, largely at least, the improvement would be chargeable to capital.

3. SAME—RIGHT TO COMPEL DIVISION.

   The rights of preferred stockholders are not those of creditors; but still they may, under the plan of organization of a corporation, be made so far superior to those of common stockholders as to enable them to compel a division of profits, which the board of directors had determined to accumulate.

4. SAME—CASE STATED.

Owners of preferred stock entitled to an annual, non-accumulating dividend, dependent on a declaration of profits by a board of directors, which had reported more than sufficient net profits, but had determined to use all for the improvement of the road, can compel the payment of dividends therefrom. If they do not get their dividends each year, they will never get them; the expected increase in net earnings could not benefit them as long as the road could otherwise pay these non-accumulating dividends. Such property could be appropriated for the general good of all stockholders no more than any other property of these stockholders.

5. SAME—ASSIGNMENT.

Such rights of preferred stockholders to share in profits are mere increments of, and pass by assignment of, the stock; though this might not be true of fully-declared dividends.

In Equity.

C. E. Tracy, for orators.

Wm. D. Shipman, for defendants.

WHEELER, J. The defendant corporation appears to have been organized under the laws of the state of New York by the preferred and common stock and security-holders of the Erie Railway Company, pursuant to a plan of reorganization assented to by them, which became a part of its charter or certificate of organization under the law. Among other stock and securities of the new company provided for in the plan to be issued and delivered, there was to be, as specified in paragraph 13,—

"Preferred stock to an amount equal to the preferred stock of the Erie Railway Company now outstanding, to-wit, 85,369 shares, of the nominal amount of $100 each, entitling the holders to non-cumulative dividends at the rate of 6 per cent. per annum, in preference to the payment of any dividend on the common stock, but dependent on the profits of each particular year, as declared by the board of directors."

The board of directors, in "their report of the operations of the company for the fiscal year ending September 30, 1880," state that—

The gross earnings and operating expenses of the road, including all branches and leased lines, have been as follows:

EARNINGS.

From general freight,	$11,199,498 37	
" coal,	3,191,616 96	
" passengers,	3,682,951 18	
" mails,	163,771 38	
" express,	328,867 15	
" miscellaneous,	116,403 82	
		$18,693,108 86

Amount brought forward, - - -		$18,693,108 86
OPERATING EXPENSES.		
For conducting transportation, - -	$5,109,979 90	
" motive power, - - -	3,291,141 43	
" maintenance of cars, - - -	861,135 29	
" maintenance of way, - -	1,938,715 41	
" general expenses, - - -	442,953 32	
		$11,643,925 35
Net earnings from traffic, - -		$7,049,183 51
To which add earnings from other sources, - -		783,956 65
Total - - - - - -		$7,833,140 16
From which deduct interest on funded debt, rentals of leased lines, and other charges, - - - -		6,042,519 45
Leaving a net profit from the operations of the year of		$1,790,620 71

A dividend of 6 per cent. upon the amount of preferred stock outstanding would amount to $489,403.50. This whole amount of net profit, together with $737,119.34 received during the year from assessments on stock, was applied by the directors "to the building of double track, erection of buildings, providing additional equipment, acquiring and constructing docks at Buffalo and Jersey City, and to the addition of other improvements to the road and property." And they "Resolved, that in the present condition of the property of the New York, Lake Erie & Western Railroad Company, its directors do not deem it wise or expedient to declare a dividend upon its preferred stock." The orators are holders of preferred stock transferred to them since the close of the fiscal year 1880, and since the report of the directors of that year, and by their bill of complaint seek, among other things, that the net profits of that fiscal year be ascertained, and that the dividends due to the holders of preferred stock in respect thereof be directed to be paid.

There is no question made, nor any apparent room for any, but that all the rights which the orators have are the rights of stockholders as such, and not as of creditors, nor but that the holders of the preferred stock have rights under the law of the organization superior to those of the common stockholders, according to the plan of the organization. The principal question is as to the true construction and legal effect of this plan. Counsel, at the outset, differ as to what is the import of the language of this thirteenth paragraph. The counsel for the orators insists that the profits are what are to be

declared by the directors, and that a declaration of profits by them entitles the holders of the preferred stock to dividends from the profits so declared; while the counsel for the defendants insists that the dividends themselves are to be declared, and that until declared these stockholders cannot be entitled to any.

The sentence "as declared by the board of directors" is directly connected with the one embracing profits, and not with the one including dividends, and can only be construed as applying to the latter by outside force. It is argued that the expression is applicable to dividends, and not to profits, and that it must be understood as intended to apply to that to which it is appropriate. It is, however, not wholly inapplicable to profits. The affairs of the corporation were to be in the hands of the directors, and it might well be supposed that they would know and make known whether there were profits or not; and if any result was to be made dependent upon the existence of profits, the fact of their existence might well be referred to the declaration of the directors. This plan is an entire instrument, speaking the same language throughout, and the obvious meaning of similar expressions in other parts might throw some light upon the meaning of this. In paragraph 19 there are provisions for the payment of non-cumulative interest at "the rate of 6 per cent. per annum, or at such lesser rate for any fiscal year as the net earnings of the company for that year, as declared by the board of directors, and applicable for that purpose, shall be sufficient to satisfy." Here it is plain that the net earnings, and not the interest, are to be declared by the directors, and that the payment of the interest was to be dependent upon the declaration of the net earnings. There is nothing more incongruous about the declaration of profits than of net earnings by a board of directors of a railroad company, and it is natural to infer that the payment of dividends to preferred stockholders was intended to be made dependent, in one aspect, upon a declaration of profits by the directors, the same as a payment of interest to bondholders was upon a declaration of net earnings by the same board.

The next question is whether the directors have so declared such profits for the fiscal year 1880 as to entitle the holders of preferred stock to dividends for that year. They have expressly stated a net profit, after deducting from the earnings all expenses attending the making of the earnings, and of maintaining the property by which the earnings were made, and all fixed charges for interest and rentals,

several times larger than the whole amount of this dividend. They have, on the other hand, stated the improvements, and resolved that they do not deem it wise or expedient to declare a dividend to the preferred stockholders. There is no pretense but what the statements of the directors are all true, in fact, nor but that in what they have done they have acted in good faith.

Here is no question of separating one part of the business from the rest, as there was in *St. John* v. *Erie Ry. Co.* 10 Blatchf. 271, and 22 Wall. 136; there is here a net profit over all expenses of all the operations by which profit was made. It is wanted for judicious improvements of the property, looking to future profits. This does not take away its character as a present profit. It would be a profit, whether it should be laid out upon the property to enhance its value, or left in the treasury of the company, or divided among the stockholders. This question is somewhat like that in *Union Pacific R. Co.* v. *U. S.* 99 U. S. 402. There the question was as to net earnings. In treating this subject, Mr. Justice BRADLEY said:

"As a general proposition, net earnings are the excess of the gross earnings over the expenditures defrayed in producing them aside from and exclusive of the expenditure of capital laid out in constructing and equipping the works themselves. Theoretically the expenses chargeable to earnings include the general expenses of keeping up the organization of the company, and all expenses incurred in operating the works and keeping them in good condition and repair; while expenses chargeable to capital include those which are incurred in the original construction of the works, and in the subsequent enlargement and improvement thereof."

There is a difference in some respects between net earnings and profits, but not in this aspect. What would be net earnings would be a profit, unless there should be some liability outside the earnings to be met before there could be any profit left. Within the definition of Mr. Justice BRADLEY the improvement sought to be set over against earnings would largely, at least, be chargeable to capital, and not left to reduce profit. And the decision of this question may properly be somewhat affected by the nature of the dividend to which it is sought to have the profits applied, as appears by some of the reasoning in that case. Stress was there laid upon the fact that the government would be merely put off in receiving, but not defeated as to, its share of the net earnings by a liberal allowance in their expenditure upon the property. Here these dividends are non-cumulative, and if the holders of this stock do not get these dividends in each particular year they never can have them. The improvement of the property by the expenditure of the money belonging to them goes to the bene-

fit of the other owners, and not to them, so long as it would pay the dividends on the preferred stock without the expenditure.

This property for the year in question was able, as it was, to pay the preferred dividends; the improvements were made for the purpose of increasing the dividends, but they would not increase these stockholders' dividends. When it comes to the question of using the profits which would go to one set of stockholders for the benefit of another set, a more rigid rule should be applied. The question becomes more one of right, to be determined by the law, than one of policy, to be determined by the discretion of the directors. Here were profits in fact; the preferred stockholders had rights dependent upon this fact. These rights could not lawfully be passed by for the benefit of other interests, however intimately connected, any more than any other property of the preferred stockholders could be appropriated to the same purpose, on the ground that such appropriation of it would be for the best good of the whole.

These rights are the rights of stockholders, and not of creditors; and it is said that stockholders are not entitled to receive dividends until they have been in some manner declared. This is, doubtless, in general true. It grows out of the contract by which stockholders become such. Each stockholder in effect agrees to be bound by the corporate action within the scope of the corporate powers; but there may be other agreements limiting what shall be done in special cases. A corporation may doubtless accumulate its profits instead of dividing them, and a common stockholder would be bound by the determination to do so, however much he might prefer to have his share of them divided out to him. But here was another agreement among the shareholders, made a part of the frame-work of the corporation, that when there were annual profits shown by the official declaration of the directors, they should, to the extent of 6 per cent. on their stock, be divided among these stockholders.

This agreement was warranted by the law of the state, and, as imbedded in the charter, is as binding as any involved in the enterprise. It applies to this first accumulation of profits with the same force that the others do to the rest of the profits. It was not made with the corporation, but was made between the shareholders in prospect before there was a perfected corporation; therefore the corporation cannot be sued for a breach of it; but it attaches to and affects the profits as they come to the hands of the corporation. This amount of annual profits is received by it in trust for the preferred stockholders, the same as the general profits are for the body of the

stockholders. No declaration of a dividend was necessary to complete the equitable right of these stockholders to this amount. *Boardman* v. *Lake Shore & Mich. R. Co.* 84 N. Y. 157; *Richardson* v. *Vermont & Mass. R. Co.* 44 Vt. 613; *Dent* v. *London Tramways Co.* L. R. 16 Ch. Div. 353. None of the cases cited for the defendants appear to be contrary to this. In most or all of them the profits applicable to the preferred stock or superior right did not exist in fact; and the right to the profits, if they should exist, was recognized.

It is further suggested that if these profits were so situated that any one became entitled to share in them on account of the preferred stock, that right would attach to the holders at that time, and would not pass to the orators by a mere transfer of the stock afterwards. Fully-declared dividends might not so pass. But here was no declaration of a dividend upon this stock separating the share of the profits from the other assets belonging to the stock. The right to share in these profits remained as a mere increment of the stock, and would pass as an incident to it. *Boardman* v. *L. S. & M. S. R. Co.* 84 N. Y. 157.

Upon the whole case, the orators appear to be entitled to a decree according to the prayer of the bill.

Let there be a decree for the orators according to the prayer of the bill, with costs.

PROEBSTEL *v.* HOGUE and others.

(*Circuit Court, D. Oregon.* March 9, 1883.)

DONATION TO MARRIED PERSONS UNDER SECTION 5 OF THE DONATION ACT.

Upon the death of a married donee, intestate, under section 5 of the donation act, (9 St. 497,) after compliance with the act, and before the issue of a patent, the share of the deceased in the donation descends to his or her heirs, under the local law of descents, (Or. Laws, 547,) and is not affected by the provision in section 4 of said act, giving the share of a married donee, dying under like circumstances, to the survivor and children, or heirs of the deceased, in equal parts.

At Law. Action to recover possession of real property.

Geo. H. Williams, for plaintiff.

Joseph N. Dolph and *Benton Killin*, for defendants.

DEADY, J. This action is brought to recover the possession of the N. ½ of the Wendell Proebstel donation, the same being situate in Multnomah county, and consisting of parts of sections 27 and 28 of town-

ship 1 N., of range 1 E., and containing about 160 acres, alleged to be of the value of $6,000. From the complaint it appears that Wendell Proebstel, on November 15, 1852, settled upon the donation in question under the donation act of September 27, 1850, (9 St. 497,) and that at the time he was married to Jane Proebstel and otherwise qualified to become a married settler on the public lands in Oregon, under said act; that in May, 1853, he filed his notification and preliminary proof of said settlement, and on July 27, 1857, made his final proof of four years' residence and cultivation; that on March 31, 1866, a patent certificate was issued to him designating the N. ½ of the donation as inuring to his said wife Jane and the S. ½ to himself, and on August 30, 1871, a patent was issued for the same in accordance therewith. In June, 1867, said Jane died intestate "without ever having had any children, and leaving no lineal descendants and without any kindred in the United States, but leaving her said husband surviving and in possession of said land;" that on November 18, 1868, and while said Wendell was in the possession of the donation, the plaintiff was married to him, and went to reside on the premises, where they remained until July 7, 1874, when said Wendell died intestate, "no children ever having been born to him, and leaving no lineal descendants," and leaving the plaintiff in the possession of the donation, where she remained until April 19, 1879, when the defendant Hogue wrongfully dispossessed her of the N. ½ thereof, and, together with his co-defendants, now wrongfully withholds the possession of the same from her.

The complaint then further alleges "that by virtue of the provisions of said act of congress and the statutes of Oregon regulating the descent of real property" the plaintiff "became, upon the death of her said husband, and now is, the owner in fee of the property wrongfully withheld from her by the defendants as aforesaid;" and "that she is entitled to the present possession of said property—the same never having been sold or conveyed by, through, or on account of the said husband."

The defendant Philo Holbrook, answering, disclaims any interest in or claim to the possession of the premises; and the defendants Hogue, Catlin, and Muir demur to the complaint for that the court has no jurisdiction and the facts stated do not constitute a cause of action.

Jurisdiction is not claimed in this case on account of the difference in the citizenship of the parties, who are all understood to be citizens of Oregon; but it is claimed upon the ground that the suit

arises under a law of the United States, to-wit, the donation act of September 27, 1850, *supra*, under which Proebstel settled upon and occupied the premises.

The first section of the judiciary act of March 3, 1875, (18 St. 470,) confers upon the circuit courts of the United States jurisdiction "of all suits of a civil nature at common law or in equity, when the matter in dispute exceeds, exclusive of costs, the sum or value of $500, arising under the constitution or laws of the United States."

In *Ry. Co.* v. *Mississippi*, 102 U. S. 141, Mr. Justice HARLAN, speaking for the court, says "that cases arising under the laws of the United States are such as grow out of the legislation of congress, whether they constitute the right of privilege, or claim, or protection, or defense of the party, in whole or in part, by whom they are asserted;" and he adds "that it is not sufficient to exclude the judicial power of the United States from a particular case, that it involves questions which do not at all depend on the constitution or laws of the United States." To the same effect is *Bybee* v. *Hawkett*, 6 Sawy. 598, [S. C. 5 FED. REP. 1,] decided in this court.

The claim of the plaintiff in this case is that upon the death of Jane, after the compliance by Wendell with the requirements of the donation act, and before the issue of the patent, the donation act gave her share in the donation to said Wendell, and that thereafter, upon the death of the latter, it descended to her under the laws of Oregon. Comp. 1874, p. 547. And it is based upon the assumption that the express provision to that effect in section 4 of the donation act, concerning a married settler thereunder, is or ought to be held equally applicable to the case of married persons claiming under section 5 of said act, as Wendell and Jane, and also the conclusion, which might very properly have been alleged in the complaint, that by operation thereof Wendell took Jane's share in the donation upon her death. Admitting this, it is not disputed that the plaintiff, upon the death of the former, succeeded by descent, under the laws of Oregon, to the premises. But the proposition that Wendell succeeded to Jane's share in the donation is denied by the demurrer—the defendants contending that upon the death of Jane such share was no longer within the operation of the donation act, but that the same descended to her heirs under the laws of Oregon, under whom it is understood they claim.

The decision of this issue or question turns solely upon the proper construction of the donation act. It matters not how it may be decided, or how probable or improbable is the claim of the plaintiff.

The determination of the question is the disposition of a case or suit arising under such act of congress. The jurisdiction is undoubted.

By section 4 of the donation act there was granted to every white settler on the public lands then residing in Oregon, "who shall have resided upon and cultivated the same for four successive years" and otherwise complied with the provisions of such act, if a single man, 320 acres of land, and if a married man, 640 acres,—"one-half to himself and the other half to his wife, to be held by her in her own right; and the surveyor general shall designate the part inuring to the husband and that to the wife, and enter the same on the records of his office; and in all cases where such married persons have complied with the provisions of this act, so as to entitle them to the grant as above provided, whether under the late provisional government of Oregon, or since, and either shall have died before patent issues, the survivor and children or heirs of the deceased shall be entitled to the share or interest of the deceased, in equal proportions, except where the deceased shall otherwise dispose of it by testament duly and properly executed according to the laws of Oregon."

Section 5 of the same act granted "to all white male citizens of the United States" above the age of 21 years, "emigrating to and settling" in Oregon between December 1, 1850, and December 1, 1853, and to all such citizens "not hereinbefore provided for, becoming one-and-twenty years of age," in Oregon, and settling there between said dates, "who shall in other respects comply with the foregoing section and the provisions of this law," if a single man, 160 acres of land, or if a married one, 320 acres,—"one-half to the husband and the other half to the wife, in her own right, to be designated by the surveyor general as aforesaid."

Section 5, as may be seen, is silent as to the disposition of the husband's or wife's share in the donation, in case he or she should die intestate before the issue of a patent therefor, and therefore the defendants contend that it descended to the heirs of the deceased, according to the local law.

But the plaintiff maintains that the clause in section 4, providing for the disposition of the share or interest of the deceased in such contingency ought to be applied to a like case occurring under section 5. As will be seen this is not a mere question of interpretation of the words of the statute, but of the construction of it, and its solution involves the inquiry, whether, taking into consideration the spirit and purpose of the whole act and the circumstances which led to its enactment, this clause in section 4, that, by its language, is

limited to cases arising thereunder, was intended by the legislature to apply to similar cases arising under section 5.

The argument of the case has gone upon the theory that if upon the death of Jane her share in the donation did not descend under the local law but went in the path prescribed by the donation act for like cases arising under section 4 thereof that then Wendell took the whole of it as survivor, while it appears upon the language of the act that he only took an equal portion with the heirs of Jane, be they near or remote, many or few.

Counsel for the plaintiff relies largely upon the case of *Silver* v. *Ladd*, 7 Wall. 219, in which it was held that the grant in section 4 embraced an unmarried woman, as furnishing the key-note to the construction of the donation act—that it is a most benevolent one, and to be liberally construed. But manifestly the court only intended this liberal rule of construction to extend to questions arising under the act between the government and persons claiming rights as settlers or donees thereunder, and not to questions arising between such settlers or donees or those claiming under them; and even as thus understood, it was applied to settlers under section 4. And so Mr. Justice MILLER, after stating (*Silver* v. *Ladd*, *supra*, 225,) that section 4 of the act "was passed for the purpose of rewarding in a liberal manner a meritorious class who had taken possession of the country and held it for the United States under circumstances of great danger and discouragement," lays down the rule for the construction of the act, as between this "meritorious class" and the United States, as follows:

"Anything, therefore, which savors of narrowness or illiberality in defining the class, among those residing in the territory in those early days, and partaking of the hardships which the act was intended to reward, who shall be entitled to its benefits, is at variance with the manifest purpose of congress."

By the language of the provision in question its operation is confined to settlers under section 4. They are designated therein as "*such* married persons"—that is, the married persons spoken of in the preceding words of such section; and also as the "married persons" who have complied with the act "so as to entitle them to the grant as above provided"—that is, as provided in the foregoing part of section 4.

In *Chambers* v. *Chambers*, 4 Or. 153, the supreme court of the state held, upon this ground, that the provision was not applicable to the case of settlers under section 5, and that the shares of the wife of a

settler under said section, upon her death, after compliance with the act, descended to her heirs according to the local law of descents.

Nor does this provision manifest any absolute or controlling purpose on the part of congress, even as to settlers under the fourth section, to establish a sort of joint tenancy in the donation between the husband and wife prior to the issue of the patent with the *jus accrescendi* or right of survivorship to the longest liver. For this survivorship, if it may be so called, was only to take effect in case the deceased did not dispose of his or her interest by will; and even then it was limited to an equal share in the donation with the children or heirs of the deceased, be the latter whom they may. *Davenport* v. *Lamb*, 13 Wall. 428; *Cutting* v. *Cutting*, 6 Sawy. 404; [S. C. 6 FED. REP. 259.]

And since the act of July 17, 1854, (10 St. 306,) amendatory of the donation act, either of "such married persons" might have disposed of his or her interest in the donation by a sale and conveyance thereof, so as to cut off any right of survivorship under this provision in section 4. *Barney* v. *Dolph*, 97 U. S. 652.

But, on the other hand, the power to devise was unqualified, and under it the testator might dispose of his or her share of the donation to any one, however remote from or unrelated to the survivor. There is nothing, then, in this provision in section 4 giving the surviving husband or wife an equal portion in the deceased's share of the donation with his or her children or heirs which calls for its application to donations under section 5. Nor, in my judgment, is there anything in the circumstances of the case that requires the extension of this provision beyond the cases for which it purports to have been made, or that indicates it was or might have been the intention of congress to make it so.

At the passage of the donation act there was no statute of descents in force in Oregon. Prior to September 12, 1849, when a person died in "the lawful possession of a land claim" it was considered a part of his personal estate, and disposed of by his executors or administrators accordingly. Or. Laws 1843–49, p. 61. By an act of that date (Or. Laws 1850–1, p. 246) it was provided that "land claims shall descend to and be inherited by the heirs at law of the claimant, in the same manner as is provided by law for the descent of real estate." But all that could have been meant or intended by this act was that such "heirs" should have the first right to the possession of the claim, for the territorial legislature was expressly prohibited by section 6 of the

organic act (9 St. 323) from passing any act "interfering with the primary disposal of the soil." Nor was there any law regulating "the descent of real estate" in Oregon other than the common law, and how far that was applicable or in force was a matter as yet undetermined. The territory had just been organized, and but one session of the legislature had been held, (1849.) The grant made by the fourth section of the act was confined to persons then in the territory or who should become resident thereof before the following December—a provision intended for the benefit of the immigrants of that year, then well across the plains. The greater portion of these contemplated beneficiaries had already complied with the meritorious conditions of the act—residence and cultivation—and were entitled to the grant as soon as the law could be put in operation, so as to enable them to make their notifications and proof.

Under this state of things this provision was probably put in section 4 to meet the contingency of the death of a married donee under it, occurring between compliance with the act and the issue of a patent and before the local legislature had established a law of descents for estates of inheritance in real property, then for the first time existing in the territory. But as to section 5 the case was different. This grant was made to persons coming into the country after December 1, 1850, who should reside upon and cultivate the same for four successive years thereafter, and in the mean time the subject could be regulated by the territorial legislature, whose power under section 6 of the organic act, *supra*, extended "to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States." And, in the case of persons dying before the completion of such residence and cultivation, and before the right to the grant vested in the settler and his wife, so as to give them an estate of inheritance therein, provision was made for the disposition of the possessory right of the settler by section 8 of the donation act.

On December 14, 1853, (Or. Laws 1853-4, p. 350,) the territorial legislature passed an act concerning the descent of real property, in which it was provided that, "when any persons shall be seized of any lands, tenements, or hereditaments, or any right thereto, or entitled to any interest therein in fee-simple, or for the life of another, not having lawfully devised the same, they shall descend, subject to his debts," as therein prescribed. This law has been substantially in force ever since, except the period between June 1, 1863, and October 24, 1864; and under it, upon the death of Jane Proebstel in June, 1867, her share of the donation in which she then had an in-

heritable estate, descended to her heirs—to her lineal descendants first, and in default of these, to her collateral heirs.

These two sections,—the fourth and fifth,—although parts of one act, and containing some provisions in common, are in essentials different and independent grants. They are made upon different motives and considerations, for different quantities of land, and to a different class of persons. The first had its motive in the past and the second in the future. The one was made as a reward for immigration and settlement substantially accomplished, and the other was offered as an inducement for future immigration and settlement. *Silver* v. *Ladd, supra*, 227; *Chambers* v. *Chambers, supra*, 155.

In *Barney* v. *Dolph, supra*, 654, Mr. Chief Justice WAITE, who has done so much towards a lucid and comprehensive exposition of this donation act, says: "Section 4 was evidently intended for the benefit of this class"—that is, the early settlers who at the passage of the act were occupying the country under the land law of the provisional government; and that the provision in that section concerning the disposition of the donation to married persons in case of the death of one of them, after compliance with the act and before the issue of a patent, is, from "the language used, evidently" confined "in its effect to the married person mentioned" therein.

The demurrer is sustained.

CLARK, by his Next Friend, *v.* CHICAGO, B. & Q. RY. CO.*

(*Circuit Court, S. D. Iowa.* January, 1883.)

RAILROAD—NEGLIGENCE—INJURY TO PASSENGERS—PLEADING.

The plaintiff in a suit against a railroad company to recover damages for injuries received while traveling as a passenger on the defendant's cars through the defendant's negligence, is not bound to state in his declaration the particular facts constituting the negligence. It is sufficient to state generally that the injury was the result of the defendant's negligence.

At Law. Action to recover damages for personal injuries. Motion to make declaration more specific.

Hagerman, McCrary & Hagerman, for plaintiff.

H. H. Trimble, for defendant.

The opinion of the court was delivered orally by MCCRARY, circuit judge, who discussed the requisites of a declaration in such a case

*From the Colorado Law Reporter.

with respect to the allegation of negligence. He said in substance: The question is one of pleading, and not necessarily one of evidence. The plaintiff, who was injured while traveling as a passenger on board the defendant's cars, alleges that he was injured by the derailment of the train on which he was traveling, and that the injury resulted from negligence on the part of the defendant, but he does not state in what the negligence consisted. If this were a suit by an employe it might, perhaps, be necessary to specify in the complaint the facts constituting the negligence; but there is a material difference between a suit by an employe and a suit by a passenger for personal injury. The latter has, as a general thing, no means of knowing what has caused the accident or injury. He has nothing to do with the operation of the road. He may be only one of a thousand passengers occupying many coaches. He may be so seriously injured as to be unable to inquire into the causes of the accident. He may be killed, and suit may be brought by his representatives. Many reasons suggest themselves at once why it would be a harsh rule to require a passenger who sues for an injury to specify the acts of negligence, or the facts showing want of care, on the part of the railroad company. It is accordingly settled, we think, by reason and authority, that it is sufficient to state in the declaration generally that the injury was the result of defendant's negligence. When it comes to the trial the burden is upon the plaintiff to show a *prima facie* case. Whether he does so by showing simply that the car ran off the track, and that he was injured in consequence, is a question which may arise on the trial, but which is not now before us. He must show enough to raise a presumption of negligence on the part of the defendant, but how far he must go in order to do this we need not now determine.

This view is supported by the authority of Thompson's work on Carriers of Passengers, p. 547, § 9, and by the cases there cited.

UNITED STATES *v.* MURPHY.

(*Circuit Court, D. Indiana.* 1883.)

1. BANKRUPTCY—CLAIM OF THE UNITED STATES—RIGHT OF PRIORITY IN PAYMENT—PERSONAL LIABILITY OF TRUSTEE.

By the Revised Statutes the right of priority in payment of debts due the United States is established, *inter alia*, in cases where an act of bankruptcy has been committed, and every assignee and other person, who pays debts due by the person or estate from whom or for which he acts before he has discharged

all that may be owing the United States by such person or estate, is made personally answerable for whatever may be needed to satisfy the unpaid claims of the government.

2. SAME—ACQUIESCENCE IN PROCEEDINGS AND OMISSION TO ASSERT CLAIMS—WAIVER OF RIGHT OF PRIORITY—ASSIGNEE NOT RESPONSIBLE.

The government is not bound to go into a bankruptcy court, nor is its debt barred by a certificate of discharge; but to secure priority in payment out of funds upon which such court is administering under the act, the right must be asserted in that court and worked out through that act. Failure of the government, with full knowledge of the adjudication of bankruptcy, to make this claim before final settlement of the estate, waives such right, and leaves it no ground on which to hold the assignee responsible out of his own means. Having done all he had undertaken to do when he had distributed the estate according to the terms of the act, the orders of the court, and the directions of a committee of creditors, the assignee would not be liable on an express or an implied *assumpsit*.

3. SAME—ENTRY OF SATISFACTION AS TO ONE JOINT JUDGMENT DEBTOR, SAVING THE RIGHT TO SUE THE OTHERS.

An actual release of one joint obligor discharges all; but it is otherwise where the right to sue the others is reserved. An entry of satisfaction of a judgment as to one joint debtor, expressly stipulating that it should not prejudice the creditor's rights as to the others, where it is the intention that it should prevent maintaining an action or issuing an execution on the judgment against such debtor, does not operate as a contract not to sue, but as a technical release.

4. SAME—FACTS.

After an execution had been issued by the proper officers of the government on certain real estate of one of several joint judgment debtors of the United States, another of the judgment debtors was adjudicated bankrupt and defendant appointed his trustee. During the entire course of the administration of the latter's estate, the real estate exceeded in value the amount of the whole debt, the execution on it continued in force, and the officers of the government, with full knowledge of the facts, never even intimated the right of priority for the claim, nor demanded its payment. Acting on a belief, induced by these circumstances, that the government relied for satisfaction exclusively on the property so levied on, the assignee withheld only his bankrupt's full contributive portion of the judgment, on proper demand paid this to the United States, and distributed all the assets according to law. *Held*, that the officers of the government, having received its quota of the debt, and having executed a release to the debtor whose property had been taken in execution, the trustee of the debtor was not personally liable.

In Bankruptcy.

C. L. Holstein, Dist. Atty., and *Chas. H. McCarer*, Asst. U. S. Atty., for plaintiff.

Baker, Hord & Hendricks and *Claypool & Ketcham*, for defendant.

GRESHAM, J. The United States recovered judgment in this court, in 1871, against James Burgess, Stephen Major, Greenville Wilson, and William C. Tarkington, as sureties upon the bond of Garland D. Rose, postmaster at Indianapolis. In the year following, Tark-

ington was adjudicated a bankrupt, and the defendant was appointed and confirmed trustee, to receive and administer upon the estate, under the direction of a committee of creditors and the orders of the court. The trustees converted the assets into money, which he distributed among the general creditors who had proved their claims, including himself. The money thus distributed was more than enough, after paying expenses of administration, to have satisfied the above judgment, which the defendant knew was unpaid.

To the complaint alleging these facts the defendant, in his special answer, avers that before Tarkington was adjudicated a bankrupt the marshal had levied an execution, which the plaintiff had caused to be issued, on the judgment against Burgess and others upon real estate belonging to Greenville Wilson, which was, and yet is, worth more than enough to satisfy such judgment; that the attorney of the United States, who was charged with the duty of collecting such judgment, and the proper officers of the United States, who were authorized to instruct such attorney in the premises, and who also knew of the adjudication of bankruptcy against Tarkington, and of all the subsequent proceedings thereunder, neither proved the claim of the United States as a creditor, nor obtained an order recognizing their supposed priority, or directing its payment, nor objected to any of such proceedings, including the final distribution of the fund; that before any of the fund had been distributed among the creditors, and while the estate was yet in process of settlement, the marshal, who had levied on the lands of Wilson, and was maintaining such levy in force, under the direction of the plaintiff, informed the defendant that such levy was sufficient to satisfy the judgment, interest, and costs; that although Wilson had filed no contingent claim for contribution against the bankrupt's estate, yet, inasmuch as it was believed the lands so levied on would sell for enough to pay the entire judgment, the defendant withheld from distribution, for Wilson, $2,419.20, the full contributive portion of the judgment due from the bankrupt, and distributed the balance of the fund, under the orders of the court, among the creditors who had proved their claims as required by the act; that since the commencement of this suit the sum so reserved for Wilson was paid to the United States on the demand of the proper officers, and thereafter, viz., on the twenty-first day of July, 1881, the attorney of the United States, by the authority of their proper officers, made a compromise with Greenville Wilson, with respect to his liability on such judgment, whereby he paid to the United States $1,000 in full satisfaction and discharge of such judg-

ment as against him, and at the same time the attorney of the United States wrote upon the margin of the record of such judgment the following stipulation and release:

"I hereby enter, by direction of the solicitor of the treasury, satisfaction of this judgment as to Greenville Wilson, (see letter of July 17, 1881, accepting $1,000 in compromise of Wilson's liability,) without prejudice to the rights of the United States against his co-defendants herein, and provided, always, that all rights of the United States as to them, and each of them, are hereby expressly saved and reserved.

[Signed] "CHARLES L. HOLSTEIN,
"U. S. Attorney."

Section 3466, Rev. St., provides that whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied, and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed. Section 3467 provides that every executor, administrator, or assignee, or other person who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

It has been held that a discharge in bankruptcy does not bar a debt due the government, (*U. S.* v. *Herron*, 20 Wall. 25;) also that the government is not bound to prove a claim in the bankruptcy court, (*Lewis* v. *U. S.* 92 U. S. 619.) But it does not follow that the government, knowing that the estate of its debtor is being administered upon in the bankruptcy court, may stand by, assert no claim to the fund, suffer the settlement to proceed, and final distribution to be made under the terms of the act, without waiving its right of priority of payment out of that fund. The assignee and trustee are the mere instruments of the court in administering upon the estate; they execute the trust committed to them, in obedience to the terms of the act, and under the orders of the court, in the case of a trustee, also under the direction of a committee of creditors. Only those creditors who prove their claims, or in some proper form present

them and have them allowed, are entitled to share in the distribution of the fund. After an estate has been fully administered in bankruptcy, and the funds distributed under the terms of the act, creditors, including the government, who, with knowledge of the adjudication of bankruptcy, neglected to prove their claims, or in some form have them allowed, can assert no rights against the assignee or trustee. If the government claims a right of priority out of a particular fund in the hands of the bankruptcy court, it is reasonable and just to treat an omission to assert that right as a waiver of it.

Section 5101, Rev. St., provides that, in the order of distribution, the following claims shall be entitled to priority: *First*, costs; *second*, debts and taxes due the United States; *third*, debts and taxes due the state; *fourth*, wages due to operatives, etc.; and, *fifth*, debts due to persons subrogated to the government's right of priority.

The government is not bound to go into a bankruptcy court, nor is it bound by a certificate of discharge; but if it claims priority out of a fund upon which that court is administering under the act, it must assert that right, just as the state and operatives and persons subrogated to the rights of the government are required to do, to be entitled to share in the distribution of that fund. The government's right of priority of payment out of a fund in the hands of the bankruptcy court must be worked out through the act.

It is true that the defendant settled the trust and distributed the fund with knowledge of the judgment against the bankrupt and others, but it is also true that the government knew Tarkington's estate was in bankruptcy, and wholly omitted to assert any right of priority until after the fund had been distributed and the trust had been fully executed under the direction of the committee of creditors and the orders of the court. The government thus waived its right of priority, and assented to the distribution of the fund among the creditors who had established their right to it under the terms of its own law, and it would be unjust, if not oppressive, to now compel the trustee to pay the balance of the judgment out of his own means.

The government had levied upon real estate of Greenville Wilson, sufficient to pay the judgment, before Tarkington went into bankruptcy. This levy was kept alive during the entire time that the defendant as trustee was settling the estate. There can be no doubt that in good faith he executed the trust, and distributed the fund among the creditors who had proved their claims, believing that the government was relying upon the specific lien which it had acquired

on the real estate of Wilson. Whether this was the purpose of the attorney of the government and the proper officers of the treasury department, who had control of the judgment, or not, they, by their conduct, induced him to think it was. With full notice of everything that was done in the settlement of the estate, and without intimation of any kind, before distribution, that it claimed a right of priority in the fund, the government now sues the trustee personally, as upon an implied *assumpsit*. The defendant's undertaking when he accepted the trust was that he would administer the estate according to the act, and the orders of the court. This he did. There was no *assumpsit*, express or implied, to do anything else. It would be clearly inequitable and unjust, on the facts already stated, to charge a liability on the defendant, and the law implies no *assumpsit* under such circumstances.

Thus far I have considered the demurrer to the special answer without reference to the compromise between the government and Wilson. This occurred long after the defendant had distributed the fund and had been discharged from his trust, and after the bringing of this suit. An actual release of one joint obligor discharges all, though it is otherwise in a covenant not to sue. It has been decided in numerous cases that a release reserving the right to sue others is not a technical release, but only a covenant not to sue. It seems clear that both the government and Wilson understood that the latter was to be absolutely discharged from all liability on the judgment. The entry was not a covenant to release the levy or to suspend further proceedings on the judgment, but a perpetual "satisfaction" of it as to Wilson. No execution can issue on the judgment against him, and no action can be maintained on it against him. It would be a strained construction of the entry of satisfaction to hold that the government meant no more than a contract not to sue on an existing judgment. If the entry was only intended to have the effect of a covenant not to sue, then the government might maintain an action against Wilson on the judgment, and his only redress for the breach would be an appeal to congress for relief. The duty of paying the judgment rested alike upon all the defendants, and the absolute satisfaction of it as to one, discharged all. *Cheatham* v. *Ward*, 1 Bos. & P. 630; *Ballam* v. *Price*, 4 E. C. L. 418; *Nicholson* v. *Revell*, 31 E. C. L. 166; *Kearsley* v. *Cole*, 16 Mees. & W. 127; *Jay* v. *Wurtz*, 2 Wash. 266; *Wiggins* v. *Tudor*, 23 Pick. 444–5; 1 Lindley, Partn. 433.

Demurrer overruled.

PUBLIC OFFICERS AND AGENTS—AUTHORITY OF AND LACHES OF. "The government is not bound by the act or declaration of its agent unless it manifestly appears that he acted within the scope of his authority, or was employed in his capacity as a public agent, to do the act or make the declaration for it. Individuals, as well as courts, must take notice of the extent of authority conferred by law upon a person acting in an official capacity."(*a*) "The government is not responsible for the laches or wrongful acts of its officers."(*b*) Laches, however gross, cannot be imputed to the government. This maxim is founded, not in the notion of extraordinary prerogative, but upon great public policy.(*c*) "The rule that the government cannot be held responsible for the mistakes of its agents includes mistakes of law as well as mistakes of fact."(*d*)

PRIORITY OF DEBTS DUE THE UNITED STATES. Section 3466, U. S. Rev. St., gives a priority to debts due the United States in all cases of insolvency, and section 3467, Rev. St., renders personally liable any trustee of such an estate who pays any debt of the estate before he satisfies and pays the debt due the United States. Congress had power to pass the act.(*e*) No *bona fide* transfer is overreached by the act, nor are vested liens superseded.(*f*) There must be a legal and known insolvency, such as bankruptcy or an assignment.(*g*) A mere inability of the debtor to pay his debts is not insolvency within the statute.(*h*) The priority does not supersede the assignment of the debtor or set it aside. The United States has simply a right of priority of payment out of the fund in the hands of the assignee, who is rendered personally liable if he fails to pay the debt of the United States.(*i*)

In construing the statute the following principles may be laid down: (1) No lien is created by the statute; (2) the priority established can never attach while the debtor continues the owner and in the possession of the property, although he may be unable to pay his debts; (3) no evidence can be received of his insolvency until he has been divested of his property in one of the modes stated in the section; (4) whenever the debtor is thus divested of his property, the person who becomes invested with the title is thereby made a trustee for the United States, and is bound to pay the debt first out of the proceeds of the debtor's property.(*j*) The fact that an assignee who neglected to pay the claim of the United States had distributed the land under the orders of a state court, will not protect him from the personal liability imposed by the statute, provided that he had notice of the existence of the claim of the United States. The United States are not bound to appear and become parties to the proceedings in the state court. The priority of the United

(*a*) U. S. v. Whitesides, 93 U. S. 247; Mayor v. Eschbeck, 17 Md. 282.

(*b*) Hart v. U. S. 95 U. S. 316; Jones v. U. S. 18 Wall. 662.

(*c*) U. S. v. Kirkpatrick, 9 Wheat. 735.

(*d*) McElrath v. U. S. 12 Ct. Claims, 201. Upon the same subject see, also, U. S. v. Vanzandt, 11 Wheat. 184; Hawkins v. U. S. 96 U. S. 691; Lee v. Munroe, 7 Cranch, 366; The Floyd Acceptances, 7 Wall. 366; Dox v. U. S. 1 Pet. 317; Smith v. U. S. 5 Pet. 292; Johnson v. U. S. 5 Mason, 423; Gibbons v. U. S. 8 Wall. 274.

(*e*) U. S. v. Fisher, 2 Cranch, 202.

(*f*) U. S. v. Fisher, 2 Cranch, 202; U. S. v. Hooe, 3 Cranch, 73; Thelusson v. Smith, 2 Wheat. 396; Conrad v. Ins. Co. 1 Pet. 386; U. S. v. Griswold, 8 Fed. Rep. 496.

(*g*) U. S. v. Hooe, 3 Cranch, 73; Prince v. Bartlett, 8 Cranch, 431; Thelusson v. Smith, 2 Wheat. 396; Beaston v. Farmers' Bank, 12 Pet. 102.

(*h*) Conard v. Ins. Co. 1 Pet. 386.

(*i*) Conard v. Ins. Co. 1 Pet. 386.

(*j*) Beaston v. Farmers' Bank, 12 Pet. 102.

States attaches in virtue of the assignment and notice to the assignee of their debt; and it is the duty of the assignee to make known the debt as having such priority.(*k*) Those affected by the statute are persons "indebted to the United States." The language is without qualification. The form of the indebtedness is immaterial. The debt may be legal or equitable, and incurred in this country or abroad. The debtors may be joint or several, and principals or sureties. The United States is in nowise bound by the bankrupt act. The clause of that act giving priority to debts due the United States is *in pari materia* with the acts in question, and was doubtless put in to recognize and reaffirm those acts. The United States need not, therefore, file their claim in the bankruptcy proceedings, but may bring their suit against the trustee in the circuit court which has jurisdiction. Where there is bankruptcy, the same remedies are applicable as if the fund had arisen in any other way. Neither statute contains any qualification, and the court can interpolate none. Where the debt is due from a partnership, the rights of the United States are the same as if the partners were severally liable. The United States are entitled to priority out of their separate property in preference to all other debts, notwithstanding the rule in equity, recognized by the bankrupt act, that partnership property is to be first applied in payment of partnership debts, and individual property in payment of individual debts.(*l*)

RELEASE OF CO-SURETY OR JOINT DEBTOR. "It seems now clearly established at law that a release or discharge of one surety by the creditor will operate as a discharge of all the other sureties, even though it may be founded on a mere mistake of law. But it may be doubtful whether the same rule will be allowed universally to prevail in equity. Thus, if a creditor has accepted a composition from one surety and discharged him, it has been thought he might still recover against another surety his full proportion of the original debt. In other words, such surety, notwithstanding such discharge, might be held liable in equity to pay his share of the original debt, treating each as liable for his equal *pro rata*.(*m*) The leading case on the subject is *Ex parte Gifford*,(*n*) in which Lord Eldon said, *inter alia*, that the creditor, in discharging one surety, "may reserve his remedy against the other surety expressly." The whole release must be considered, and if it be general in its terms it may be limited and controlled in its effects by the limitation in the recital; and it may expressly extend to only a part of the claim, or to the party released, with express reservation of rights against other parties, in which case it will be construed only as a covenant not to sue.(*o*) The legal operation of a release to one of several joint contractors may be restrained by the express terms of the instrument itself. Courts endeavor to carry out the intention of the parties by holding the instrument to be a covenant not to sue, and not a release.(*p*) Where a release of one of two sureties, who had entered into a joint and several covenant to pay an annuity in default of payment by the grantor, was accompanied by a proviso that such release should not prejudice the right of the grantee to enforce its payment against the grantor and the other surety,

(*k*) Field v. U. S. 9 Pet. 182.
(*l*) Lewis v. U. S. 92 U. S. 618.
(*m*) Story, Eq. Jur. § 493a.
(*n*) 6 Vesey, 805.
(*o*) 2 Pars. Cont. 714.
(*p*) Chit. Cont. (11th Amer. Ed.) 1155. See, also, Whart. Cont. § 832; Brandt, Suretyship, § 383; Story, Cont. (5th Amer. Ed.) §§ 63, 67.

or either of them, it was held that the proviso restrained the operation of the release, and that the liability of the co-surety was not affected thereby.(*q*) Courts will not suffer the strict letter of a release to defeat the intention of the parties. Hence, even general words of release cannot operate to enlarge a previous statement, which defined the particular object of the agreement.(*r*) The release pleaded must be a technical release, under seal, expressly stating the cause of action to be discharged. No release is allowed by implication; it must be the immediate legal result of the terms of the instrument which contains the stipulation.(*s*)

RELEASE OF PRINCIPAL. Even in the case of a discharge of a principal debtor, if the rights of the creditor against the surety are reserved in the release of the principal, this is not to be construed as extinguishing the remedy against the surety, but merely as a covenant not to sue the principal.(*t*) The rule that the unconditional release of one surety releases all his co-sureties seems to rest upon two reasons: (1) The release gives rise to a presumption that the debt is satisfied; and (2) because the unconditional release destroys the co-surety's right of contribution against the released surety for any excess he may pay above his *pro rata* proportion, and thereby increases his liability. A release which expressly reserves the remedy against the co-surety is open to neither of these objections. Its *tenus* rebut the presumption of satisfaction; and by accepting the limitation in the release the released surety enters, as it were, into an agreement that the creditor may still pursue his remedy against the co-surety; and justice requires, and he impliedly agrees, that if by reason of his making such agreement the co-surety is compelled to pay more than his proportion, he will still hold himself liable for contribution as though he had not been released. That this right of contribution against a surety who has accepted such a release exists in favor of his co-surety seems well settled;(*u*) and, by analogy, in case of release of the principal.(*v*)

CONTRA TO VIEWS SUPRA. In *Nickson* v. *Revel*(*a*) there appears a severe criticism on the case of *Ex parte Gifford,* and the ability to limit the effect of a release to only the person to whom the release was granted is denied. The release given in that case, however, contained no reserve of remedies whatever, and the decision, so far as that point is concerned, seems an *obiter dictum.* Justice STORY, in commenting on the two cases, says as to *Ex parte Gifford:* "I see no reason to question either the accuracy of the report or the soundness of the doctrine."(*b*) In *Wiggins* v. *Tudor*(*c*) it is held that the reserve of remedies against the co-surety will not preserve the creditor's right against

(*q*) Thompson v. Lack, 3 Man., G. & S. 540.

(*r*) Solly v. Forbes, 2 Brod. & B. 46.

(*s*) Bailey v. Berry, 8 Amer. Law Reg. (N. S.) 270; Shaw v. Pratt, 22 Pick. 305. See, also, the following cases in which it was held that a release to one of two joint-obligors would not release a co-obligor against whom the creditor's rights were expressly reserved by the terms of the release: Willis v. De Castro, 21 Law Rep. 376; Seymour v. Butler, 8 Clarke, (Iowa,) 305; Couch v. Mills, 21 Wend. 424; Crane v. Alling, 3 Green, (N. J.) 423; The Bank v. Osgood, 5 Barb. 455; Durrell v. Wendell, 8 N. H. 369; Lane v. Owings, 3 Bibb, 247; McAllister v. Sprague, 34 Me. 296; Burke v. Noble, 48 Pa. St. 168; Ainsworth v. Brown, 31 Ind. 270.

(*t*) Whart. Cont. § 832; Kearsley v. Cole, 16 Mees. & W. 127; Clagett v. Salmon, 5 Gill & J. (Md.) 314; Sohier v. Loring, 6 Cush. 537; Green v. Wynn, L. R. 4 Ch. App. 204; De Colyer, Guaranties, 403.

(*u*) De Colyer, Guaranties, 406; Hill v. Morse. 61 Me. 541; Clapp v. Rice, 15 Gray, 559.

(*v*) Clagett v. Salmon, 5 Gill & J. (Md.) 314; Kearsley v. Cole, 16 Mees. & W. 127.

(*a*) 31 E. C. L. 166.

(*b*) Eq. Jur. § 498a, note.

(*c*) 23 Pick. 444.

him. As shown in this note there is great weight of authority against this view, and the case could hardly have been well considered, when the case of *Shaw* v. *Pratt*,(*d*) where the contrary opinion was expressed, was neither cited by counsel nor noticed by the court, although decided shortly before in the same forum. * * *

(*d*) 22 Pick. 305.

In re MOYER, Bankrupt.*

(*District Court, E. D. Pennsylvania.* February 27, 1883.)

BANKRUPTCY—SECTION 5045, REV. ST.—EXEMPTION TO BANKRUPT—MISCONDUCT—LACHES.

A bankrupt, who is a fugitive from justice, and who has failed to account to the assignee for $5,000 and other property in his hands, has no right, after 10 years' acquiescence, to claim, under section 5045, Rev. St., an exemption out of cash in the hands of the assignee, the proceeds of property sold by him.

In Bankruptcy. Exceptions to the report of the register who allowed the claim of the bankrupt for exemption. The facts are set forth in the opinion.

J. P. S. Gobin and *Josiah Funk*, for exceptions of creditors and assignee.

C. L. Lockwood and *P. H. Reinhard, contra*, and for the bankrupt.

BUTLER, J. I cannot agree with the register respecting the bankrupt's claim. When the proceeding began the bankrupt had no property "exempt from levy and sale upon execution or other process, under the laws of the state," as contemplated by section 5045 of the Revised Statutes. He had fled from, and abandoned his residence in, this state—was a fugitive from justice; and has remained abroad ever since. The exemption provided for by the state statute is confined to citizens of the state, as her courts have decided. But the bankrupt, in my judgment, is not entitled to any part of his claim. If the trustee failed in duty, as alleged,—retaining and converting property to which the bankrupt was entitled,—the latter could have had redress by suit, or an order of this court in the premises. He sought no such redress, however; but for 10 years has apparently acquiesced in the trustee's conduct. The property has now passed beyond his reach, and his right of action against the trustee is barred. I was about to say that he now presents himself here to recover, not the property alleged to have been exempted, but money returned to the court for distribution, as part of the bankrupt's estate. This

*Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.

statement, however, is not accurate. He has not presented himself, either in person or by petition. The trustee, whose duty it was not, has called attention to the circumstances, and counsel for the bankrupt have pressed the claim before the register. As before suggested, the claim is not for the property, but for money, the alleged proceeds. It is, therefore, purely equitable. To this money he has no legal right. Brought into court as part of the trust estate, *prima facie*, as matter of law and in strict right, it belongs to the creditors, who alone are entitled to share in the distribution. Under similar circumstances the courts of this state would dismiss the claim without hearing—refusing to inquire into the sources from which the fund came. *Okie's Appeal*, 9 Watts & S. 156; *Mark's Appeal*, 34 Pa. St. 36; *Nyman's Appeal*, 71 Pa. St. 447.

The courts of bankruptcy have adopted a more liberal view, and allow the bankrupt to follow the proceeds of property unlawfully withheld and converted, where it is equitable to do so.

In the case before us, however, it would not be equitable to award the bankrupt any part of the fund,—granting even that his property was improperly converted. His delay, and apparent acquiesence for so long a time,—well calculated to mislead creditors,—should of itself close his mouth respecting the fund. In addition to this, however, is the important fact that while the law contemplates that the bankrupt shall be within reach, to assist, by information and otherwise, in making the most of his estate, this claimant remained away, beyond reach, to escape demands made upon him here. Still more important, I think, is the fact that within three or four months of the adjudication declaring him a bankrupt, and even a shorter time prior to the confession of bankruptcy found in the voluntary proceeding which he commenced and abandoned, he received the large sum of $5,000 in money, in addition to the proceeds of valuable jewelry and pictures sold, no part of which was turned over to the trustee, and of which no satisfactory account, in my judgment, has been rendered. He says he paid some debts, without specifying any debts so paid; that he presented $1,500 to his son, and gave some amount to somebody who was under obligations on his account. This is far from satisfactory; and it is hardly made less so by the general statement that he appropriated none of it to his own use. Presenting himself here as a claimant against the small sum left for creditors, it certainly is not too much to demand an account of what was done with the large sum so received; and in the absence of such an account to treat him as having carried it away. Doubtless he could

readily have told us all about it had he been within reach and been called upon to do so early in the history of this proceeding. It cannot be doubted that he was insolvent, and knew it, when this money was collected; his voluntary proceeding was commenced a very few months later. Why should he under such circumstances *give away* $1,500, as he confesses he did? It belonged to his creditors.

In the light of these facts it would, in my judgment, be grossly unjust to allow him to withdraw from the creditors any part of the fund here for distribution. The report of the register must be corrected accordingly, the claim being disallowed.

PARSONS *v.* COLGATE and others.

(*Circuit Court, S. D. New York.* December 27, 1882.)

1. FIELD OF INVENTION—RESTRICTION—DESCRIPTION, HOW CONSTRUED.

   If the field of invention be bounded by prior patents, though referring to the objects of the patent in issue only by general terms known in the art to which they belong to include them, the description of what the inventor undertook to cover must be construed in the light of their existence.

2. SAME—FOREIGN PATENTS NOT WITHIN TERMS OF ACT OF 1836, §§ 7, 15, NOT CONSIDERED.

   Foreign patents urged as anticipations of domestic patents, where the article is not properly proved to have been known or used in this country, or the patentee's circular to the trade was not a printed publication, or his provisional specification did not make the invention described in it patented, within the meaning of sections 7 and 15 of the act of 1836, will not be considered.

3. RESIDUUM—NATURE—INFRINGEMENT.

   A residuum is what is left after a process of separation. There are as many different residuums of a substance as there are distinct products which may be taken away from it. Showing that both residuums come from the same source, that all in the residuum of the earlier of two patents is also in and is obtained by separation from that of the patent of later date, does not make out an infringement on the former. It does not show that they are the same; otherwise a prior patent for the same use, of the common source, would cover both. The proper effect is to limit the application of "residuum."

4. SAME — UNCHARRED RESIDUUM OF PETROLEUM — USE IN SOAP — PATENT NO. 237,484—ANTICIPATION—VALIDITY.

   Letters patent No. 237,484, for use in manufacture of soap of vaseline, produced by simmering petroleum down in open kettles, and afterwards filtering through bone-black, does not infringe letters patent No. 56,259, employing for the same purpose another uncoked residuum of petroleum so obtained by vacuum and steam process; for, while the charred and uncharred particles are always mechanically mixed, and the filtering out may be without chemical reaction, vaseline does not contain all the latter residue does; nor is it anticipated by other patents using residuums of petroleum in soaps; they confine it, however, to that particular residuum.

Edmund Wetmore, for plaintiff.

F. R. Condert, for defendants.

WHEELER, J. This suit is brought upon letters patent No. 56,259, dated July 10, 1866, and granted to the plaintiff for an improved soap.

The defense is a want of novelty, and of infringement. The specification of the patent sets forth:

"My invention is based on my discovery that when petroleum is so treated in a still or retort that the volatile parts are passed off without having the residuum coked or charred, the same residuum may be introduced in considerable quantities, by proper management, into the manufacture of soap, to the palpable benefit of its quality, reference being had to its cost, thus utilizing an article which has hitherto had little commercial value. This uncharred residuum may be produced by varied management of the still or retort. I have produced it by employing a vacuum in connection with a fire-heated still; also by injecting into the still and into the body of the petroleum free superheated steam, never having employed it at a temperature higher than would suffice to melt lead, and producing good results at a lower temperature. My invention consists in a soap made by combining the described petroleum residuum with alkalies and with animal oils or fats, or with vegetable oils or resin, or with any compound of or with these or any of them."

And then describes a method of manufacture of "ordinary yellow bar soap," and "ordinary soft soap," and proceeds:

"The petroleum residuum may be introduced to a greater or less extent into the manufacture of soaps of all varieties, to their improvement, if not used in too great proportion to other ingredients, the residuum having peculiar detergent properties."

The claim is for: "As a new manufacture, soap in which the described petroleum residuum is one of the ingredients."

The soap complained of as being an infringement is made by the use of vaseline, which is produced by simmering petroleum residuum in open kettles, and afterwards filtering it through bone-black, according to the specification of letters patent No. 237,484, granted to Robert A. Chesebrough. The principal anticipations relied upon are a soap made by one Hendrie, in London, and described in a circular, issued and published by him to the trade, long prior to the orator's invention; a provisional English specification of William Lloyd Caldecott, dated August 1, 1845; English letters patent to Maria Bounsall Rowland, dated May 19 and sealed November 10, 1857; to John Henry Johnson, dated October 30, 1863, and sealed April 26, 1864; and to Moreau and Ragon, dated August 6, 1862, and sealed February 9, 1863.

Hendrie's soap is not proved by the requisite measure of proof in such cases to have been known or used in this country, nor is his circular to the trade considered a printed publication or a public work within the meaning of the patent law. Act of 1836, §§ 7, 15. And Caldecott's provisional specification did not make the invention described in it patented within such meaning. Act of 1836, § 7. Therefore, these things are laid out of consideration. The field of invention, open to the plaintiff at the time of his invention, was bounded by these three English patents. What ground they covered he could not occupy, and the description of what he undertook to cover, is to be read and construed in the light of their existence.

The patent of Rowland covered adding:

"To a solution of soap dissolved in hot water," "ammonia, or certain of its components, and also some liquid hydrocarbon, or equivalent substance, such as turpentine, mineral or coal tar, naphtha, camphene, benzole, or other analogous substances obtained by the distillation of bituminous or resinous substances."

That of Johnson:

"The adjunction of mineral oils, such as oils of petroleum, naphtha, rock, or schist oil, to the fat or drying vegetable or animal oils, fats, or greases hitherto made use of in the manufacture of soap."

That of Moreau and Ragon what is shown by these parts of their specification:

"The liquid substances or hydrocarbons to be operated upon are first deoderized by the action of hydrochloric acid gas, which is made to pass through it, after which the liquid is conducted to the distilling vessel, where it is submitted to heat, which will cause the volatile matters to distill and pass over to a globular or other vessel."

"The light oils will, by their specific gravity, float on the top, and form an upper stratum which may be drawn off and used for lighting purposes, or for any other purpose for which they may be applicable. The heavier oils, after being separated from the hydrochloric acid gas solution, may then be subsequently treated and rendered capable of saponification." "It has been heretofore found extremely difficult, if not impossible, to saponify mineral oils. This difficulty, we consider, has arisen from the fact that in all such attempts endeavors have been made to cause the alkali to act directly upon and combine with the oil. We have discovered that although it is impracticable to cause the oil and alkali to combine when alone, yet that if saponification can be set up with other substances when the oil is present, the latter will be induced to saponify also."

Neither the patent of Rowland nor that of Moreau and Ragon mentions petroleum by name as anything, a product from which is to be used for soap, but that of Johnson does; and as petroleum is a min-

eral oil, and is essentially a hydrocarbon, or a mixture of hydrocarbons, and was at the time of all these patents well known in the art to which they belong, it is very evident that all of them refer to it and cover the products of it described in them. And in considering the bearing of these patents upon the one in suit it is necessary to keep in view that this patent is not for any particular combination of ingredients in soap, nor for any particular process of making soap containing the residuum described, but is merely a patent for what would otherwise be any common soap, of which that residuum is an ingredient. Also it is to be kept in mind that the residuum of the patent is not the only residuum of petroleum. A residuum is what there is left after a process of separation. From petroleum there may be separated by distillation cymogene, gasoline, the naphthas, benzine, kerosene, and other known products, and after each is taken there is a residuum left.

At the time of the plaintiff's invention, according to the evidence, what was known in the art and trade as a residuum appears to have been what there was left after taking off the comparatively valuable products; but these residuums were not all alike. In some cases the process was carried further than others. In some the residuums were treated so that they were substantially charred; in others, they were comparatively free from being charred. In these former patents petroleum products and petroleum residuums were to go as ingredients into soaps. They were not the same residuum as that of the plaintiff's patent; and those patents do not appear to anticipate his so as to defeat his for what he really invented that the patent assumes to cover. Had he been the first discoverer of the use of petroleum products in soap, he might, perhaps, by this patent, cover every form of such use of everything known as residuum not actually charred in this art; but as he was not, he is only entitled at the most to the particular form which he discovered the use of and patented. *Railway Co.* v. *Sayles*, 97 U. S. 554.

The defendants make use of a residuum, but they do not infringe unless they use the plaintiff's residuum. His and theirs all come from the same source, petroleum. According to the plaintiff's argument there is nothing in theirs not in his, and they obtain theirs only by processes of separation from his. This may be true, but if it is, theirs may not be the same as his. There is, according to this argument, nothing in either not in petroleum; and, if the argument should be carried out, a patent for petroleum in soap would cover both, and Johnson's patent would defeat the plaintiff's.

There were in the art, at the time of the plaintiff's invention, residuums from vacuum and steam processes which contained but very few charred particles; and residuums from distillation which contained but few uncharred particles, and from each of which most of what was then known to be valuable had been separated. The patent would, to those skilled in the art, probably be understood to refer to the former, and not to include the latter. When the former is used for the defendants' vaseline, it is first made to be like unto the latter. As the patent is only for a soap of which the former is an ingredient, and not for the latter, nor for converting the former into the latter, it can hardly be said to be infringed by reducing the former to the latter and putting the latter into soap.

The charred particles of a residuum are only mixed, and not chemically combined with the uncharred, however great the preponderance of either in the mixture may be; and if the uncharred portion is merely separated and put into soap, it is quite clear, as has been argued, that a patent for a soap containing uncharred residuum would be infringed. If vaseline is merely the uncharred part of the plaintiff's residuum, or the uncharred part of a like residuum except in the proportion of charred particles, it might infringe the plaintiff's patent. But, on the proofs, vaseline does not appear to be merely such a residuum with the charred particles filtered out. No one testifies that it is.

Competent witnesses testify that it is merely filtered without chemical reaction, which may be true; but, if so, this does not show that only the charred portions are taken out. The question is as to the identity of the residuums in other respects than as to charred particles, which is the distinction that the patent makes. The heat and the bone-black filter appear to remove more than the charred particles. These substances are so complex that it cannot now be told exactly what is removed by these processes. Vaseline may contain nothing that the plaintiff's uncharred residuum does not contain; but, whether it does or not, it does not contain all the things which that does contain. Very learned and competent men differ as to what the difference is, but that there is a difference clearly and fairly appears.

Vaseline is a residuum and an uncharred residuum, but is not the residuum of the plaintiff's patent. The patent cannot be upheld without limiting it to that particular residuum, and cannot be infringed but by the employment of that same residuum.

Let there be a decree that the defendants do not infringe, and that the bill be dismissed with costs.

HAYDEN v. THE ORIENTAL MILLS.

(*Circuit Court, D. Rhode Island.* March 12, 1883.)

PATENT LAWS—LIMITATION OF ACTIONS—COPY UNDER THE PROVISIONS OF REV. ST. § 721.

State statutes of limitations are applicable to actions at law for the infringement of a patent.

At Law.

J. L. S. Roberts, for plaintiff.

Benj. F. Thurston, for defendant.

Before LOWELL and COLT, JJ.

LOWELL, J. The plaintiff brings this action on the case for infringement of his rights under a patent. The defendant pleads that the infringement, if any, occurred more than six years before action brought, which is a bar by the statute of Rhode Island. Pub. St. c. 205, § 3. The plaintiff demurs.

Several judges of great ability and experience have held that the statutes of limitations of the states do not affect actions upon patent rights, upon the theory that section 34 of the judiciary act, (now Rev. St. § 721,) making the laws of the states the rules of decision in the courts of the United States, in actions at the common law, does not apply to actions which are within the exclusive jurisdiction of the courts of the United States. There are several able decisions on the other side, but perhaps the weight of authority is with the plaintiff on this point. We give the citations in a note at the end of this opinion. This is an action at law, and if the statutes in question do not apply, there is no limitation, unless it be that of Rhode Island in 1789, for a court of common law has no discretion to refuse to entertain stale claims.

This result appears to us to be inadmissible. No reason is given in any decision for excepting one class of cases out of section 721. Some arguments upon the general question have been made which we shall advert to. There is no such exception in the statute itself, and none in its intent and purpose. Exclusive jurisdiction is given for reasons which are apart from this question. For instance, in patent cases the federal courts have this control in order that the construction of the law and of the patents granted under it may be as nearly uniform as possible, not that the remedies of a patentee shall be of uniform duration. Equity is a uniform system in the federal courts throughout the United States, but the remedies in equity are barred in those courts by the state statutes of limitations in certain cases.

Suppose congress chooses to give assignees in bankruptcy or national banks an exclusive right to sue in the courts of the United States, can any one maintain that their debtors have no protection by the lapse of time, unless a special statute of limitations is passed by the national authority?

This theory of the dependence of section 721 upon concurrent jurisdiction seems to be an echo of the rule that courts of equity, and perhaps even courts of admiralty, are bound by the state statutes of limitations in cases of concurrent jurisdiction; but it is not concurrent jurisdiction of the state courts, but that of courts of common law, state or national, which decides the point. Besides, what is this concurrent jurisdiction? There are very few cases in which the jurisdiction is really concurrent. In nearly all the defendant has an absolute and conclusive right to make the jurisdiction of the federal courts exclusive by a removal of the cause.

The truth is that section 721 is a declaratory act, announcing a general doctrine of international law, and the supreme court have so construed it. They apply it only to local matters, such as land laws, statutes of limitations, and the like, and in those cases they apply the same rule in equity, though equitable suits are not mentioned in the act; and on the other hand they refuse to apply it to general questions, such as those of commercial law, though when arising at common law they are within the words of the act.

The United States, when they are plaintiffs, are not bound by such statutes of limitations; but this is because they are not bound by similar acts of congress, unless specially mentioned, and they are not mentioned in section 721. It is said that the states cannot declare when actions on patent rights shall be barred. Very true; but neither can they bar any actions in the federal courts. The bar arises from the constitution and situation of those courts, the general international law, and section 721. If not, it would seem to follow that there is no limitation, or that it depends upon the law of Rhode Island in 1789, as in *U. S.* v. *Read*, 12 How. 361, in which the court, finding that section 721 did not apply to criminal cases, were obliged to find some law, and went back to the origin of the government.

To us it seems as inadmissible to say that section 721 does not apply to patent cases, as that the law adopting the general practice of the states does not apply to them. In one particular it perhaps does not, because the statute says that an action on the case shall be the remedy. This is a reproduction of the old law which was passed when all the states had that form of action, and it may or may not

now be an exclusive remedy; but no one can deny that in other respects the process and procedure acts apply to actions at law for the infringement of patent rights. A dozen questions may arise in any patent case which can only be decided by the law of the state.

There is no doubt, of course, of the right of congress to make a statute of limitations for patent causes. The power is specially reserved in section 721, and by the act of 1870, section 55, (16 St. 206,) they made such a law, which provides that all actions shall be brought within the term for which letters patent shall be granted or extended, or within six years thereafter. Congress, when they passed this act, may have supposed that there was no limitation; but, if so, they found out their mistake, for they repealed this part of the patent law, when they passed the Revised Statutes, by omitting it from the chapter on patents. *Sayles* v. *Oregon Central Ry. Co.* 6 Sawy. 31; *Vaughn* v. *East Tenn., etc., R. Co.* 11 O. G. 789. When they thus repealed the act of congress, the state law became again applicable to future infringements, but one of the repealing sections (section 5599) reserves all existing causes of action, so far as limitations are concerned, precisely as though no repeal had been made. *Sayles* v. *Oregon Central Ry. Co., supra; Vaughn* v. *East Tenn., etc., R. Co., supra.*

The plaintiff declares upon a patent granted in 1857 and extended in 1861, expiring in 1878, and alleges damage for the whole period of 21 years. The plea, which merely sets up the bar of six years before action brought, does not fully answer this declaration in the view we have taken of the law, because, granting that when the act of 1870 was passed, an action for a part of the damages was barred, and granting that all causes of action which have accrued since the act was repealed, and more than six years before the service of the writ, are barred, there may remain, for anything that appears by the declaration, certain rights which arose between these times which are saved by the very strong language of the repealing act. The precise effect of these acts and repeals will come up more properly at the trial, under a modified plea, if one should be filed. It is plain that the plea is too broad and must be overruled.*

*That the state statutes govern such cases: *Parker* v. *Hawk*, 2 Fisher, 58; *Parker* v. *Hall*, 2 Fisher, 62, note; *Rich* v. *Ricketts*, 7 Blatchf. 230; *Sayles* v. *Oregon Cent. Ry. Co.* 6 Sawy. 31; *Sayles* v. *R. F. & P. R. Co.* 4 Ban. & A. 239. That the state laws do not govern: *Parker* v. *Hallock*, 2 Fisher, 543, note; *Collins* v. *Peebles*, 2 Fisher, 541; *Read* v. *Miller*, 2 Biss. 12; *Anthony* v. *Carroll*, 2 Ban. & A. 195; *Wood* v. *Cleveland Rolling-mill Co.* 4 Fisher, 550; *Wetherell* v. *New Jersey Zinc Co.* 1 Ban. & A. 485.

STEAM STONE CUTTER CO. *v.* SHELDONS and others.

(*Circuit Court, D. Vermont.* March 12, 1883.)

1. PATENT LAW—INFRINGEMENT—CHOICE OF ACTIONS.

The sale of machines embodying the patented inventions of another to one for use, is an invasion of the patentee's rights, and such a conversion of his property as will render the party so selling the invention liable in an action for tort. But in such case the plaintiff may waive the tort and sue in *assumpsit* for the money received from the sale.

2. SAME—MEASURE OF DAMAGES—WAIVER.

In an action or proceeding for the money, the measure of damages would be the amount of money received, not the amount of damages done, and all right of recovery beyond that would be waived. This is the effect of waiving the tort. The recovery of satisfaction in either form would pass the right to that for which satisfaction was had, and there could be no damages beyond. Consequently, when the plaintiff has recovered and received satisfaction for the tort committed the title to so much of his property as was wrongfully converted will have passed by the sale and conversion and no damages will accrue to him on account of further use of that property.

In Equity.

Aldace F. Walker, for orator.

Walter C. Dunton, for defendants.

WHEELER, J. This suit is brought for relief against infringement of several patents owned by the orator by the use of machines embodying the patented inventions bought by the defendants of the Windsor Manufacturing Company, with a guaranty of the right to use. The orator brought suit against the Windsor Manufacturing Company for infringement of the same patents, and claimed to recover therefor the profits on these sales to the defendants here. To this the Windsor Manufacturing Company objected on account of the guaranty. Upon this question it was held that the liability on the guaranty would not relieve that company from the liability to account for the profits on these sales, for the reason that after a recovery and satisfaction clearly, if not after a recovery only, for those profits, the right to use those machines would have passed to these defendants, so that they would not be liable to the orator for the use of the machines, and there would be no liability over on the guaranty to take away or reduce the profits; and a decree was passed for the recovery, among other things, of these profits. *Steam Stone Cutter Co.* v. *Windsor Manuf'g Co.* 17 Blatchf. C. C. 24. The orator has recovered upon that decree some money, and has caused real estate to be set off on execution in satisfaction of the balance. Other persons

claimed the real estate so set off, and resisted the taking of possession of it by the orator, and suits were brought by the orator against the several claimants of the land, in one of which the orator has recovered one parcel of the land by a final decree; and in another, the principal one, the orator has obtained a decree of this court establishing the validity of the title by the levy, from which an appeal has been taken to the supreme court. The defendants now move for a dissolution of the injunction restraining the use of the machines pending the litigation, and the cause has been heard upon this motion.

The defendants insist that the mere taking a decree for the profits of the sale was a ratification of the sale, and made it valid to pass the rights of the orator to everything covered by it belonging to the orator, the same as if it had been made by the orator. The orator claims that only actual beneficial satisfaction will affect the right to follow the defendants for their infringement, and that there are, or may be found to be, damages beyond the profits of the sale resulting from the use of the machines, if not restrained, and that the orator has the right to a continuance of the injunction to prevent such damage.

The full determination of all these questions does not appear to be necessary to the proper disposition of this motion. The patented inventions were property of the orator. When the Windsor Manufacturing Company sold machines embodying these inventions to the defendants for use it invaded the orator's rights and converted the orator's property to its own use. These acts were tortious and an action would lie for these wrongs. As that company received money for the orator's property, the orator could waive the tort and sue in *assumpsit* for the money, or, what is the same in effect, proceed for an account of the money received. In an action or proceeding for the money the measure of damages would be the amount of money received, not the amount of damage done, and all right of recovery beyond that would be waived. This is the effect of waiving the tort. The recovery of satisfaction in either form would pass the right to that for which satisfaction was had, and there could be no damages beyond. Upon these principles, which are elementary, when the orator has recovered and received satisfaction for the tort committed by the sale and conversion of so much of its property, its title to so much of its property will have passed, and no damages could accrue to it on account of further use of that property. By the satisfaction the machines would be freed from the orator's monopoly.

The levy upon the real estate is *prima facie* a satisfaction of the decree, therefore the machines are *prima facie* free. The defendants, as the case now stands, have *prima facie* the right to have the injunction dissolved. If this right is varied by further developments or different results, compensation can be made to the orator in the accounting with less danger of injustice than the continuance of the injunction would involve.

Motion granted and injunction dissolved.

THE HARRISBURG.*

(*Circuit Court, E. D. Pennsylvania.* February 2, 1883.)

1. ADMIRALTY JURISDICTION—PROCEEDING FOR TORT IN CASE OF DEATH UPON NAVIGABLE WATERS.

   In the admiralty courts of the United States, the death of a human being upon the high seas, or waters navigable from the sea, caused by negligence, may be complained of as an injury and the wrong redressed under the general maritime law.

   The Towanda, 34 Leg. Int. 394, followed

2. COLLISION—LIMITATION OF ACTION—LIBEL IN REM.

   Where a death was caused by a collision, in 1877, near the Cross Rip light-ship, in Nantucket sound, the offending vessel being enrolled in Philadelphia, and a libel *in rem* was filed in the district court for the eastern district of Pennsylvania in 1882, by the widow and daughter of the man so killed, their cause of action does not depend upon the statute laws of either Massachusetts or Pennsylvania, and the limitation of one year in the statutes of those states does not operate as a bar.

In Admiralty.

Appeal by the steamer Harrisburg from the decree of the district court awarding $5,100 damages against her upon a libel, filed by the widow and daughter of the late first officer of the schooner Tilton, whose drowning was caused by a collision.

The material facts are as follows:

Near the Cross Rip light-ship in Nantucket sound, a sound of the sea, embraced between the coast of Massachusetts and the islands of Martha's Vineyard and Nantucket, parts of Massachusetts, on the sixteenth of May, 1877, a collision occurred between the schooner Tilton and the steamer Harrisburg, which resulted in the loss of the schooner and the drowning of six of her crew.

A libel by the schooner was determined against the steamer, (9 FED. REP. 169,) and its liability for the consequences of the collision was not contested

*Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.

in the present proceeding. On February 25, 1882, Emma S. Rickards, and Mary E. Rickards, by her next friend, Emma S. Rickards, widow and daughter of Silas E. Rickards, deceased, late first officer of the schooner Tilton, filed a libel *in rem* against the steamer Harrisburg, for damages for his death, occasioned by the collision. The steamer was engaged in the coasting trade, and belonged to the port of Philadelphia, where she was enrolled.

No innocent rights to or in the steamer had arisen between the date of the collision and the exhibition of the libel, and it did not appear that any inconvenience resulted to the respondents by the laches of libelants.

The district court entered a decree in favor of the libelants, and damages were assessed at $5,100.

Curtis Tilton and *Henry Flanders*, for libelant.

In the admiralty courts of the United States the death of a human being upon the high seas, or waters navigable from the sea, caused by negligence, may be complained of as an injury, and the wrong redressed under the general maritime law. *The Towanda*, (Cir. Ct. Dis. Pa.) 23 Int. Rev. Rec. 384; 34 Leg. Int. 394; *The Chas. Morgan*, 18 Law Reg. 624; *The Sea Gull*, Chase, Dec. 148; *The Highland Light*, Id. 150; *Cutting* v. *Seabury*, 1 Spr. 525; *Long Island Transp. Co.* 5 FED. REP. 599; *The Garland*, Id. 984; *Holmes* v. *O. & C. R. Co.* Id. 75; *The Sylvan Glen*, 9 FED. REP. 335; *The Favorite*, 12 FED. REP. 213; *The Epsilon*, 6 Ben. 379; *Taylor* v. *Dewar*, 117 E. C. L. 63.

The rule of the common law that no redress can be had for such injuries is peculiar to that jurisprudence, and does not obtain in the admiralty. *Sullivan* v. *Railroad Co.* 3 Dill. 337; *De Lovio* v. *Boit*, 2 Gall. 472; *The Chas. Morgan*, 18 Law Reg. 624; Ben. Adm. 149. In *The Towanda*, decided in this circuit, the court said: "While the weight of authority in common-law courts is, perhaps, in favor of the principle, it has not been adopted with uniform sanction even by them," and declaring that "the question is one of general jurisprudence," the court would not recognize the common-law rule. So in *The Sea Gull*, *The Highland Light*, and *The Chas. Morgan*, *supra*. It is believed that the admiralty courts of the United States and of England have not followed the common-law rule in a single case.

The libel complains of a maritime tort, and "the jurisdiction of the American admiralty comprehends all maritime torts and injuries." "It is co-extensive with the subject, and depends upon the locality of the wrong, not upon its *extent, character, or the relations of the persons injured.*" *De Lovio* v. *Boit*, *The Towanda*, and *The Highland Light*, *supra*.

"A maritime lien arises against a ship for the damages resulting from a tort committed by it. This lien travels with the thing wher-

ever it goes. The lien and the proceeding *in rem* are correlative—where one exists the other can be taken." *The Rock Island Bridge*, 6 Wall. 215; *Ins. Co.* v. *Baring*, 20 Wall. 163; *The Gen. Smith*, 4 Wheat. 438.

As to the statutory or laches bar of the action: (*a*) The supreme court in *The Key City*, 14 Wall. 660, say that "the courts of admiralty are not governed by any statute of limitations in the enforcement of maritime liens. (*b*) That no arbitrary or fixed period of time has been or will be established as an inflexible rule, but that the delay which will defeat such a suit must in every case depend on the peculiar equitable circumstances of that suit. (*c*) That where the lien is to be enforced to the detriment of a purchaser for value, without notice, there will be a more rigid scrutiny of the delay than when the claimant is owner at the time the lien accrued."

State statutes of limitation are not observed in the admiralty. 2 Pars. Shipp. 361; *Willard* v. *Dorr*, 3 Mason, 95; *Brown* v. *Jones*, 2 Gall. 481. "The matter of limitations in the admiralty is left to the discretion of the court, which can best judge, in view of all the circumstances, whether the demand be so stale as to be neglected and abandoned. This discretion is not mere caprice, but the sound legal discretion of cultivated reason, in which the circumstances of the parties, the property, and the transaction are to be carefully weighed." Ben. Adm. § 575.

The numerous cases holding that "the lien is not lost by delay in enforcing it, where no third person has acquired any right to the vessel, and the owner has not been injured by the delay, are referable to the above rule." *The Canton*, 1 Spr. 437; *The Mechanic*, 2 Curt. 404; *The Bold Buccleugh*, 3 Wm. Rob. 29; *The Europa*, 2 Lush. 93; *The Louisa*, 2 Wood. & M. 60. In *The Utility*, Blatchf. & H. 222, it was said that "the only general restriction upon the right to sue, adopted by the admiralty, is that it will not take cognizance of stale demands." And in the *D. M. French*, 1 Low. 44, the cause of action was four years one month old, and there was a sale without notice. Held, that "where no injury would result from granting the remedy, and there is reason to believe that no evidence has been lost by the delay, the lienholders may sustain a suit after a very considerable period; even, in the United States, after the lapse of the time prescribed by the statutes of the state as a peremptory bar to similar actions."

The libelants, therefore, encounter no bar to their action unless the court, exercising its discretion, interpose one. There is no rea-

son why this should be done, but these weighty reasons for permitting the actions to go on: There has been no sale of the vessel; nor has evidence been lost, (it is all preserved in the records of this court;) nor, viewing the facts, has there been delay, for the test case was vigorously pressed from the time of collision; nor were the claims abandoned, for in the test case it was expressly averred that they would be pursued.

Thomas Hart, Jr., for respondents.

The libel should be dismissed, because there is no law under which it is maintainable, except the statute law of Massachusetts and Pennsylvania, and by both it is barred by the limitation of time therein provided. The death of a person upon navigable waters, caused by the negligence of another, cannot be complained of as an injury to be redressed under the general maritime law. Such a right depends solely upon the statute laws governing the locality where the death took place; or, if upon the high seas, upon the statute laws of the state to which the vessel causing the injury belonged. Both the states of Maryland and Pennsylvania bar this action. The libelants are the persons entitled to sue, by the Pennsylvania statute. See *Iron Company* v. *Rupp*, 39 Leg. Int. 337.

The jurisdiction of the admiralty is not denied. The right given by the Pennsylvania statute may, within the year, be enforced in the admiralty. *Ex parte McNeil*, 13 Wall. 243; *Railroad Co.* v. *Whitton*, 13 Wall. 270. It was in accordance with this principle that the writ of prohibition was refused in *Ex parte Gordon*, 13 Reporter, 417. None of the cases sustain a libel in a case like this. In *The Towanda*, 34 Leg. Int. 394, (1877,) the judgment was right, for the ship was a Philadelphia vessel and the statute applied. *The Towanda* cannot be sustained on any other ground. The common-law cases cited therein are not now law. See *Green* v. *Hudson R. R. Co.* 2 Keyes, 294; *Ins. Co.* v. *Brame*, 95 U. S. 754; *Dennick* v. *Railroad Co.* 103 U. S. 11; *Osborn* v. *Gillett*, L. R. 8 Exch. 88; Amer. Law Rev. 1882, p. 128.

Cutting v. *Seabury*, 1 Spr. Dec. 525, was in 1860, and is opposed by *Crapo* v. *Allen*, Id. 184.

No distinction was attempted between common law and admiralty law on this subject. *The Sea Gull*, 2 Amer. Law T. 15, (1869,) is responsible for the error on this subject. The decision is made without examination or discussion, and, as far as it goes upon authority, is baseless. It should be rejected. *The Highland Light*, 2 Amer. Law

T. Rep. 118, went on the ground of the locality of the wrong, and the United States and Maryland statutes.

In all the recent cases, state statutes governing the locality of the tort, or the vessel committing it, existed, and the decisions went wholly or partially thereon. This was so in *Holmes* v. *O. & C. Ry. Co.* 5 FED. REP. 75; *The Clatsop Chief*, 7 FED. REP. 163; *Long Island T. Co.* 5 FED. REP. 599; *The Charles Morgan*, 18 Amer. Law Reg. 624; *The Garland*, 20 Amer. Law Reg. 742; (see note to this case, page 750.) When cause of action has arisen on high seas, the law of the state of the offending vessel has been applied. *McDonald* v. *Mallory*, 77 N. Y. 546; *Crapo* v. *Kelly*, 16 Wall. 610. *The Sylvan Glen*, 9 FED. REP. 335, is a direct authority for respondents; and so is *Armstrong* v. *Beadle*, 5 Sawy. 484. English admiralty law is with respondents. *Smith* v. *Brown*, L. R. 6 Q. B. 729; *The Guldfaxe*, L. R. 2 Adm. 325; *The Explorer*, L. R. 3 Adm. 289; *The Franconia*, L. R. 2 Prob. Div. 163. The civil law did not give an action in such a case. Note to *The Garland*, 20 Amer. Law Reg. 747; *Hubgh* v. *Railroad*, 6 La. Ann. 498; *Herman* v. *Railroad*, 11 La. Ann. 5.

After a partial oral argument, MCKENNAN, J., (BUTLER, J., also sitting,) said that the court would not disturb the decision in the case of *The Towanda;* but that the case was doubtful, and it should go to the supreme court. The decree of the district court was, therefore, affirmed, and the following conclusions of law were subsequently filed:

1. By the statute law of the commonwealth of Massachusetts, (St. 1860, *c.* 63, §§ 98, 99,) it is provided in cases of death arising from negligence that a fine may be recovered by indictment and paid to the executor or administrator, and that such indictment shall be prosecuted within one year from the injuries causing the death.

2. By the statute laws of Pennsylvania, acts of April 15, 1851, and April 26, 1855, it is provided that the action therein given in cases of death occasioned by negligence shall be brought within one year after the death, and not thereafter.

3. In the admiralty courts of the United States, the death of a human being upon the high seas, or waters navigable from the sea, caused by negligence, may be complained of as an injury, and the wrong redressed under the general maritime law.

4. The right of the libelants does not depend upon the statute law of either the states of Massachusetts or Pennsylvania, and the limitation of one year in the statutes of those states does not bar this proceeding.

5. Although an action in the state courts of either Massachusetts or Pennsylvania would be barred by the limitation expressed in the statutes of those states, the admiralty is not bound thereby, and, in this case, will not follow the period of limitation therein provided and prescribed.

6. The drowning complained of was caused by the improper navigation, negligence, and fault of the said steamer, producing the collision aforesaid, and the libelants are entitled to recover.

7. As there are no innocent rights to be affected by the present proceeding, and no inconvenience will result to the respondents from the delay attending it, the action, if not governed by the statutes aforesaid, is not barred by the libelants' laches.

Eo die. An appeal was entered to the supreme court of the United States.

EIGHT HUNDRED AND FORTY-ONE TONS OF IRON ORE.*

(*District Court, E. D. New York.* January 29, 1883.)

1. PRACTICE—SUPPLEMENTAL LIBEL—EXCEPTIONS.
   A libel having been filed claiming freight and demurrage under a charter-party, the libelant thereafter filed a supplemental libel, setting up the same and additional facts, and claiming the same freight and demurrage and additional demurrage, to which supplemental libel the claimant excepted on the ground that it set forth facts occurring after the suit was commenced. *Held*, that as it did not appear upon the face of the supplemental libel that any of the facts therein stated occurred subsequent to the commencement of the suit, the exceptions must be overruled.
2. SAME—MOTION TO STRIKE OUT SUPPLEMENTAL LIBEL.
   Where it appeared that the original libel was filed and process issued and served on September 22d, and the supplemental libel, claiming an additional amount, was filed October 4th, before the return of process, no claimant having appeared, and on October 6th the claimant appeared and procured a discharge of the property by depositing in court money to the amount claimed in the supplemental libel, *semble*, that a motion to strike out the supplemental libel on the ground that it set forth facts occurring after the suit was commenced, would be denied, on the ground that the claimant would be deprived of no right by allowing it to stand, while to strike it out would increase expense without benefit, and would also deprive the libelant of the security which the claimant had given for the demand made in the supplemental libel.
   As to when a proceeding in admiralty is deemed to be commenced, *quære.*

In Admiralty.

*Reported by R. D. & Wyllys Benedict.

Ullo & Davison, for libelant.

Benedict, Taft & Benedict, for claimant.

BENEDICT, J. A libel was filed setting up a charter-party, and claiming freight and demurrage to be due thereon. Thereafter a libel supplemental thereto was filed, setting forth the same charter-party counted upon in the original, and some additional facts, and claiming the same freight and demurrage claimed in the original libel, and some additional demurrage.

The claimant excepts to the supplemental libel, upon the ground that the suit was commenced on the twenty-second day of September 1882, and the supplemental libel sets forth facts occurring subsequent to the commencement of the suit. This exception has been pressed with earnestness, and the attention of the court called to the importance of an observance of the forms of law.

In the light of the argument, it is easy to see that the exceptions should be overruled. In strictness, the exceptions must stand or fall by the averments contained in the pleadings excepted to; and it does not appear upon the face of the supplemental libel that the suit was commenced on the twenty-second day of September, 1882. When the original libel was filed, and when the supplemental, is not disclosed by the supplemental libel. If it be a legal presumption that the supplemental libel was filed on a day subsequent to the day on which the original libel was filed, there is no legal presumption that process had been served, or even issued, before the supplemental libel was filed, and the right of a libelant to supplement his libel as he sees fit, before the issue of the process, will not, I suppose, be denied.

But, although a strict observance of the forms of law compels the overruling of the exceptions, I have examined the question that would be presented by a motion to strike out the supplemental libel. Upon such a motion it would appear that the original libel was filed on September 22, 1882, and that process was on that day issued. The supplemental libel was filed on October 4th, before the return of the process, and before the appearance of any claimant. On the sixth of October the present claimant appeared and filed his claim, and on the same day procured a discharge of the property proceeded against, by depositing in court money to the amount of the claim made in the supplemental libel. Thereafter he filed the present exceptions to the supplemental libel. These facts do not present a case for striking out the supplemental libel, because the claimant will be deprived of no right by allowing the supplemental libel to stand, while

to strike it out will increase expense without benefit, and will also deprive the libelant of the security which the claimant has given for the demand made in the supplemental libel. Undoubtedly the original libel might have been dismissed on the libelant's motion, and a new suit commenced. To have done so would have cost the libelant something more, but the rights of the claimant would have been the same as now. Those rights are not affected by the course pursued. If it be said the libelant may demand marshal's fees incurred before the supplemental libel was filed, the answer is that costs are in the control of the court, and the claimant can be fully protected from any increase of liability in the matter of costs arising out of the course pursued.

On the other hand, if the supplemental libel be stricken out, and the libelant limited to the facts set forth in the original libel, the libelant loses the security for the claim made in the supplemental libel, a security given him by the claimant, and by means of which the claimant has been able to regain the possession of the property proceeded against. The supplemental libel was filed while the property proceeded against was in custody of the marshal, as shown by the marshal's return. No person had appeared to claim the same, nor had any change occurred in the ownership of the property, as shown by the claim filed. The claimant, who owned the property when it was seized and also when it was released from custody, notified by the supplemental libel on file of the existence thereof, and of the demand set forth therein, deposited the amount of that demand as security therefor, and upon such deposit obtained a redelivery of the property to him. Having given security to pay the demand in the supplemental libel, and removed the property proceeded against, why should he now be permitted to limit the libelant's recovery to the demand set forth in the original libel, and for the rest turn him over to a second recovery against the property, if perchance the same should be found?

Forms of procedure are important, but I know no law that requires a court of admiralty to carry its reverence of forms so far as, for the sake of mere form and nothing else, to work injustice by striking out this supplemental libel, when full justice can be administered by retaining it. Speaking of forms, the averment of fact contained in these exceptions, that this suit was commenced on the twenty-second day of September, recalls the question when a proceeding in admiralty is deemed to be commenced. If the procedure of the civil law be the procedure of the admiralty, it may be that the suit is not deemed

to be commenced even by the service of the process. According to Dr. Brown (2 Brown, Civil & Adm. Law, 367) it would seem that in strictness the suit is not deemed to be commenced until the issues are made up, and the case ready for transmission from the *prætor* to the *judices* for trial. See, also, *The Martha*, Blatchf. & H. 151.

But, in the absence of aid from the advocate upon this point, I forego the inquiry alluded to, and limit my action on the present occasion to overruling the exceptions upon the ground that it does not appear upon the face of the supplemental libel that any of the facts there stated occurred subsequent to the commencement of the suit.

The Sultan *v.* Three Thousand Empty Oil Barrels.*

(*District Court, E. D. Pennsylvania.* January 30, 1883.)

Libel for Freight—Bill of Lading—Construction of—Custom of Port—Burden of Proof.

The burden of proof rests upon a respondent setting up a custom to return and deliver at Chester oil barrels, which, under a bill of lading, stipulating to deliver the same at the port of Philadelphia, had been carried beyond Chester to the city of Philadelphia, and such custom has not been shown to have existed at the date of this contract.

Whether such custom now exists, not decided.

Admiralty. Libel, answer, and proofs.

On August 20, 1881, 7,061 empty petroleum barrels were shipped on the Sultan, the bill of lading stipulating that the same should be delivered at the port of Philadelphia, at a wharf to be selected by the consignees. The Chester Oil Company was established in March, 1881, and a large proportion of the barrels afterwards consigned to the port of Philadelphia were discharged at Chester. The Sultan arrived at the city of Philadelphia on the twentieth of September, 1881, and was requested by Witthof, Marsily & Co. to go back and discharge at Chester. This the master refused, and thereupon discharged at Cathrall's wharf, Philadelphia, and filed this libel for $818.76 freight, attaching 3,000 barrels. The respondent claimed that one-third of the oil business of the port was done at Chester, and it was a custom of the port to discharge at that place. The libelant contended that a custom of five months was not sufficient to affect this contract; that up to January, 1883, 176 vessels had discharged at Chester, and of

*Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.

these the respondent had produced only 22 bills of lading not containing a "Chester clause;" only three vessels had returned to Chester after arriving at the city of Philadelphia, and to these towage expenses had been paid, while no instance was shown where a vessel had returned without towage expenses, which the libelant had offered to receive.

Charles Gibbons, Jr., for libelant.

J. W. Coulston and *Alfred Driver*, for respondent.

BUTLER, J. The defense is not sustained. Upon arrival of the cargo at Philadelphia, where the charter required it brought, the respondent ordered it back to Chester, several miles below, claiming a right to do so under the contract. Conceding Chester to be without the limits of Philadelphia, the respondent sets up a custom, which he says requires it to be treated as within, where the particular commerce to which this contract relates is involved. Without entering upon a discussion of the subject it is sufficient to say that no such custom existed at the date of this contract,—whether one exists now need not be considered. What is necessary to the establishment of such a custom is well understood; the burden of proof is on the party setting it up. In the case under consideration the proof is insufficient. That many outward-bound vessels, under contract to carry oil from Philadelphia, had, within two or three months preceding the date of this charter, loaded at Chester, and inward-bound vessels loaded with oil, or oil casks, had unloaded there, is unimportant. In each instance Chester was directly on the way, and a request so to load or unload tended to the carrier's relief, and would, therefore, be favorably received. No instance is shown of a vessel carrying her cargo back to Chester, under such a contract. The opinions of witnesses cited are of no value.

The libel is sustained, and a decree will be entered accordingly.

THE ALERT.*

(*District Court, E. D. New York.* February 10, 1883.)

COSTS—DOCKET FEE—"FINAL HEARING" UNDER REV. ST. § 824.

Where a vessel was in custody of the court under process issued against her, and the case was entered in the admiralty docket, a consent was given that the case be discontinued on payment of the amount claimed and libelant's costs. *Held*, that the granting of a motion for an order discharging the vessel from custody and canceling stipulations, was a final hearing under Rev. St. § 824, and the libelant was entitled to a docket fee of $20.

In Admiralty.

Goodrich, Deady & Platt, for libelant.

L. B. Bunnell, for claimant.

BENEDICT, J. This was a proceeding *in rem*. The libel was filed, process issued, the vessel taken into custody, and the case entered in the admiralty docket. Subsequently, an order dismissing the case and discharging the vessel from custody on payment of costs, founded upon a consent of the libelant that the cause be discontinued on payment of the amount claimed and the libelant's costs, was applied for and obtained.

The costs are presented for taxation, and the question is raised whether the libelant can tax a docket fee of $20. The fee-bill allows on a final hearing in admiralty a docket fee of $20, where the amount recovered is over $50. Rev. St. § 824. A distinction is drawn by the statute between admiralty causes and cases at law. In the latter case a docket fee of five dollars only is allowed where the case is discontinued. A docket fee of $20 is allowed in all admiralty cases where there is a final hearing. In *Hayford* v. *Griffith*, 3 Blatchf. 79, it was held by the circuit court that a dismissal of a cause upon the calendar, upon a motion before hearing, for an omission to file security for costs, was a final hearing within the meaning of the statute. The ground of this decision would seem to be that granting an order which disposed of the cause was a final hearing.

In accordance with this decision, the practice of this district has been to allow a docket fee in admiralty causes *in rem*, like the present. In this case the court has possession of the vessel. An order of court is necessary to obtain her release and to effect the cancellation of the libelant's stipulations. A discharge of the vessel does not follow of course. It may be that the pendency of other proceedings

*Reported by R. D. & Wyllys Benedict.

against the same vessel will prevent a release of the vessel upon such a motion. Such a motion, when granted, terminates the cause, so far as the vessel is concerned, and the hearing thereon is deemed a final hearing within the principle of the case of *Hayford* v. *Griffith*, above referred to.

The clerk's taxation of a docket fee of $20 is affirmed.

See *Coy* v. *Perkins*, 13 FED. REP. 111, and note; also *Yale Lock Manuf'g Co.* v. *Colvin*, 14 FED. REP. 269.

THE SAMUEL OBER.

(District Court, D. Massachusetts. February 23, 1883.)

1. SEAMEN'S WAGES.
   A vessel under charter is liable for the wages of seamen hired by the charterers, although the owner may not personally be liable therefor.
2. SHIPPING CONTRACTS.
   A seaman is not bound by a clause in his shipping contract unfavorable to his interest if it was concealed from him, or its meaning misrepresented; and if, from any cause, he is unable to read the contract, he may show that it differs from his oral engagement, upon clear proof that the written contract was not read or explained to him.

In Admiralty.

F. Cunningham, for libelants.

H. P. Harriman, for claimant.

NELSON, J. The claimant, Edward E. Small, of Provincetown, chartered the schooner Samuel Ober for a cod-fishing voyage of seven months from May 1, 1882, on the coast of Maine. The libelants, Manuel Francisco, John Francisco, and Manuel Caton, are Portuguese fishermen, living in Provincetown, unable to read or write. They allege that they shipped as fishing hands on the schooner for this voyage, under an oral agreement by which they were to serve for five months from May 1st, and were to receive as wages for such service, respectively, $250, $240, and $210. They left the vessel October 2d, at South-west Harbor, Mount Desert, after having served five months, and now sue for their wages according to the verbal contract. The shipping articles fix their wages at the sums stated, and contain this clause written in below the printed part, above the signatures of the men:

"And it is further agreed that the fishermen, whose names are to this agreement subscribed, shall continue in said schooner Samuel Ober during the time for which she is chartered, viz., seven months from May 1, 1882, and shall receive the following wages or lay; providing, however, that if they should leave the vessel for any other reason, excepting sickness, before the expiration of seven months from May 1, 1882, this contract shall be null and void, and they shall receive a *pro rata* amount of wages at the rate as follows."

Below the signatures is a memorandum, written in after the men had signed, as follows:

"Now, providing the above-named crew shall continue in the said vessel for seven months, they shall receive the above wages for five months, and one-half for what they make in the other two months, less their proportionate part of the whole expense of the voyage; but, as before agreed, should they leave the vessel before the expiration of seven months, they shall receive one-seventh of the amount for which they have shipped for every month engaged."

The libelants allege that they signed the shipping articles, supposing that they contained the verbal agreement; that the written parts were not read to them; and that they were induced to sign them as they now appear by the fraud of the claimant.

A vessel under charter is liable for the wages of seamen hired by the charterer, although the owner may not personally be liable therefor. *Flaherty* v. *Doane*, 1 Low. 148; *The Adelphi*, an unreported decision of Judge SPRAGUE, cited by Judge LOWELL in *Flaherty* v. *Doane*.

A seaman is not bound by a clause in his shipping contract unfavorable to his interest, if it was concealed from him or its meaning misrepresented; and if from any cause he is unable to read the contract, he may show that it differs from his oral engagement upon clear proof that the written contract was not read or explained to him. *Wope* v. *Hemmenway*, 1 Spr. 300; *The Quintero*, 1 Low. 38. But I am convinced, after a careful examination of the conflicting evidence, that the shipping articles correctly state the contract made by the libelants with the charterer. The evidence wholly fails to show that he was guilty of any unfair or dishonest conduct towards these men. The whole contract, including the written parts, was read and carefully explained to them. The clause inserted after the signatures was written in their presence, and was read to them. It was intended as an additional inducement for them to remain with the vessel after the expiration of the five months. It certainly was for their benefit, since it gave them a half-line share in the catchings for the last two months of their service, in addition to their round wages. The claimant had hired the vessel for a seven months' voy-

age, and she was not to return to Provincetown until the end of the voyage. Under such circumstances, it is highly improbable that he would have engaged a crew for round wages for five months only. As it was, owing to the advanced state of the season when the libelants left, the skipper was unable to procure men at South-west Harbor to take their places, and in consequence the voyage was broken up. The amount of the stipulated wages also indicates that seven months was the agreed length of the service. The evidence showed that from $30 to $40 a month is what is usually earned by fishermen on voyages such as this.

The libelants, although illiterate, are not unintelligent. They converse readily in English. They have lived for many years in Provincetown, and are familiar with its peculiar usages. They knew as well as their neighbors what a fishing contract means. When they heard this contract read, they must have comprehended its terms, and must have known that it took the place of any previous verbal arrangement which they may have made with their employer. I think it is quite clear that they understood their contract to be that expressed in the shipping articles. The amounts due them, after deducting the sums advanced during the voyage, are correctly stated in the answer. As these sums were tendered and refused before suit brought, the libelants are not to recover costs.

One other matter should be adverted to. This is a proceeding against the vessel. A warrant of arrest was issued, and she was seized and held by the marshal until released, upon the claimant's giving the usual stipulation, with sureties, to abide the final decree. A very considerable expense was thus incurred. The amounts involved in the suit are small. The claimant lives in this district, and is of ample pecuniary responsibility; and this was known to the libelants and their proctor. The libelants should have proceeded against the claimant *in personam*. There was no occasion to incur the expense of the arrest and detention of the vessel. This expense was wholly unnecessary. If I had given costs to the libelants, I should have allowed for the service of the warrant of arrest only the cost of serving the claimant with a simple monition to appear and answer the suit.

Decrees are to be entered for the libelants, without costs, as follows: For Manuel Francisco, $111.75; for John Francisco, $140.60; for Manuel Caton, $57.32. Ordered accordingly.

The City of New York.

(*District Court, S. D. New York.* March 5, 1883.)

1. Collision—Rules of Navigation—Fault by Non-Observance.
   The non-observance of the statutory rules of navigation is itself a fault which charges the vessel with damages, where it appears that but for this fault the collision would have been avoided.
2. Steamer in Fog—Moderate Speed—Rule 17.
   Where a steamer in a fog does not go at "moderate" speed nor "slacken," as soon as there is perceptible danger of collision, as required by rule 17, and a collision ensues, which would have been avoided had the rule been observed, *held*, that the steamer is chargeable with fault, and responsible, notwithstanding the fault of the other vessel, also without which the collision would not have happened.
3. Same—Case Stated.
   Where the steamer "C. of N. Y.," in a fog, kept on her usual speed of 10 knots, and heard the fog-horn from the bark H. about a point on her starboard bow, and starboarded her helm, without either moderating or slackening her speed until she saw the bark coming across her bows about an eighth of a mile distant, and a collision afterwards ensued by which the H. was sunk, *held*, that the steamer was in fault both in going at too great a rate of speed, and also in not slackening her speed when the fog-horn was heard; it appearing that if she had done either the collision would have been avoided.
4. Contributory Cause—Mutual Fault—Damages Divided.
   The bark being, at the time of the collision, headed about E., four points to the eastward of N. E., the usual course of vessels under similar circumstances, and the witnesses from the steamer testifying that when first observed the bark was heading N. E., but changed her course across the steamer's bow, while the mate of the bark testified that the only change about the time of the collision was a slight luff a few moments preceding it, and alleged a prior change from the course of N. E. nearly three hours previous, and it appearing that the latter change alleged by the mate involved extreme improbabilities as to the previous navigation, and was not in harmony with other parts of his testimony as to the bearing of lights, *held*, that the mate's testimony as to this change should be rejected, and the change of four points held to have been made near the time of the collison, notwithstanding the usual rule giving superior credit to a vessel's own officers as to her navigation, and the difficulties of observation from the steamer in the fog; and as this change of course contributed to the collision, the bark was also in fault and the damages should be divided.

In Admiralty.

Scudder & Carter, for libelants.

A. O. Salter and *R. D. Benedict*, for claimants.

Brown, J. The libel in this case was filed by the owners of the iron bark Helen, a British vessel of about 450 tons burden, bound from Havana to New York, against the steamer City of New York, bound from New York to Havana, to recover for the loss of the bark and her cargo, valued at $52,000, which were sunk by a collision with

the steamer at 10:50 P. M. on the night of June 28, 1879, off the Jersey coast.

The libelants contend that the wind was W. S. W.; that the bark, from 8:15 P. M. to a few minutes preceding the collision, had been heading E. by N. ½ N., and making three to three and a half knots per hour; that soon after 10 P. M. the weather became foggy, with periods of greater density, and shortly before the collision had become quite thick; that the steamer's fog-whistle was first heard nearly abeam some two or three minutes before the collision; that the steamer's mast-head light was shortly after seen in the same direction, and next the steamer's green light; that the order was then given to "luff a little," which was at once obeyed, but before the wheel could be got down, and when the bark had changed her course thereunder not more than one point, she was struck on the port side just forward of the mizzen rigging by the stem of the steamer; that the bark's fog-horn had been blown properly during the fog; and that her colored lights were properly set and burning.

The speed of the steamer was nearly checked at the time of the collision; but the blow was sufficient to cause the bark to sink, in about 10 fathoms of water, in a few minutes afterwards. Five of the bark's crew, including the master, were drowned; and five, including the mate, the wheelsman, and one lookout, were saved; the mate being in charge of the navigation at the time.

The respondents contend that the wind was about S.; that the course of the steamer was S. by W. ½ W., and her speed about 10 knots per hour; that the night was fair, with moonlight; that the fog came on between 10 and 11, and at the time of the collision was such that the vessel's sails could be seen about an eighth of a mile distant; that the faint sound of a horn from the bark was first heard about a point on the starboard bow; that the steamer's wheel was at once starboarded; that the bark's head-sails next became first visible about one point on the steamer's starboard bow, apparently coming in a direction about opposite the course of the steamer; that very soon thereafter the bark was seen changing her course to the eastward, and swinging around so as to open her masts and show her red light; that the steamer's wheel was thereupon immediately changed to port, and her engines stopped and backed; that at the time of the collision she headed S. S. W. ½ W., having gone about three quarters of a point to port, under her starboard wheel, and come back to starboard, under her port wheel, one and three-fourths

points; and that the bark, under her port wheel, had come around so as to be heading, at the time of the collision, about E. or E. by N.,—a change of course, as claimed by the respondents, of from four to six points.

The respondents contend that when the bark's horn was first heard she was heading about N. E. or N. E. by N.; that she would have been avoided by the steamer under her starboard wheel had the bark kept her course; and that the collision was caused solely by the latter's change of course.

The libelants deny that there was any such material change of course by the bark, or any other change than a slight luff, *in extremis*, a few moments only before the collision, and when it was unavoidable.

The City of New York is a steamer of 1,715 tons measurement and 242 feet long; her greatest speed under steam and sail, according to the testimony, is 13 to 14 knots. Up to the time when her engine was stopped, after sighting the red light of the bark, there had been no slackening of speed since she left New York; and from the evidence it is clear that she was running at the rate of a little over 10 knots. There was a strong head-wind, described by those on board as very nearly directly ahead; and the master of the Old Dominion, who was sailing in close company, says the wind was sufficient to retard his vessel a mile and a half per hour. The effect of the wind upon the City of New York must have been similar; and as she used no sails, it is clear that her rate of 10 knots prior to making the bark must have been very near her full speed against this strong head-wind.

There is no substantial dispute in regard to the density of the fog. An eighth of a mile, or a little more, may be taken as the distance at which a vessel's sails could be seen on that moonlight night. The bark's head-sails, it is claimed, were seen at somewhat more than that distance, though the hull could not then be seen.

If the course of the bark had been N. E. by N., as claimed by the respondents, and that course kept by her, and if she were then one point on the steamer's starboard bow, I think it is clear that the steamer, under her starboard wheel, would have cleared the bark, whether the steamer's speed were unchecked, or had been "slackened" and reduced to a "moderate" speed of from five to seven knots.

The respondents contend, therefore, that the bark was solely responsible for the collision, by reason of the change of course which

they claim to have shown on the part of the bark; and that the steamer cannot be held chargeable, notwithstanding the fact that she did not at first, on hearing the bark's horn, "slacken" her speed, because such slackening of speed was not necessary to avoid the collision had the bark kept her course. Rule 21, however, provides that "every steam-vessel, when approaching another vessel, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse, and every steam-vessel shall, when in a fog, go at a moderate speed." This rule plainly imposes upon a steamer two duties: (1) To proceed in a fog at a *moderate* speed; (2) in approaching another vessel so as to involve danger of collision, to *slacken* her speed, and, if necessary, to stop and back. Whenever this rule becomes applicable, then the duties it imposes are absolute and imperative obligations. They are not dependent, in the slightest degree, on the conduct or fault of the other vessel. Negligence in observing these obligations is itself a fault; and, if accidents ensue, it is incumbent on the vessel neglecting these duties, if she would exonerate herself from liability, to show clearly that this neglect in no way contributed to the collision.

Rule 21, I cannot doubt, is designed not merely to secure safety in case the other vessel observes exactly the duties incumbent on her, but to make navigation less perilous at all events, whatever may be the fault of either vessel, and that the consequences of even faulty navigation may be less fatal to life and property.

In this case, rule 21 was, I think, plainly applicable to the situation from the time when the horn of the bark was heard upon the steamer's starboard bow. The fog was such that the vessels could not be seen much more than an eighth of a mile apart. When the bark's horn was first heard, only a point on the steamer's starboard bow, and the course of neither vessel was known to the other, it is plain that the steamer was "approaching a sailing vessel so as to involve the risk of collision," within the meaning of rule 21. *The D. S. Gregory*, 2 Ben. 226, 234. The place was one where numerous vessels are constantly going up and down the coast. The bark, for aught known to the steamer, might have been going either in the same direction with her, or opposite, or beating to windward on her starboard tack; and in the latter case the steamer's starboard helm would have increased the peril.

The steamer in this case was going substantially at full speed; she starboarded, not upon any present observation of facts in regard to the course of the bark, but merely on surmise as to the most probable mode of avoiding the collision. The object of the sailing rules is to

provide safer guides than surmises, however probable, and to impose definite obligations on each vessel. Rule 21 required, not only that the steamer should be going at moderate speed, but also that in view of the danger she should slacken her speed. She did neither till the bark came into view, close at hand, and was seen crossing the steamer's bow. The collision was then inevitable; and not until then did the steamer check her full speed of 10 knots. That she had not previously slackened her speed was in itself, as I have said, a fault in her navigation, because it was a disobedience of a statutory rule; and this fault plainly contributed to the collision, because, if she had slackened her speed as required when the horn was heard about a point off her starboard bow, the collision clearly would not have happened.

The fact, if such be the fact, that the collision would, nevertheless, not have happened but for the fault of the bark in changing her course across the steamer's bow, does not relieve the steamer, because she had no right to disregard the statutory obligation to slacken her speed. The only effect of the other's fault would be to charge the latter also. If slackening speed would have made no difference as to the collision or the results of it, then the rule could not be invoked against her, because immaterial. But the fact here is clearly to the contrary; and the steamer is, therefore, chargeable with contributory negligence because she did not slacken speed as required, when, if she had done so, the collision would have been avoided. The same remarks apply in regard to the second clause of rule 21, which required the steamer, in this fog, to go at moderate speed. The fog, though not very dense, was sufficient to prevent any observation of the lights, or of the course of vessels, more than about an eighth of a mile distant, and it therefore diminished greatly the ordinary means of avoiding danger. The authorities are quite uniform in requiring a diminution of speed under such circumstances. Whatever "moderate speed" may be, under given circumstances, having reference, as it doubtless does, to the steamer's ordinary speed and her ability to stop quickly, the density of the fog, and the means which vessels have of observing each other, so as to avoid danger, it is, at least, something materially less than that full speed which is customary and allowable when there are no obstructions in the way of safe navigation. To continue at full speed, therefore, as the steamer in this case substantially did, until the bark was in sight, was a clear violation of the statutory obligation to go at a moderate speed. And as she would have cleared the bark if her speed had been less, she is necessarily chargeable with contributory negligence. *The Louisiana,*

2 Ben. 373–376; *McCready* v. *Goldsmith*, 18 How. 90; *St. John* v. *Paine*, 10 How. 583; *The Eleanora*, 17 Blatchf. 88, 91, 101; *The Great Eastern*, 11 Law T. Rep. (N. S.) 5; *The D. S. Gregory*, 2 Ben. 168.

The question whether the bark was also in fault presents great embarrassments upon the testimony in this case. Her duty was to keep her course. The libelants strenuously contend that she did so, except a slight and immaterial luff of not over one point to the eastward, a few moments before the collision, and when the collision was seen to be inevitable. If this was the only change of course made, she cannot be charged with fault. *The Northern Indiana*, 3 Blatchf. 92, 101; *The Genessee Chief*, 12 How. 443, 461; *The Favorita*, 18 Wall. 598, 603; *The Farnley*, 1 FED. REP. 631, 637.

The usual and ordinary course for vessels coming up this part of the coast, with a fair wind, is N. E. or N. E. by N. The steamer, before the bark's horn was heard, was going S. by W. ½ W. At the time of the collision the bark, as all the witnesses agree, was heading about E. or E. by N., or about four points to the eastward of the usual course of vessels bound for New York. Three witnesses from the steamer testify that they saw the bark rounding to the eastward when nearly an eighth of a mile distant; so that while her head sails only were seen at first, her masts, by this change of course, opened into view.

The mate of the bark, on the other hand, testifies that the captain went below shortly after 8 o'clock and was not again on deck until the collision; that by the captain's orders, at 8:15 P. M., the bark was put upon a course of E. by N. ½ N., and so continued without change until the slight luff above spoken of, a few minutes before the collision. This statement is, to a certain extent, corroborated by the wheelsman, who, at 10 o'clock, relieved "Jacob" at the wheel, and, as he says, received from him the course of E. by N. ½ N., which, he testifies, was kept until a few moments before the collision. "Jacob" was drowned, and there was no further confirmation of this testimony.

The question on this branch of the case is, how did the bark come to be heading E., or E. by N., at the time of the collision? Was it through the two prior changes of course, as testified to by the mate, viz., one at 8:15 P. M. from N. E. to E. by N. ½ N., and then a slight luff of one point only, just previous to the collision; or was it by a single change only, *i. e.*, one luff of about four points from a N. E. course, made after the fog signals were heard, and when the bark

was seen on the steamer's starboard bow, as testified to by the witnesses from the latter?

After a good deal of consideration and re-examination of the testimony, I find myself unable to credit the statement of the mate as to the change and course of the bark at and after 8:15 P. M. From the projection of the masts of the Helen above water, the precise place of the collision is known. A buoy was placed there, and the position subsequently determined by the light-house board, as follows:

"From Barnegat light-house, N. ⅛ E., (magnetic,) distant 12⅛ miles; Tucker's Beach light-house, W. S. W. ¾ W., (magnetic,) distant 9½ miles; being 6¼ miles from shore, in 10 fathoms at low water."

This determination fixes the place of collision about half a mile nearer the shore than appears in the diagram of Capt. Trask, based upon previous testimony. Proceeding backwards from the place of collision, as thus ascertained, upon the course alleged by the mate, the bark at 8:15 P. M., at the rate of four knots per hour, would be upon the beach near Tucker's light-house; at the rate of three and a half knots, she would be near the breakers, about one mile to the eastward of the light; at the rate of three knots, she would have been about two miles from the light, and about three-quarters of a mile from land, in four fathoms of water. The speed of the bark during this time is stated by the mate and wheelsman at from three to four knots; but considering that the bark had come from Cape Henlopen, which she made "in the forenoon" of that day, a distance of about 62 knots, at an average speed of about four and a half knots; that the mate himself says the bark during the day was going only a little faster than in the evening; and the further fact that at 9 P. M. the wind was blowing at the signal station at Barnegat at the rate of 24 miles per hour, nearly a gale, and is described by the steamer's witnesses as well as by the captain of the Old Dominion as a "strong breeze" of six to eight knots,—I think that the speed of the bark cannot have been less than four knots per hour.

The mate further testifies that prior to the alleged change of course at 8:15 P. M. the bark had been sailing N. E. during the day. Tracing still further backward the course of the vessel accordingly, the bark would have been ashore on the shoals above Absecom light, reckoning from her place at 8:15 P. M. as found according to the mate's testimony, and a speed of three and a half knots prior to the collision; or she would have been aground off Atlantic City, reckoning backward from her place at 8:15 P. M., resulting from a speed of only three knots prior to the collision.

But if the bark's course be traced back from the place of collision by the usual route,—say a N. E. course,—we should find the bark, at the rate of four knots, at 8:15 P. M. at a point four and three-fourth miles from shore, in nine fathoms of water, about five and one-half miles distant from Tucker's light-house, which would bear about N. N. W., while Barnegat would bear N. N. E. 20½ miles distant, and Absecom light would bear W. S. W. about nine and seven-eighths miles distant. At 8 P. M., when the mate came on deck and observed the lights, Absecom light would have been W. S. W. three-fourths W. nine miles distant; Tucker's light, five and three-fourths; and Barnegat, 21¼ miles distant. Absecom light would, therefore, be at that time two points on the bark's port quarter, and Tucker's light two points forward of her beam. These positions of the vessel and the bearings of lights derived from the ordinary course of vessels coming up the coast and passing through the place of this collision, not only agree with the British sailing directions for this region, of which it must be presumed the master had a copy and which he would naturally follow, but they also agree precisely with the position and bearing of the lights which the mate testifies to observing when he came up on deck at 8 P. M., viz., one (Absecom) aft and one (Tucker's Beach light) "a little forward of abeam," as he reported it; although it is conceded that he was wrong in naming the lights, and the direction, N. N. E., given by him cannot be correct. Tucker's Beach light, a small light visible at best but 12 miles, would naturally be only dimly descried five and three-fourth miles distant in the twilight, a half an hour after sunset; Absecom light, visible 19 miles, and then only nine miles distant, would be seen on the quarter; while Barnegat, visible only 19 miles at best, would, in this twilight and 21¼ miles distant, be invisible.

Upon the previous course given by the mate, on the other hand, whether the speed be taken at three knots or four, the bark at 8 o'clock must have been only a mile or two E. by N. from Little Egg harbor (Tucker's) light; and at that distance there could not possibly have been any of that difficulty in discovering it which it is obvious there was from the mate's testimony; while Barnegat, 16 to 17 miles distant, in the early evening twilight, could not possibly, I think, have been discerned; and, if it were seen, it would not be "a little forward of abeam," nor even N. N. E., but nearly N. E., or nearly directly ahead, as the bark was then steering; and no light at all could have existed "a little forward of abeam," as the mate testifies that he reported it. Nor, if the bark were headed E. by N. ½ N. at 8:15,

would Barnegat light, when it afterwards came into view in the mate's watch, have been seen "two points off the port bow," as Brown, then on the lookout, testifies; though Camellieri, the other lookout, says he saw none, (and there was no other than Barnegat light which could have been seen except astern;) while that light would have been seen in just that direction, viz., two points off the port bow, if the bark had reached the place of collision by a N. E. course.

The story of the mate as to the course of the bark previous to the collision must, for these various reasons, therefore, be rejected as wholly incredible in itself and irreconcilable with his testimony and that of others in regard to the lights. Rejecting the alleged change at 8:15 P. M., there is no other change from the previous north-easterly course which the evidence admits, except that made after the fog signals of the vessels were heard by each other; for not only does the mate say that there was no other change, but, as the captain was not on deck, it is not to be supposed that the mate would change the course without orders. Nor has the court any right, if it finds the mate's statement false as to the alleged change of course at 8:15, to substitute some other time between 8:15 and the collision when such a change might have been made, except the admitted change made shortly before the collision; and having no other testimony to go upon, it must assume that the previous N. E. course continued until this last change was made, especially as that course is the customary one, and is found to harmonize with all the other circumstances and probabilities of the case.

The usual north-easterly course to the point of collision harmonizes, as I have said, with the distance and bearing of the lights, with the sailing directions, and with the natural course of navigation after making Cape Henlopen. It accords, also, with the weight of testimony in regard to the wind. All the witnesses on the bark state that the wind was very nearly aft—about a point on the starboard quarter. The mate of the bark testifies that the wind was "W. S. W., or a little southerly." Evidence was taken from the signal stations from Sandy Hook to Cape May; but none of it makes the wind W. S. W. At Sandy Hook, and by one observer at Atlantic City, the wind is given as S. W.; while the light-house keeper at Atlantic City, and the evidence from Barnegat and from Cape May, make the wind S. The testimony of those on board the steamer, as well as that of the master of the Old Dominion, gives the wind as nearly directly ahead, or about S.; while the mate of the bark, in his deposition before the consul, was recorded as giving the wind

S. S. W. When examined on that point at the trial, he claimed to have subsequently corrected that statement before the consul. The respondent's copy of his deposition gives the wind S. S. W., while the libelant's copy in one place still gives the wind S. S. W.

On the whole, I am of the opinion that the weight of testimony shows that the wind was somewhere from S. W. to S. S. W., and this confirms the previous conclusion that the bark, up to the time of the collision, had been sailing on a N. E. course, since that would bring such a wind about a point on her starboard quarter, as all her witnesses testify. The fact that the bark's jibs were not set, and that other sails which could not draw with an aft wind were furled, confirms the testimony that she was sailing with the wind very near astern. It is not impossible that the course E. by N. ½ N., testified to by the mate and wheelsman, may have been derived from that course adopted for a short time after making Cape Henlopen, in the forenoon, by the same watch; since that course might, for a short time, have been naturally followed if the captain found himself within a few miles of the cape.

The improbabilities or impossibilities involved in the mate's testimony cannot be accounted for upon any theory of the master's ignorance of his position; for it appears that Cape Henlopen had been made in the forenoon. Shortly after, the land above Cape May, which is visible some four miles at least, was seen. The day was clear. An azimuth had been taken, and shortly before 8 P. M. the lead had been thrown. These circumstances show that the master must have known his position perfectly. I cannot doubt, therefore, that he kept the ordinary and prescribed course, running from three to six miles from shore. There was no reason why he should deviate from it. This usual north-easterly course, continued above Absecom, would carry the bark somewhat further off shore and bring her to the place of collision. The mate's testimony as to the alleged change of course at 8:15 P. M. I must, therefore, reject, as I have said, because it involves the most violent improbabilities as to the previous navigation of the bark, and is wholly irreconcilable with other accredited facts. I have no right to substitute any later change in the place of the one testified to at 8:15, and hence I must hold that the former course of N. E. was continued up to the time of the collision; that there was but one change of course instead of two, which brought the bark to heading nearly E., and that this change was the luff which her witnesses admit, except that it was a luff of three to four points, instead of one, and

begun earlier than they admit, while off the steamer's starboard bow, and not *in extremis*, as they allege.

Little weight can be attached to the testimony of those in the bark that the steamer's whistle, when first heard, seemed about abeam. The reflections of the waves of sound amid banks of fog are such as to render the seeming direction of sounds in a fog wholly unreliable. The wheelsman of the bark testifies that the order to luff was given when the steamer's mast-head light was seen. There is no reason to suppose this was not seen as early as the vessel's sails were visible to the lookout on the steamer; and that was probably somewhat over one-eighth of a mile distant; and the light was probably visible earlier than that. The two vessels were approaching each other from that time at a combined average speed of not exceeding eight knots, considering the change of course and the steamer's diminishing speed. This would give from one to two minutes from the time the mast-head light was visible until the collision, which was sufficient time, I judge, for the bark, with a strong aft wind, and no jibs set, to have luffed from three to four points. From the testimony of those on board the steamer as to what was done after first seeing the bark's sails, it would seem that more than one minute must have elapsed from that time up to the collision. Several of her witnesses estimate the time at from three to four minutes; the mate of the bark estimated it at three; but mere estimates of time under such circumstances are unreliable; and I think from one to two minutes is probably nearer correct; but this was sufficient for the change of three to four points.

I have not been unmindful of the rule which gives the most credit to a vessel's own witnesses in regard to her own motions; nor of the fact that observations from the steamer as to the bark's course through the fog, were in this case necessarily attended with much greater uncertainties than observations made in clear weather; and if the mate had given an account of the bark's course, which was in the slightest degree credible and reconcilable with his other testimony and the other facts in the case, so as to furnish a probable and consistent story, it would have been adopted without hesitation, notwithstanding all the steamer's testimony concerning the bark's apparent changes; but as I feel obliged to discredit the mate's testimony as to one of the most important facts in the case, and to remark also his suspicious indefiniteness and asserted want of knowledge concerning other important facts in regard to the position of the

bark, which he knew shortly before giving his testimony, and which it is not probable he had forgotten, such as the result of the azimuth, which he himself computed, the distance of the bark from shore, the depth of water on sounding, the time of making Cape Henlopen, etc., there is no alternative but to follow the testimony from the steamer, since this is not only consistent with itself, with the several changes in her own course which were based upon the facts testified to by her witnesses, but is also consistent with the only probable course which could have brought the bark to the place of collision.

The testimony from the steamer shows that the apparent course of the bark to the north-east when first observed, a point upon the steamer's starboard bow, would have carried her clear if unchanged. As this change of three to four points was too great, and was commenced too early and too far off from the steamer, to be regarded as a change *in extremis*, and as this change of course evidently contributed to the collision, the bark must also be held chargeable with fault, and a decree should therefore be entered for the libelants for the recovery of one-half the excess of their damages over the damages sustained by the steamer, and a reference directed to ascertain the amount, with costs.

THE FRED. M. LAURENCE.*

(*District Court, E. D. New York.* February 27, 1883.)

COLLISION ON ERIE CANAL—ALIBI—CONFLICTING EVIDENCE—PRESUMPTION.

In an action to recover damages for collision between two canal-boats, the I. and the L., on the Erie canal at Little Falls, the defense set up was an *alibi*. Several witnesses declared that the L. was the boat that collided with the I., and several declared that the L. was not at Little Falls at the time of the collision, and was not in collision with any boat that night. *Held*, that the fact that a witness on the I., who was known to have ascertained by inspection the name of the colliding boat, was not produced, no excuse being given for his non-production, warranted the presumption that his testimony would not support the libelant's case, and that in such a conflict of testimony this presumption was controlling, and the libel was dismissed.

In Admiralty.

L. R. Stegman, for libelant.

Carpenter & Mosher, for claimant.

*Reported by R. D. & Wyllys Benedict.

BENEDICT, J. This is a proceeding *in rem* to recover of the canal-boat Fred. M. Laurence the damages sustained by the canal-boat Idlewild in a collision that occurred at Little Falls, on the Erie canal, on the night of the twenty-sixth of August, 1879. The defense is an *alibi*.

Two persons on the deck of the libelant's boat are able to prove the occurrence of the collision, but are not able to identify the Fred. M. Laurence as the other colliding boat. Two persons on the deck of the Fred. M. Laurence at the time of the collision swear that their boat was not then at Little Falls, but some miles to the eastward, and they also testify that the Laurence was not in collision with any boat on the night in question. These two witnesses for the Laurence are confirmed to some extent by the captain's wife, who was in the cabin of the Fred. M. Laurence, and swears that she felt no collision and heard of no collision on the night in question. This testimony for the Laurence is claimed by the libelant to be overcome by the testimony of two other witnesses who were on board the Laurence on the night in question. A steersman on the Laurence, called by the libelant, testifies that on the night in question, being asleep in bed, he was awakened by a jar, and looking out of the window saw that the boat was at Little Falls. This testimony is in direct conflict with that of the captain's wife, who, being up and awake, could not fail to have observed a jar sufficient to awaken one abed and asleep.

Leaving out, then, the testimony of the wife and the steersman as balancing each other, there remains in opposition to the testimony of the captain and the steersman of the Laurence that of the driver of the Laurence, also called by the libelant, who swears positively that at the time and place stated in the libel the Laurence collided with the Idlewild. The credibility of this witness is seriously impaired by the fact that he testifies after an arrangement made with the libelant for his future employment on the libelant's boat; and he is contradicted, not only as to the fact of a collision, but in several important points of detail, by both the captain and the steersman of the Laurence. These contradictions are of such a character that the advocates agree that perjury has been committed on one side or the other.

There is, however, one fact not disputed, and sufficient to control the present decree. It is proved that one of the hands employed on board the Idlewild at the time of the collision knows whether the Laurence was the boat that did the damage, having ascertained the name of the colliding boat by inspection a very short time after the

collision. This witness is not called, nor is any excuse for his non-production given. The presumption, therefore, is that his testimony would not support the libelant's case, and in such a conflict this presumption is controlling.

The libel is accordingly dismissed, and with costs.

VIANELLO *v.* THE CREDIT LYONNAIS.

(*District Court, S. D. New York.* March 8, 1883.)

1. ADMIRALTY—PRACTICE—RULE 53—SECURITY.

   Rule 53 (formerly rule 54) in admiralty, providing that security may be required of the respondents "whenever a cross-libel is filed upon any counter-claim arising out of the same cause of action for which the original libel was filed," is to be construed as embracing cases arising out of the same subject-matter of dispute, when the question in litigation is substantially the same in both suits. The words "cause of action" are not used in this rule in the sense of the same identical legal demand.

2. SAME—SECURITY IN CROSS-SUIT.

   Where a libel is filed to recover an alleged deficiency of cargo delivered, and the payment of freight having been refused by the libelants on the same ground, a cross-libel is filed to recover the freight on the cargo delivered, and security having been obtained in the first suit through the arrest of the vessel, *held*, that the respondents should be required to give security in the cross-suit, under rule 53.

In Admiralty.

Wilhelmus Mynderse, for libelant.

Condert Brothers, for respondents.

BROWN, J. A motion is made in this case that the respondents file security under the present fifty-third (formerly fifty-fourth) rule of the supreme court in admiralty.

The respondents were the consignees of certain iron imported from Europe upon the Italian bark Querini Stampalia, in December, 1881. The quantity of iron delivered being less than that described in the bill of lading, the respondents refused to pay freight, and on December 31, 1881, filed their libel in this court to recover the value of the iron not delivered.

Thereafter, on the same day, the present libelant, the master of the bark, filed this cross-libel against the respondents to recover the freight. In both actions the question in dispute is the same; namely, whether the bark is responsible for the shortage of iron; no other matter being in controversy. In the respondent's suit the bark was

arrested, and gave security for the claim and costs. The libelant in this suit now asks for similar security from the respondents, upon an affidavit that the respondents are a non-resident corporation, and have now no agent resident within this district.

The motion is opposed upon the ground that the present libelant's counter-claim does not "arise out of the same cause of action for which the original libel was filed," within the language of rule 53; because, it is said, the cause of the action in the original libel is to recover the value of the iron not delivered; while the cause of action in the cross-libel is to recover payment of freight upon the iron that was delivered.

The objection is evidently based upon the contention that the words "same cause of action," in rule 53, mean the same legal demand or legal claim. The words themselves, separately considered, might doubtless have that meaning; but if that meaning were adopted here, it would destroy, as it seems to me, all the force of the rule; and, so far as I can see, render it incapable of application in any case. For I cannot recall any circumstances in which a cross-libel could be filed for the purpose of asserting against the original libelant a counter-claim arising out of the same identical legal demand or the same legal claim as that sought to be enforced by the original libelant. The context itself shows that a different legal claim is contemplated by this rule, for it refers to a "*counter*-claim," and not the *same* claim, "arising out of the same cause of action." I am satisfied that the words "the same cause of action" are here used in a more general sense, meaning the same transaction, dispute, or subject-matter which has been the cause of the action being brought, and that they include those cases of cross-libels where the question in dispute is identical in both, the defense in one suit being the ground of the claim in the other. It is just that in such cases each side should be similarly protected by security; and the original libelants having obtained security for their alleged claim by the arrest of the bark, they ought not to complain of being required to furnish security in turn upon the counter-claim. Such I think was the intention of this rule.

The respondents suggest that the rule was designed to cover such cases as mutual claims upon collisions; but in that class of cases the cross-libel does not assert a counter-claim arising from the same identical legal demand. Each vessel bases its claim for damages upon the alleged fault of the other; and that is the only ground of action by either. Such cases do not present so single and identical

a question as the present libel and cross-libel; but both, I have no doubt, were designed to be embraced in the rule.

In the case of *Roberts* v. *Ralli*, in the eastern district, (not reported,) a case essentially like this, security was required. I am satisfied that this is the correct construction of the rule, and the motion is, therefore, granted.

THE FOX.*

(*Circuit Court, E. D. Louisiana.* January, 1883.)

TOW-BOATS—TOLLS.

The relation of a tow-boat to the vessels it has in tow is not such as to make it liable for the tolls due by said vessels for passing through a channel excavated by private enterprise, and for which passage tolls are allowed by statute to be charged.

In Admiralty.

Thomas L. Bayne and *George Denegre*, for libelant.

E. M. Hudson and *J. Walker Fearn*, for claimants.

PARDEE, J. The legislature of Alabama enacted—

"That John Grant be, and he is hereby, authorized to enter upon and take possession of so much of the shoal or shell reef, situated between Dauphin island and Cedar Point, in the county of Mobile, as may be necessary to cut or excavate a channel or channels of sufficient depth and width to afford a good, safe inland passage for steam-boats and other vessels in the trade between the waters of Mobile bay and other places on the Gulf of Mexico, etc.; that, so soon as said Grant shall have deepened or excavated a channel of sufficient depth and width to admit the passage of steam-boats or other vessels drawing five feet of water, he shall be authorized to charge and receive, from all such boats or vessels as may go in or out of said channel, a toll or tonnage duty at a rate not to exceed 15 cents for each ton of the registered measurement of such boat or vessel, and any boat or other vessel that shall become liable for toll as aforesaid, whose captain, owner, or other person who may be in charge, neglecting or refusing to pay the same for five days after the same shall have been demanded, shall be liable to be sued for the amount of the toll due, together with 50 per cent. damages, and said boat or other vessel and their owners shall be liable for the same, together with costs of suit, to be collected before any court of competent jurisdiction," etc.

The libel in this case is prosecuted to compel the steamer Fox, which is a tug-boat of about 25 tons measurement, to pay tolls for 11 passages through the pass or canal built by John Grant under the

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

authority of said act of the legislature, and also to recover from the Fox tolls on 11 boats and barges by it towed through said pass. The claimant admits liability for the tolls claimed on the Fox, and alleges a tender of the same, but denies liability for the boats and barges admitted to have been towed through the pass.

Taking it for granted in this case, because not disputed by claimant, that the tolls authorized by the act aforesaid constitute a maritime lien on all such boats or vessels as may go in or out of said channel, the only question for decision in the case is whether the relation of a tug-boat to the boat or vessel it has in tow is such as to make it liable for the tolls which the act puts on the boat or vessel. No such liability arises from the legislative grant aforesaid. By that authority each boat or vessel going in or out of the channel is made liable, and the amount of toll may be recovered from the "boat or other vessel, and their owners." The owner of the pass may follow the boat or other vessel going in or out of the channel, or the owner of such boat or other vessel, but he is given no remedy against any other party.

The ordinary contract of towage is one merely covering the furnishing of propelling power to move a boat or vessel from one place to another. See Desty, Shipp. & Adm. §§ 332, 333. In such contracts tug-boats or tow-boats are not common carriers even. *The Webb*, 14 Wall. 406.

I am unable to see how a tow-boat, towing a vessel through Grant's pass, can be held liable for toll except on its own measurement, unless the liability is implied from the contract of towage, or is incurred by special contract. I think it clear that no such liability is implied from the contract of towage, and there is no suggestion of any special contract.

The libelant should have a decree for the amount of tolls due on the Fox, and his claim to recover tolls on the boats and barges in this action should be rejected. The claimant having confessed in his answer liability for all libelant is entitled to recover, should pay the costs up to the first decree rendered in the case. All the other costs in the district court and the costs in this court should be paid by the libelant. And it is so ordered.

In re CONRAD, United States Commissioner, etc.

(*Circuit Court, D. Delaware.* February 16, 1883.)

1. UNITED STATES COMMISSIONERS AND SUPERVISORS—FEES OF—HOW AUDITED AND ALLOWED.

   The act of February 22, 1875, regulating fees, requires that before any bill of costs shall be taxed by any judge or other officer, or any account payable out of the moneys of the United States shall be allowed by any officers of the treasury in favor of clerks, marshals, or district attorneys, the party claiming such account shall render the same, with the vouchers and items thereof, to a United States circuit or district court, and in presence of the district attorney or his sworn assistant, whose presence shall be noted on the record, prove in open court, to the satisfaction of the court, by his own oath or that of other persons having knowledge of the facts, to be attached to said account, that the services therein charged have been actually and necessarily performed as therein stated * * * and by section 2031, Rev. St., the above provision is extended to accounts of fees of chief supervisors.

2. SAME—PUBLIC OFFICERS IN DUAL CAPACITY.

   Where an act is required to be performed or services to be rendered, and the officer required to perform it necessarily holds two positions intimately and indispensably connected, and provision is made by law for the payment of services rendered in each capacity, it is more consonant with the principles of justice and equity that compensation for that service should be made according to the provisions of the statute that applies to it, rather than to deny such remuneration on mere technical grounds.

3. SAME—SUPERVISORS OF ELECTION, FEES OF.

   Section 2031, Rev. St., provides that there shall be allowed to each supervisor of elections who is appointed and performs his duty under the preceding provisions, compensation at the rate of five dollars per day, for each day he is actually on duty not exceeding 10 days. The chief supervisor is included under the provisions of this section.

4. SAME.

   Fees for drafting and furnishing certain papers, and the rate per folio or otherwise at which public officers are allowed to charge therefor, are provided for under section 828, Rev. St.

Henry C. Conrad, for himself.

John C. Patterson, Dist. Atty., *contra.*

BRADFORD, J. The following charges of said commissioners and supervisors having been previously disallowed by the first comptroller's office, treasury department, under date of December 28, 1882, as unauthorized by law, are now reclaimed and again objected to, viz.:

(1) For drafting recommendations to the court for appointment of supervisors of election, at 15 cents a folio; (2) for drafting oaths of office and furnishing same to supervisors of election for qualification, at 15 cents a folio; (3) for drafting oaths of office and furnishing same to special deputy marshals

for qualification, at 15 cents a folio; (4) for drafting instructions to supervisors of election, at 15 cents a folio; (5) for necessary attendance before United States circuit courts, at five dollars a day.

The act of February 22, 1875, regulating fees, etc., requires that "before any bill of costs shall be taxed by any judge or other officer, or any account payable out of the moneys of the United States shall be allowed by any officer of the treasury in favor of clerks, marshals, or district attorneys, the party claiming such account shall render the same, with vouchers and items thereof, to a United States circuit or district court, and in presence of the district attorney or his sworn assistant, whose presence shall be noted on the record, prove in open court to the satisfaction of the court, by his own oath or that of other persons having knowledge of the facts, to be attached to said account, that the services therein charged have been actually and necessarily performed as therein stated, * * * and the court shall thereupon cause to be entered of record an order approving or disapproving the account, as may be, according to law and just;" and it also provides that United States commissioners shall forward their accounts, duly certified by oath, to the district attorneys of their respective districts, by whom they shall be submitted for approval in open court, and the court shall pass upon the same in the manner aforesaid.

The above provision is extended to accounts of fees of chief supervisors, by section 2031, Rev. St. The manifest intention of the legislature in thus providing for the presence of the district attorney at the time of submitting such accounts, for the approval of the court, was that a proper scrutiny and inspection of the same might be had by the attorney of the United States, and a full opportunity be offered for objection and argument on his part, should any claims be made by said officers which might be illegal or questionable; the object, of course, being to guard against the payment by the treasury of fraudulent or fictitious claims.

Now, the chief supervisor is *ex officio* United States commissioner, (section 2025, Rev. St.,) and his fee bill is, (section 2031, Rev. St., and also section 847, Rev. St.,) and when he performs other services not provided for in said sections, the same compensation as is allowed to clerks for like services under section 828, Rev. St. This appears from the express provisions of the law above quoted; and, therefore, when the chief supervisor is required by a statute to do or perform any service, the payment for which is not provided for by section 2031 aforesaid, he may lawfully claim payment for the performance

of said service under sections 828 or 847, Rev. St., if the service comes within the scope of those acts. This is plainly so, because, otherwise, it would assume that congress, having created an officer of a dual capacity and individuality, and having provided a somewhat complicated fee-tariff for his compensation in either capacity, might at pleasure impose imperative duties on him in one capacity, and at the same time avoid payment on the ground there was no provision for the payment of such services, when performed in such capacity. In other words, by a mere quibble, escape from payment of just charges for the performance of services imposed upon him.

We cannot presume that this was the intention of the law-creating power. Every reasonable presumption points to the contrary. Where an act is required to be performed or services to be rendered, and the officer required to perform it necessarily holds two positions intimately and indispensably connected, and provision is made by law for the payment of services rendered in each capacity, it is more consonant with the principles of justice and equity that compensation for that service should be made according to the provisions of the statute that applies to it, rather than to deny such remuneration on mere technical grounds and to require the gratuitous performance of the service by the officer.

The conclusion might be different if the officer were compensated in part by a salary, but such is not the case here.

The question then is, do the services claimed by the commissioner and supervisor come within the scope and provisions of sections 847 and 828, Rev. St.?

As to the first charge. It appears by section 2026, Rev. St., that it is made the duty of the chief supervisor to present to the court applications or recommendations for the appointment of supervisors. The charge is 15 cents a folio for drafting such recommendations. We think this charge is clearly within the provisions of section 828. That section says: "For * * * drawing any bond, or making any record, certificate, return, or report, for each folio, 15 cents." The charge is accordingly allowed.

As to the second charge. The said section 2026, Rev. St., requires that "the chief supervisors shall prepare and furnish all necessary forms, blanks," etc., to the supervisors of election. These oaths of office were necessary. Each supervisor had to take an oath, which had to be signed by the affiant, and the same is required to be filed in the office of the chief supervisor by said section. A reasonable construction of said section leads to the conclusion that the chief

supervisor is the proper person to furnish and prepare the blank oaths. The charge is 15 cents a folio, and is clearly within the provisions of section 828, Rev. St. The charge is accordingly allowed.

As to the third charge. The chief supervisor is required by section 2026, Rev. St., to file the oaths of the special deputy marshals in his office. The oaths were necessary to be taken before the marshals could enter upon the discharge of their duties; and while the act does not require the chief supervisor to furnish the same to the marshals, it does require that when taken they shall be filed in his office. The implication that the chief supervisor should furnish the proper form of oath to be taken does not seem unwarranted, and we therefore allow him this charge, fixing his compensation at 15 cents a folio, under the provisions of section 828 as above.

As to the fourth charge. Here, again, by section 2026, Rev. St., is the imperative requirement that the chief supervisor "shall prepare and furnish all necessary instructions for the use and directions of the supervisors," etc. Considering the fact that the supervisors of election are scattered over large and often remote sections of the district, that many of them are unfamiliar with the duties and responsibilities of their position, the wisdom of the requirement, "that the chief supervisors shall furnish them instructions," etc., is apparent. The claim is for 15 cents a folio for drafting such instructions to supervisors, and we think it clearly within the provisions of section 828, Rev. St. The charge is accordingly approved.

As to the fifth charge. Section 2031, Rev. St., provides that there shall be allowed and paid to each supervisor of election * * * who is appointed and performs his duty under the preceding provisions, compensation at the rate of five dollars per day for each day he is actually on duty, not exceeding 10 days. We think the chief supervisor is included under the provisions of this section. He "is appointed and performs his duty under the preceding provisions," and is *per se* a supervisor; indeed, the chief.

The claim is for 14 days' necessary attendance before the United States circuit court, but the chief supervisor, in his written explanation, states it was for time while he was actually on and performing his duties. With this explanation we think the claim is proper, but must be restricted to the 10 days limited by the statute. The claim is, therefore, reduced to 10 days at five dollars a day, and approved for that amount. The duties pertaining to the office of chief supervisor are very responsible and onerous, and involve a judgment and discrimination beyond mediocrity. The person selected and fitted for

such an office is entitled to the fees which properly come within the tariff of compensation provided for the office of commissioner and supervisor, and the construction that under the laws above considered the supervisor would be entitled to none of the claims above considered, would reduce his remuneration to such an inconsiderable sum as to make it difficult, if not impossible, to induce any person fitted for the discharge of these very important duties to accept the office.

HURST and others *v.* COLEY.*

(*Circuit Court, S. D. Georgia, W. D.* December 16, 1882.)

1. TROVER AGAINST PLEDGEE.
   Where notes and mortgages were given by a debtor to a creditor as collateral security for a debt, and the creditor redelivered the notes and mortgages to the debtor, to be by him collected for the creditor's account, the statutory action, which is a substitute for the action of trover, will lie against such debtor or pledgee, where the latter fails to return or account for the collaterals on demand.
2. SAME—HOW AFFECTED BY DEFENDANT'S AGENCY.
   In such case it makes no difference that the original debt grew out of transactions between the creditor and defendant acting as agent of his wife, in a business conducted by him. An agent may be charged in trover; his agency is no defense.
3. AMENDMENT.
   To a suit brought for such written securities, an amendment declaring for their proceeds is germane.
4. MEASURE OF DAMAGES.
   In such a suit the measure of damages (for which the statute allows an alternative verdict) is the plaintiff's interest in the collaterals, which interest cannot exceed the debt or the value of the collaterals.
5. VERDICT—IMPEACHMENT BY JURORS.
   Jurors cannot be heard to impeach their verdicts by affidavits as to mistakes made by them in arriving at a verdict.

At Law. On motion for a new trial and motion in arrest.

The case is very fully reported in the written decision. To that report it may be added that the original declaration in the prescribed statutory form under the Code of Georgia, which is a substitute for the action of trover, alleged that the defendant, J. A. D. Coley, was in possession of certain written securities which had been turned over to him by plaintiff for collection for their account, etc. The defendant filed an answer to the plaintiff's ancillary proceeding for

*Reported by W. B. Hill, Esq., of the Macon bar.

bail, in which he set up that he had collected a large amount of the securities, but had not done so in his individual capacity, as sued, but as agent for his wife. Prior to the filing of this answer, defendant had not accounted for these securities. Upon the coming in of this answer, the plaintiff amended his writ so as to sue for the *proceeds* of the securities so collected. This amendment the court ruled was germane to the original cause of action and was allowable. The amendment, however, was afterwards withdrawn, owing to rulings made on other points. The following is a copy of the second plea, mainly relied on by the defendant:

"And for further plea in this behalf the defendant says that if he ever gave the said plaintiffs any receipt, such as that described in said suit, he did not do so on his own individual account, on his individual responsibility, or for any consideration moving to him individually, but solely as the agent of Mrs. Charlotte T. Coley, in the course of conducting her business as a merchant and trader, for her account, upon her responsibility, and upon a consideration alone moving to her; the agency of this defendant in the premises, and his authority to act therein from the said Charlotte T. Coley, being then and before that time, to-wit, the day said receipt purports to have been given, well known to and recognized and acted on by said plaintiff," etc.

Hill & Harris and *J. A. Thomas*, for plaintiffs.

Lanier & Anderson and *L. C. Ryan*, for defendant.

PARDEE, J. The 29 grounds assigned for a new trial and in arrest of judgment in this case may be arranged under the following heads:

(1) Error of the judge (*a*) in sustaining demurrer to defendant's second plea; (*b*) in allowing plaintiff to amend by adding a second count; (*c*) in rejecting evidence; (*d*) in instructions given to the jury, and in neglecting to give certain instructions to the jury; (*e*) in allowing the plaintiff's counsel to write out the verdict rendered in the case.

(2) Error of the jury—the verdict being informal and illegal; and (*a*) contrary to law; (*b*) contrary to the evidence; (*c*) contrary to the charge of the court; (*d*) not responsive to the issues in the case.

(3) Misconduct in impaneling the jury to the prejudice of the defendant.

There are affidavits submitted from nearly all the jurors to the effect that some did and some did not understand the issues involved in the case, and the force and effect of the verdict found by them; but I do not find that movant makes any point on this. And I further understand that the grounds referring to the manner of impaneling the jury are withdrawn. If I am wrong in this, then the questions are disposed of by saying that jurors will not be heard to impeach their own verdict; and that the affidavits show no misconduct on the part of any one in the matter of impaneling the jury.

The demurrer to defendant's second plea was properly sustained, because the matters alleged in said plea, if true, constitute no defense to the plaintiff's action. The defendant was sued for the wrongful conversion of certain notes and mortgages belonging to the plaintiffs. The plea admits the conversion, but sets up that in the matter he was acting as the agent of his wife, all to the knowledge of the plaintiffs.

"The gist of the action of trover is the wrongful conversion of the property of the plaintiff by the defendant. The wrongful detention of the property is a conversion, and in a tortious act all are principals and equally liable. A servant may be charged in trover, though the conversion be done by him, however innocently, for the benefit of the master, and it is immaterial whether he had his master's authority or not. Leigh, Nisi Prius, 1480; *Stephens* v. *Elwall*, 4 Maule & S. 259." *Porter* v. *Thomas*, 23 Ga. 471; Georgia Code, § 2213.

Whatever error there may have been in allowing the plaintiffs to amend, and I am unable to perceive any, was fully corrected by the withdrawal by plaintiffs' counsel during the trial, and before the jury retired, of the obnoxious amendment. The only evidence rejected on the trial, against the defendant, was evidence wholly in support of the second plea, to which a demurrer was properly sustained. But in fact, as the record shows, the evidence showing defendant's business relations with his wife, and his agency, and the knowledge of the plaintiffs, was all before the jury, notwithstanding the adverse ruling of the court. No requests on the part of the defendant were made to instruct the jury upon any point, nor were any objections made nor exceptions taken to the charges and instructions given by the judge to the jury. According to the practice of this court, objections to the charge of the judge to the jury come too late if first made after verdict. See Rule 17, Circuit Court Rules. The plaintiffs' counsel was not permitted to write out the verdict and procure the foreman to sign it. The verdict was written out in open court by the foreman himself, in the presence of the other jurors and the counsel on each side, the latter knowing what was being written and making no objection. In fact there was nothing to object to, as the shaping of the verdict was perfectly regular and proper. See Georgia Code, § 3562.

The verdict is for a certain sum as damages.

Upon the trial the plaintiff elected to demand a verdict for damages, and not demand an alternative verdict for the property or its value. This, I understand, is permitted by section 3564 of the Georgia Code.

I utterly fail to see wherein the verdict is contrary to law, or wherein it is not responsive to the issues. The plaintiff sued for the wrongful conversion to recover certain personal property of the alleged value of $4,250.84. On the trial he elected to demand a verdict for damages alone. The jury find in his favor for $2,849.52, with certain interest from certain dates.

We now come to the grounds that the verdict is contrary to the evidence and to the instruction of the judge. The evidence shows that the defendant received August 1, 1881, sundry notes and mortgages, amounting in principal to $4,501.50, substantially bearing interest from October 1, 1881, from the plaintiff for collection and return proceeds; that plaintiffs owned and held these notes as collateral security of a certain debt or debts of Charlotte Coley, defendant's wife and alleged principal, the original amount of which was not clearly shown; that defendant returned to the amount of $251.46; that defendant had collected or disposed of the remaining notes, and had remitted to plaintiffs as proceeds thereof $1,900; and that plaintiffs' debt against Charlotte Coley, as evidenced by notes offered on the trial, still outstanding, amounted to $2,849.52, with interest from about November 15, 1881.

It is true that now some opposition is made to the establishment of the remittances amounting to $1,900; but the brief of evidence shows that defendant swore to it unqualifiedly, and plaintiffs offered nothing to dispute him on this point. Indeed, my own recollection is that during the trial I asked counsel for plaintiffs if he denied this amount having been paid, and he replied that he did not dispute it. The jury were instructed in effect that the plaintiffs could recover damages only to the extent of their interest in the property; that as they received the notes only as collateral to a debt due from the defendant, (as the jury were authorized to treat it,) that interest could not exceed the amount of the debt, nor the amount in value of the collateral unaccounted for. The jury found damages to the amount of the debt, as is plain from the verdict. If this amount is in excess of the amount of the deposited notes unaccounted for, it is erroneous to that extent.

The total amount of the collateral was - - - -		$4,501 50
Amount of notes returned, - - -	$ 251 46	
Remitted, - - - - - -	1,900 00	
Collateral accounted for, - - - - -		2,151 46
Collateral unaccounted for, - - - - -		$2,350 04

The verdict is for $2,849.52, and exceeds the value of the notes converted by the sum of $499.48. This calculation is made by adding protest fees found to amount of verdict, and offsetting interest. A verdict will not be disturbed in this court as contrary to the evidence when there was testimony before the jury which, if credited, will support the verdict. In this case there was sufficient before the jury to warrant a verdict for the full amount of the converted notes, but for no greater sum. In finding a verdict for $2,849.52, and interest, the jury went beyond the evidence to the amount of $499.48, and to that extent disregarded the charge of the court. Except for this excess, the verdict does substantial justice between the parties. If there is any real dispute as to the 1,900-dollar remittances, the plaintiffs can take the new trial offered.

The following order will be entered on the motions for a new trial and in arrest of judgment:

For the written reasons on file, it is ordered and adjudged that a new trial be granted in this case, unless the plaintiffs, within 10 days from the filing hereof, shall write off from the verdict and judgment in the sum of $499.48, with interest thereon from November 15, 1881. In case such remitter is entered within the delay aforesaid, the said motions for a new trial and in arrest of judgment are overruled and discharged, with costs.

HENRY and another *v.* GOLD PARK MINING CO.*

(*Circuit Court, D. Colorado.* March 28, 1883.)

GARNISHMENT.

A judgment of one court is not attachable under process issued out of another court.

One John W. Bailey sued the plaintiff Henry in one of the courts of the state of Colorado, and, having caused a writ of attachment to issue, served process of garnishment upon the defendant, the Gold Park Mining Company. The garnishee answered, admitting that it is indebted to plaintiff Henry in the sum of $4,942.47 on a judgment against him in this court, in this cause, and thereupon moved this court to stay execution upon the judgment until the matter of its liability in the state court can be determined. This is the motion now to be considered.

*From the Denver Law Journal.

Wells, Smith & Macon, for the motion.

Samuel T. Rose and *Chas. J. Hughes, contra.*

McCRARY, J. The only question which I deem it necessary to consider is whether a debtor by judgment in a federal court can be subjected to garnishment at the suit of a creditor who proceeds against him in a state court. Whatever the rule may be with respect to the garnishment of a judgment debtor in the same court in which the judgment was rendered, I am of the opinion that it would lead to great inconvenience and to serious conflict of jurisdiction to hold that a judgment in one court may be attached by garnishment in another, especially where the two courts are of different jurisdiction, as in the case before us, and the decided weight of authority sustains this view. Drake, Attachm. § 625; *Young* v. *Young*, 2 Hill, (S. C.) 426; *Burrill* v. *Letson*, 2 Speers, 378; *Wallace* v. *McConnell*, 13 Pet. 136; *Wood* v. *Lake*, 13 Wis. 94; *Thomas* v. *Wooldridge*, 2 Wood, 667, (opinion by Mr. Justice BRADLEY;) *Franklin* v. *Ward*, 3 Mason, 136; Freeman, Ex'ns, § 166.

Upon these authorities, as well as upon what I conceive to be much better reason, I am constrained to hold that a judgment in this court cannot be attached in a proceeding in a state court, and this ruling is conclusive of the motion to stay execution, which, without considering the other questions raised, must be overruled. Ordered accordingly.

DENVER & N. O. R. Co. *v.* ATCHISON, T. & S. F. R. Co.*

(*Circuit Court, D. Colorado.* February 24, 1883.)

1. RAILROADS—CONTRACT NOT TO DO BUSINESS AT CERTAIN POINTS.

   A contract by which one railway company agrees with another upon a division of territory and traffic between them, and that one will not "do any through business to and from Trinidad, or to and from New Mexico via Trinidad or El Moro," amounts to an express renunciation of a duty of transportation enjoined by the state, and is therefore void.

2. SAME—COMBINATION—CONTRACT NOT TO DO BUSINESS IN CONNECTION WITH RIVAL COMPANY.

   A contract by which two railway companies agree to exchange their traffic, and not to "connect with or take business from or give business to any railroad" which may be constructed in Colorado or New Mexico after the date of the agreement, is against public policy and void.

3. SAME—DISCRIMINATION—INJUNCTION.

   If such companies refuse to accept "through" freight and passengers from a third company, whose road has been built in the territory specified in the

*Reported by Adelbert Hamilton, Esq., of the Chicago bar.

contract, after the date thereof, except at rates or fares higher than the rates or fares charged persons or property coming over the roads of the parties to the contract, such refusal amounts to an unreasonable and illegal discrimination against such traffic coming over the new road, and will be restrained by injunction at the suit of the new company.

4. CONSTITUTIONAL LAW—PROHIBITION OF RAILWAY DISCRIMINATION—CONSTRUCTION.

A provision of the constitution of the state of Colorado, that "all individuals, associations, and corporations shall have equal rights to have persons and property transported over any railroad in this state, and no undue or unreasonable discrimination shall be made in charges or in facilities for transportation of freight or passengers within the state, and no railroad company, nor any lessee, manager, or employe thereof, shall give any preference to individuals, associations, or corporations in furnishing cars or motive power," (section 6, art. 15, Const. of Colorado,) is not merely authority to the legislature to pass laws on the subject to which it applies, and otherwise incapable of enforcement. While, in the absence of a special law directing such a proceeding, this provision would not authorize a company to make a physical connection of unconnected railroads, yet, independently of legislative power and action, it requires the railroads in the state of Colorado to be operated in conjunction for the convenience of the public; at least, to the extent usual and customary between connecting lines in the control of companies not hostile to each other; and to this extent it will be enforced by the courts.

5. SAME—NOT IN CONFLICT WITH FEDERAL CONSTITUTION.

The above provision of the constitution of Colorado is not in conflict with section 8, art. 1, of the constitution of the United States, conferring upon congress the power "to regulate commerce with foreign nations and among the several states."

Wells, Smith & Macon, for plaintiff.

Geo. R. Peck and *Thatcher & Gast,* for defendant.

HALLETT, J. The duty of common carriers to give equal service on equal terms and upon reasonable compensation to all who may apply to them to carry persons or property is as well established as any rule of the common law. As to railroads, it is expressed in section 6, art. 15, of the constitution of this state in the following language:

"All individuals, associations, and corporations shall have equal rights to have persons and property transported over any railroad in this state, and no undue or unreasonable discrimination shall be made in charges or in facilities for transportation of freight or passengers within the state, and no railroad company, nor any lessee, manager, or employe thereof, shall give any preference to individuals, associations, or corporations in furnishing cars or motive power."

As a rule of law it must carry with it all that is essential to its due observance and enforcement. It is good for what is fully expressed in it, and from all that may arise therefrom by necessary implication. Whatever is inconsistent with it, or with the purposes for

which it was adopted, is against public policy, and cannot be upheld. It is a rule of conduct for carriers which is designed to give the public the largest use of public conveyances which may be consistent with the service, and one which leaves to carriers only such powers as are necessary to the business. Thus the carrier may charge for his services, because he cannot work without pay; but he is allowed only a reasonable price, such as will be fair compensation for his labor. He may exclude from his carriage explosive compounds which may be dangerous to other goods and the carriage itself. He may also exclude thieves and gamblers and other mischievious persons who may be traveling for an unlawful purpose. These and the like things for the good of the service the carrier may do, but in general he must have regard for the public interest in all that he does; for, as said by the supreme court, "he is in the exercise of a sort of public office, and has public duties to perform from which he should not be permitted to exonerate himself without the assent of the parties concerned." *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 How. 382; *Munn* v. *Illinois*, 94 U. S. 130.

If, then, a common carrier can set no limits to the service in which he is engaged except such as are inherent in it, the position of the defendant in this controversy is made plain. The defendant refuses to carry to or from Denver, and points between Denver and Pueblo, except in connection with the Rio Grande road; not absolutely, indeed, but for the price charged in connection with that road. To say to the public that the rate shall be less by the Rio Grande road than by any other line, is, in effect, to say that the public shall use that road only. A very little difference in the tolls will prohibit traffic over other lines, and clearly enough such was the effect in this case. It is admitted that defendant refuses to carry, in connection with complainant, at the same rate of charges as with the Rio Grande Company, and that it charges for such carriage a much higher rate. For all practical purposes that course of proceeding amounts to a refusal to carry except in connection with the Rio Grande road. In support of its refusal to deal with complainant as a connecting road, defendant avers that it has entered into a contract with the Rio Grande Company for making "a through line," and doing "through" business between the Missouri river and Denver, which is of great advantage to defendant, and which cannot be maintained except on the theory of exclusive dealing between the parties thereto. So understood, the contract is open to the objection that it gives no choice of route to travelers and shippers of goods, of which something will be said hereafter.

The answer, however, gives no intimation as to the true character of the contract as it appears in evidence. It is an agreement between the Union Pacific Company of the first part, the defendant and its leased lines of the second part, and the Rio Grande Company of the third part, for a division of territory and traffic in Colorado and New Mexico. At the time it was made, March 22, 1880, these companies owned or controlled all the railroads in Colorado and the northern half of New Mexico, and they assume in this agreement to divide the country and allot to each of the parties its separate portion for the purpose of building new railroads. The parties are severally bound not to trespass on the territory of other parties as defined in the agreement, and each stipulates with the other that it will not "voluntarily connect with, or take business from or give business to, any railroad which may be hereafter constructed" in the territory of the other. After settling the question of new roads, the parties proceed to a division of traffic in paragraphs 4, 5, and 6, of the contract, as follows:

"*Fourth.* All traffic to and from the Missouri river, and all competitive local traffic, both passenger and freight, to and from the territory south and west of Denver, reached and covered by the Denver & Rio Grande Railway Company, or the Denver, South Park & Pacific Railroad Company, and lines controlled or constructed or to be constructed by them or either of them, or promoted by and connecting with them or either of them, shall be pooled between the Union Pacific Railway Company and the Atchison, Topeka & Santa Fe Railroad Company, one-half to each; also all traffic to and from the Missouri river, and to and from competitive local points, both freight and passenger, to and from Denver, shall be divided, three-quarters to the Union Pacific Railway Company and one-quarter to the Atchison, Topeka & Santa Fe Railroad Company, each company in each case to deduct 40 per cent. as cost of operating; it being understood and agreed that all local business, both passenger and freight, to and from the Denver, South Park & Pacific Railroad Company east of and including Weston station, shall be treated as Denver business and divided accordingly. It is also understood that the party of the third part is not to do any through business to and from Trinidad, or to and from New Mexico via Trinidad or El Moro.

"*Fifth.* That as long as the parties of the second part, and each of them, shall keep the agreements on their behalf herein contained, one-half of all the traffic, both passenger and freight, originating in Colorado, and also in New Mexico at points as far south as the party of the third part is authorized to build under article 2 of this agreement, and coming or delivered to the party of the third part for transportation over any of the lines of the party of the third part, constructed or to be constructed or promoted by it, or coming or delivered to it for transportation from lines connecting with it, and destined for points east of the line between Denver and El Moro, and said line extended northerly and southerly, shall be delivered at South Pueblo for trans-

portation over the railroads controlled by the parties of the second part, and the other half at Denver for transportation over the railroads controlled by the party of the first part, as far as the party of the third part can legally control such traffic. It is further agreed that as to all traffic, both freight and passenger, interchanged between the party of the third part and the other parties hereto, to and from Denver via South Pueblo, and from and to South Pueblo via Denver, the party of the third part shall be entitled to and shall prorate with the other parties at the rate of one mile and a half to one; that is to say, shall be entitled to and shall share in the distribution of such total fare and freight moneys for each mile of actual haul done by the Denver & Rio Grande Railway Company, as if the same were carried by it one mile and a half; but the allowance of extra mileage shall in no event exceed local rates, and, in case of any more favorable *pro rata* being given to the party of the first part, the same shall be given to the party of the second part. It is further agreed that the rates between South Pueblo and Leadville, and between South Pueblo and all other points west of Pueblo, shall be as low as between the same points and Denver, under any and all circumstances, and the party of the third part shall not discriminate against the parties of the second part in respect of cars or other facilities for the transfer of freight or passengers.

"*Sixth.* In order to enable the party of the third part to carry out its obligations under the above article, and for its protection, it is further agreed that the parties of the second part shall, as long as the party of the third part shall keep the agreements on its behalf herein contained, deliver at South Pueblo, for transportation and traffic, passengers or freight destined from points east of the said line of the party of the third part to points on its line constructed or to be constructed or promoted by it, or connected with it, in Colorado, and also in New Mexico, to points on its line as far south as the party of the third part is authorized to build under article 2 of this agreement, and shall not deliver to, or cause the same to be transported over, or voluntarily receive the same from, any other line or railroad in the territory named than that of the party of the third part, so far as the said parties of the second part can legally control the same; and that any agreement or understanding of the parties of the first and second parts with each other, or of both, or either, or any of them, with any competing railroad for a division of business or territory or earnings that might divert business which would otherwise, under this agreement, pass over the lines of the party of the third part, shall provide for securing to the party of the third part a proportionate benefit on the mileage basis stated in article 5, for not less than one-half of the southern and western business, and one-fourth of the Denver business, as provided in article 4 of this agreement: provided, that this shall not prevent the party of the second part from making any agreement or understanding with the Atlantic & Pacific Railroad Company, without incurring any liability to the party of the first or third parts."

Of this remarkable document it will not be necessary to speak at length in this connection. To do so would perhaps convey an impression that for some purposes these corporations have the powers which in this instrument they have assumed to exercise. It is

enough to say that it is a conspiracy to grasp commerce and suppress the building of railroads in two great states. Similar provisions have fallen under the condemnation of other courts, whose judgment of them has been clearly expressed. In *Hartford & N. H. Co.* v. *New York & N. H. Co.* 3 Robt. (N. Y.) 411, it was held that a provision in a contract forbidding one of the parties to extend its road would avoid the contract. An association of carriers to regulate the price of freight, *with provisions prohibiting the members from engaging in similar business out of the association*, has a tendency to increase the price of carriage and to suppress competition, and is therefore illegal. *Stanton* v. *Allen*, 5 Denio, 434; *Hooker* v. *Vandewater*, 4 Denio, 349.

The Rio Grande Company also agrees, in this instrument, "not to do any through business to and from Trinidad, or to and from New Mexico via Trinidad or El Moro;" an express renunciation of a duty enjoined by the state, and therefore void. If that company can decline a part or all of the carrying business at Trinidad, it may also abandon its entire line and refuse to serve the public in any way. *Shrewsbury & B. Ry. Co.* v. *London & N. W. Ry. Co.* 4 De G., M. & G. 115; S. C. 6 H. L. Cas. 113; *State* v. *Hartford & N. H. R. Co.* 29 Conn. 538; *Union Pac. R. Co.* v. *Hall*, 91 U. S. 343.

A more objectionable feature of this instrument is that in which the parties agree not to "connect with or take business from or give business to any railroad," which may be constructed in Colorado or New Mexico after its date. That is to say, these powerful corporations having secured a monopoly of the carrying business in two states, will hold it indefinitely, and refuse to recognize or deal with any rival that may enter the field. Argument is not necessary to show that a compact of this kind is against public policy and therefore void. Certain corporations of Pennsylvania, controlling coal produced in a large district of country, made a combination to regulate the supply and the price, which was held to be illegal. *Morris Run Coal Co.* v. *Barclay Coal Co.* 68 Pa. St. 173. In this instance the combination is to control the carrying trade of a great country, which is of much greater importance to the people than coal.

It is believed, however, that the true principle mentioned at first should control without reference to any compact or agreement, valid or otherwise, that may have been made. The carrier service is subject only to conditions and limitations necessary to its existence, and not such as the carrier himself may impose from motives of gain or other purpose. If the defendant may elect to receive goods and pas-

sengers at Pueblo from the Rio Grande Company, and to deliver to that corporation alone, other conditions may be added, as that the goods shall be brought in wagons and the passengers on horseback. What right has the defendant to say that goods or passengers shall come to it in one way or another? or that goods and passengers carried by it shall be carried to other points beyond its terminus by one company only? The answer of defendant is that such arbitrary distinctions are profitable to it, and therefore lawful. Its first duty is to its stockholders, and anything that will bring money to its exchequer is permissible. In the courts a different view of the subject prevails. *Twells* v. *Pa. R. Co.* is a case decided in the supreme court of Pennsylvania, for which the reporter of that court was probably unable to find space in the regular series of reports. The case may not be of interest to the corporations of that state. The opinion is, however, printed in 3 Amer. Law. Reg. (N. S.) 728, and as it is cited by the court in later cases, it seems to be authentic. Defendant's road extended from Pittsburgh to Philadelphia, and it had arranged with some other road to carry from Philadelphia to New York, so that it was able to carry through to the latter place from points on its own line. By raising the local rate between Pittsburgh and Philadelphia defendant sought to compel shippers to patronize its through line. As the question is stated by the court, defendant said to plaintiff:

"Employ us to carry your oil, not only over our road to Philadelphia, but thence to New York. If you do not, we will exact from you, for its carriage to Philadelphia, six cents per 100 pounds more than we demand from all others who employ us to transport similar freight only to Philadelphia; or, if you will employ us to carry it to New York, after it shall have reached Philadelphia, we will carry it Philadelphia for six cents less per 100 pounds than we are accustomed to charge others for similar transportation."

And the court then adds:

"No one will maintain that they can lawfully make such a stipulation for the benefit of a third party, *e. g.*, one of two other carriers. They cannot say to a shipper at Pittsburgh of any domestic product, 'You have freight destined to New York. You must send it over our road to Philadelphia. If, when it arrives there, you will forward it by A. to New York, we will carry it over our line at certain rates. If you send it by any other than A. our charges will be higher.' This is a discrimination that cannot be allowed. Conceding it would put in the power of the defendants a monopoly of the carriage of all articles which pass over their road from either terminus to every place of final delivery. The oppressive effects of such a rule are the same, whether its motive be to benefit third parties or the railroad company itself. Of transportation along the line of their road the defendants practically have a monopoly. It is

not consistent with the public interests, or with common right, that they should be permitted so to use it as to secure to themselves superior and exclusive advantages on other lines of transportation beyond the ends of their road."

The court cites *Baxendale* v. *Great Western Ry. Co.* 1 Nev. & McN. 191, which clearly supports the view expressed. That case is said to be reported in 5 C. B. (N. S.) 309, and other English books, as in Neville & McNamara.

So also a carrier cannot refuse to receive a passenger on the ground that his coach connects with another which extends the line to another place, and he has agreed with the proprietors of such other coach that he will not receive passengers from such place unless they come in his coach. *Bennett* v. *Dutton*, 10 N. H. 481. On the same principle a railroad company cannot elect to deliver grain at one warehouse on the line of its road to the exclusion of other warehouses, (*Chi. & N. W. Ry. Co.* v. *People*, 56 Ill. 365,) or to deal with one express company to the exclusion of other express companies. *Sandford* v. *Railroad Co.* 24 Pa. St. 378; *New England Exp. Co.* v. *Maine Cent. R. Co.* 57 Me. 188. These cases are sufficient to show the great weight of authority in support of the rule as stated, that a carrier cannot hamper or limit his duty to the public except in matters essential to the service.

The opposite view has secured recognition from some eminent judges, as in *Jencks* v. *Coleman*, 2 Sumn. 221; but great names do not prevail against great principles, and should not be allowed to do so in this instance.

In all that has been said the right of the defendant to arrange with the Rio Grande Company for a through line to Denver and elsewhere, and to carry its connection with that company, has not been impugned. We recognize the authority of railroad companies to unite in continuous lines for greater facilities in the transportation of passengers and freight, as established in numerous cases. In fact, the constitutional provision to which we shall presently refer seems to demand such union. But we maintain the right of travelers and shippers of goods to choose between rival lines of railroads without let or hindrance from the latter. We deny the power of a railroad company, in the use of its own road, by discriminating charges or other arbitrary measures to compel the public to resort to any other road, or adopt any particular course in the transmission of goods or passengers. This proposition stands with the general rule

before mentioned, that carriers shall not limit or trammel with arbitrary distinctions the service to be rendered; that all roads shall be open to wholesome competition, as declared in the cases in 4 and 5 Denio; and with the doctrine that the carrier shall follow the instructions of his patrons to the extent of forfeiting his earnings in case of disobedience. *Robinson* v. *Baker*, 5 Cush. 137.

We hold, therefore, that defendant is bound to give to complainant reasonable facilities for the exchange of passengers and freight at Pueblo as to all who desire to use complainant's line in connection with its own, and for the price of carriage charged to persons who use the Rio Grande road in connection with defendant's. There is some difficulty in deciding what such facilities shall be. On demurrer to the bill we had occasion to consider the meaning of section 4, art. 15, of the constitution, which declares the right of every railroad to connect with any other railroad, and we arrived at the conclusion that the connection mentioned in the constitution is of a business character involving the interchange of passengers and freight in the manner usual and customary between railroads throughout the country. Objection is now made that the clause referred to is authority to the legislature to pass laws on the subject, but otherwise incapable of enforcement. We have not maintained that the physical connection of tracks provided for could be made without a law to direct the course of proceeding. In this case it is conceded that the roads are united, and the question is whether any use shall be made of the connection. And we shall not attempt to point out the course of legislation or the limits to which it may extend under that section. Independently of legislative power and action, the clause conveys to us the idea that railroads in this state are to be operated in conjunction for the convenience of the public; at least, to the extent usual and customary between connecting lines in the control of companies not hostile to each other. What more may remain for the consideration and judgment of the legislative assembly we are not concerned to know. "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced." Cooley, Const. Lim. 101.

Within this rule the section is obligatory on railroads to the extent indicated, if no further.

It is also objected that this construction of the section brings it into conflict with section 8, art. 1, of the constitution of the United States, which confers on congress the power "to regulate commerce

with foreign nations, and among the several states." The clause referred to directs what shall be done within the state for the advantage of the people of the state. Whatever the effect may be on interstate commerce until congress shall act on the subject, such regulation is within the authority of the state. *Munn* v. *Illinois*, 94 U. S. 113; *Peik* v. *Chi. & N. W. Ry. Co.* Id. 164.

Many witnesses in the service of prominent railway companies were examined as to the course of business between railway companies in the United States in forming continuous lines and sending freight and passengers over connecting roads. The greater number concur in the statement that such arrangements are the subject of special agreement, as to which the corporations interested claim and exercise the absolute authority of natural persons in the daily affairs of business. The evidence discloses what is fully known to all who have given any attention to the subject, that, as to business intercourse, railway companies assume to be absolutely independent of each other. In the strife of competition it is not strange that each should assume to have authority in all things, and yet they do not absolutely refuse to take passengers and freight from each other.

In *Bennett* v. *Dutton*, 10 N. H. 486, in 1837, when the carrying business was young, defendant refused to take plaintiff in his coach because the latter had been guilty of riding in a rival coach. But now the managers of railroads are too wise in the law to make such blunders. By discriminating charges, business may be sent in one way or another to avoid a rival line, as well as by refusing to deliver to such line. An illustration—not given in the evidence, but within the knowledge of many persons in this community—may be recalled: Not many years ago the Union Pacific road and the Denver Pacific road were in the control of companies hostile to each other. They did not refuse absolutely to deliver freight and passengers to each other, but they could not agree in the rates to be charged by each company, and goods from California, consigned to Denver, were carried by Cheyenne to Omaha, 600 miles east of Denver, and then to Kansas City, 200 miles south, and back to Denver, 639 miles. This circuit of more than 1,400 miles was made to avoid the use of the Denver Pacific road from Cheyenne to Denver, a distance of 110 miles, or something like that. If railway companies impose such onerous burdens on the public it must not be supposed that they have authority or law for it. Returning to the evidence, it sufficiently shows that passengers and freight are freely exchanged between connecting railroads in most cases. This is the rule, and the exception

arises when one of the parties conceives that it can make more money by some other course. Obstacles are then made to the continuance of friendly relations in the way of discriminating charges and the like, and the companies become hostile to each other. Now, the right of railroad companies to raise such obstacles in their own interest and against the public interest is the very matter in issue in this cause. We have endeavored to show that they have no such right, and if we have succeeded, the practice itself is not now in the way of granting relief in this cause. If that has not been shown, further discussion will not avail.

We perceive that there is a difficulty in setting up these companies to be agents, each for the other, in the sale of tickets for passage over both lines, and for making through contracts binding on both companies for the transportation of goods. But some things may be done without making either company an agent for the other, and without bringing the companies into any relation of contract or agreement as between them. Passengers and their baggage may be delivered at the junction of the roads by each company, to be transported by the other, and goods may be forwarded in car-load lots and otherwise on terms that will not involve any contract made by one of these companies for and on behalf of the other. The defendant accepting the services of other railroad companies in selling through tickets and making through contracts over its own line, in connection with the Rio Grande road, ought not to object to the same company's performing the same service for complainant if they are willing to do so; nor should defendant be heard to say that it will not carry goods or passengers on the ground that they are to be carried further by complainant from defendant's terminus to some other point. It is, however, unnecessary to discuss in detail the relief to be granted, as that can be well enough expressed in the decree. In this opinion we seek only to define the general rule.

The decree will be for the complainant, but not to the full extent of the prayer of the bill.

McCrary, J., concurs.

DECREE.

(Entered March 1, A. D. 1883.)

This cause came on to be heard at this term of court, and was argued by counsel, and thereupon, upon consideration thereof, it was

ordered, adjudged, and decreed by the court that the said defendant do from henceforth exchange passengers and freight with the plaintiff at the junction of the plaintiff's railroad with the Pueblo & Arkansas Valley Railroad, near to the city of Pueblo, in the county of Pueblo, as in the bill mentioned, and that each party extend to the other all the facilities for such exchange of passengers and freights which are or may be hereafter usual or customary between railroad companies operating connecting railroads, except as hereinafter otherwise provided; and that each company shall cause all regular passenger trains moving upon its railroad to be stopped, upon all trips, at the said junction, and at the platform or depot erected thereat by the plaintiff, a reasonable and sufficient time to enable passengers to conveniently and safely alight from and get upon such trains, and express matter and mails to be delivered therefrom and thereto at the said station; and that the freight trains of each company shall stop at the proper tracks near to the same station whenever the agents of the other company shall signify to those operating such freight trains that there is freight at the said station to be delivered to such train.

Second. And that whenever hereafter merchandise or freight shall be received or come to the hands or control of the defendant in carload lots or otherwise, or shall, at any station upon the roads controlled by the defendant, be offered to it to be transported over the Pueblo & Arkansas Valley Railroad, or the said railroad and other railroads controlled by defendant, to Pueblo, or to the junction aforesaid, and thence over the plaintiff's railroad to points thereon or beyond the same, and the shippers thereof (or the consignee, if no directions thereunto be given by the shipper) shall direct that such freight or merchandise be delivered to plaintiff or forwarded over plaintiff's railroad, the defendant shall receive and transport the said freight or merchandise from the place of receiving the same to the junction of the Pueblo & Arkansas Valley Railroad with the railroad of plaintiff near Pueblo aforesaid, and there deliver the same to the plaintiff, to be by the plaintiff transported to the destination thereof, or to the point or terminus of the plaintiff's railroad nearest such destination; and that for the transportation of such freight or merchandise the defendant shall be entitled to demand and receive a reasonable freight money not exceeding the rates and sums by the said defendant at the same time wont to be demanded and received for the transportation of like freight from the same initial point or terminus to the city of Pueblo, when the same is or may be

delivered or contracted or received by defendant to be delivered to the Denver & Rio Grande Railway Company, or any other person or company operating a railroad in competition with the plaintiff; and if the freight moneys for the transportation of such freight or merchandise shall be prepaid wholly or in part, the defendant, after deducting its reasonable charges aforesaid, shall render the residue of said moneys, if any, together with, and at the same time with, the said goods to the plaintiff.

Third. And that whenever hereafter merchandise or freight shall be received by the plaintiff in car-load lots, or otherwise, to be transported over its said railroad to the said Pueblo, or the said point of junction, and thence over defendant's railroad to points upon or beyond the same, and the shipper thereof (or the consignee, if no directions thereunto be given by the shipper) shall direct that the same be forwarded over defendant's railroad or delivered to the defendant, the same shall by the plaintiff be transported to the point of junction aforesaid of its said railroad with the Pueblo & Arkansas Valley Railroad, and there be delivered to the defendant, to be carried and transported by defendant over the said Pueblo & Arkansas Valley Railroad, or the same and other railroads controlled by the defendant, to the destination thereof, or to the point or terminus upon or of defendant's railroad nearest such destination, and that for the transportation of all such freight or merchandise the said defendant shall be entitled to demand and receive a reasonable freight money, not exceeding the rates and sums by the defendant at the same time wont to be demanded and received for the transportation of like freight from Pueblo to the same point or terminus when received from the Denver & Rio Grande Railway Company, or from any other person or company operating a railroad in competition with the plaintiff; and that if the said freight moneys for the transportation of such freight shall be prepaid to the plaintiff wholly or in part, the plaintiff, after deducting its reasonable charges in that behalf, as aforesaid, shall render the residue of the said moneys, if any, together with, and at the same time with, the said goods to the defendant.

Fourth. And that all freights and merchandise by the defendant received to be delivered to the plaintiff, or forwarded over plaintiff's railroad, and all freights and merchandise by the defendant received from the plaintiff to be carried and transported over defendant's railroad, shall be forwarded, carried, and transported by defendant at the same speed, and at the same intervals of time, and in like cars, and under like conditions, and with the same conveniences and fa-

cilities, as like freights or merchandise marked, consigned, or directed to be delivered, or by defendant, in fact, delivered, to any other person or company operating a railroad in competition with the plaintiff, or like freights or merchandise by the defendant received from any other such person or corporation operating a railroad in competition with the plaintiff.

Fifth. And that whenever either company, in the course of said business, shall receive from the other freight or merchandise, loaded in the cars of such other company, and shall use the cars of such other company for the transportation of such freight, it shall be the duty of the company receiving such cars of the other, if the same shall be unloaded upon its own line, to return the same with all convenient speed, and without reloading the same, to the owner thereof, and to pay therefor reasonable car service or hire, after the same rate and according to the course of dealing heretofore established between the defendant and the Denver & Rio Grande Railway Company; but if the said plaintiff shall at any time demand of defendant for use upon its said railroad, or to be shipped or transported, with the freight therein, over its said road, a number of cars in excess of the number of cars of the plaintiff then in use on defendant's road, payment of the hire of said cars shall be made by the plaintiff in advance from week to week, at the rate and price aforesaid; and nothing herein contained shall be deemed to require either company to furnish to the other empty cars to be loaded and used by such other company, either upon its own railroad or elsewhere. That whenever and so long as the defendant shall be wont to allow its freight cars to pass to and upon any railroad not owned or controlled by the defendant, it shall be required to allow its freight cars of like character to pass to, upon, and over the railroad of the plaintiff to the same extent as to pass to, upon, and over the railroads of other persons and companies. That whenever and so long as the plaintiff shall allow its freight cars to pass to, upon, and over other railroads, not owned or controlled by it, plaintiff shall allow its freight cars of like character and to the same extent to pass to, upon, and over the road of defendant, and, save in the case aforesaid, and to the extent aforesaid, neither of said companies party hereto shall be required to allow its freight cars to pass to, upon, and over the road of the other party.

Sixth. It is further ordered, adjudged, and decreed by the court that all passengers who shall by the plaintiff be transported over plaintiff's railroad to the junction aforesaid, and who shall desire to be carried from thence over said Pueblo & Arkansas Valley Railroad,

or the same and other railroads controlled by defendant, shall by defendant, at the said junction, be received into the trains of defendant, and therein carried and transported, with their baggage, to the destination of such passengers, or to the point of terminus of or upon the roads controlled by defendant nearest to such destination; and that all passengers upon defendant's railroad, and persons who shall desire to be carried over defendant's railroad to the said junction, and to proceed thence over plaintiff's railroad, shall by defendant be carried and transported over the said Pueblo & Arkansas Valley Railroad and other railroads controlled by defendant, and delivered with their baggage at the said junction of the plaintiff's railroad with the said Pueblo & Arkansas Valley Railroad, and that for the transportation of such passengers, with their baggage, defendant shall be entitled to demand and receive the same fare and sum by the defendant at the same time wont to be demanded and received for the transportation of passengers of the same class, and their baggage, from said city of Pueblo to the same other point or terminus on the railroad of defendant, or from the same other point or terminus on the railroad of defendant to said city of Pueblo, when the said passenger is by defendant received from or carried in connection with the Denver & Rio Grande Railway Company, or any other person or corporation controlling a railroad in competition with the plaintiff, and no more; and that all passengers traveling over the road of plaintiff, from any point or place thereon to the said junction, and desiring to proceed from the junction aforesaid over the roads controlled by the defendant, shall receive from the plaintiff a certificate setting forth that such passenger is entitled to proceed from said junction, over the road of the defendant, at the rates and fares above prescribed, and that all passengers traveling upon the road of the defendant, from any point or place thereon to said junction, and desiring to proceed from said junction over the road of plaintiff, shall receive from the defendant a certificate setting forth that such passenger is entitled to proceed over the road of the plaintiff at the rate and fare aforesaid: provided, nevertheless, that whenever and so long as the said defendant and the Denver & Rio Grande Railway Company shall be wont to insert in the passage tickets by the said companies respectively sold for passage over their railroads in connection, any limitation of the time within which the passage on said ticket shall be made, the parties hereto, and each of them, shall insert in the certificates hereby above required to be issued to passengers the like limit of time, and the passenger receiving such certifi-

cate shall be entitled to passage, by virtue thereof, only where the same is presented and used within the said limit of time; but nothing in this provision shall prevent either company from issuing such certificates without limitation of time, and passengers receiving the same shall be required to pay after the same rate as when traveling upon an unlimited ticket upon the roads of defendant in connection with the road of the Denver & Rio Grande Railway Company.

Seventh. It is further ordered, adjudged, and decreed by the court that passengers traveling over plaintiff's railroad and the railroads controlled by defendant, upon tickets issued by any other railroad company, or otherwise, shall be entitled to travel upon the same trains and in the same cars, and shall be entitled to the same facilities, conveniences, attention, and privileges as passengers of the same class traveling upon tickets issued for travel over defendant's railroad and the Denver & Rio Grande Railroad, or the railroad of any person or corporation operated in connection with the railroads controlled by defendant, and in competition with plaintiff's railroad; but this shall not be construed to entitle either company to run its trains over the railroad or railroads controlled by the other company, nor to require or entitle either company to operate the passenger cars of the other company upon its railroad.

Eighth. It is further ordered, adjudged, and decreed by the court that if the defendant company doth or shall at any time decline to employ or authorize any other person or corporation controlling or operating a railroad to sell tickets or to issue through bills of lading over the railroads controlled by defendant, and shall refuse to recognize passage tickets or bills of lading issued by any such person or company, said defendant shall not be required to honor any such passage ticket or bill of lading issued by any such person or company over the roads controlled by defendant in connection with the plaintiff's road, nor transport any passenger or his baggage, or any freights or merchandise, over the roads controlled by defendant upon passage tickets or bills of lading issued by such other person or company.

Ninth. But whenever and so long as the defendant is or shall be wont to honor the passage tickets, bills of lading, or other contracts of carriage issued by any other company, over the railroads controlled by defendant, or any part thereof, in connection with the Rio Grande Railroad, and to transport passengers and freights thereon, it shall honor the passage tickets, bills of lading, and contracts of carriage issued by the said company over defendant's road and the rail-

road of plaintiff, and carry and transport passengers and their baggage upon such tickets, and freights upon such bills of lading or contracts of carriage.

Tenth. It is further ordered, adjudged, and decreed by the court that where, in any case, in the transaction of the said business in connection, either company shall have received and transported freights or merchandise over its railroad, or the same, and roads in connection therewith, upon which the freights earned by such company, or any charges advanced by such company, remain unpaid in whole or in part, such company shall be entitled to demand from the other company all such freights and charges remaining unpaid in respect to such freight or merchandise at the time of the delivery thereof.

Eleventh. Whenever and so long as either company, party hereto, is wont to receive, without prepayment of freights or charges thereon, freights or merchandise to be transported over its railroad, and any other railroad operated in competition with the railroad of the other company, party hereto, such company shall be required to receive like freights without demanding prepayment of freights or charges thereon when offered for transportation over its railroad in connection with the railroad of the other company, party hereto; but, save in the cases aforesaid, neither of said companies shall be required by virtue hereof to receive or transport freights or merchandise without prepayment of freights and charges thereon, and neither company shall be required to accept for transportation over its road freight upon which the charges have been prepaid to the other, unless the proper portion of such prepaid charges be rendered to the company to which the said freight is offered, together with, and at the same time with, said freight.

Twelfth. It is further ordered, adjudged, and decreed by the court that each company shall, at the said junction, receive freights, and passengers and their baggage, and sell passage tickets to all those desiring to proceed thence, over the roads of said companies respectively, and each company shall there check the baggage of passengers purchasing tickets over its road, and provide reasonable and proper facilities for the discharge of all duties hereby required to be performed by said companies respectively.

Thirteenth. It is further ordered, adjudged, and decreed by the court that in and about the transaction of the said business in connection, each party shall extend and accord to the other the same privileges, facilities, and conveniences in all respects by the same party extended to any person or corporation operating a railroad in

competition with the other, without unreasonable or undue discrimination or preference.

Fourteenth. It is further ordered, adjudged, and decreed by the court that if, at any time hereafter, the provisions herein made for the purpose of carrying out and effectuating the terms of this decree, in securing to each the rights herein settled and defined, shall appear to be inadequate, either party shall be at liberty to apply to the court for further directions.

Fifteenth. It is further ordered, adjudged, and decreed that the provisions herein contained, so far as the same are applicable to the defendant, shall extend to all railroads situate in Colorado, Kansas, New Mexico, Texas, and elsewhere that are either owned, operated, or controlled by the defendant.

Sixteenth. It is further ordered, adjudged, and decreed by the court that this decree, and each and every of the directions herein contained, shall be deemed an injunction upon each of the parties hereto, and from and after the expiration of 30 days after the entry hereof the same shall be in full force, and all and singular the officers, agents, and servants of the respective companies shall, from thenceforward, without service thereof, be required to observe and perform the same, under the penalties of a contempt.

Seventeenth. It is further ordered, adjudged, and decreed by the court that so much of the plaintiff's bill as prays the court to fix or prescribe the rates or fares to be charged by the defendant, or to apportion rates or fares between the said parties, be and hereby is dismissed without prejudice.

It is further ordered, adjudged, and decreed by the court that the plaintiff recover its costs in this suit expended, to be taxed, and have execution therefor.

RAILWAY POOLS. One provision of the contract in the principal case provides for the pooling of certain traffic. The first question which suggests itself with reference to pooling contracts is, are they not *ultra vires* of the companies which form them, as amounting substantially to a partnership of corporations? Every corporation's action is limited "by the four corners of its charter." Ordinarily, railway charters do not authorize them to form partnerships. See *N. Y. & S. C. Co.* v. *Fulton Bank*, 7 Wend. 412; *Pearce* v. *M. & I. R. Co.* 21 How. 441; *Marine Bank* v. *Ogden*, 29 Ill. 248; *Van Kuren* v. *Trenton L. Co.* 13 N. J. Eq. 302; *Catskill Bank* v. *Gray*, 14 Barb. 471; *Whittenton Mills* v. *Upton*, 10 Gray, 582; *Bissell* v. *M. S. & N. I. R. Co.* 22 N. Y. 258; *Olcott* v. *Tioga R. Co.* 27 N. Y. 546; *Peckham* v. *North Parish*, 16 Pick. 287; *Stanley* v. *C., C. & C. R. Co.* 18 Ohio St. 552; *Holmes* v. *Old Colony R.*

Co. 5 Gray, 58; *Darling* v. *B. & W. R. Co.* 11 Allen, 295; *Gass* v. *N. Y., P. & B. R. Co.* 99 Mass. 220; *M. & H. R. Co.* v. *Niles*, 3 Hill, 162; *C. P. & I. R. Co.* v. *I. & B. R. Co.* 5 McLean, 450; and generally, Green's Brice's Ultra Vires, 423 *et seq.*; Ang. & A. Corp. § 272.

Another question is, are not railway managers who make their company a party to a pool guilty of a breach of trust to their stockholders? The revenues of a railway company are by law required to pay its expenses and its creditors. After these are paid, stockholders have a right to receive any surplus in the shape of dividends. Suppose that a railway that is a party to a pooling contract carries in fact more than its agreed share of the traffic, and gets more than its agreed share of revenue. In order to execute the contract the excess of revenue must be paid by such company to some other company, party to the contract, that has carried less than the agreed share of traffic, and has earned less than its agreed share of revenue. The excess so paid to another company is diverted from the creditors and stockholders of the first company and donated to the second company. Clearly the creditors and shareholders have a right to such diverted funds; and their diversion by the managers appears to be a breach of their duty to shareholders. Perhaps it may be replied with some force that the excess paid to the second company ought to be considered simply as money paid for business which would not be secured, or, if secured at all, only at ruinously cheap rates, and that stockholders ought not to complain of the spending of money to secure such business and to make it profitable, since they receive the ultimate benefits.

Similar views to the foregoing were expressed by Lord Justice KNIGHT BRUCE in *Shrewsbury, etc., Railroad Co.* v. *London, etc., Railroad Co.* 4 De G., M. & G. 121, wherein a company having a road already completed and in operation agreed to divide competitive business and the income thereof with another almost-completed competitive line. Said BRUCE, L. J.: "It was to divert so much of the funds of the company properly applicable for the purposes of their current expenses and of dividends into a different, an irregular, and an illegitimate channel." But different views were expressed in *Hare* v. *London, etc., Railroad Co.* 2 Johns. & H. 112, wherein the vice-chancellor said: "When, in the judgment of the directors and of the company assembled in general meeting, it is found advantageous to give up certain contingent profits in order to secure certain other profits expected from the arrangement, an individual shareholder does not seem to have any right to treat such a contract as an injury to himself."

Again, are not railway pools against public policy? That policy is to stimulate and maintain competition in all branches of business. "Competition is the life of trade," is the maxim. Several cases throw light upon this question.

In *Stanton* v. *Allen*, 5 Denio, 440, the proprietors of boats on the Erie and Oswego canals formed a pooling association. They agreed to regulate and fix the price of freight and passage, to divide the profits of their business according to the number of boats employed by each, and that members should not engage in a similar business outside of the association. The New York court of appeals held the agreement unlawful, saying: "It is nothing less than the attainment of an exemption of the standard of freights, and the

facilities and accommodations to be rendered to the public from the wholesome influence of rivalry and competition. To produce that end more completely, each member binds himself not only to run all his present boats according to the agreement and turn their earnings into the common stock, at the rates agreed upon, and at which rate he is to be charged in the final distribution, though he may have received or charged less, but he is also prohibited, under severe penalties, from employing on any other terms boats subsequently acquired. Besides, as much as possible to secure the exclusion of others from their fair share of business, each party is bound, if he shall have more freight than he can carry, to offer it to some of the associates; and if they do not take it he is then authorized to procure its transportation without limitation as to rate, and after taking out the freight, and certain charges for risk and trouble, to turn in the balance to the common stock. The association being thus secure against internal defection and external encroachments, and the members having thrown their concerns into stock, to derive an income in proportion to the number of shares they hold, and not according to their merit and activity in business, and safe against the reduction of compensation that would otherwise follow mean accommodations and want of skill and attention, the public interest must necessarily suffer grievous loss. Indeed, the consequence of such a state of things would shortly be that freighters and passengers would be ill served, just in proportion that carriers were well paid." *Stanton* v. *Allen*, 5 Denio, 441. See, also, *Hocker* v. *Vandewater*, 4 Denio, 349.

In *People* v. *Fisher*, 14 Wend. 9, it was decided that a combination of shoemakers to raise their wages is a conspiracy against trade and commerce, and punishable as such.

In another case five coal corporations of Pennsylvania entered into an agreement in New York to divide two coal regions of which they had the control; to appoint a committee to take charge of their interests, which was to decide all questions and appoint a general agent at Watkins, New York; the coal mined to be delivered through him; each corporation to deliver its proportion at its own costs in the different markets at such time and to such persons as the committee might direct; the committee to adjust the prices, rates of freight, etc.; enter into agreements with anthracite companies; the five companies might sell their coal themselves only to the extent of their proportion, and at prices adjusted by the committee; the agent to suspend shipments to either beyond their proportion; frequent detailed reports to be made by companies, and settlements monthly by the committee; prices to be averaged and payments made to those in arrear by those in excess; neither to sell coal otherwise than agreed upon; and the regulations of the committee to be carried out faithfully. A statute of New York makes it a misdemeanor for "persons to conspire to commit any act injurious to trade or commerce." The supreme court of Pennsylvania decided that this agreement was in contravention of that statute, and also against public policy, and therefore illegal and void.

Said Judge AGNEW: "The effects produced on the public interests lead to the consideration of another feature of great weight in determining the illegality of the contract, to-wit, the combination resorted to by these five

companies. Singly, each might have suspended deliveries and sales of coal to suit its own interests, and might have raised the price, even though this might have been detrimental to the public interest. There is a certain freedom which must be allowed to every one in the management of his own affairs. When competition is left free, individual error or folly will generally find a correction in the conduct of others. But here is a combination of all the companies operating in the Blossburg and Barclay mining regions, and controlling their entire productions. They have combined together to govern the supply and the price, and the price of coal in all the markets from the Hudson to the Mississippi rivers, and from Pennsylvania to the lakes. This combination has a power in its confederated form which no individual action can confer. The public interest must succumb to it, for it has left no competition free to correct its baleful influence. When the supply of coal is suspended, the demand for it becomes importunate and prices must rise. Or, if the supply goes forward, the price fixed by the confederates must accompany it. The domestic hearth, the furnaces of the iron master, and the fires of the manufacturer, all feel the restraint, while many dependent hands are paralyzed and hungry mouths are stinted. The influence of a lack of supply or a rise in the price of an article of such prime necessity cannot be measured. It permeates the entire mass of the community, and leaves few of its members untouched by its withering blight. Such a combination is more than a contract: it is an offense. 'I take it,' said GIBSON, J., 'a combination is criminal whenever the act to be done has a necessary tendency to prejudice the public or to oppress individuals by unjustly subjecting them to the power of confederates, and giving effect to the purpose of the latter, whether of extortion or mischief.' *Com.* v. *Carlisle*, Brightley, 40. In all such combinations, where the purpose is injurious or unlawful, the gist of the offense is conspiracy. Men can often do, by the combination of many, what severally no one could accomplish, and even what, when done by one, would be innocent."

The same learned jurist says again: "Every 'corner,' in the language of the day, whether it be to affect the price of articles of commerce, such as breadstuffs, or the price of vendible stocks, when accomplished by confederation to raise or depress the price and operate on the markets, is a conspiracy. The ruin often spread abroad by these heartless conspiracies is indescribable, frequently filling the land with starvation, poverty, and woe. Every association is criminal whose object is to raise or depress the price of labor beyond what it would bring if it were left without artificial aid or stimulus." *Morris Run Coal Co.* v. *Barclay Coal Co.* 68 Pa. St. 173.

Two railway companies in England made an agreement to divide their receipts in the proportion of nine-tenths to one company and one-tenth to the other. Sir W. PAGE WOOD, V. C., granted an injunction restraining the companies from proceeding under it, and said: "An agreement that the profits and loss shall be brought into one common fund, and the net receipts divided into two shares of nine-tenths and one-tenth, without the authority of an act of parliament, appears to me so clearly and palpably illegal, that I do not think the court ought to hesitate in its views in that respect; otherwise it might be that all the railways in the kingdom might be collected into one

large joint-stock concern." *Charlton* v. *New Castle, etc., R. Co.* 5 Jur. (N. S.) 1100.

As late as 1880 the supreme court of Ohio passed upon and condemned a contract by which all the salt manufacturers, with one or two exceptions, in a large salt-producing territory, formed an association by the articles of which all salt manufactured or owned by the members when packed in barrels became the property of the company, whose committee was authorized and required to regulate the price and grade thereof, and also to control the manner and time of receiving salt from the members; and each member was prohibited from selling any salt during the continuance of the association except by retail at the factory, and at prices fixed by the company. Said the court: "The clear tendency of such an agreement is to establish a monopoly, and to destroy competition in trade; and for that reason, on grounds of public policy, courts will not aid in its enforcement. It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public." *Salt Co.* v. *Guthrie*, 35 Ohio St. 672.

In *Central R. Co.* v. *Collins*, 40 Ga. 582, the court thought that the grants by the state of Georgia of charters to several railroads, from the seaboard to the interior, indicate a public policy to secure a reasonable competition between those roads for public patronage. But an entirely different view was taken by the vice-chancellor in the English case of *Hare* v. *London, etc., R. Co.* 2 Johns. & H. 80, in which two groups of railway companies, being respectively the owners of independent coterminous routes, agreed to divide the profits of the whole traffic in certain fixed proportions, calculated on the experience of the past course of traffic. It was held that such an agreement, being *bona fide*, was not *ultra vires*. The vice-chancellor said: "With regard to the argument against the validity of the agreement, I may clear the ground of one objection by saying that I see nothing in the alleged injury to the public arising from the prevention of competition. I find no indication in the course taken by the legislature of an intention to create competition by authorizing various lines. From my own experience in parliamentary committees, I should rather be disposed to say that the legislature wisely inclined to avoid authorizing the construction of two lines, which would necessarily compete with each other. It is a mistaken notion that the public is benefited by pitting two railway companies against each other till one is ruined, the result being at last to raise fares to the highest possible standard. The legislature protected the public in a different way, by a provision limiting the maximum of tolls to be taken, and with respect to fares it guarded against excessive profits by an exactment (7 and 8 Vict. *c.* 85, §§ 1, 2,) that in the event of profits reaching 10 per cent., the treasurer may revise the scale of fares, and that the board of trade may, under certain conditions, purchase the line. Except by fixing a maximum rate of tolls, and, as far as practicable, a maximum amount of profit, the legislature has imposed no conditions in favor of the traveling public. I cannot have any doubt that it is competent for a railway company to abstain altogether from carrying. If a company enters

upon the carrying business, it is bound to carry on equal terms for all; but I find in the acts no obligation upon a company to become carriers, except as to the mails and the queen's troops." 2 Johns. & H. 112. On the validity of pooling contracts in England, see, also, the case of *Shrewsbury, etc., R. Co.* v. *London, etc., R. Co.* 20 Law J. Ch. 90, 102; 3 McN. & G. 70; 17 Q. B. 652; 21 Law J. Q. B. 89; 16 Beav. 441; 4 De G., M. & G. 115; 22 Law J. Ch. 682; 6 H. L. Cas. 113; 26 Law. J. Ch. 482.

There is no question, however, but that, according to the weight of American authority, a railway pooling contract is monopolous in its tendency, and objectionable as such for the three reasons so tersely set forth by Lord COKE in *Darcy* v. *Allen*, 11 Coke, 84: "A monopoly hath three incidents mischievous to the public: (1) The raising of the price; (2) the commodity will not be so good; (3) the impoverishing of poor artificers." The formation of every railway pool is always followed by the advancement and maintenance of rates cut down by competition. The pool's effect upon new lines is perceived in the principal case where the combined companies have clearly undertaken to keep the newer and weaker company out of business. In the light of the foregoing decisions, railway pooling contracts appear to be clearly illegal.

CONTRACTS NOT TO EXCHANGE TRAFFIC. May two railway companies agree not to "connect with, or take business from, or give business to any [other] railroad," except at rates higher than those which are charged upon traffic the parties to this agreement exchange with each other? Certainly not, unless the traffic coming from or consigned to the other railroad costs more for carriage than that which is exchanged between the contracting companies. Railway charges must be based upon the expense of transportation. If, by reason of the bulk, the manner, and times in which the traffic is delivered by the shipper to the carrier, the latter is enabled to handle and transport the traffic at less cost than he can the traffic of others, and is willing to extend the same terms to all shippers who bring themselves within the same conditions, the discrimination is legal. *Ransom's Case*, 87 E. C. L. 437; *Oxlade's Case*, 87 E. C. L. 453; *Nicholson's Case*, 94 E. C. L. 366; *Harris* v. *Cockermouth, etc., Co.* 91 E. C. L. 712. If, therefore, a railway company proposes to discriminate in its charges against traffic coming from or going to another railway, the former company must show an increased cost of carriage to justify its discrimination, else it will be unreasonable and illegal.

There are two cases, however, which appear to conflict somewhat with the ruling in the principal case. One is the *Southsea & Isle of Wight Steamferry Co.* v. *London & S. W. R. Co. and the L. B. & S. C. R. Co.* 2 Nev. & McN. 341, wherein the S. Steam-boat Company and the R. Steam-boat Company respectively owned passenger steam-boats, plying between S. and R., and the B. and the S. W. Railway Companies carried passengers by their own lines to S.; and having entered into a traffic arrangement with the R. Steam-boat Company that their vessels should run between S. and R. in connection with the lines of the railway companies, issued through tickets to passengers from places on their lines to R., available by the boats of the R. Steam-boat Company, to the exclusion of the boats of the S. Steam-boat Company. It was decided that this arrangement did not amount to an undue preference of the R. Steam-boat Company. But there were peculiar circumstances in this case that led

the court to hold the discrimination against the S. Company warranted. It did not furnish as large boats or as ample accommodations for the traffic as the R. Company.

In the *Eclipse Tow-boat Co.* v. *Pontchartrain R. Co.* 24 La. Ann. 1, the defendants, owning a short railway from New Orleans to Lake Pontchartrain, and one Morgan, owning a line of steamers plying from the lake terminus to Mobile, and the plaintiffs and other parties owning two other steamers in the same trade, an arrangement was made by defendants with Morgan, and, temporarily, with the proprietors of the other steamers, respectively, to share *pro rata* the through freight from New Orleans to Mobile. It appeared that this arrangement was unprofitable to the defendants, for the lines of steamers, by competing and lowering the rates of freight, greatly reduced the share coming to the railway. The defendants, therefore, entered into an agreement with Morgan by which the latter loaned them $250,000, and the former agreed to *prorate* with him the through freight from New Orleans to Mobile, and to charge all other steamers the tariff rates paid by the public generally. The plaintiffs immediately laid up their steamer, and sued for damages, on the ground that this prorating with Morgan, and refusing further to prorate with plaintiffs, was an illegal combination with Morgan to confer on him an unlawful monopoly and preference. A verdict and judgment of $100 was awarded plaintiffs. This judgment the supreme court affirmed, but refused to increase it in amount, and decided that the acts of defendants were not in contravention of any statute of Louisiana, or any principle of her jurisprudence; that they might agree or refuse to prorate through freight with anybody, and the plaintiffs could not complain of a refusal to *prorate* with them; and that, as common carriers, in the absence of statutory prohibition, their acts in the premises were not unlawful. The opinion of a majority of the court presents a curious mixture of theology, modern science, bad law, and judicial subserviency to the interest of wealth and power:

"The Creole [plaintiffs' boat] was 16 years old at this time. Her cost to plaintiffs was $35,000; her tonnage 396 tons. Morgan placed on the route three steamers, aggregate tonnage 2,800 tons, and cost $585,000." After affirming that no one can be held liable for the regular and prudent exercise of a legal right that belongs to him, and that he does not commit a fault by making use of a right, the majority opinion continues: "And these principles are especially applicable to the competitions of modern commerce. 'To him that hath shall be given, and from him that hath not shall be taken away, even that he hath.' One man by rare powers of combination acquires capital, and by its use builds up a business which dwarfs and finally kills the trade of his less fortunate neighbor. We may pity the weaker merchant, but we cannot mulct the stronger one in damages. The great law of 'natural selection' is something we cannot repeal, and 'the fittest survive,' and always will.

"The case is narrowed, then, to the inquiry whether there was anything unlawful and legally injurious to plaintiff in the agreement made by the Pontchartrain Railroad Company with Charles Morgan, by which, in the language of their trade, they 'prorated' the through freight with him to and from

New Orleans and Mobile, and declined to further *prorate* with plaintiffs. We cannot perceive anything illicit in this agreement. The plaintiffs do not pretend that the railroads charged them, or the public generally, too much, but that it charged Morgan too little. What law did they violate in so doing? No statute of Louisiana has been infringed; none is quoted by appellants except the charter of the company, and that is silent on the subject. No rule of jurisprudence has been violated, so far as we can perceive. The company is a judicial person; its special business is to make contracts in regard to freight, and what is there to prevent it from making an agreement by which a large loan is secured to enable it to extend its road and build its depots, and by which a daily line of fine steamers is secured to connect its short route with the great highways to the east and north? And what is there to prevent its declining to 'prorate' with the Creole and Camelia, when it found that the effect of prorating with several lines was to enable them to engage in the game of competition at the expense of the railroads?

"The plaintiffs never offered to loan the railroad a quarter of a million of dollars or any other sum; the plaintiffs never offered to establish a daily line of large, swift steamers; they call their own vessel the 'Poor Little Creole.' Why should they complain, then, if the company chooses to avail itself of the great advantages offered by Morgan? But, above all, why should they complain if the railroad refuses to *prorate* with them when it is not bound to prorate with any one?"

The dissenting opinion of Mr. Justice TALLIAFERRO is more in accordance with the law. "It is shown," said he, "that the [railroad] company published a tariff of prices for the carriage of goods, to go into operation on the fifteenth of November, 1867. All were required to pay the prices so fixed *who did not ship* to and from the lake terminus of the railroad by the Morgan line of steamers; but those who did ship by the Morgan line were not required to pay them, and were charged vastly less for their transportation. The discrimination was very large, and evidently intended by the company to enable the Morgan line of steamers to grasp the entire carrying trade through the lakes by excluding the boats of plaintiff,—an object which the evidence satisfies me the Morgan steamers had previously been unable to do by fair competition. I believe it to be against equity and conscience to give, as this company has avowedly done, undue preferences to one party to injure another. Not even the plea that circumstances may justify the violation of individual right to promote the general good can be interposed in this case. The evidence is that the prices of transportation by the Morgan steamers were raised shortly after they got rid of the competition that had been kept up previously by the boats of the plaintiffs,—a result naturally and certainly to be expected. I think this a case in which exemplary damages should be awarded to redress a private wrong, and to vindicate public justice."

Chicago. ADELBERT HAMILTON.

BALBACH and others *v.* FRELINGHUYSEN, Receiver, etc.

(*Circuit Court, D. New Jersey.* March, 1883.)

1. BANKS—PROPERTY IN CHECKS DEPOSITED FOR COLLECTION.
   Checks deposited in a bank by its customers for collection, do not at once become the property of the bank; the bank continues to be the agent of the customer until the collection of the check, which remains, in the mean time, the property of the depositor.
2. SAME—DIFFERENT RULE, WHEN.
   The rule is different where such checks are deposited to make good an overdrawn account of the customer, or when the amount deposited by check is immediately drawn against; in that case the bank may hold the deposit until the overdraft is made good from other sources.
3. SAME—CASH DEPOSITS.
   Unlike checks, cash deposited by customers with the bank ceases to be the property of the depositor, and becomes the property of the bank, creating at once the relationship of debtor and creditor.
4. SAME—INDORSEMENT.
   The indorsement by the customer of a check, deposited for collection, is only intended to put the paper in such shape that the bank may collect it, and not to thereby pass the title to the bank.
5. SAME—PRACTICE OF CREDITING CHECK DEPOSITS.
   The practice which has grown up among banks to credit deposits of checks at once to the account of the depositor, and to allow him to draw against them before the collection, is a mere gratuitous privilege, which does not grow into a binding legal usage.
6. SAME—NOTES RECEIVED FOR DISCOUNT—OFFSET.
   The plaintiffs seek to offset the amount of their credit on the books of a defunct bank, against the promissory notes received by the bank for discount before its failure. *Held*, that if the bank held the notes at the time of its failure and was entitled to receive the amounts due thereon when they matured, such offset might be made; but an offset of this kind cannot be allowed where it appears that the notes were not the property of the bank at the time of its failure, but had been indorsed away for value.
7. SAME—BANK'S INSOLVENCY—KNOWLEDGE BY THE CASHIER.
   No knowledge by any of the officers of a bank, of its insolvency, is sufficient to avoid transactions between the bank and its customers, on the ground of fraud, unless the evidence clearly shows that the directors, who represent the corporation, also had such knowledge.

On Bill and Answer.

This case has been heard on bill and answer, except so far as they have been explained or qualified by the admission and proofs of the parties, in a stipulation filed at the hearing. It was therein agreed:

(1) That the last day on which the Mechanics' National Bank of Newark carried on the general business of banking was Saturday, October 29, 1881; that on Sunday, October 30th, the cashier disclosed to its board of directors its insolvent condition; that the board then resolved to close the doors of the

bank; that it should be put in the hands of a government examiner for the purpose of ascertaining its condition; that accordingly the doors of the bank were closed on Monday, October 31st, and no banking business was afterwards transacted, except that relating to items for collection, receiving money due the bank and receiving special deposits, as for paying notes due at the bank, of which separate accounts were kept, and which special business was done under the charge of the examiner; and that, as the result of an examination, the bank was declared insolvent, and the defendant was appointed receiver on November 4, 1881.

(2) That in a suit in this court, at law, by the defendant, as receiver, against Stephen H. Condict, an affidavit, of which a copy is annexed, marked Schedule A, was made by the defendant; the defendant, on this hearing, being entitled to object to the relevancy and materiality of the affidavit in this cause.

(3) That the letters of which copies are annexed, Schedule No. 2, were written and sent by the complainants to the Mechanics' National Bank of New York, the relevancy and materiality of which may be objected to by the defendant in this cause.

(4) That the schedule annexed, marked No. 3, is the account between the Mechanics' National Bank of New York and the receiver, showing their collateral account and the settlement of the same between them.

The bill of complaint alleges the following facts:

(1) That the complainants have been engaged in business for some years past, in the city of Newark, as smelters and refiners of gold, silver, and other metals; that they kept an account in the Mechanics' National Bank of Newark, depositing therein, from time to time, large sums of money; that on the twenty-ninth of October, 1881, being Saturday, and the last day on which the said bank transacted any business, they left with it, for collection, a check of that date, drawn by Hague & Billings of the city of New York, upon the American Exchange Bank of that city, and payable on demand to the order of complainants, for the sum of $11,781.93, the said check being duly indorsed by complainants; that the bank, instead of receiving and holding the same for collection only, and as a trust for the benefit of the complainants, credited the check on its books as so much cash, and as if it had been indorsed to the bank as its property, and its amount constituting so much indebtedness on the part of the bank to the complainants.

(2) The bill further alleges that at the time of the failure of the bank the complainants were indebted to it in the sum of $30,000, the amount of two promissory notes discounted by the bank for them, and the proceeds of which they had received, to-wit, one note dated July 19, 1881, made by complainants to the order of one H. M. Diffenbach, for $15,000, payable at the bank four months after date, and which was indorsed by Diffenbach for their accommodation, and the other in the like sum, dated August 13, 1881, payable four months after date, also to the order of Diffenbach, and indorsed by complainants; that each of said notes fell due after the failure of the bank; that if the same, or either of them, was held by the bank at the time of its failure, the complainants were entitled to set off against the same any indebtedness due from the bank to them, and thus have the benefit of the full amount of such indebted-

ness, and not merely a dividend thereon from the assets in the hands of the receiver; that by the books of the bank, and upon the bank-book of complainants, as written up by the clerks of the bank since the failure, it is stated that there was due to complainants from the bank, at the date of its failure, the sum of $18,872.63, but that said sum was made up by the wrongful crediting to complainants, against their will and protest, of the aforementioned check for $11,781.93; that said amount should be deducted therefrom, so that the true indebtedness to complainants, at the date of the failure, was only the sum of $7,090.70; that at the time of the failure of the bank it was the holder of both of said promissory notes, and that complainants are entitled to set off against their payment any balance which really existed in their favor, as depositors, against said bank, whether the same was the smaller sum of $7,090.70, or the larger one of $18,872.63.

The bill further alleges, that the complainants were informed that at the time of the failure of the bank the said notes were not actually in its hands at Newark, but had been sent to the Mechanics' National Bank of New York, having been pledged to said bank as collateral security for an indebtedness then existing on the part of the Newark bank to it; that a large amount of promissory notes and other negotiable paper had been pledged at the same time with the said notes, much larger than said indebtedness, and that the other negotiable paper had been paid, and thereby the Mechanics' National Bank of Newark and its receiver became entitled to the notes of the complainants; and that said notes ought to have been returned to the receiver, and the amount of complainants' credit on the books of said bank applied to the discharge thereof; but that neither of said notes were so returned, and the same, when due, were found by the complainants in the hands of the Newark National Banking Company, to which they had been sent for collection, and that complainants were compelled to pay, and did pay, the same at maturity,—at the same time giving notice to the National Newark Banking Company, and the Mechanics' National Bank of New York, and to the receiver, of their rights in the premises.

The bill claims that the said check, being left for collection on the last day that the doors of the bank were open for the transaction of business, and when the bank was utterly insolvent and was known to be so by the cashier and some of the directors, and being still in the hands of the bank when its doors were closed on the next business day, ought to have been returned to the complainants, and prays:

(1) That the same be now delivered up by the receiver, to be canceled; (2) that the receiver may be restrained from bringing any suit upon the same, either within the limits of New York or New Jersey, or the United States; (3) that an account be taken of the indebtedness which existed at the time of the failure of the bank from it to the complainants, and that it may be decreed that such indebtedness was and is a lawful and equitable set-off in favor of complainants against their indebtedness, by reason of said promissory notes, and that complainants, having paid the same, are entitled to have a return from the receiver of the moneys by them paid, to the amount of such

indebtedness, and that he be decreed to make such payment accordingly, without regard to the amount of any dividend declared or to be declared to the general creditors.

The answer of the defendant states that the Mechanics' National Bank of Newark closed its doors on the thirty-first of October, 1881, and, after an examination into its affairs by the comptroller of the currency, was declared insolvent, and that defendant was appointed receiver on the fourth of November, 1881, under the national banking laws, and that, as such receiver, he represents all the creditors of the association, and has no right or authority to prefer any one of the unsecured creditors before another, and that he is bound so to administer and protect the assets in his hands as to distribute the same equally among the persons entitled thereto. It admits that on Saturday, October 29, 1881, the complainants deposited with said bank a check, drawn by Hague & Billings, of New York, upon the American Exchange National Bank of New York city, payable to their order, for $11,781.93, and says, in reference to said deposit, that the check was indorsed in blank by complainants and was at once credited to them as cash upon their pass-book and upon the books of the bank; that, according to the usual custom and course of business, between complainants and the bank, the complainants were at once entitled to draw against the same, if they chose so to do, as upon so much cash paid in, and that no special agreement or contract was made in reference to said deposit; that by the receipt of said check the bank was entitled to forward the same for collection and to receive credit for the whole amount thereof, as its assets; that its liability to the complainants was like its liability to any other creditor, and that complainants, after delivering said check for collection, had no right to prevent the collection or stop the payment thereof after the failure of the bank and its assets had become a general fund for its creditors.

It further states that on the thirty-first of October, 1881, and before any demand for the return of said check, the same was forwarded by E. H. Shelley, the government examiner in charge of the bank, to New York for collection, and was by him charged to the account of the National Park Bank of New York, to whom the same was sent; but that it was not collected because the payment thereof had been stopped, although the makers were able to pay the same, and have offered to pay the amount to defendant if complainants would consent, and that said check had been protested and returned to defendant, and is now in his possession or under his control, the

defendant claiming the same as a part of the general assets of the bank.

The answer also admits that the credit of the bank stood very high in the community at the time of the deposit of the check; that statements of its condition had been published from time to time, sworn to by the cashier, and certified by some of the directors, which were wholly false; that their falsity was known to the cashier, but not to the directors certifying to the truth of the same; that the bank had been in fact insolvent for many years, but a knowledge thereof had never come to the directors until Sunday, October 30, 1881, when they were told by the cashier that it was ruined by his defalcations and unlawful abstractions to the amount of over $2,000,000; that the board of directors immediately ordered its doors to be closed, and that it be placed in the hands of a government examiner for investigation.

The defendant insists that the cashier's knowledge of the insolvency of the bank was not imputable to the bank or its directors, and that complainants had no right, on account thereof, to demand the return of the check and revoke the contract on their discovery of the insolvency, and that they could have no such right unless the directors, managing the affairs of the bank, carried on its business after a knowledge of its insolvency; that the deposit of the check was not received in contemplation of insolvency, but that at the time of receiving the same the directors and also the cashier expected and intended to carry on the business of the bank in its usual course.

The answer further states that at the time of its failure the bank was indebted to its depositors in about the sum of $2,700,000, all or nearly all of which had been received since the bank was, in fact, insolvent, but was not so known to be by its directors, and was all received, as was the deposit of complainants, with the expectation and intention on the part of the directors of continuing the business; that the assets are not sufficient to pay in full all deposits; that defendant is holding all the assets, including said check, for equal distribution among the creditors, and that delivering said check to complainants would practically amount to giving them a preference for their claims over other creditors.

The answer denies that, at the time of the failure of the bank, the complainants were indebted to it in the amount of two promissory notes, set out in paragraph 7 of the bill of complaint, or of either of them. It admits that the first of said notes—for $15,000, dated

July 19, 1881—had been discounted for complainants previous to the failure of the bank, but denies that the other note, dated August 13, 1881, for the same amount, was ever discounted by the Newark bank, alleging that it was discounted by the Mechanics' National Bank of New York on the tenth of October, 1881, and the proceeds charged on that day against the New York bank and credited to the complainants on the books of the Newark bank; that said note, from the time of its discount to the date of its payment, belonged to and was the property of the said New York bank; that so far from its being true, as alleged in the bill, that the Mechanics' National Bank of Newark, at the time of its failure, was the holder of said notes, it, in fact, held neither; but, on the contrary, it had, during the month of October, 1881, indorsed over and delivered the note dated July 19, 1881, along with other notes before discounted by the said Newark bank, to the amount of about $442,000, to the Mechanics' National Bank of New York, as collateral security for about $400,000,—the amount of loans and overdrafts of the Newark bank, —and that, at the time of the failure of said bank, and when it came into the defendant's hands, the said indebtedness had not been paid, but still existed, to the amount of $273,000; that the New York bank claimed, and was entitled to, the right of collecting for its own benefit, and for applying, in said indebtedness, the proceeds of all of said notes so held as collateral security, including the said note dated July 19, 1881, which had been discounted for the complainants; that the said first note of complainants was indorsed generally, and not for collection; that at the time of the failure of the bank, and when the said note was matured, the debt of the Newark bank to the New York bank had not been paid, and the New York bank was entitled to receive, and did receive, the amount of the same as a credit upon said indebtedness; that the indebtedness was not fully paid when the second note became due; the amount paid to and received thereon by the New York bank never came to defendant's hands, but was regularly, and in due course, applied by the New York bank to the payment of the debt due from the Newark bank; that the other note, dated August 13, 1881, was the sole and absolute property of the New York bank upon its discounting the same; and that at the time when complainants paid said notes, as stated in the bill of complaint, the defendant had no right to the return of said notes, or to receive the same; and that complainants are, therefore, not entitled to the set-off claimed in their bill to the amount of said notes.

Cortlandt Parker and *R. Wayne Parker*, for complainants.

John R. Emery, (with whom was *A. Q. Keasbey*,) for receiver.

NIXON, J. The pleadings and stipulations present two questions for consideration:

(1) Whether the complainants are entitled to have the check, which was deposited by them for collection on the twenty-ninth day of October, 1881, and not forwarded until after the bank was closed, returned to them on account of the insolvency of the bank.

(2) Whether the receiver should allow to the complainants the balance due to them from the bank, at the time of its failure, as an offset to their indebtedness upon the two promissory notes for $15,000 each, and respectively dated July 19 and August 15, 1881.

There is no difficulty about the facts of the case. All the material facts are admitted. The complainants were the regular customers of the bank, and were the owners of Hague & Billings' check upon the American Exchange National Bank of New York for $11,781.93, payable to their order, which they indorsed generally and left with the Newark bank for collection. It was the custom of the bank, at least in regard to these depositors, to credit their account with such foreign checks when left, and to enter the amount at once upon their pass-book. Such credits were made in this case on the twenty-ninth of October, when the check was deposited for collection. The bank was then indebted to the complainants in the sum of $7,090.70 on previous deposits, and the credit of the check in question increased its indebtedness to $18,872.63, for which sum the complainants were entitled to draw. The next day was Sunday, when the cashier revealed to the directors the insolvency of the bank. Its doors were closed on Monday. A government examiner took charge at once, and finding the check still in the hands of the bank he forwarded it to New York for collection. It was not paid by the drawers,—its payment having, in the mean time, been stopped. It has never yet been paid, although the makers are pecuniarily responsible.

The complainants claim that they are entitled to the return of the check:

(1) Because, although it was indorsed generally, and the amount had been credited to the depositors upon their pass-book and the books of the bank, the deposit for collection did not make the check the property of the bank, the bank continuing to be the agent of the customers for its collection, and the check remaining, in the mean time, the property of the depositors. (2) Because it was fraudulent on the part of the bank to receive the check for collection at a time when it was insolvent, the insolvency being caused by and known to the cashier, who had been intrusted by the directors with the general management of the business of the association.

With regard to the first claim there seems to be no well-settled rule. I was under the impression, on the argument, that the weight of authority was in favor of the doctrine that, whenever a banking association gives credit upon its books to a depositor for the amount of a check or negotiable paper deposited for collection, the title to the check or paper immediately passed to the bank, and it became the holder of the same for value. But I am satisfied, upon reflection, that this is not true, without qualification.

When the deposit was made and credited in order to make good an overdrawn account of the customer, or where the amount thus credited was immediately drawn against, the bank is undoubtedly to hold the check, at least, until the overdraft of the account is made good from other sources, or the cash drawn on the strength of the credit has been returned. The first of these conditions existed in the case of *Titus* v. *Mechanics' Nat. Bank*, 6 Vroom, 592, and the opinion of the court of errors of New Jersey must be construed in reference to that fact. The learned counsel of the defendant also relied upon the decision of the chancellor in *Terhune* v. *Bergen Co. Bank*, 7 Stew. 367, in support of the doctrine. But the controlling fact in that case was that the checks, which were credited to the account of the depositor by the Bergen County Bank, had been forwarded to the Chatham National Bank of New York for collection, and had been collected and the proceeds credited to the Bergen County Bank before its failure. The claim there was that the depositor was entitled to preference in payment over other depositors.

It was correctly held that the complainant was only a general creditor of the bank for the proceeds of the collection, and must accept his dividend like other depositors. Such was declared to be the rule in *Foley* v. *Hill*, 2 H. L. Cas. 28, in which the relations of the banker and customers are very ably discussed and stated. The claim of the appellants was that the relation was that of trustee and *cestui que trust;* but their lordships held that it was rather that of debtor and creditor. When the customer deposits cash with the bank it ceases to be the money of the depositors, and becomes immediately the property of the bank; but when he deposits a check for collection in the absence of any special contract, the property in the check remains in him, and the bank becomes his agent for its collection, and has no responsibility in reference to its payment, except that it assumes to neglect no duty in the matter of its collection. When the collecting bank has notice of its payment, and is credited

by its correspondent with the proceeds, it then becomes the debtor to the owner for the amount of the check.

The case (*Ex parte Richdale, In re Palmer*, 19 Ch. Div. 409) was also cited by the counsel of the defendant in support of the rule that the moment the check was credited by the bank to the depositor it became the property of the bank, and it was its holder for value. It is true that the master of the rolls, (JESSEL,) in reviewing the decision of BACON, C. J., did state that doctrine as the law, but it was *obiter dictum* in the case, and the court expressly alleged that they preferred to base their decision on the ground that the transaction came within, and was protected by, the provisions of the ninety-fourth section of the bankruptcy act of 1869.

In the present case the receiver's counsel insist that the indorsement of the check to the bank, and its credit upon its books and upon the pass-book of the complainants, are conclusive evidence of a special contract that the check should at once become the property of the bank for value. The reply is twofold: (1) That in all cases where credits are thus made banks claim and always exercise the right of charging checks returned to them for non-payment to the account of the depositor, which could not be done if the check had become the property of the bank, and did not remain the property of the depositor until collected. (2) The practice, which has grown up among banks, to credit such deposits at once to the account of the depositor, and to allow him to draw against them before the collection has been made, is reckoned by the ablest text writers, a mere gratuitous privilege, which does not grow into a binding legal usage.

Morse, in his treatise on Banks & Banking, in discussing this subject in his chapter on "Collections," p. 427, says:

"Where the customer deposits in the bank commercial paper for collection, at the same time indorsing it over to the bank, the parties understanding that it is only intended by the indorsement to put the paper in such shape that the bank can collect upon it, the title in the paper does not thereby pass to the bank, nor does the bank owe the amount to the customer until such time as the collection is actually consummated. Neither is this strict right of the bank curtailed or altered simply because a practice has been allowed to prevail by which it has allowed the depositor to draw against deposits of paper for collection before the collection has been actually made. This is a mere gratuitous privilege allowed by the bank, which does not grow into a binding legal usage. Thus, it is very common for depositors to deposit checks with their banks, and to draw against them on the same day checks of their own, which may be presented for payment before the bank has had an opportunity to collect upon the deposited checks. In such cases banks are fre-

quently wont to honor such checks of their customers upon the confidence that the deposited checks will be duly paid. But this habit of the banks is a pure favor, and if there be no distinct understanding to change the natural effect of such dealing, its long continuance gives no real right whatsoever to the depositor to demand its continuance or its practice in any individual case wherein the bank may, for any arbitrary reason, see fit to withhold that favor. *Scott* v. *Ocean Bank*, 23 N. Y. 289. In England, a decision given by Lord ELLENBOROUGH (9 East, 21) went much further even than this. Bills, not yet due, were sent to a country banker to collect. According to the custom of country bankers these were actually entered in the banker's own books to the depositor's credit, with the proper discount, and he was thereafter entitled to draw against this credit before the actual collection. Upon the subsequent failure of the banker, before the collection, it was held that the title in the bills had not passed to him, and that the depositor should recover them specificially, or their amount, if the bankrupt's assignee had already made the collection."

Nothing more than this is asked for by the complainants in the case under consideration. The accounts between the depositors and the bank were in nowise changed from the date of the deposit to the closing of the doors of the bank against further business. It is true, the credit had been entered on the books of the bank; but it was not to make good an overdrawn account, and if it enabled the depositors to draw against the credit, they had not, in fact, done so. The check was still in the hands of the bank when it stopped. It was, perhaps, a gratuitous act for the bank examiner to send it forth for collection. But, whether it was so or not, it was not honored by the bank on which it was drawn, and was returned unpaid to the receiver.

The naked question is whether, under such circumstances, the right to recall the check remained with the depositors, or whether it had passed beyond their reach. I see no reason, in principle, which should not allow them to recall it. It was their property until collected. If the bank had continued business, and the check had been returned unpaid, it would have been charged up to their account and handed back to them. The receiver, in the new condition of affairs growing out of the insolvency, represented the bank, and when the check came back to him ought to have charged the account of the depositors with the amount and returned it to them.

This view of the case renders it unnecessary for me to consider whether the complainants were entitled to its return on account of the fraud which is alleged to have been committed by the officers of the bank in receiving the check for collection when the cashier, acting for the directors, was aware of the total insolvency of the association. It is proper, however, to observe that no knowledge by any

of the officers of the bank of its insolvency is sufficient to avoid the transaction, unless the evidence clearly shows that the directors, who represent the corporation, also had such knowledge.

I have much less difficulty with regard to the other question raised by the pleadings and the evidence, to-wit, the right of the complainants to offset the amount of their credit on the books of the bank, at the time of the failure, against the two promissory notes, for $15,000 each, which the bank had received from them for discount in the months of July and August preceding the failure.

It is unquestionably true that if the Newark bank held these notes at the time of the failure, and was entitled to receive the amounts due thereon when they matured, such offset might be made. But the evidence is clear that at that date the notes were not the property of the Newark bank, but had been indorsed away for value. The facts are that the second of these notes, dated August 19, 1881, was never discounted by the Newark bank. It was sent to the Mechanics' National Bank of New York for discount, and the proceeds were duly credited to the makers on the books of the Newark bank. When it fell due it was still the property of the New York bank and was paid to it by the makers—the Newark bank having no interest whatever in the note or its proceeds.

The first note, of July 19, 1881, stands in a different position, but not in one which allows the offset to be made as demanded. It was regularly discounted by and became the property of the Newark bank on the twentieth of July, 1881, and the proceeds placed to the maker's credit on that day. Afterwards, in the month of October, the Newark bank, having largely overdrawn its account with the Mechanics' National Bank of New York, sent to the latter bank a batch of paper, which had before been discounted, in which was included said note of complainants, amounting in the aggregate to $442,000, as collateral security for the payment of said indebtedness. The amounts of these notes, as they matured and were paid, were credited on the account, for the payment of which they had been indorsed as collaterals. When the Newark bank failed there yet remained due upon said indebtedness upwards of a quarter of million of dollars, and the New York bank claimed, and I think had, the right to retain the indorsed notes (including the one of complainants) not due or paid, and to apply the proceeds as they severally and in the order in which they became due to the payment of the remaining indebtedness. When the said first note of complainants ma-

tured, it was collected and the amount applied to the extinguishment of the said debt.

But when the notes were all collected the New York bank had remaining in its hands about $7,000 over and above what was necessary to pay said account against the Newark bank. It paid the surplus to the receiver, and the complainants insist that they have at least an equitable lien thereon, and that the receiver should offset the same by allowing said surplus to be paid on account of the last-named note. This claim cannot be allowed. It was the duty of the New York bank to apply the proceeds of the notes, as they were severally paid, to the extinguishment of the debt for which they were collateral, and when complainants' note was paid and credited the receiver had no right to demand, nor was the New York bank bound to refund, any part thereof until the overdrawn account was fully paid. Nor will the receiver be permitted, as against the other creditors of the insolvent bank, to use any portion of this surplus to give a preference over them to the complainants.

Let a decree be drawn in conformity with this opinion, with costs of the complainants.

FRENCH *v.* CARTER and others.

(*Circuit Court, S. D. New York.* February 12, 1883.)

SHIPMAN, J. The demurrer of the defendant Oliver S. Carter, in the above-entitled cause, is overruled, with leave to the said defendant to answer the bill within 30 days after the entry of the order overruling the demurrer. The plaintiff is entitled to his costs to the date of the hearing upon the demurrer.

THE E. M. NORTON and barges.*

(*Circuit Court, E. D. Louisiana.* January, 1883.)

1. COMMON CARRIER—NEGLIGENCE OF LICENSED PILOT.
   For negligence or want of skill the owner or boat is responsible, although a licensed pilot was the real delinquent.
2. SAME—NEGLIGENCE.
   The result is a safe criterion by which to judge of the character of the act which has caused it.

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

3. SAME—BURDEN OF PROOF.

When the evidence does not explain (to a degree sufficient to fix responsibility) the cause of the loss of a vessel, the case should be decided upon the general principles governing such cases. Non-delivery of goods shipped raises the presumption of negligence on the part of the carrier, and, in an action for them, the burden is on the carrier to show good excuse for the non-delivery, and, if he fail to do so, he must be held liable.

Gordon & Gomilla shipped in January, 1880, a large lot of corn by the St. Louis & New Orleans Navigation Company barge, Sallie Pearce, from St. Louis to New Orleans. The barge was one of four barges, composing the tow of the steam-boat E. M. Norton. The tow proceeded down the river without accident to near Cairo, Illinois, when, in passing across the point behind Willow bar, one of the barges, the Moore, was run aground with such force as to part her lines, open her seams, and tear her loose from the tow. No damage was apparently done to the other barges. After some attempt to get the Moore off, and failing, the other barges, including the Pearce, were towed to the Missouri shore and landed at Bird's Point, where they were left moored to the bank, while the Norton returned to the Moore to get her off and save the cargo. Shortly after the Pearce was landed she was observed to be leaking, and, in spite of the efforts made by the two men left in charge of the barges, she soon listed and sunk, a total loss.

The Hibernia Insurance Company, insurer of half the value of the cargo, and subrogated to the demands of Gordon & Gomilla, bring this libel to recover the one-half the cargo, less freight.

Thomas Gilmore, John A. Gilmore, Samuel L. Gilmore, Joseph C. Gilmore, and *O. B. Sansum,* for libelant.

John A. Campbell and *J. Ward Gurley, Jr.,* for claimant.

PARDEE, J. The evidence in this case shows that the barge Sallie Pearce was apparently seaworthy when she started on her voyage. She had been repaired at large expense about one year previous.

The defense that she was landed at Bird's Point against "an unknown and unseen root of a tree," which, by the barge pressing against with her side, "caused her side to be pressed in and produced the leak from which the barge was sunk," is entirely unsupported by the evidence. In fact, the evidence shows that the Sallie Pearce was not moored next to the bank, but a barge intervened, and that the depth of water where she sunk was 40 or 50 feet, completely negativing the theory that her side was pressing an uncovered root of a tree depending to the bank. If the barge was seaworthy, and she was not injured while lying at Bird's Point, the presumption is

that she was injured and set aleak by the shock and strain resulting from the grounding of the barge Moore, which appears to have been very violent,—so violent that the Moore was torn loose from the tow, and run 80 feet into and over the bank. And if the evidence gives any reason for the leaking of the Pearce which resulted in her loss, the grounding of the Moore, and the injuries resulting therefrom, is the reason.

The evidence shows that the grounding of part of the tow was from attempting to take the tow across the point behind Willow bar instead of following the channel of the river. This was done by the pilot over the objection of the master. In my opinion, based on the evidence, it was negligence to take that course. If it was not negligence, then the handling of the tow and barges was unskillful.

There may be cases, and I think this is one, in which "the result is a safe criterion by which to judge of the character of the act which has caused it." See *The Webb*, 14 Wall. 406. For this negligence or want of skill the owner or boat is responsible, although a licensed pilot was the real delinquent. See *The China*, 7 Wall. 67; *The Merrimac*, 14 Wall. 199; *Sherlock* v. *Alling*, 93 U. S. 105. But, in fact, the evidence does not explain (to a degree sufficient to fix responsibility) the cause of the loss of the Sallie Pearce, and the consequent loss of libelant's goods. The case should, therefore, be decided upon the general principles governing such cases, instead of upon any particular case or state of facts as proved.

The claimant was a common carrier for hire. Non-delivery of the goods shipped raises the presumption of negligence on the part of the carrier. See *Nelson* v. *Woodruff*, 1 Black, 156.

In an action for goods not delivered, the burden is on the carrier to show good excuse for the non-delivery. The carrier, having failed in this case to excuse himself, must be held liable.

The decree of the district court was correct, and the same, less some interest which libelants remit, should be entered in this court. Let a decree be entered for the libelants in the same terms as that of the district court, except that interest shall commence to run from January 1, 1881, instead of from judicial demand, and for all costs.

GRIBBLE *v.* PIONEER PRESS CO.

(*Circuit Court, D. Minnesota.* February 5, 1883.)

1. REMOVAL OF CAUSE—CITIZENSHIP.
   Where there is reason to doubt the existence of jurisdictional facts, the parties may be examined upon the question, and the court may direct the proper pleadings to be filed to raise the issues involved in such question.
2. SAME—REMAND.
   Where both plaintiff and defendant are citizens of the state where suit is brought this court has no jurisdiction, and the cause will be remanded.
3. ALIEN—NATURALIZATION.
   An alien naturalized under the laws of the United States is a citizen of the state in which he resides.

This cause was removed from the district court of Ramsey county by the defendant, upon the ground that it was at the time of the commencement of the action a citizen of the state of Minnesota and the plaintiff an alien. The plaintiff filed a plea to the jurisdiction of the court, alleging that at said time he was a citizen of the same state with the defendant.

A jury trial was waived, and the issue raised by the plea was brought to trial before the court. The plaintiff testified that he was about 60 years old; that he was born in Devonshire county, England; that his father was Joseph Gribble, an Englishman, who immigrated into the country, bringing plaintiff with him, when he was about nine years old; that he knew of his father's voting in the state where they then resided before he, witness, was 17 years old; that he had himself voted in different states, and ever since he was 21 years old; that he had pre-empted public land of the United States, using therefor as proof of citizenship the original naturalization papers of his father.

The plaintiff offered in evidence a duplicate of the naturalization papers of his father, which are in the words and figures following:

"*Commonwealth of Pennsylvania, Allegheny County:*

"Be it remembered that at a court of quarter sessions, held at the city of Pittsburgh, in and for the county of Allegheny, in the commonwealth of Pennsylvania, in the United States of America, on the second day of October, A. D. 1838, Joseph Gribble, a native of England, exhibited a petition to be admitted to become a citizen of the United States. And it appearing to the satisfaction of the court that he has resided within the limits and under the jurisdiction of the United States for five years immediately preceding his application, and that during that time he has behaved as a man of good moral

character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same, and that he has in all things fully complied with the laws of the United States in such case made and provided, and having declared on his solemn oath before the said court that he would support the constitution of the United States, and that he did absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty whatever, and particularly to the queen of Great Britain, of whom he was before a subject: whereupon the court admitted the said Joseph Gribble to become a citizen of the United States, and ordered all the proceedings aforesaid to be recorded by the clerk of said court, which was done accordingly.

"In testimony whereof I have hereunto set my hand and affixed the seal of the said court at the city of Pittsburgh, this second day of October, *Anno Domini* 1838, and of the sovereignty and independence of the United States of America the sixty-third.

[Original Seal of Court.] "T. L. McMillan, Clerk.

"Duplicate of original issued by me this fourteenth day of September, A. D. 1882. A. H. Roward, Jr., Clerk."

No further testimony was offered by either party, and the matter was submitted.

John B. Brisbin, for plaintiff.

W. D. Cornish and *C. D. O'Brien*, for defendant.

Nelson, J. The evidence under the plea is satisfactory, and sufficient to show that the plaintiff is by virtue of law a citizen of the United States and of the state of Minnesota.

Objection is made to the admissibility of the certificate of naturalization of the plaintiff's father offered in evidence. The evidence of the plaintiff alone, uncontradicted, without this authenticated record, is sufficient to authorize the court, under the act of congress of March, 1875, to dismiss or remand the case, but in my opinion the certified copy is admissible. The act of congress (Rev. St. § 905, p. 171) providing for the mode of authenticating records of state courts is not exclusive, and states can adopt any other method. In the state of Minnesota it is enacted that "the records and judicial proceedings of any court of any state or territory of the United States shall be admissible in evidence in all cases in this state when authenticated by the attestation of the clerk * * * having charge of the records of such court, with the seal of such court annexed." Young's St. (Minn.) § 54, p. 800. The document offered meets the requirements of this statute and is admissible in evidence.

It is without doubt the right and duty of the court to remand a case removed from a state court if it ascertains in any way that it was not removable under the law. This court cannot be obliged to proceed

with the trial of a cause with the knowledge that it is in fact not within its jurisdiction, and that either party may at any moment, by raising the question of jurisdiction on the record, put an end to the proceedings. If it were otherwise, the parties to such an action might, by suppressing the facts with respect to citizenship, require the court to proceed until they have discovered its views of the law, and then, if not satisfied, might interpose a motion to dismiss or remand. See 104 U. S. 209. The court cannot permit any practice which will make possible such an experiment. If the judge has reason to doubt the existence of the jurisdictional facts, he has a perfect right to examine the parties upon that question, or to direct a plea in abatement to be filed and heard in order to settle *at the outset* that question.

The proof in this case shows that the plaintiff was the son of a person who was duly naturalized under the laws of the United States, and a minor dwelling therein at the time of the naturalization of his father. He thus became, by virtue of law, a citizen. Rev. St. § 2172, p. 380.

The plaintiff and defendant being citizens of the state of Minnesota, this court has no jurisdiction of the cause removed. Judgment on the plea will be entered in favor of the plaintiff, and in furtherance of justice it is remanded to the Ramsey county district court, with costs to be paid by the defendant.

MATTHEWS *v.* MURCHISON and others.

(*Circuit Court, E. D. North Carolina.*)

1. RAILROADS—REORGANIZATION—DISSOLUTION—BONDHOLDERS BOUND BY A QUIESCENCE.

   A bondholder of a former organization has no standing in chancery to dissolve the present organization of a railroad company, for which his agent had voted his bonds, it was alleged, in excess of authority, and to enforce a different plan, where it appears that he had known of what his agent was doing, but had not dissented, and that he had accepted his share of the bonds of the new organization, had offered to buy and sell, and had brought suit for them. Such conduct ratified the act; or, inducing others to believe he had acquiesced in the organization, worked estoppel.

2. SAME—CAPACITY TO OWN SHARES—OBJECTION—BY WHOM TO BE RAISED.

   A bondholder of one railroad company is not the proper person to object to the right of another road to own shares of the stock of the former. If it exceeded its corporate power in purchasing, they belong to the vendor; if it only could not hold, the state incorporating is the party offended.

3. SAME—INTENTION TO SACRIFICE INTERESTS.

A court of equity will not interfere when it is alleged that the parties in control of one road intend to sacrifice its interest to that of another, if there is no proof of the fact, and the complainant is wanting in equity on the merits, and no irreparable injury is threatened, and the road is able to respond in damages.

In Equity.

BOND, J. This is a bill filed to dissolve and declare void the organization of the Carolina Central Railway Company, and to reorganize it and establish it under a new plan, alleged to have been the only one to which the plaintiff, who is a large bondholder of a former organization, ever agreed, and for injunction and the appointment of a receiver meantime. The case is not submitted on its merits, but upon this preliminary motion. The evidence is very full, and the record a very large one. The motion has been thoroughly argued, and ably-prepared briefs submitted, and the court has given them patient study. The facts, so far as it is necessary to recite them for the present purpose, are these:

The complainant was the owner of 1,194 bonds, each for the sum $1,000, secured by a first mortgage on the Carolina Central Railway Company, all its properties and franchises, and she likewise held second-mortgage bonds issued by that company to the amount of $2,550,000. The company made default in the payment of the interest upon its bonded debt, and an action was brought in the superior court of New Hanover county, North Carolina, to foreclose the mortgage and sell the property, which that court decreed should be done, and the sale was made accordingly on the thirty-first day of May, 1880. There is no question about the regularity of these proceedings. At the sale, Francis O. French, Arthur B. Graves, David R. Murchison, James S. Whedbee, and Andrew V. Stout, a committee appointed by the first-mortgage bondholders, became the purchasers. The court directed the commissioners who made the sale to make a deed to these purchasers, who were to be a corporation, by such name as they might see fit to adopt, in conformity to the laws of North Carolina. The old corporation was dissolved, and a new one formed under the corporate name, "Carolina Central Railway Company," to which all the property and franchises of the old corporation were conveyed free, and discharged from all former liens and incumbrances. Prior to this sale there had been consultation among the bondholders respecting the sale and purchase of the road, and the plan of reorganization to be followed when the purchase was made. It is in respect to these plans that the complainant makes complaint.

In our opinion Col. Matthews, the husband of Virginia B. Matthews, was, as appears from the whole case, if not the real owner of these securities, the complainant's plenary attorney, and the case must be treated as if he were the plaintiff, or as if all his acts and declarations were those of his wife.

Before the twelfth of May, 1880, during the pendency of the foreclosure suits, several plans of reorganization had been agreed upon between Graves and Matthews,—two, at least. These both gave an undue advantage to the old second-mortgage bonds,—that is, to Matthews,—and it is to be presumed that it was impossible to get the consent of the first-mortgage bondholders to them. At any rate they were abandoned, and complainant signed a paper authorizing Francis O. French, a party defendant hereto, to designate a plan, and making him substantially arbitrator as to the question between the old second and first mortgage bondholders. This was on the fifteenth of May, 1880. On or before December 12, 1879, Mrs. Matthews had owned $1,690,000 of the old first-mortgage bonds. On that day she sold $500,000 of them to R. A. Lancaster & Co., hypothecated $500,000 more on a loan from French, Stout & Graves, and gave the last-named persons a power of attorney for five years, to vote on $1,000,000 of her bonds, including the $500,000 hypothecated ones. The power of attorney was given on the condition that the attorneys should consent to and approve the plan of reorganization of the company in accordance with the plan annexed. This plan was modified by plaintiff on the twenty-seventh of February, and abrogated on the fifteenth of May, 1880, French being authorized to designate a new plan, as above stated.

Before this, however, on the twelfth of May, 1880, more than five-sixths of the old bondholders had entered into an agreement looking to the purchase of the Carolina Central Railroad at the foreclosure sale. This paper was signed by complainant, among others, and was binding upon all who signed it, and the court, as far as the nature of the case permitted, would enforce it. The purchase was made under this instrument, and no organization not effected in accordance with its terms would have had the consent of the parties in interest while it remained in force. It provided, among other things, that French, Murchison, Graves, and Whedbee, with power to add a fifth to their number, should be a committee to purchase at the foreclosure sale, and in case they did they were to prepare and submit to the subscribers a plan for the reorganization of the company, which plan should be binding when approved by two-thirds in amount of the

bonds. This was signed by Mrs. Matthews on the twelfth of May, and three days afterwards she signed the agreement that French might designate a new plan. These two papers were of course in the mind of Mrs. Matthews, or rather of her husband, at the same time, and it is impossible to doubt she meant that the plan was to follow the course of the former, and be submitted by the committee to and be approved by the requisite number of first-mortgage bonds. This could not be done till after the purchase of the road.

It is true that before that time French did draft a plan, and the requisite number of bondholders signed an authorization to the committee to carry it out. The plan, however, was never presented by the committee, and was never carried out. We are now asked to enforce it. It is plain we ought not to do so. It is not within the terms of the instrument of May 12, 1880. French had not exhausted his power under the instrument making him arbitrator, and when he subsequently presented the plan marked "F" he was acting under that authority. This plan differed from plan "C" in but two points: it added to the definition of the word "income" the words "all questions of expenditure within the discretion of the board of directors," and it changed the attachment of the stock and its amount. Neither of these changes is material. The discretion mentioned is, of course, a legal discretion, and the board would have had that without giving it in express words; and the change in the attachment of the stock from one set of bonds to the other is of no importance to complainant, as she got the same share under one agreement or plan as she would have done under the other. The company has been organized; its new bonds and stock issued and sold. The complainant has received her proportion of bonds in the new organization without objection, and has offered to sell the whole or part of it; yet, if the complaint she now makes be true, she knew the company was illegally organized and had no power to issue either bonds or stock. French acted within the scope of his power of attorney. The plan "F," which he voted for in the presence of his associates Graves and Stout, was sent to Matthews, who was then in Europe, as is evident from Matthews' letter to Robinson, of sixteenth of September; and even if French had exceeded his power of voting for Matthews, he professed to act under it; and complainant and her husband knew it, and their conduct, after such knowledge, ratified her act. The complainant received the new bonds. She attempted to buy more, and offered to sell them, and brought suit for some she claimed to be hers. All these things were done after the knowledge of French's act. To

come into a court of equity and ask it to set aside the organization of the new company, under these circumstances, and to take its property out of its hands and put into those of a receiver, is little else than monstrous. Every act of complainant and her husband, after the vote of French, led the public and the committee of purchase and organization to suppose they acquiesced.

The law and good conscience required that if they disapproved French's conduct, and denied his power to act as he had done, then to say so at once, and not mislead everybody by dealing in the worthless securities which they secretly meant to repudiate. Whether this is an estoppel or a ratification is of little consequence; not to regard it as one or the other would work the greatest injustice to the other bondholders. We think this decides the matter, and is fatal to complainant's claim for a receiver now or at any other time under her bill of complaint. The bill charges that the Seaboard & Roanoke and Raleigh & Gaston Railroads have no right to own shares in the reorganized Carolina Central Railway Company. This is of no importance to complainant. If the company had no right to purchase shares, then those they sold belong to Murchison's estate, from whom they bought them, and if they could purchase and not hold them and are exceeding their corporate powers, the state of North Carolina is the party offended. The bill charges that the parties holding the control of the company intend to sacrifice its interest to that of the Raleigh & Gaston and Seaboard roads, but there is no proof whatever of the fact, and even if the complainant had more equity, on the merits there is no irreparable injury threatened, and the road is solvent and abundantly capable of responding in damages to the complainant.

The motion for injunction and receiver is denied. We have not copied into this opinion the papers referred to in it. It would be useless to do so for the sake of the counsel, who are familiar with the record, and to do so for the benefit of the profession would make the paper as large as the record, and the profession would never see it, for it would never find a printer.

AMERICAN BOARD OF COM'RS OF FOREIGN MISSIONS *v.* FERRY, Ex'r, etc.*

(*Circuit Court, W. D. Michigan.* April, 1883.)

1. WILLS—TESTATOR MAY DESIGNATE AN UMPIRE TO CONSTRUE HIS WILL—WHEN SUCH UMPIRE'S DECISION FINAL.

   A testator may in his will designate his executor an umpire, and invest him with power to construe his will and determine every doubtful question that may arise touching the testator's intentions; and if such umpire exercises the power honestly and in good faith, his decisions will not be revised by a court, notwithstanding the court may think the same are erroneous.

2. SAME—COURTS OF EQUITY WILL INTERFERE—WHEN.

   But if the umpire refuses to act, transcends his authority, makes an incomplete award, or commits some gross mistake or error of judgment evincing partiality, corruption, or prejudice, or violates some statutory requirement on which the dissatisfied party had a right to rely, a court of equity may interfere and correct the error, and, in proper cases, restrain further abuse of such power.

3. INTEREST—WHEN IT WILL NOT DISQUALIFY AN UMPIRE.

   Such an umpire, interested in the residuum, that may be increased or diminished by his decisions, is not disqualified to act, provided the contingency in which he acts was foreseen and understood by the testator when he conferred the power.

4. WILLS—PECULIAR BEQUEST CONSTRUED.

   The testator by will, after providing for the payment of his debts, certain legacies, and expenses of administration, declared that he supposed there would be a large balance remaining, out of which he directed his executor, "in *pro rata* distribution, to pay over to the appropriate medium of the following bodies the indefinite sum of letter A, the maximum of which shall be $30,000, to-wit: To the American Board of Commissioners of Foreign Missions, the *pro rata* of letter A; to the American Bible Society, the like *pro rata* of letter A; to the American Tract Society of Boston, the *pro rata* of one-half of letter A; and to the Presbyterian Publication Committee, the like *pro rata* of letter A. Should the indefinite amount prove to be adequate to the whole payment, from $30,000 down to $15,000, then the whole is to be paid; otherwise, each is to receive their definite proportion, but in no case to exceed the *pro rata* of the full amount of the letter A." *Held*, that the maximum amount of said bequest was $30,000, and that of said sum the first two bodies named should receive one-third part each, and the other two one-sixth part each.

C. T. Walker, for complainant.

Hughes, O'Brien & Smiley, for defendants.

BAXTER, J. William M. Ferry, late of Ottaway county, Michigan, died in the latter part of 1867. He left a last will and testament, in which, after disposing of a large part of his estate, and appointing the defendant his "male executor," he provided as follows:

"*Eighth.* After defraying my funeral expenses, the services of executors, and all debts, if any there be, I presume there will be remaining a large bal-

*Reported by J. C. Harper, Esq., of the Cincinnati bar.

ance over and above all bequests already made, of which my executor, as soon as he shall be able to convert real estate into money or available funds, shall, in *pro rata* distribution, pay over to the appropriate medium of the following bodies the indefinite sum of letter A, the maximum of which shall be thirty thousand dollars, to-wit: To the American Board of Commissioners of Foreign Missions, the *pro rata* of letter A; to the American Bible Society, the like *pro rata* of letter A; to the American Tract Society of Boston, the *pro rata* of one-half of letter A; and to the Presbyterian Publication Committee, the like *pro rata* of letter A. Should the indefinite amount prove to be adequate to the whole payment from thirty thousand down to fifteen thousand dollars, then the whole is to be paid, otherwise each is to receive their definite proportion, but in no case to exceed the *pro rata* of the full amount of the letter A. It is further presumed there will remain, after the foregoing provision, a residue or balance unprovided for, hence,—

"*Ninth.* I give, devise, and bequeath all the rest, residue, and remainder of my estate, or the avails thereof, to my six children, viz.: To my three daughters, Amanda Harwood, Hannah Elizabeth, and Mary Luccia, each, one-twelfth part, share and share alike, and the balance to my three sons, William Montague, Thomas White, and Edward Payson (defendant herein) one-third part each, share and share alike. * * *"

"*Twelfth.* Be it distinctly understood by all concerned that every word and sentence herein is strictly my own; and I hereby determine and direct, furthermore, that in case any doubt or uncertainty arise touching any matter or thing contained or supposed to be contained in the foregoing, he, the existing male executor, shall act as umpire, and his determination and decision over his signature attached to this will, shall, in all respects, be accepted as final."

On the seventh of September, 1867, the testator appended a codicil in these words:

"Whereas, I, William M. Ferry, did in writing, over my signature, make my last will and testament, bearing date the twenty-third day of February, A. D. 1867, in which I constituted Edward P. Ferry, or his successor therein designated, as my male executor, and also did authorize him to construe and determine any matter or thing which might be doubtful, or in any manner needful, pertaining to said will. * * * In a word, my desire and design in respect to every person, matter, or thing wherein there may be supposed the least uncertainty or doubt, my male executor shall use his judgment, in accordance with my supposed purpose, and determine and decide every matter just as he may think was my intention, thereby making final and conclusive, under his hand, every possible uncertainty."

The defendant accepted the trust imposed on him by said will, and duly qualified as executor thereof, and made and attached the following declaration in writing, under his hand and seal thereto, to-wit:

"*State of Michigan, County of Ottaway:* In the matter of the last will and testament of William M. Ferry, deceased. In this matter the American Board of Commissioners of Foreign Missions, the American Bible Society, the Ameri-

can Tract Society of Boston, and the Presbyterian Publication Committee, having made, through their agents and attorneys, a claim, under the eighth bequest or subdivision of said will, in substance, that said societies or bodies were entitled to receive from the executor of said William M. Ferry's estate, and from said estate, a sum total of $90,000, and that the indefinite sum of letter A, mentioned in said bequest, represented the sum of $90,000, if there should be that sum remaining of the estate after paying the legacies therein before mentioned; and it being claimed on the other hand that the said indefinite sum of letter A, is, at the most, only the sum of $30,000. And, whereas, in and by said will and testament, and particularly in and by the twelfth subdivision thereof, and the codicil annexed thereto, it is provided that in case any doubt or uncertainty arise touching any matter or thing contained, or supposed to be contained, in said will and testament, the executor therein named, Edward P. Ferry, shall act as umpire, and his determination and decision over his signature attached to said will, shall be in all respects final.

"Therefore, in consideration of the premises, and inasmuch as doubts have arisen by reason of said claim among the parties, concerning the true construction of said will, and said bequests contained in the eighth subdivision, by virtue of the power contained in said will and codicil, I, the executor therein named, do hereby determine and decide that the true construction of said instrument, and the true intent and meaning of said testator, was that the said indefinite sum represented by said letter A, named in said will, is at the utmost and under any circumstances only the sum of $30,000, and that the said sum of $30,000, if said estate should amount to so much after paying said sums before that therein mentioned, should be divided between the said bodies named, in the following manner and proportion, viz.: To the American Board of Commissioners of Foreign Missions, and to the American Bible Society, each one-third of said indefinite sum; and to the American Tract Society of Boston, and to the Presbyterian Publication Committee, each one-sixth of said indefinite sum of letter A, but in all not exceeding $30,000."

The complainant seeks, upon the foregoing and other formal allegations made in connection therewith, a construction of the foregoing several clauses of said will, and insists that the construction thereof made by the defendant and hereinbefore copied, was and is unauthorized; that the conclusion reached is erroneous; and that it is entitled thereunder to the sum of $30,000, provided there are funds enough subject to the legacy to pay the same. To all which the defendent interposes a general demurrer, and upon argument contends—*First*, that defendant's construction of said eighth clause is an authortative, final, and conclusive determination of the questions; and, *second*, that under said eighth clause of said will, the maximum of letter A is $30,000, and that the complainant is only entitled to one-third part of that sum, subject to the contingency therein stated.

The testator had the legal right to dispose of his property by will. The paper executed by him for that purpose has been duly probated,

and is his last will and testament; it assumes to dispose of his estate. The language is not in every part a clear and definite expression of his intentions; on the contrary it is in some particulars involved and even repugnant. He seems himself to have been conscious of this infirmity of the paper, and therefore constituted the defendant an umpire, and clothed him with authority in case "any doubt or uncertainty" arose "touching any matter or thing contained or supposed to be contained" therein, to "determine the same," declaring that in the execution of said power the defendant might "use his judgment in accordance with" the testator's "supposed purpose, and determine and decide every matter just as he may think" the testator intended it to be understood and construed, and thereby make the same "final and conclusive," and remove "every possible uncertainty." Are these clauses valid? May a testator thus designate and provide an umpire and clothe him with the power of interpreting his meaning and determining every doubtful question that may arise touching his intentions in regard to the disposition made of his estate?

No adjudication has been cited by the counsel interested expressly affirming the validity or declaring such testamentary provision contrary to positive law or in contravention of public policy. "A man," says Lord Chancellor SUGDEN, "may devise an estate under any conditions provided it is not an illegal one;" and it is believed he may in like manner bequeath personalty subject to such limitatations and restrictions not forbidden by law or in conflict with public policy, as he may choose to prescribe. Is the designation of an executor as an umpire with authority to construe and execute the will an illegal or an unreasonable power? Similar provisions are frequently found in building and other contracts, stipulating that the parties will abide the judgment and award of an architect, engineer, or other arbiter upon all doubtful questions that may arise in relation to the construction or execution of the contract, and these have been generally, if not uniformly, sustained and enforced by the courts, in all cases where the power conferred was exercised fairly and in good faith. If parties, dealing with each other at arm's length, may thus agree upon an arbiter and covenant to abide his decision upon all questions arising out of such contracts, may not a person authorized to dispose of his property by will, in like manner designate an umpire in whose judgment, friendship, and integrity he reposes confidence, and clothe him with authority to interpret his testament and declare its meaning? Such provisions do not vest such umpires with authority to ignore the testator's intentions as expressed in the will, and substi-

tute his own wishes. "Clauses of this description," says MARSHALL, C. J., in *Pray* v. *Belt*, 1 Pet. 679–80, "have always received such judicial construction as would comport with the reasonable intention of the testator."

The real object in such inquiries is to ascertain the testator's intentions, but does not include the power of altering or making another and different will. Such an umpire could not, under the pretense of exercising such power, refuse to pay the legacies clearly bequeathed, or pay to A. a legacy bequeathed to B., or otherwise depart from the plain and obvious meaning of the will. Such gross departure from the manifest intention of the testator would be considered by the courts as evidence of a fraudulent exercise of the power conferred. In other words, an umpire, however plenary his authority, must act in good faith in the execution of his powers. When they thus act their decisions are to be received and treated with respect. The rule, as we conceive it, is, when an arbiter honestly and in good faith exercises his power and passes upon a doubtful question, either of law or of fact, his decision will not be revised by a court, notwithstanding the court, whose interposition is invoked, may think his decision erroneous. As a rule the courts will not interpose to correct a mere mistake in the judgment of an arbitrator. But if the arbitrator refuses to act, awards upon a matter not submitted, makes an incomplete determination, or commits a gross mistake or error of judgment, evincing partiality, corruption, or prejudice, transcends his authority or violates some statutory requirement on which the dissatisfied party had a right to rely, or commit some other like error, courts of equity may interfere and correct the error, and, in proper cases, and upon good cause shown, restrain all further abuse of the granted powers.

But there are no such allegations in this case. The power conferred by the will, if valid, authorized the award made; its ambiguity called for construction. The decision made, if erroneous, is not so manifestly wrong as to evince prejudice, partiality, or corruption. Defendant's integrity is not impugned, and his determination of the question passed on ought not to be disturbed unless something else appears which is sufficient in the view of a court of equity to vitiate his action. The record discloses the fact that the defendant is one of the residuary legatees, and that as such legatee he would, in case there is a residuum for distribution, be entitled to an undivided sixth part thereof; that his construction of the eighth clause of the will sought to be revised by this proceeding tends to swell the residuum and increase his interest therein; and it is insisted that this direct

personal pecuniary interest in the fund to be distributed is a legal disqualification to his acting as an umpire in the matter. There is a maxim, long approved, which excludes persons from sitting in judgment in their own cases. The reasons for and the limitations of this legal maxim need not be stated here. It is enough to say that it has never been understood as an inhibition upon the rights of individuals to select their own tribunals provided they do so with a full knowledge of all the facts, for the adjustment and determination of such controversies as they may choose to submit to their arbitrament. MARSHALL, C. J., said in the case of *Pray* v. *Belt, supra*, that if "an unreasonable use be made" by interested parties of such a power, "one not foreseen," and hence "not intended by the testator," it was the duty of the courts, "under their general powers," to interpose and preserve the rights of parties. Certainly. But the court did not adjudge that an interested party could not, under any circumstances, act as an umpire. The decision is that he cannot do so in an *unforeseen contingency* not within the scope of the testator's intentions.

But that question is not involved in this case. Here the facts were clearly understood by the testator. He knew that the defendant was one of his residuary legatees, and that his decision in almost every contingency that could possibly arise, would, in a greater or less degree, increase or diminish the residuum in which he was to be interested. And yet, with full knowledge of this important fact, he designated defendant as an umpire and invested him with plenary authority to interpret his testamentary wishes, as expressed in his will, and administer his large estate. Has complainant, which had no inherent claim upon the testator's bounty, been wronged thereby? The testator had the legal right to give or not to give, and giving, he had the right to bestow his bounties on such conditions, and with such limitations and restrictions as he chose to impose; to select the agents to execute his declared intentions, and to invest them with such powers and discretion, not forbidden by positive law or in conflict with public policy, as he chose to confer, subject, of course, to such legal and equitable supervision to the extent and within the limits heretofore defined, as the parties interested, might, from time to time, invoke in their behalf. Why then, could he not designate the defendant, a son in whom he had confidence, to exercise the extraordinary powers given by the will? It may be that the testator desired that all doubts in reference to his intentions should be solved in favor of his own family. Of this, however, we know nothing. But we do know that he made the designation and conferred the

power with a full knowledge of defendant's contingent interest in the fund to be administered; and defendant's construction thereof, made pursuant to the power conferred, is entitled to the same consideration, respect, and legal force, as if made by an umpire having no interest therein.

But we need not rest the decision alone on this ground. The construction of said eighth clause by the defendant is, we think, a correct exposition of the testator's intentions. We agree with complainant's solicitor in the declaration that it is susceptible of but one of two constructions: *First*, that the testator intended to give not exceeding $30,000 to each of the two first, and not exceeding $15,000 to each of the other two legatees named; or that he intended to give not exceeding $30,000 to them all, to be apportioned between them as therein directed. But the question still remains, did he intend to bequeath $30,000, or $90,000? The amount given is the "indefinite sum of letter A." But why describe it as an *indefinite sum?* Because the testator had previously bequeathed other large legacies which were to be paid before the legacies given by the eighth clause; and his estate consisting mainly of unimproved lands of uncertain value, he could not anticipate results, and therefore gave, in the event the assets turned out to be sufficient, the indefinite sum of letter A, but he was careful to add that the maximum thereof should be $30,000. Upon this point the testator's intentions have been well expressed. It is, after this plain and explicit declaration, and when he assumes to apportion the aggregate sum among the several legatees to whom it is given, that the redundant and unintelligible language commented on by counsel is encountered. We will not attempt to reconcile the verbiage employed, or clear up the obscurity complained of, further than to say that it is incapable of any interpretation which can, by any recognized canon of construction, enlarge the amount bequeathed. On the contrary the ascertained intention of the testator to limit the amount bequeathed by said clause, is a key to unlock the obscurity that follows. When the maximum of the bequest is ascertained and definitely fixed, the subsequent involved and unintelligible language must be made to harmonize with that which precedes and which is susceptible of a clear and definite construction. If we will do this all uncertainty as to the testator's intentions will disappear. Of the $30,000, the maximum of the sum bequeathed, the complainant is entitled to one-third, the American Bible Society to another third, and the American Tract Society and the Presbyterian Publication Committee each to a sixth part thereof; and it will be so declared.

UNION NAT. BANK OF CINCINNATI *v.* MILLER, Treasurer of Hamilton County, Ohio.*

(*Circuit Court, S. D. Ohio, W. D.* March 26, 1883.)

1. JURISDICTION OF SUITS BY OR AGAINST NATIONAL BANKS—ACT OF JULY 12, 1882—PARTIES.

   The act of July 12, 1882, to enable national banks to extend their corporate existence, placed national and other banks, as to their right to sue in the federal courts, on the same footing, and consequently a national bank cannot, in virtue of a mere corporate right, sue in such courts.

2. SAME—SUBJECT-MATTER—CASE ARISING UNDER AN ACT OF CONGRESS.

   But national banks may, like other banks and citizens, sue in such courts, whenever the subject-matter of litigation involves some element of federal jurisdiction. Thus a suit by a national bank against a county treasurer, to enjoin the collection of an excessive tax upon its personal property, alleged to be made in violation of the act of congress permitting the state to tax national banks, presents a case arising under a law of congress, and is, therefore, maintainable in a federal court.

In Equity. Demurrer to the jurisdiction.

Perry & Jenney and *Stallo & Kittredge*, for complainant.

Otway J. Cosgrave, Co. Sol., and *Foraker & Black*, for defendant.

BAXTER, J. The complainant, a national bank, seeks by its bill in this case to enjoin the collection of an excessive tax assessed upon its personal property. Both parties are citizens of Ohio. The defendant, by demurrer, denies the jurisdiction of this court. The constitutional authority of congress to provide for the organization of national banks to aid the government in its financial operations, and to clothe them with the right to sue in the federal courts, has been too long recognized and sustained to be now questioned. Such jurisdiction is expressly given by sub-section 10 of section 629 of the Revised Statutes. But section 4 of the act of July 12, 1882, entitled "An act to enable national banking associations to extend their corporate existence, and for other purposes," provides "that the jurisdiction of suits hereafter brought by or against any association, established under any law providing for national banking associations, * * * shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States, which do or might do banking business where such national banking associations may be doing business when such suits may be begun."

The effect of this last act is to place national and other banks, in

*Reported by J. C. Harper, Esq., of the Cincinnati bar.

respect to their right to sue in the federal courts, on the same footing. It follows that a national bank cannot, in virtue of any corporate right, sue in a federal court. But, like other banks, and citizens, it may thus sue whenever the subject-matter of litigation involves some element of federal jurisdiction of which a federal court may, under the law, take judicial cognizance. Such an element, I think, exists in this case. The state could not tax complainant at all without congressional permission. This permission is given by section 5219 of the Revised Statutes. But the authority to tax is coupled with the limitation that the taxation of national banks shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the state. The complainant alleges a violation of this act. The allegation necessarily involves the validity and construction thereof, and therefore presents a case arising under a law of congress. If so, this court has jurisdiction of the suit under and in virtue of the act of March 3, 1875.

Defendant's demurrer is overruled, and he will be allowed 20 days in which to answer.

UNITED STATES *ex rel.* HARSHMAN *v.* COUNTY COURT OF KNOX COUNTY.*

(*Circuit Court, E. D. Missouri.* March 23, 1883.)

1. MUNICIPAL BONDS—RECITALS THEREIN—MANDAMUS.

   Suit was brought upon certain county bonds which recited upon their face that they had been issued under the provisions of the charter of a railroad company. The petition stated that they had been issued under the provisions of the General Statutes of the state. The bonds were duly filed in the case, and judgment was obtained by default. *Mandamus* proceedings were thereupon instituted to enforce the judgment, and an alternative writ was issued commanding the county court to levy a special tax *sufficient to pay it.* Under the laws of the state it was the duty of the county court to levy such a tax, where the bonds were issued as alleged in the petition, but they could only levy a tax of one-twentieth of 1 per cent. per annum, where they were issued as recited in said bonds. The return to the writ stated that the bonds had been issued under the charter of the railroad company, and that the lawful taxes had been levied. Upon motion to quash the return, *held*, that the bonds were a part of the record for the purpose of determining the measure of taxation to be enforced, and that the presumption was that the recitals therein were true, in the absence of evidence that such recitals were the result of mistake or inadvertence.

2. SAME—POWER OF FEDERAL COURTS OVER STATE OFFICERS.

   In such proceedings federal courts can only require state officers to enforce state laws.

*Reported by B. F. Rex, Esq., of the St. Louis bar.

Motion to Quash Return to Alternative Writ of *Mandamus*.

The relator obtained judgment by default against Knox county upon certain bonds issued by the county to aid in the construction of the Missouri & Mississippi Railroad. It was averred in the petition in this suit upon said bonds, that they were issued under certain provisions of the General Statutes of Missouri, in pursuance of a vote of the people. On the face of the bonds themselves it is recited that they were issued under and in pursuance of the provisions of the charter of the Missouri & Mississippi Railroad Company. For the payment of a judgment rendered upon bonds issued under the former law, it is the duty of the county court to levy a sufficient tax; but for the payment of bonds issued under the latter, only one-twentieth of 1 per cent. per annum is authorized. The alternative writ directs the levy of a special tax sufficient to pay the judgment, and proceeds upon the theory that the record in the suit upon the bonds conclusively shows that they were issued under the General Statutes. The return avers that they were issued under the charter of the company, and states that the taxes authorized thereby have been levied. The question is as to the sufficiency of this return.

T. R. Skinker, for relator.

James Carr and *George D. Reynolds*, for respondent.

McCrary, J. The decision of this motion depends upon the question of the effect of the adjudication in the original suit. In the petition it was averred that the bonds were issued under the general law and in pursuance of a vote of the people. Upon the face of the bonds sued on it is declared that they were issued under and in pursuance of the provisions of the charter of the Missouri & Mississippi Railroad Company. The judgment was by default. Are we to take the allegations of the petition as to the authority under which the bonds were issued as established beyond dispute for the purposes of this proceeding, or can we look to the contracts sued upon? It is well settled that the judgment in the original suit settles all questions as to the validity of the bonds, and conclusively determines that they were binding obligations of the county duly created by authority of law, and as such entitled to payment out of any fund that can lawfully be raised for that purpose. We are also satisfied that where the plaintiff's petition in the suit and the bonds sued on agree in stating that they were issued under a given statute, and this is not denied by any pleading in that suit, or if denied is found for the plaintiff, it will be too late in a *mandamus* proceeding brought to enforce

the judgment to raise the question. But here there was a variance between the allegations of the petition and the recitals in the bonds sued on. The plaintiff was bound by both, unless he was prepared to aver and prove that the recitals in the bonds were written there by mistake, and that the power to issue them was in fact derived, not from the act named, but from some other. Ordinarily, a judgment by default is conclusive of the truth of all the material allegations of the petition, the establishment of which was necessary to entitle the plaintiff to the judgment rendered; but it often happens that for the purpose of determining what property is liable to be taken for the satisfaction of a judgment, it is necessary to look behind the judgment and into the contract upon which it was rendered.

Questions of exemption are often determined by reference to the nature of the contract, or its date. As, for example, where it is sought to enforce a judgment against property claimed as a homestead, it may often be necessary to go back to the contract and ascertain whether it was executed before the debtor acquired the homestead, or whether it was a debt for which the homestead was liable, or whether the homestead right has been released. And so, in a case like the present, we must, in order to determine what remedies to apply, and what measure of taxation to enforce, look into the contract upon which the judgment was rendered. The county, when sued upon its bonds, has a right to assume that any judgment rendered will be enforced according to the law which entered into and is a part of the contract. And when *mandamus* proceedings are instituted for the enforcement of such a judgment, the respondents may properly raise the question as to what taxes are authorized to be levied and collected for its payment. And for the purpose of determining this question the court must go back to the contract expressed in the bonds upon which the judgment was rendered. In *Ralls Co.* v. *U. S.* 105 U. S. 733, the supreme court say:

"While the coupons are merged in the judgment, they carried with them into the judgment all the remedies which in law formed a part of their contract obligations, and these remedies may still be enforced in all appropriate ways, notwithstanding the change in the form of the debt."

If the remedies given by the original contract are to be enforced after the judgment, it follows, of course, that in order to know what those remedies are, and to enforce them, we must know what the contract was. And what is the best evidence of the terms of the contract? Manifestly the contract itself, if we are permitted to look at it. But it is contended that the bonds sued on in the original

suit, though filed with the clerk in accordance with the statute regulating the practice in such cases, and pursuant to a rule of this court, are no part of the record and cannot there be considered. Whatever the general rule upon this subject may be, we are of the opinion that in a case such as the present, and for the purpose of ascertaining what remedy to apply or enforce, we are at liberty to look into the terms of the contract upon which the relator's judgment was rendered, and if there is a variance between the contract and the allegations of the petition, we will presume in favor of the contract until it is shown that the recitals therein were the result of mistake or inadvertence. It is only necessary to hold that the instrument sued on and filed with the clerk in accordance with the statute and the rule of the court are a part of the record, for the purpose of determining, in a case such as the present, what measure of taxation to enforce against the municipal corporation for the satisfaction of the judgment. This is all that is now decided. Were we to hold otherwise, we might be called upon to command the officers of the county to levy taxes not authorized by law, for the fulfillment of their contracts; or, in other words, to violate their duty and exceed their powers. And it is now well settled that a federal court can only require of such officials obedience to the law, and cannot make a law for them. Motion to quash overruled.

TREAT, J., concurs.

SPARE *v.* HOME MUT. INS. CO.

(*Circuit Court, D. Oregon.* March 28, 1883.)

1. FIRE INSURANCE—CONTRACT FOR.

   A contract for insurance against loss by fire is a contract of indemnity; and a contract to that end with a person who has no insurable interest in the property, or cannot sustain any pecuniary loss by injury thereto, is a mere wager, contrary to public policy and void.

2. SAME—INSURABLE INTEREST.

   Any person who has a legal or equitable interest in property, or is so related to it that an injury to it may cause him pecuniary loss, has an insurable interest therein.

3. SAME—JUDGMENT CREDITOR.

   A judgment creditor has an insurable interest in the property of his debtor; but he cannot recover from the insurer upon an injury thereto as for a loss to himself, unless he also shows that the judgment debtor has not sufficient property left out of which the judgment can be satisfied.

4. SAME—VOID CONTRACT—ESTOPPEL.

While the insurer may be estopped to insist on conditions and restrictions contained in a policy issued with a knowledge of facts inconsistent therewith, neither party to a contract of insurance which is void, as being contrary to public policy, is estopped to deny its legality.

Action to Recover Damages on Fire Insurance Policy.

W. Scott Beebe, for plaintiff.

Cyrus Dolph, for defendant.

DEADY, J. The plaintiff, a citizen of Oregon, brings this action against the defendant, a corporation formed under the laws of California and doing business in Oregon, to recover the sum of $900 with interest since March 1, 1882, on a policy of insurance for that amount against loss by fire. The case was heard upon a demurrer to the complaint. The question argued was, had the plaintiff an insurable interest in the property destroyed?

From the amended complaint it appears that on July 26, 1881, Aaron and Ben Lurch were partners under the name of "Lurch Brothers," and as such, owned a lot in Cottage Grove, Lane county, Oregon, of the value of $100, together with a warehouse thereon of the value of $1,300; that on December 1, 1878, the plaintiff obtained a judgment against said firm, in the circuit court of the state for said county, for the sum of $4,500, which judgment was duly docketed before said July 26th, and thereafter was a lien thereon; that on said last-mentioned date the defendant, in consideration of the premium of $18.90, paid to it by plaintiff, insured him against loss or damage by fire, to said warehouse, for one year, in the sum of $900; and that on February 14, 1882, said warehouse was totally destroyed by fire, whereby the plaintiff was damaged $1,300. The complaint also states that on March 1, 1882, the proof of loss was furnished and the same adjusted at $900, and that the defendant at all the times mentioned well knew that the property was owned by Lurch Brothers, and the nature of the plaintiff's interest therein.

A contract for insurance against fire with a person not having an insurable interest in the property, or subject of the insurance, is a mere wager, and considered void on grounds of public policy. For where the only interest that the assured has in the property is its destruction by fire, the transaction is a direct incentive to fraud and arson. A lawful contract of insurance against fire is, therefore, a contract of indemnity—an engagement to make good to the assured a pecuniary loss sustained by him on account of injury to the property in question. Therefore it is said that the assured must have an

interest in the property injured, for otherwise he can suffer no loss thereby. Wood, Fire Ins. § 248; *Rohrbach* v. *Germania Fire Ins. Co.* 62 N. Y. 52; *Grevemeyer* v. *S. Mut. F. Ins. Co.* 62 Pa. St. 340; *McDonald* v. *Adm'r of Black*, 20 Ohio, 191; *Carter* v. *Humboldt Fire Ins. Co.* 12 Iowa, 287; *Godin* v. *London Assurance Co.* 1 Burr. 490; *Hancox* v. *Fishing Ins. Co.* 3 Sumn. 134. But what is such an interest in the property is not altogether clear upon the authorities.

In *Hancox* v. *Fishing Ins. Co.*, *supra*, 140, Mr. Justice STORY says "that an insurable interest is *sui generis*, and peculiar in its texture and operation;" and that "it sometimes exists where there is not any present property or *jus in re*, or *jus ad rem*." In *Rohrbach* v. *Germania Fire Ins. Co.*, *supra*, 54, FOLGER, J., said this interest need not amount to a legal or equitable title to the property, but that "if there be a right in or against the property, which some court will enforce upon the property,—a right so closely connected with it, and so much dependent for value upon the continued existence of it alone, as that a loss of the property will cause pecuniary damage to the holder of the right against it,—he has an insurable interest."

Accordingly it has been held that a person having a specific lien upon property as a security for a debt, such as a mechanic or mortgagee, has an insurable interest therein; and that, although he may also have the personal obligation of his debtor for the payment of the same. *Carter* v. *Humboldt Fire Ins. Co.*, *supra*. And in *Herkimer* v. *Rice*, 27 N. Y. 163, it was held that the creditors of an insolvent estate had an insurable interest therein, upon the ground that the same was pledged by the law to the payment of the debts of the deceased. See, also, comments on Chief Justice DENIO'S opinion in this case by FOLGER, J., in *Rohrbach* v. *Germania Fire Ins. Co.*, *supra*, 57. But no case has been found in which it was held that a judgment creditor, by reason simply of his lien on the judgment debtor's property, has an insurable interest therein. In *Grevemeyer* v. *S. Mut. Fire Ins. Co.*, *supra*, it was distinctly held that he had not. The decision is placed on the ground that "a judgment is a general and not a specified lien. If there be personal property of the debtor it is to be satisfied out of that. If there be not, then it is a lien on all his real estate without discrimination, and hence the plaintiff is not interested in the property as property, but only in the lien." It does not appear from the report of the case whether the debtor had other property out of which the judgment might have been satisfied or not.

In considering this question it ought not to be overlooked that insurance against loss, to the party insured, by fire, is a transaction intended and calculated to preserve and promote the financial security and stability of the community, and therefore ought to be regarded with favor, and upheld by the courts. On the other hand, a wagering policy by which the assured is to receive the insurance upon the destruction of the property, although he lost nothing thereby, the courts will not enforce. But, in my judgment, whoever is in danger of loss by fire ought to be allowed to insure against it. Whenever it appears that the assured has a pecuniary interest in the preservation of the subject-matter of the insurance against injury by fire, he has such an interest therein, or holds such relation thereto, as gives him a right to protect himself by insurance.

A judgment creditor, in Oregon, upon the docketing of his judgment, has a lien upon all the real property of the judgment debtor within the county as a security for his debt. Or. Code, Civil Proc. § 266. But such lien cannot be enforced if sufficient personal property can be found to satisfy the judgment. Id. § 273.

Under these circumstances, if it appears that the debtor has no personal property, and that his real property, with the combustible improvements thereon, is not more than sufficient to satisfy the judgment, I think the creditor ought to be regarded as having an insurable interest. Although he has no legal or equitable title to or interest in the property, he certainly sustains such a relation thereto that any injury to it would cause a corresponding loss to him; and nothing more than this can be said of the right of a mortgagee, mechanic, or even the legal owner, to insure. In the *corpus* of the property insured he may have no interest or estate, but he has a pecuniary interest in its preservation, and may sustain a loss by its destruction. *Springfield F. & M. Ins. Co.* v. *Allen*, 43 N. Y. 389.

But when the judgment debtor has personal property, out of which the judgment can be made, or when the real property upon which it is a lien is clearly more than sufficient for that purpose, is the judgment creditor thereby precluded from protecting himself by insurance against possible loss from injury to his security by fire? This is a question upon which no direct decision has been found, except the one in *Grevemeyer* v. *S. Mut. F. Ins. Co., supra.* But, upon general principles, I think the creditor has an insurable interest; that is, he sustains such a relation to the subject as gives him an interest in its preservation against fire. The law gives the judgment creditor a lien

on his debtors' real property as a security for his debt, and whatever may be its value as compared with the amount of the debt, if this value is chiefly or even partly owing to the buildings thereon, and is therefore liable to be depreciated by fire, the creditor sustains such a relation to the property that he may insure against loss by this injury to his security. And the fact that the debtor has more or less personal property at the time is immaterial. When the creditor concludes to enforce his judgment, this personal property may have been destroyed or disposed of. And so if the real property to which the lien extends, and upon which the insurance is affected, is then of much greater value than the debt, it may be of much less value before the creditor levies his execution upon it. And if in the meantime it should be injured by fire, he would sustain a loss which he ought to be allowed to protect himself against by insurance. But, nevertheless, the lien of a judgment creditor is a general, and not a specific, one. And, although, as we have seen, circumstances may, in particular cases, make it the same in effect as a specific lien, these are not to be presumed, but must be shown.

The contract for insurance being one for indemnity only it follows that, while the judgment creditor may insure himself against loss by injury from fire to the whole or any part of his security,—the property upon which his judgment is a lien,—yet before he can recover on such contract as for a loss sustained by the peril insured against it, it must appear that at the time of the fire the amount of the judgment could not have otherwise been made on an execution against the property of the judgment debtor. If, notwithstanding the injury to the debtor's property by fire, he has sufficient left, out of which the judgment may be made, the creditor has sustained no loss, and can recover nothing from the insurer. His contract was against loss to himself by fire, not his debtor.

Now the complaint in this case is silent upon this point. True, it is alleged that the plaintiff sustained a loss by the burning of the warehouse. But as that conclusion does not necessarily follow from the premises, the allegation is not sufficient. The complaint should contain a statement of the facts showing the plaintiff's right to recover. And as his lien was *prima facie* a general one on all the judgment debtor's real property, and not a specific one on this warehouse only, and was in effect conditioned on the debtor's want of personal property to satisfy the judgment, the complaint ought to show how the plaintiff sustained a loss by this fire—as that the warehouse was all the property of the judgment debtor subject to execution, or that what

was left would not more than satisfy the remainder of the judgment.

The plaintiff also contends that the defendant, being well aware of the nature of his interest in the property at the time he affected the insurance thereon, is now estopped to say that he had not an insurable interest therein. Conditions and restrictions contained in a policy may be considered waived by a knowledge, on the part of the insurer, of facts inconsistent therewith. In such case the insurer may be estopped to insist on the condition, as that no other insurance existed on the property. Wood, Fire Ins. § 498. But a contract of insurance entered into contrary to law or public policy is simply void, and neither party to it is estopped from showing the fact. "Otherwise the public law and policy would be at the mercy of individual interest and caprice." *In re Comstock*, 3 Sawy. 228.

If the plaintiff sustained no such relation to this property as entitled him to have it insured against injury by fire, his contract with the defendant to that effect was a mere wagering policy, and void, as being contrary to public policy. But, in my judgment, the plaintiff was entitled to insure the property; he had a pecuniary interest in its preservation, and might protect himself against possible loss by its destruction. His was not a wagering policy, as his right to the insurance was conditioned not simply on the destruction of the property, but also his loss thereby. However, his interest being that of a judgment creditor, an injury to the property of his debtor was not necessarily a loss to him. That depended upon the condition in which it left the debtor. If he still had sufficient property liable to an execution wherewith to satisfy the judgment, the creditor lost nothing by the fire. As happens every day, he simply insured against a possible loss, which he was fortunate enough not to sustain.

The demurrer is sustained.

UNITED STATES *v.* HUNTER.

(*District Court, N. D. Mississippi.* December Term, 1882.)

1. SUBPŒNA DUCES TECUM—TELEGRAPH OPERATOR—PRACTICE—EXAMINATION BEFORE GRAND JURY.

When the district attorney, either upon his own motion or at the instance of the grand jury, applies for a *subpœna duces tecum*, he should state that there is a question either pending before, or which is intended to be brought before, the grand jury or the court, in which certain telegrams, sent from or received at the telegraph office in charge of the witness named, are believed to be per-

tinent to the question to be considered, and should state the name of the parties sending or receiving the telegrams, and should further state the periods between which, or the day upon which, they were sent or received, which should be a reasonable time; or, if the names of the parties should not be known, then the time, and the subject-matter which the dispatches contain, or to which they relate, should be stated.

2. SAME—SUBPŒNA—WHAT TO STATE.
The subpœna should describe the telegrams required to be produced as they are described in the application for the writ, either naming the parties sending or receiving them and the subject-matter to what they relate, or, if the names are unknown, then the subject-matter and the time or the periods between which they were sent or received.

3. SAME—DUTY OF WITNESS TO APPEAR—SUBMISSION TO INSPECTION OF COURT—PROVINCE OF COURT.
It is the duty of the witness so subpœnaed to appear before the grand jury or court and produce the telegrams stated in the subpœna, and if he has doubts as to whether or not he should produce any telegram called for, he may submit it to the inspection of the court, which may decide on the question of its production.

HILL, J. The questions now presented for decision arise upon the motion of said Hunter to quash the *subpœna duces tecum*, which has been issued and served upon him, commanding him to appear before the grand jury of said court now in session, and to produce all the telegrams sent from or received at the telegraph office at Holly Springs, and of which he has charge, between the sixth and twentieth days of November last, and including both of said days, and to be used as evidence before said grand jury.

It is insisted, upon behalf of said Hunter, that he ought not to be required to produce said telegrams, and for the following reasons, stated in the motion:

First. Because said subpœna is too vague and uncertain, not specifying what telegrams are wanted, nor whose telegrams, or upon what subject-matter. *Second.* Because said subpœna requires said Hunter to produce telegrams having no bearing or relation to any proceeding or suit or prosecution before the grand jury, and which could by no kind of possibility relate to any crime of which said grand jury could have cognizance. *Third.* Because said subpœna requires said operator to use and cause to be used, and to make known and cause to be made known, the contents of dispatches which were sent and received over the telegraph lines used by him, which said operator could not do without the consent of the parties sending and receiving the same, or of either of them, the said parties. *Fourth.* Because said subpœna requires said operator to produce documents which are protected from disclosure by reason of public policy. *Fifth.* And for various other good causes.

The questions presented are very important, as they relate to the administration of public justice on one side, and to private interests on the other. Such practice should be adopted and observed as will

secure the administration of justice on the one side, and, as far as possible, avoid the invasion of private rights and secret communications affecting individuals by means of this unparalleled mode of communication on the other. That the United States and the states have a right to call for and use such telegrams as may be pertinent to any matter pending before their respective grand juries or courts, in relation to prosecutions for crimes, is admitted. That telegrams having no pertinency to such inquiries are inadmissible, and ought not to be produced, is also admitted. The only inquiry is as to the proper mode to require the production of those proper to be produced and those which should be excluded. The practice heretofore resorted to in the courts over which I preside, and not objected to, was for the subpœna to require the production of all telegrams received or sent between certain short specified periods which were submitted to the inspection of the court, who was, without any one else knowing it, put in possession of the points of inquiry before the grand jury; and only such telegrams as pertained to the point of inquiry were permitted to be used as evidence, the others being returned to the witness.

This is the first time any other rule has been invoked; but, another rule being invoked, it becomes necessary to settle it. After consideration of the question I am satisfied the following rule of practice more nearly tends to secure the desired purpose than any other:

When the district attorney, either upon his own motion or at the instance of the grand jury, applies for the subpœna, he should state that there is a question either pending before the grand jury or the court, or which is intended to be brought before the grand jury or court, as the case may be, in which certain telegrams sent from or received at the telegraph office in charge of the witness named, are believed to be pertinent to the question to be considered, and should state the names of the parties sending or receiving the telegrams, and should further state the periods between which, or the day upon which, sent or received, which should be a reasonable time; or, if the names of the parties should not be known, then the time should be stated, and the subject-matter which the dispatches are supposed to contain, or to which they are supposed to relate, in either case, in order that the court or judge ordering the subpœna may have some means of judging the relevancy of the testimony sought. The district attorney is an officer of the court, and who cannot be presumed to be influenced by any design only to enforce and vindicate the law, hence his statements must be relied upon by the court as true, and induced only by a proper sense of official duty.

The subpœna should describe the telegrams required to be produced as described in the application, either naming the parties sending or receiving, if stated, and the subject-matter to which they are supposed to relate; or, if the names are not known, then the subject-matter and the time or periods between which they were sent or received. When such a subpœna is served upon the person having the possession of the telegram, it is his duty to appear before the grand jury or court and produce the telegram. If he has doubts as to whether or not he should produce any telegram called for, he has a right to submit it to the inspection of the court, who will determine whether or not it should be produced. It is insisted in behalf of Hunter, the witness, that the court has no right to judge as to what papers should be submitted as evidence to the grand jury; that it is a body entirely separate and distinct from the court. I do not so consider it. The grand jury is part of the court and under its control, and when any question arises between the grand jury and a witness, it is the province and duty of the court to decide between them and direct what questions shall be answered, which is done without publicity, by means of written interrogatories and answers submitted to the court, the decisions of the court being made in writing.

It is objected by the district attorney that the witness is not competent to judge as to what is pertinent and proper evidence, and therefore all the telegrams should be submitted to the court, or some one else designated by the court. There is force in the position; but the witness is the custodian of all the telegrams in his office, and is presumed to be a man of ordinary sense and capable of understanding the telegrams designated in the subpoena, either by the names of the parties or the subject-matter, and although there may be cases in which, either from the want of proper discernment upon the part of the witness, or a disposition to screen the party sought to be charged, it is better that such testimony be lost than that any improper disclosure of the correspondence between those unconnected with the matter of inquiry should be made.

There being a necessity for an immediate decision of the question, I have not time to further discuss the questions presented. The subpœna being obnoxious to the rules stated, the motion to quash it must prevail, but with leave to the district attorney to amend his application and process according to the rules stated.

See *Wertheim* v. *Cont. Ry. & Trust Co.*, *post*, 716, and note, *post*, 718.

WERTHEIM and others *v.* CONTINENTAL RY. & TRUST CO.

(*Circuit Court, S. D. New York.* February 17, 1883.)

EVIDENCE—PRODUCTION OF BOOKS AND PAPERS—RIGHTS OF LITIGANTS.

A corporation may be compelled to produce its books and papers in evidence, which may be necessary and vital to the rights of litigants, and considerations of inconvenience must give way to the paramount rights of parties to the litigation.

Motion for Attachment of Witnesses.

Evarts, Southmayed & Choate, for complainants.

Henry L. Burnett, for defendants.

WALLACE, J. There are informalities in the record upon which this motion to attach witnesses for contempt has been argued, which lead to a denial of the motion. But counsel have desired that the main question involved should be considered and decided as a guide to their future action in the cause. This question is whether the president and secretary of the North River Construction Company, a corporation, can be compelled by a *subpœna duces tecum* to produce books and papers of the corporation in a suit in equity, to which the corporation is not a party, upon the application of one of the parties. The proceeding is opposed upon the authority of several cases in the state courts of New York which deny the right of a party to compel the officers of a corporation to produce its books as evidence in a cause to which it is not a party. The first of these cases is the *President etc., of Bank of Utica* v. *Hillard,* 5 Cow. 153, where a clerk of the bank refused to produce the books. SAVAGE, C. J., said: "The obligation of the witnesses to produce the books upon the *duces tecum* depends on the question whether they were in his possession or under his control;" and the obligation was denied because he was a mere clerk of the corporation. The same case was before the court again (5 Cow. 419) upon a motion to attach the cashier of the bank, who had refused to produce the books under the subpœna, and was denied because the bank could not be required to produce evidence against itself as a party to the action. Both of these cases, by the strongest implication, concede the power to compel the production of the books by an officer when the corporation is not a party. Thirty years later the point arose again in *La Farge* v. *La Farge Fire Ins. Co.* 14 How. 26, upon a motion for an attachment against the president of the defendant for refusing to produce its books under a subpœna *duces tecum,* and the motion was denied upon the authority of the cases in 5

Cow. The precedent thus established was recognized incidentally or directly in several subsequent cases, and was assumed to apply whether the corporation was a party or not a party to the suit. The question was never considered by the courts of last resort, and was put at rest by section 868 of the Code of Civil Procedure, which expressly conferred the right theretofore denied.

As this suit is in equity, the present motion is not affected by the provisions of the Code of Civil Procedure, and the court is asked to apply the doctrine of the antecedent decisions of the state courts. No authority is found in any decisions of the federal courts denying the right to compel corporations to produce evidence which may be necessary and vital to the rights of the litigants. On principle it is impossible to suggest any reason why a corporation should be privileged to withhold evidence which an individual would be required to produce. It may be inconvenient, and sometimes embarrassing, to the managers of a corporation to require its books and papers to be taken from its office and exhibited to third persons, but it is also inconvenient and often onerous to individuals to require them to do the same thing. Considerations of inconvenience must give way to the paramount right of litigants to resort to evidence which it may be in the power of witnesses to produce, and without which grave interests might be jeoparded, and the administration of justice thwarted.

The researches of counsel have been unavailing to find any decisions of the courts of other states which sanction the rule thus maintained by the courts of New York. Notwithstanding these cases, it is believed to have been the common practice in this state to subpœna officers as witnesses to produce the books of their corporations in actions between third persons. In other states, so far as is known, the right to do so has never been controverted. There has been strenuous opposition on the part of corporations to the production of their papers and records in suits to which they were not parties. The effort of telegraph companies to maintain the privacy of their messages is an illustration, (see *Henisler* v. *Freedman*, 2 Pars. Select Cas. 274; *U. S.* v. *Babcock*, 3 Dill. 566,) but immunity has never been claimed upon the ground now taken.

Why should not the officers of a corporation be required to produce the books of the corporation as witnesses when the books are necessary evidence? The corporation can only act through its officers. The suggestion that the books are in the legal custody of the corporation, and not of its officers, may be theoretically correct. If tech-

nically true, it is not an objection to compelling the officers to produce them. As said by Lord ELLENBOROUGH, in *Amey* v. *Long*, 1 Campb. 17: "Although a paper should be in the legal custody of one man, yet if a *subpœna duces tecum* is served on another, who has the means to produce it, he is bound to do so."

In *Crowther* v. *Appleby*, L. R. 9 C. P. 27, Lord DENMAN asks: "When documents are in the possession of a company, who but the secretary can be subpœnaed to produce them?" Courts of equity have always permitted the officers of corporations to be made parties to bills of discovery, upon the theory that they are the custodians of the books and documents of the corporation, and may be compelled to produce them and answer to the interrogatories propounded.

As has been indicated, the cases in 5 Cow. have been misapplied by the later cases in the courts of New York, and do not sanction the precedent which they are asserted to establish. This court must refuse to follow these later decisions, deeming them to be unsupported by precedent, an innovation upon the rule generally recognized, and opposed to good sense.

The production of documentary evidence in which a party to a cause has an interest, may, at common law, (independent of the auxiliary remedy by bill of discovery in chancery,) be had in three ways: (1) By an order for inspection; (2) by a notice to produce; (3) by a *subpœna duces tecum*;—the first used where the writings are required before the trial takes place or the pleadings are completed; the last two where the writings are wanted at the trial. The purpose of this note is to give a concise statement of the rules governing the *subpœna duces tecum*, but as an introduction to these it is proposed to present a brief sketch of the two other methods just stated.

I. The Order for Inspection.

The English courts of common law early exercised a power to make an order for the inspection of writings in the possession of one party to a suit in favor of the other,(*a*) in order to assist the plaintiff in drawing his declaration,(*b*) or the defendant in framing his pleas.(*c*) A few examples of this practice will suffice. A tenant of a corporation was assessed an increased rent by a jury under the provisions of a statute permitting this to be done when the value of the lands should be increased. He indorsed the finding of the jury on his lease. The corporation afterwards brought an action for the increased rent, and, in order to frame its declaration, asked to be allowed

(*a*) Mayor of Arundel v. Holmes, 8 Dowl. 118, (1839;) Woolmer v. Devereux, 2 M. & G. 758; King v. King, 4 Taunt. 666; Browning v. Aylwin, 7 B. & C. 204.

(*b*) Mayor of Arundel v. Holmes, 8 Dowl. 118; Rowe v. Howden, 4 Bing. 539; Blakey v. Porter, 1 Taunt. 386.

(*c*) Raynor v. Ritson, 6 B. & S. 883, (1865;) Reid v. Coleman, 2 C. & M. 456.

to take a copy of the indorsement, and this was ordered by the court.(*d*) An action was brought on a policy of marine insurance for a constructive total loss. The defendant applied to inspect all the papers relative to the matters in issue, including letters between the captain and the plaintiff, and it was so ordered.(*e*) An action was brought against a broker for negligence in making a contract, and, on application, the court compelled him to produce his books in order to enable the plaintiff to inspect and take a copy of the contract.(*f*) Where an agreement was entered into between two persons, of which there was but one copy, the party who retained it held it as trustee for the other, and would be compelled to permit the other to inspect and take a copy of it. Thus, where only one copy of a lease is drawn up and executed, and is delivered to the lessee, the lessor in a suit for the rent may obtain inspection of it;(*g*) and also where two parties enter into a partnership agreement drawn up and signed by the plaintiff, but remaining in the custody of the defendant.(*h*)

The practice in the common-law courts at first was to order inspection of a document only where there was but one copy of the document, and the party in whose possession it was, held it as a *quasi* trustee for the other party. But the word "trustee" was not strictly construed, nor was it used in any technical sense, and hence it was not long before the rule was extended so as to include every case where the party seeking to inspect had an interest in the document.(*i*) Therefore it was not essential that there should be an agreement in writing entered into between the parties. Where the agreement consists of a series of letters, or of a written proposal on one side and an oral acceptance on the other, and the writer of the letters, who is sought to be charged with a contract arising out of them, has no copies, he has such an interest in them as to give him a right to ask to inspect them and take copies. So of the case of an offer by word of mouth, and an acceptance of it in writing. The writer surely has a right to say, "Let me see my letter, in order that I may know what contract I have entered into."(*j*) An order for the inspection of a document was always granted where the circumstances called for it; as, where the defendant suggested that it was a forgery or had been altered since it was signed, or made affidavit that he had no recollection of ever having executed such a document.(*k*) Therefore the usual practice was for the party applying for the inspection to make affidavit attacking its genuineness.(*l*) But even this was not always required. But, though a party has a right to inspect documents sustaining his own side of the case affirmatively, he has no such right as to those which form part of his adversary's case; he cannot call for those which, instead of supporting his title, defeat it by entitling his adversary.(*m*)

In *Avery* v. *Langford*,(*n*) a plaintiff in ejectment sought to inspect and

(*d*) Mayor of Arundel v. Holmes, 8 Dowl. 118, (1839.)

(*e*) Raynor v. Ritson, 6 B. & S. 883, (1865;) Lawrence v. Ocean Ins. Co. 11 Johns. 215.

(*f*) Browning v. Aylwin, 7 B. & C. 204, (1827.)

(*g*) King v. King, 4 Taunt. 666, (1812.)

(*h*) Morrow v. Saunders, 1 Brod. & B. 318, (1819.)

(*i*) Price v. Harrison, 8 C. B. (N. S.) 617, (1860.)

(*j*) Id.

(*k*) Woolmer v. Devereux, 2 Man. & Gr. 758, (1841.) In the common pleas it was held that discretion of the judge in such cases was not reviewable on appeal.

(*l*) Jackson v. Jones, 3 Cow. 17, (1824.)

(*m*) Brougham, C., in Bolton v. Corp. of Liverpool, 1 Mylne & K. 88, (1833.)

(*n*) 21 L. J. (Q. B.) 217, (1852.)

take copies of certain deeds in order to prove his title to the premises. It appeared that the assignee of certain premises for the residue of a term became seized in fee of adjoining premises, and demised both to R. and S., and that subsequently the interest of the assignee in both was transferred to the defendant, who, after the determination of the term of R. and S., retained possession of the leasehold premises. The application was made by the plaintiff as reversioner, and he asked for an order to inspect the conveyance by which the leaseholds were assigned and the freeholds conveyed to the defendant, alleging that the latter had obliterated the boundaries between the two, and that the premises now sought to be recovered formed part of the leaseholds. It was held that the plaintiff was entitled to inspect the assignment of the term, but not such part of the deed as related to the conveyance of the freeholds. And where an instrument was executed in duplicate, each party keeping a copy, and one of the parties lost his copy, the court refused to compel the other to produce his copy.(*o*)

Nor will the party succeed where the inspection is asked, not for the purpose of his own case, but to find out his adversary's. Thus, in an action against executors upon an agreement under which the plaintiff claimed certain arrears of an annuity alleged to be due to him from the testator, the defendants pleaded that after the making of the agreement, and before the accruing of the causes of action, it was agreed between the testator and the plaintiff that the agreeement should be, and the same accordingly was, rescinded, and that the testator should be, and he accordingly was, exonerated from all further performance thereof. The court refused to grant the plaintiff leave to inspect a supposed letter, upon which the plea was founded, upon an affidavit stating that the plaintiff had written some letter to the testator relating to the annuity, the words of which he could not remember, and also his belief that the defendant intended to rely on that letter as constituting the agreement alleged in the plea, but denying that such agreement ever was made; the inspection being sought, not in order to support the plaintiff's own case, but to see by what means a defense could be made out against him. The grounds upon which the judgment proceeded were that there was no certain allegation that there was any such document in existence, and that it was a mere fishing application.(*p*) But the fact that the document discloses the case of the party in whose hands it is, is irrelevant, provided it also supports the case of the party asking to inspect it.(*q*)

The English statute(*r*) provides that the common-law judges should have power, on application made, to compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to the action, and, if necessary, to take examined copies of the same in all cases in which, previous to the passing of the act, discovery might have been obtained in equity. Under this statute it was held that the party must show by affidavit (1) that an action or other proceeding is pending; (2) that certain documents are in the control

(*o*) Street v. Brown, 1 Marsh. 610.

(*p*) Shadwell v. Shadwell, 6 C. B. (N. S.) 679, (1859.)

(*q*) London Gas-light Co. v. Chelsea, 6 C. B. (N. S.) 411, (1859.)

(*r*) 14 & 15 Vic. c. 99, § 6.

of the opposite party relating to such action; (3) that the applicant would be able, by a bill of discovery, to obtain an inspection of the documents.(s)

The American courts were less ready to assume jurisdiction in such cases,(t) and chancery had generally to be resorted to for relief of this character. Within recent years, however, statutes have been enacted in most of the states giving courts of common law power in proper cases to order the inspection of documents; and the bill of discovery is not now resorted to, except under special circumstances. The wording of these statutes generally is that the courts of law shall have power, in such cases as shall be deemed proper, to compel any party to a suit pending therein to produce and permit the opposite party to take copies of such writings in his possession as are material to his case.

II. The Notice to Produce.

Where any paper which is *in possession of the opposite party* is necessary to be produced at the trial, notice may be given to the party in whose possession it is to produce it, and, if he neglects to do so, parol or secondary evidence may be given of its contents. This does not compel him to produce the document; it only lays a foundation, if he fails to do so, for the introduction of secondary evidence, after he has proved the existence of the original.(a)

In three cases it is said notice to produce is not necessary: (1) Where the instrument to be produced and that to be proved are duplicate originals; (2) where the instrument to be proved is itself a notice,—as a notice to quit, a notice of protest, etc.; (3) where from the nature of the action the defendant has notice that the plaintiff intends to charge him with possession of the instrument,—as, for example, in trover for a bill of exchange. (b) The notice may be directed to the party or his attorney, and may be served on either; and this should be done previous to the commencement of the trial. The notice to produce must be reasonably specific. Thus, a notice to produce "all letters, papers, and documents touching the bill of exchange mentioned in the declaration, and the debt sought to be recovered," has been held too general;(c) as have a notice to produce "letters and copies of letters, and all books relating to this cause,"(d) and one to produce "all books, etc., relating to the matter in controversy."(*) But a notice to produce "all letters written by the party to and received by the other, between the years 1837 and 1841, inclusive," was held sufficient to entitle the party to call for a particular letter.(e)

III. The Subpœna Duces Tecum.

§ 1. SUBPŒNA DUCES TECUM—OBJECT AND HISTORY OF THE WRIT. The writings in a man's possession are as much liable to the calls of justice as the faculties of speech and memory are. There can be no difference in principle between obliging a man to state his knowledge of a fact and compelling him to produce a written entry in his possession which proves the

(s) Hunt v. Hewitt, 7 Ex. 236, (1852.)
(t) See Bank of Utica v. Hilliard, 6 Cow. 62, (1826.)
(a) Sharpe v. Lambe, 3 P. & D. 454.
(b) Greenl. Ev. 561.
(c) France v. Lucy, Ry. & M. 341.
(d) Jones v. Edwards, 1 McCl. & Y. 139.
*Stalker v. Gaunt, 12 N. Y. Leg. Obs. 125.
(e) Morris v. Hauser, 2 M. & Rob. 392; Rose v. King, 5 Serg. & R. 211.

same fact. Not only a man's estate, but even his liberty or life, may depend upon written evidence which is the exclusive property of a stranger.(*f*) If a person, *not a party to the cause*, have in his possession any writings that either party may consider essential to be introduced in evidence at the trial, such writings, etc., are brought to the court through the medium of a *subpœna duces tecum*. The *subpœna duces tecum* is the only mode in many cases to obtain the production of a document in the hands of a third party at the trial. In *Bank* v. *Lewis*(*g*) an application having been made to the vice-chancellor to have a solicitor ordered to produce a certain deed in evidence at the trial, the motion was refused, the vice-chancellor saying: "The right of the solicitor to the possession of the deed is altogether collateral to this cause; and in this suit I have no jurisdiction to compel him to produce it. You must treat him as you would treat any other witness in possession of a deed." Still, it was early laid down that the witness was none the less bound to obey the writ, because there was another way of obtaining the documents called for by the *subpœna duces tecum*.(*h*) No trace of the use of this writ by the common-law courts of England is to be found in the books earlier than the time of Charles II. But, as said by Lord ELLENBOROUGH, C. J., in 1808: "The right to resort to means competent to compel the production of written as well as oral testimony seems essential to the very existence and constitution of a court of common law, which receives and acts upon both descriptions of evidence, and could not possibly proceed with due effect without them. And it is not possible to conceive that such courts should have immemorially continued to act upon both without great and notorious impediments having occurred, if they had been furnished with no better means of obtaining written evidence than what the immediate custody and possession of the party who was interested in the production of it, or the voluntary favor of those in whose custody the required instruments might happen to be, afforded. The courts of common law, therefore, in order to administer the justice they have been in the habit of doing for so many centuries, must have employed the same or similar means to those which we find them to have in fact, used from the time of Charles II.; at least, according to the entries before referred to. * * * They may be taken, therefore, as known and recorded special instances of a general practice to compel by writ the production of necessary written testimony at the trial of suits at law."(*i*) This writ can only be used to compel the production of documentary evidence; *i. e.*, books, papers, accounts, and the like. It will not, therefore, issue to bring into court "patterns" for a stove.(*j*)

§ 2. BY STATUTE, WRIT MAY RUN TO PARTIES TO SUIT. In some of the states, the courts have construed the statutes on the subject so as to compel the parties to a suit to produce documents under a *subpœna duces tecum*. The New York Code(*a*) provided that a party might be compelled to testify as a witness "in the same manner and subject to the same rules of examination as any other witness." Notwithstanding that another section(*b*) gave the court authority to order either party to allow the other an inspection

(*f*) Starkie, Ev. 113.
(*g*) 6 Madd. 29a.
(*h*) Corsen v. Dubois, 1 Holt, 239.
(*i*) Amey v. Long, 9 East, 483.
(*j*) In re Shepherd, 3 Fed. Rep. 12.
(*a*) Section 390.
(*b*) Section 388.

of documents in his possession, it was held that under the first section a party to an action might, at the instance of the adverse party, be compelled by a *subpœna duces tecum* not only to appear at the trial and submit to an oral examination, but to produce books and papers in his possession, precisely as any other witness may be so compelled. This decision, which conflicted with an earlier ruling under the same sections,(*c*) was reached by construing the word "testify" to mean not only the giving of oral evidence, but the production of evidence of any kind in the possession of the party;(*d*) and the same view has been taken of a somewhat similar statute in New Jersey,(*e*) and under the same sections it is held that a party to an action may by a *subpœna duces tecum* be compelled to produce documents in any examination had before trial,(*f*) and if such a subpœna is issued and served on the party, it compels him to attend and be examined, even though it does not reach his books and papers.(*g*).

§ 3. PARTY MUST OBEY WRIT—QUESTION OF LAWFUL EXCUSE FOR COURT. The *subpœna duces tecum* calls on the party to appear at the trial, and also bring the papers, etc., with him. Therefore he must obey the command to appear, even though the papers may be immaterial to the case. That is to be decided by the court. Where the witness did not appear, and on an attachment being applied for, filed affidavits showing that the instrument required to be produced was immaterial to the case, "it is unimportant in this proceeding," said LITTLEDALE, J., "so far as the witness is concerned, whether the instrument which the subpœna required to be produced was or was not material. He was bound to attend according to the exigency of the writ."(*h*) The *subpœna duces tecum* is compulsory upon the person to whom it is addressed. It is for the court to say whether the witness has any lawful excuse for refusing to obey its commands, (*i*) and if the witness declines to produce it on any ground, the court will examine into that ground, and for this purpose the witness must submit the document to the inspection of the court.(*j*) "The *subpœna duces tecum* is a process of compulsory obligation on the witness to produce the deed or writing required of him, if he has it in his possession and has no lawful excuse for withholding it, of the validity of which excuse the court is the judge. The court will exercise its discretion in deciding what papers should be produced, and under what qualifications as respects the interest of the witness in the paper."(*k*) But before the court will order the witness to

(*c*) Trotter v. Latson, 7 How. Pr. 261.

(*d*) Bonesteel v. Lynde, 8 How. Pr. 226; affirmed by the full court, Id. 352; People v. Dyckman, 24 How. Pr. 222; Mitchell's Case, 12 Abb. Pr. 249; Jarvis v. Clerk, 12 N. Y. Leg. Obs. 129.

(*e*) Murray v. Elston, 23 N. J. Eq. 212.

(*f*) Woods v. De Figamere, 16 Abb. Pr. 159; De Barry v. Stanley, 48 How. Pr. 349; Hauseman v. Stealing, 61 Barb. 347; Smith v. McDonald, 50 How. Pr. 519; Central National Bank v. Arthur, 2 Sweeney, 194.

(*g*) Smith v. McDonald, 50 How. Pr. 519; 52 How. Pr. 117; Martin v. Spofford, 3 Abb. N. C. 125; De Barry v. Stanley, 5 Daly, 412; Havemeyer v. Ingersoll, 12 Abb. Pr. 301; People v. Dyckman, 24 How. Pr. 222; Jarvis v. Clark, 12 N. Y. Leg. Obs. 129; Mitchell's Case, 12 Abb. Pr. 249; Morrison v. Sturgis, 26 How. Pr. 174; Lane v. Cole, 12 Barb. 680; Lefferts v. Brampton. 21 How. Pr. 257; Brett v. Bucknam, 32 Barb. 655. These cases are very conflicting on this point, but the majority of them, especially the latter ones, sustain the text.

(*h*) Doe v. Kelly, 4 Dowl. 273; Key v. Russell, 7 Dowl. 693.

(*i*) Amey v. Long, 9 East, 483; Holtz v. Schmidt, 2 Jones & Sp. 23; Bull v. Loveland, 10 Pick. 9; Chaplain v. Briscoe, 5 Sm. & M. 198; Corsen v. Dubois, 1 Holt, 239; Field v. Beaumont, 1 Swanst. 209; U. S. v. Hunter, ante, 712.

(*j*) Mitchell's Case, 12 Abb. Pr. 249; Doe v. Clifford, 2 C. & K. 448.

(*k*) In re O'Toole, 1 Tuck. 39.

produce a document called for by a *duces tecum*, it must be shown conclusively that the witness has the power to comply with it. It is not sufficient that there is such evidence as would be competent to be submitted to a jury upon the question.(*l*) Where it is found that a party subpœnaed to produce documents has procured the possession of them in order to prevent their being introduced in evidence by others, his excuse for not producing them, that he has lost or mislaid them, will not be regarded.(*m*) It is no ground for refusing to produce them, that the papers are private;(*n*) but there are a number of grounds on which the witness, coming into court with the documents in his possession, will be excused from producing them. These grounds will be stated in the next sections.

§ 4. DOCUMENTS EXEMPT FROM PROCESS—PUBLIC DOCUMENTS. Thus a public officer will not be required by *subpœna duces tecum* to bring public documents in his custody into court where official copies can be had,(*o*) for this would cause great and unnecessary inconvenience, without any corresponding advantage.(*p*) So it is a good objection to producing the papers asked for that they are of a public nature and cannot be exhibited without injury to the public.(*q*)

§ 5. SAME—CRIMINAL CHARGE OR PENALTY. So it is a good answer to the call for their production that obedience to the writ might subject the witness to a penalty or forfeiture, or to a criminal charge.(*r*)

§ 6. SAME—PAPERS AFFECTING CIVIL RIGHTS. The English rule is that a witness is not compelled to produce title deeds or other documents belonging to him when their production might prejudice his civil rights;(*s*) but though he may decline to produce a document of this character, and cannot be compelled to state its contents, yet he must disclose the date and the names of the parties in order to identify it.(*t*) In the United States "the weight of authority is in favor of the rule that a witness may be called and examined in a matter pertinent to the issue, where his answers will not expose him to criminal prosecution or tend to subject him to a penalty or forfeiture, although they may otherwise adversely affect his pecuniary interest; and * * * there is no difference in principle between compelling a witness to produce a document in his possession under a *subpœna duces tecum* in a case where the party calling the witness has a right to the use of such document, and compelling him to give evidence where the facts lie in his own knowledge."(*u*) In an early case in South Carolina, a security on a sheriff's bond was compelled to produce the books of his principal, who had died insolvent, notwithstanding he was apprehensive of danger to himself from the production, in the way of suit on the bond.(*v*)

(*l*) Hall v. Young, 37 N. H. 134.

(*m*) Bonesteel v. Lynde, 8 How. Pr. 226-352.

(*n*) Burnham v. Morrissey, 14 Gray, 240; In re Dunn, 9 Mo. App. 261.

(*o*) Delaney v. Regulators, 1 Yeates, 403; and see Shippen v. Wells, 2 Yeates, 260.

(*p*) Corbett v. Gibson, 16 Blatchf. 334.

(*q*) Reg. v. Russell, 7 Dowl. 693; Gray v. Pentland, 2 S. & R. 23.

(*r*) U. S. v. Reyburn, 6 Pet. 367; Cosen v. Dubois, 1 Holt, 241, note.

(*s*) Doe v. Date, 3 Q. B. 609. The rule, however, does not extend beyond the evidence of title. Starkie, Ev. 111, so lays it down. And see Corsen v. Dubois, 1 Holt, 241, note; Roberts v. Simpson, 2 Starkie, 203; Miles v. Danson, 1 Esp. 405.

(*t*) Doe v. Clifford, 2 C. & K. 448.

(*u*) Shaw, C. J., in Bull v. Loveland, 10 Pick. 9.

(*v*) Hawkins v. Sumter, 4 Dessau. 446.

§ 7. SAME—PRIVILEGED COMMUNICATIONS. An attorney cannot, by a *subpœna duces tecum*, be compelled to produce papers of his clients in his hands, any more than he can be compelled to testify as to confidential communication between them.(*a*) But an ordinary agent is not within this rule, and may be called on to produce his principal's papers in his possession.(*b*) Still, all privileged statements are within the rule; *e. g.*, the books of a physician containing entries of information acquired by him in attending patients in a professional character, and which information was necessary to enable him to prescribe for such patients.(*c*)

§ 9. TELEGRAMS IN HANDS OF COMPANY. On the ground of privileged communications it has been attempted by the officers of telegraph companies to withhold copies of dispatches in their hands when required as evidence in courts of justice. This attempt, however, has not succeeded. It is held that telegraph messages in the hands of officers of the company are not privileged communications; and they must be produced when ordered by a *subpœna duces tecum*, any rule or by-law of the corporation to the contrary notwithstanding.(*d*) The statute subjecting the agents of telegraph companies to a penalty for disclosing the contents of any private dispatch to any person other than the person to whom it is addressed, or his agent,(*e*) or a statute making a person liable who unlawfully exposes the secrets of a telegraph office,(*f*) does not prohibit such a disclosure when required as evidence in a judicial proceeding.

§ 10. PAROL EVIDENCE OF PRIVILEGED DOCUMENT INADMISSIBLE. Where a witness refuses to produce a document and is justified in so doing, for any of the reasons which we have seen, he cannot be compelled to give parol evidence of the contents.(*g*) The court will receive such evidence if he gives it willingly, but will not compel him to give it.(*h*) Where the papers required as evidence in a trial are in the possession of a person who is not obliged to produce them under a *subpœna duces tecum*, the party desiring them may by other witnesses give secondary evidence of their contents, if he has endeavored to obtain their production by subpœna, for he has done everything in his power to obtain the best evidence.(*i*) So, too, parol evidence is admissible where a witness, in fraud of the subpœna, has transferred the document to another, and for this reason does not produce it.(*j*) But parol evidence is not admissible where the document is not produced, and cannot be compelled because the subpœna was served too late.(*k*)

§ 11. WITNESS MAY BE ORDERED TO READ OR EXPLAIN PAPERS. To simply produce the books or papers called for is not all the witness may be asked to do; he may be compelled to read out of them specific items or charges to

(*a*) Rex v. Dixon, 3 Burr. 1687; Durkee v. Leland, 4 Vt. 612; Copeland v. Watts, 1 Starkie, 95; Davies v. Waters, 9 M. & W. 609; Newton v. Chaplin, 19 L. J. (U. S.) 374.

(*b*) Earl of Falmouth v. Moss, 11 Price, 455.

(*c*) Mott v. Consumers' Ice Co. 52 How. Pr. 244.

(*d*) Ex parte Brown, 72 Mo. 83; Henisler v. Freedman, 2 Pars. Sel. Cas. 274; U. S. v. Babcock, 3 Dill. 566; U. S. v. Hunter, ante, 712.

(*e*) Ex parte Brown, 72 Mo. 83.

(*f*) Hensler v. Freedman, 2 Pars. Sel. Cas. 274.

(*g*) Davies v. Waters, 9 M. & W. 609; Hibberd v. Knight, 2 Ex. 11; Marston v. Downes, 6 C. & P. 381.

(*h*) Hibberd v. Knight, 2 Ex. 11.

(*i*) Ditcher v. Kenrick, 1 C. & P. 161; Gilbert v. Ross, 7 M. & W. 102; Hibberd v. Knight, 2 Ex. 11.

(*j*) Leeds v. Cook, 4 Esp. 256.

(*k*) Hibberd v. Knight, 2 Ex. 11.

which he has referred, in order that they may be incorporated in the evidence, as where an examination before trial is being had. "May it be made the duty of the witness to read the charges or state the contents of the book, or has he discharged all the duty that can be required of him when he has produced the book and said, this is my book of accounts? It is not doubted he is obliged to go further and to state whether it contains a particular account, in whose handwriting it is, on what page it commences, where it ends, to what part of the subject of the action it relates, and other similar questions, to test its pertinency. But it is said you cannot ask him to read from it. Why not? If not he, whom can you ask? Not who may volunteer or offer to read it, but who can be required to read it; for read it must be if it is to go into the deposition. How, then, are you to get the evidence if the witness refuses and cannot be compelled, and no other person, under objection, may read it?"(*l*) But where the witness is simply ordered to produce his books, his refusal to leave them in the custody of the court is not a contempt.(*m*)

§ 12. WITNESS NEED NOT BE SWORN OR TESTIFY. A *subpœna duces tecum* has two distinct objects—one, the appearance of the witness at the trial to testify in the cause if called upon; the other, the production of the papers which it describes. In the English courts it was always held that one of these objects might be enforced without the other. Thus it was held that a person producing documents under the subpœna need not be sworn if the party by whom he was called did not wish him to be sworn, but only wanted the documents in his hands produced, even though the opposite party might desire to cross-examine him.(*n*) The same rule has been laid down in South Carolina.(*o*) In Alabama it has been ruled that where a witness has been subpœnaed to testify generally, as well as to bring papers into court, the party at whose instance the subpœna issues may require the production of the papers without introducing the witness.(*p*) In New York it has been ruled that it is the witness' privilege to be sworn, if he desires to, for the purpose of enabling him to state on oath any reason why he should not be compelled to produce the document.(*q*) On the other hand, it is held in New Jersey to be a fatal defect in the writ that it contains no words directing them to testify, but simply requires him to appear at the trial and bring the documents with him. The power of a court, it is said, to compel the attendance of a witness, is derived from the purpose for which he is to come, viz., to give evidence in some action, suit, or proceeding pending before it.(*r*) Where a witness has a writing in his possession in court he may be compelled to produce it, though he has not been subpœnaed to do so.(*s*) The court should require its production in order to determine its materiality as evidence; and it is error to refuse to require its production because it may not then appear to be material evidence.(*t*)

§ 13. HOW PAPERS TO BE DESCRIBED IN SUBPŒNA. The papers called for must be specified in the subpœna with such certainty as is practicable under all

(*l*) People v. Dickman, 24 How. Pr. 222.
(*m*) Ludlow v. Knox, 7 Abb. Pr. (U. S.) 411; Morley v. Green, 11 Paige, 240.
(*n*) Perry v. Gibson, 1 Ad. & El. 48, (1834;) Summers v. Moseley, 2 Cromp. & M. 477.
(*o*) Sherman v. Barrett, 1 McMull. 163.
(*p*) Martin v. Williams, 18 Ala. 190.
(*q*) Aikin v. Martin, 11 Paige, 493. And see Hall v. Young, 37 N. H. 134.
(*r*) Murray v. Elston, 23 N. J. Eq. 212.
(*s*) Boynton v. Boynton, 25 How. Pr. 490.
(*t*) Boynton v. Boynton, 16 Abb. Pr. 87.

the circumstances of the case, so that the witness to whom the subpœna is addressed may be able to know what is wanted of him.(*u*) A call in a subpœna directed to a telegraph company for all messages sent during a certain term by certain parties specified by name, to certain other parties specified by name, was held sufficient.(*v*) But a similar call in a subpœna issued from a state court in the same city was held insufficient.(*w*) In the principal case of *U. S.* v. *Hunter*,(*x*) the description required in the writ is very clearly stated. A call to produce "all papers touching or concerning the matter in dispute" is insufficient.(*y*) A *subpœna duces tecum* from the federal courts should be tested in the name of the chief justice of the United States,(*z*) and should require the production of the papers before a "court," not a "judge."(*a*) The subpœna may command the party to whom it is addressed to *make search* for the witness required, and it is his duty to make seasonable efforts to produce the papers by doing so.(*b*) But it need not state that the documents called for are material to the case.(*c*) The witness served with a *subpœna duces tecum* may be required to make a return to the writ before the case is opened.(*d*) No greater fee is allowed under the New York Code(*e*) to a witness under a *duces tecum* than one under an ordinary subpœna.(*f*)

§ 14. THE BOOKS OF CORPORATIONS—RULE IN NEW YORK. The courts of New York, rigidly adhering to the rule that a party cannot be compelled to furnish evidence against itself, refused to compel an officer of a corporation to produce its books in a suit to which the corporation was a party. In the earliest case on this point, a bank brought an action on a promissory note, to which the defense of usury was set up. To show the usury, the defendant served the cashier with a *subpœna duces tecum* to produce the books. He refused to obey it, and a motion for an attachment was denied. "The course," said the court, "for proving the books or papers of a bank where it is the adverse party, is to give notice to produce them, and on its non-compliance to show the contents by inferior evidence, as in other cases. The effect of this motion would be to compel a party to produce evidence against himself. * * * The cases in which the production of papers may be coerced by subpœna are where they are the property of a competent witness, or at least where they do not belong exclusively to the adverse party. When he can say 'These are my papers,' we will not compel one who happens to have the temporary possession of them, in the right of the party, to produce them on subpœna."(*g*) It was ruled that a "joint-stock company was not a corporation within this rule, and entitled to its immunities.(*h*) Since then the New York Code of Civil Procedure provided as follows:(*i*) The production upon a trial of a book or paper belonging to or under the control of a corporation may be compelled in a like manner as if it were in the hands or under the control of a natural

(*u*) United States v. Babcock, 3 Dill. 566.
(*v*) Id.
(*w*) Ex parte Brown, 72 Mo. 83.
(*x*) Ante, 712.
(*y*) Re O'Toole, 1 Tuck. 39. See ante as to discription of papers in "notice to produce."
(*z*) Corbett v. Gibson, 16 Blatchf. 334.
(*a*) Id.
(*b*) United States v. Babcock, 3 Dill. 566.
(*c*) Re Dunn, 9 Mo. App. 255.
(*d*) Treasurer v. Moore, 3 Brev. (S. C.) 550.
(*e*) Section 852.
(*f*) Re Corwin, 6 Abb. N. C. 437.
(*g*) Bank of Utica v. Hilliard, 5 Cow. 419, (1826;) La Faye v. La Faye Fire Ins. Co. 14 How. Pr, 26; Central Nat. Bank v. White, Jones & Sp. 297; Morgan v. Morgan, 16 Abb. Pr. (N. S.) 291.
(*h*) Woods v. De Figamere, 16 Abb. Pr. 159.
(*i*) Section 683.

person. For that purpose, a *subpœna duces tecum*, or an order made as prescribed in the last section, as the case requires, must be directed to the president or other head of the corporation, or to the officers thereof, in whose custody the book or paper is." This law, it has been held, applies to foreign corporations doing business in the state of New York.(*j*) But previous to this provision the New York rule was not the rule everywhere. In *Wertheim* v. *Continental Trust Co.*(*k*) the subject was by a United States judge, sitting in New York, examined independently of the provision in the Code just recited, and he came to the conclusion that a corporation was compellable to produce its books and papers under a *subpœna duces tecum*, subject to the same duties and privileges as an individual. "No authority," it was said, "is found in any decisions of the federal courts denying the right to compel corporations to produce evidence which may be necessary and vital to the rights of litigants. On principle it is impossible to suggest any reason why a corporation should be privileged to withhold evidence which an individual would be required to produce."

§ 15. PARTY HAVING POSSESSION WITHOUT LEGAL CUSTODY. Although a document be in the legal custody of one man, yet if the subpœna is served on another in whose possession it is, or who has the means to produce it, he is bound to do so.(*l*) Thus a solicitor has been ordered to produce papers whose legal custody was in the assignee in bankruptcy.(*m*) In *Bank of Utica* v. *Hilliard* (*n*) the suit was on a promissory note of a bank against the indorsers, the defense being that the note was usurious. To prove this defense, a clerk in the bank was served with a *subpœna duces tecum* to produce the bank books. It was held that he was not bound to obey it. "His obligation to produce the books," said SAVAGE, C. J., "depends on the question whether they were in his possession and under his control. He was the mere clerk of the plaintiff, and in that character had no such property in or possession of the books as imposed the obligation to bring them. They were under the control of the cashier, who might forbid their removal or place them beyond the reach of the witness."(*o*) This has been changed in New York, as we have seen, by statute. Under the New York Code,(*p*) the party on whom the *subpœna duces tecum* is served sufficiently obeys it if the documents are produced by a subordinate officer, who is able to identify them, and to testify respecting the purposes for which it is used. If the personal attendance of a particular officer is requested, a subpœna without the *duces tecum* clause must also be served on him. Section 868 of the New York Code has been held to give so ample a means of obtaining the production of the books of a corporation, as to make an order to inspect unnecessary.(*q*)

§ 16. WHEN BOOKS ARE "IN CUSTODY OF" OFFICER OF CORPORATION. The New York Code, as we have seen, requires that to compel the production of books or papers of a corporation the subpœna be directed to the officer "in

(*j*) United States v. Tilden, 18 Alb. L. J. 416.
(*k*) Ante, 716.
(*l*) Amey v. Long, 1 Comp. 14.
(*m*) Corsen v. Dubois, 1 Holt, 239.
(*n*) 5 Cow. 152, (1825.)
(*o*) Subsequently the cashier of the bank was served with a subpœna duces tecum; but the court on another ground refused to compel him to produce the books. Bank of Utica v. Hilliard, 5 Cow. 419, (1826;) La Faye v. La Faye Fire Ins. Co. 6 Duer, 680; 14 How. Pr. 26.
(*p*) Section 869.
(*q*) Central, etc., R. Co. v. Twenty-third Street R. Co. 53 How. Pr. 45.

whose custody" they are. It is important to note that this law does not require the officer of the corporation to obtain the custody of the books in order to produce them, but simply to produce them if they are in his custody. Therefore it seems that he is not compelled to bring them into court where they are not so under his power and control that, of his own will, and without obtaining the consent of others, he can take them and bring them into court. In one case, a corporation formed under the laws of Illinois had its general office at Chicago, where its president resided. It had a branch office in New York for the transaction of business there, which was in charge of the vice-president, who was also the secretary of the corporation. There was an assistant secretary at Chicago, who was a co-ordinate officer with the secretary, and not under his control. By a by-law of the company, the secretary was required to keep the books, accounts, and papers of the company; and books of stock transfers, etc., which were kept in New York, were required, when no longer in use, to be sent to the general office of the company in Chicago, and were in the charge of the officers there. It was held that after such books were sent by the secretary in New York to Chicago, they were no longer in the custody of that officer, and he could not be required to produce them by *subpœna duces tecum* under this law.(*r*)

§ 17. PARTY REFUSING TO OBEY WRIT LIABLE TO ACTION. A person who is served with a *subpœna duces tecum* to produce papers in his possession at the trial of a cause, and failing to do so, in consequence of which the party in whose favor the evidence was to be used, fails in his cause, is liable to said party for the damages resulting from this failure of evidence, unless he can show some legal excuse for not obeying the writ.(*a*) The leading case establishing this principle is *Amey* v. *Long*.(*b*) The plaintiff, Amey, having obtained judgment against one G., sued out a *testatum fieri facias* to levy the sum recovered, directed to the sheriff of Surrey. The writ was returned *nulla bona*, and Amey brought an action against the sheriff for a false return. The warrant from the sheriff to levy on G.'s goods had been directed to Long, a sheriff's officer. To compel the production of the warrant at the trial against the sheriff, the plaintiff sued out a *subpœna duces tecum*, directed to Long, commanding him to produce the said warrant granted to him by the sheriff of Surrey upon the writ of *fi. fa.* against G. At the trial, Long appeared as a witness, but would not produce the warrant, and in consequence the plaintiff was nonsuited, and was obliged to pay costs, amounting to £132. He brought an action against Long and recovered this £132. If it is the non-production of the papers that has caused the party's evidence to fail, the witness will be liable, even though he obeyed the subpœna in other respects, as by personally appearing and giving oral evidence in the cause.(*c*) It is not necessary to sustain such an action for the plaintiff to prove that he had a good cause of action in the suit wherein the defendant was subpœnaed. It is sufficient for him to show that he was nonsuited in consequence of the non-production of the papers mentioned in the subpœna.(*d*) In an action against a sheriff's officer, who had been subpœnæd in a former action by the plaintiff against another

(*r*) United States v. Tilden, 18 Alb. L. J. 416.
(*a*) Amey v. Long, 9 East, 473; 1 Camp. 14; Lane v. Cole, 12 Barb. 680.
(*b*) 9 East, 473; 1 Camp. 14.
(*c*) Lane v. Cole, 12 Barb. 680.
(*d*) Id.

person, to produce the warrant under which he acted, but had neglected to do so, whereby the plaintiff was nonsuited, it was held that the officer's ability to produce the warrant, and his want of excuse for not producing it, were sufficiently alleged in the declaration, which stated that he could and might, in obedience to the said writ of subpœna, have produced at the trial the said warrant, and that he had no lawful or reasonable excuse or impediment to the contrary.(*e*) It is not a preliminary objection to such an action that the defendant had sworn, at the trial at which he was ordered to produce the document, that he had not the warrant in his possession and knew nothing of it.(*f*)

JOHN D. LAWSON.

St. Louis, Missouri.

(*e*) Amey v. Long, 9 East, 473.

(*f*) Amey v. Long, 1 Camp. 14.

UNITED STATES *v.* BANK OF AMERICA.*

(*Circuit Court, E. D. Pennsylvania.* January 15, 1883.)

INTERNAL REVENUE—ASSESSMENT LIST—EVIDENCE—REV. ST. § 3408, SUBSEC. 2; §§ 3224, 3226.

In an action by the United States to recover a tax of one twenty-fourth of 1 per centum each month upon the capital stock of a bank, under section 3408, subsec. 2, the assessment list made by the commissioner of internal revenue and not appealed from is not conclusive evidence, but the defendant may show that the assessment was excessive or illegal.

Rule for a New Trial. *Assumpsit*, for a tax of one twenty-fourth of 1 per centum each month upon the capital stock of a bank, amounting, with fines and interest, to $3,168.12.

The plaintiff put in evidence the official assessment list, made by the commissioner of internal revenue, under section 3408, Rev. St., subsec. 2, and closed.

The defendant offered to prove (1) that the capital of the defendant was less than $45,000, and not in the amount charged in the assessment list, put in evidence; (2) that at the time of said assessment the defendant was not engaged in business as a bank, and had no capital employed in the business of banking, or liable to be taxed.

The court rejected the offers, and directed a verdict for plaintiff, reserving the question of their admissibility.

H. T. Dechert and *Henry M. Dechert*, for the rule.

The assessment list was not conclusive evidence, and our offer was admissible to show that the assessment was erroneous and illegal.

*Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.

Clinkenbeard v. *U. S.* 21 Wall. 65; *U. S.* v. *Halloran*, 22 Int. Rev. Rec. 321; *Ketchum* v. *Pacific R. R.* Id. 383; *U. S.* v. *Myers*, 3 Hugh, 239; 5 FED. REP. 364; *Runkle* v. *Ins. Co.* 6 FED. REP. 143; *U. S.* v. *Rindskopf*, 105 U. S. 418.

Hood Gilpin, Asst. Dist. Atty., and *John K. Valentine*, Dist. Atty., *contra*.

The assessment, being regular and unappealed from, was conclusive, and the defendant may not set up as a defense to this action what could not be made a cause of action against the collector, nor upon which the collection of the tax would be restrained. Rev. St. §§ 3224, 3226; *Collector* v. *Hubbard*, 12 Wall. 1; *Bergdoll* v. *Pollock*, 95 U. S. 337.

Eo die. THE COURT. When the government elects to resort to the aid of the court, it must abide by the legality of the tax.

The defendant may show that it was not, at the time for which the assessment was made, doing business as a bank, within the definition in section 3407, Rev. St., and that the assessment was therefore illegal.

Rule absolute.

Oral opinion by MCKENNAN, J.; BUTLER, J., concurring.

A corporation whose business is confined to the investment of its capital in bonds secured by mortgage on real estate, and to the negotiation, sale, and guaranty of them, is not a bank or banker within the meaning of section 3407 of the Revised Statutes. *Selden* v. *Eq. Trust Co.* 94 U. S. 419. Whether the mere business of buying, carrying, and selling stocks for others, on the deposit of money or property as a margin for their security, would come within the definition "bankers," *quære*. *Clark* v. *Bailey*, 12 Blatchf. 156. See *Northrup* v. *Shook*, 10 Blatchf. 243. Under the section taxing deposits in banks, an entry made in the depositor's pass-book of a deposit or payment is a "certificate of deposit" or "check" or "draft," within the meaning of the section. *Oulton* v. *Savings Institution*, 17 Wall. 109. Under the proviso of section 3408 of the Revised Statutes, savings banks are not exempt from taxation if they have a capital stock, or if they do any other business than receiving deposits to be lent or invested for the sole benefit of the depositor. Id. A construction of a proviso which makes it plainly repugnant to the act is inadmissible. *Savings Bank* v. *U. S.* 19 Wall. 228. If, after paying expenses, the bank sets apart a portion of the net earnings for a reserve fund, the moneys paid to depositors are dividends, within the meaning of this section, and not interest, within the meaning of the proviso. *San Francisco, S. & L. Soc.* v. *Cary*, 2 Sawy. 333; affirmed, 22 Wall. 38.—[ED.

HUNTRESS *v.* TOWN OF EPSOM.

(*Circuit Court, D. New Hampshire.* March 20, 1883.)

1. COSTS—VIEW OF GROUND BY JURY—ALLOWANCE OF EXPENSES.
   Where, by the practice and procedure of the state courts of record within the district, the costs and expenses of viewing the ground by the jury in civil actions are allowed, such costs and expenses may be allowed in courts of the United States held within such district, in civil suits other than suits in equity or admiralty, under the provisions of section 914 of the Revised Statutes, which adopts as near as may be the practice, pleadings, forms, and modes of procedure of the state courts of the district in which such United States courts are held.

2. DOCKET FEE.
   Where there have been two trials of a cause, the first of which resulted in a disagreement of the jury and the second in a verdict for the defendant, but one docket fee of $20 will be allowed.

Copeland & Edgerly and *Wallace Hackett*, for plaintiff.

Wm. L. Foster, *Thomas J. Smith*, and *John Y. Mugridge*, for defendant.

CLARK, J. This was an action by the plaintiff against the town, for damages to himself and team from a defect in a highway which the town was under obligation to keep in reasonable repair. There were two trials. On the first the jury disagreed; at the second there was a verdict and judgment for the defendant. At each of these trials the jury, upon motion of the defendant, was sent out by the court, under the direction of the marshal, to view the highway where the accident happened, and where the damage was sustained by the plaintiff.

The statute of New Hampshire provides (chapter 231, §§ 17, 18, p. 537, Gen. Laws) that—

"In trials of actions involving questions of right to real estate, or in which the examination of places or objects may aid the jury in understanding the testimony, the court, on motion of either party, may, in their discretion, direct a view of the premises by the jury, under such rules as they may prescribe." "The cost of such view shall be subject to adjudication as to the whole or any part thereof, as the court may deem equitable."

The statute of the United States provides, (section 914, p. 174, Rev. St., 2d Ed. 1878:)

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit or district courts, shall conform as near as may be to the practice, pleadings, and forms and modes

of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

The defendant claimed to recover, as costs from the plaintiff, the expenses paid out by the town in conveying the jury, in each of the trials, to the place of view, and in returning them to the court; and also a further sum for the board and lodging of the jurors upon the last view, which detained them "over night." It is conceded that there is no statute of the United States that provides for the allowance of such an expenditure as costs; and in *Parker* v. *Bigler*, 1 Fisher, 285, it was held that no costs could be recovered by the prevailing party but the legal taxed costs. The same decision was substantially made in *Day* v. *Woodworth*, 13 How. 363. But this rigid rule has not been followed in this district or circuit. The fee bill, or fees enumerated in the statute, has not been construed as exclusive of other necessary *expensa litis*. Thus the attendance and travel of *parties* has been taxed and allowed in this district, and in Massachusetts, for very many years, uniformly so, so far as I learn. No statute of the United States prescribes or authorizes such an allowance, and possibly the practice may have arisen under the act of September 29, 1789,—long since repealed,—which prescribed that "the rates of fees, *except fees to judges* in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now allowed in the supreme courts of the same." Costs of parties' travel and attendance were then allowed, and so of the expense of views by the jury.

In the case of *Stockbridge Iron Co.* v. *Cone Iron Works*, 102 Mass. 80, 89, $4,800 was allowed for a view, and CHAPMAN, C. J., in delivering the opinion of the court, said: "Courts of law have power to allow reasonable expenses of surveys and views in proper cases, and the fee bill does not apply to the expense of such proceedings." This was in a state court.

I am inclined in this case to allow as costs to be recovered by the defendant of the plaintiff the expense paid by the defendant as carriage hire and car fare to take the jury to the place of view and back to the court—$15 at the first trial and $46.40 on the second, the distance being much greater,—and to disallow the sum of $19.50 for the board and lodging of the jury over night on the second view, as this expenditure should have been borne by the jurors out of their per diem allowance while making the view; and this I do on the more distinct ground that the law of the United States (section 914, Rev.

St.) above cited requires the practice and mode of proceeding in civil causes, other than equity and admiralty causes in the circuit and district courts, to conform, as near as may be, to the practice and mode of proceeding in the state courts; and it is a mode of proceeding in the state courts of this district, in a case where a view may aid the jury to understand the testimony, to direct such view upon motion of either party, and it is the practice of the court to allow such part or all of the costs as may be deemed equitable.

The defendant claims to recover a docket fee of $20 at the former trial, when the jury disagreed, and a like fee at the second trial, when judgment was for the defendant; but only one docket fee can be allowed. Witness fees, travel and attendance, and other items allowed as taxed.

In re GILLESPIE and others, Bankrupts.

(*District Court, S. D. New York.* March 17, 1883.)

CHOSE IN ACTION—CONFLICTING ASSIGNMENTS.

A subsequent *bona fide* assignee of a chose in action, who, for a valuable consideration, after due inquiry, and without notice of any prior assignment, gives immediate notice of the assignment to the debtor, or trustee of the fund, and takes possession of the evidences of debt, has a superior equity over a prior assignee of the same debt or fund, who leaves the evidences of the debt with the assignor, and gives no notice of the assignment to the debtor or trustee.

In Bankruptcy.

The firm of Gillespie & Co. having been adjudicated bankrupts, T. J. Daly & Co., holders of four promissory notes of the bankrupts, payable to their own order and indorsed in blank, proved the notes in bankruptcy, and in March, 1874, received a dividend of 25 per cent. thereon, which was indorsed upon the notes. Afterwards, on September 13, 1875, Daly & Co., being in embarrassed circumstances, made a composition with their own creditors, and, for the purpose of securing payment of certain composition notes, executed an assignment of all their assets to Amasa A. Redfield, among which assets the claim against the Gillespie estate was mentioned. The Gillespie notes were not delivered to Redfield, nor did the latter notify the assignee in bankruptcy of the transfer to him. On the ninth of December, 1876, Daly & Co., being still in possession of the notes, received from the assignee of Gillespie a further dividend of 5 per cent., which was likewise indorsed upon the notes, and the receipt thereof

signed by T. J. Daly & Co. On July 5, 1877, Daly & Co. applied to Hatch & Sons for a loan upon the security of the Gillespie notes, and further dividends expected thereon. Hatch & Sons made inquiry of Gillespie's assignee, and being informed that a further dividend would be payable, and having no information of the prior assignment to Redfield, made advances upon the notes which were delivered to them by Daly & Co., and at once notified the assignee in bankruptcy of the transfer, and that all further dividends would be payable to them. Redfield gave notice of his claim to the assignee for the first time on March 25, 1880, and claimed that any future dividends should be paid to him. Under these conflicting claims, a subsequent dividend on the Gillespie notes of $717.92 was deposited in the registry of this court, and both assignees have presented petitions claiming the dividend under the assignments above stated.

Ward & Jenks, for Hatch & Sons.

E. C. Delavan and *J. P. Lowery*, for Redfield.

BROWN, J. The question involved in the rival claims to this dividend has been differently decided by high authorities. The claim for the dividend is not a claim strictly upon the note against the maker, but a claim for payment from the assignee of the bankrupt upon the proof of the bankrupt's notes made prior to assignment to either of the rival claimants. In this view I cannot distinguish it from the case of *Muir* v. *Schenck*, 3 Hill, 228, and *Cooper* v. *Fynmore*, 3 Russ. 60. And upon these authorities, Redfield being prior in time, would have the prior right. On the other hand, the case last cited is certainly overruled in England by the lord chancellor in the carefully-considered cases of *Dearle* v. *Hall* and *Loveridge* v. *Cooper*, 3 Russ. 1, 57, 58; and the principle of these cases has been repeatedly adopted and approved by the supreme court, as shown by the cases of *Judson* v. *Corcoran*, 17 How. 612, 615; by MARSHALL, C. J., in *Hopkirk* v. *Page*, 2 Brock. 20, 41; in *Spain* v. *Hamilton's Adm'r*, 1 Wall. 604; and *Nat. Bank* v. *Texas*, 20 Wall. 72, 89.

In *Judson* v. *Corcoran*, *supra*, the court say:

"There may be cases in which a purchaser, by sustaining the character of a *bona fide* assignee, will be in a better situation than the person was of whom he bought; as, for instance, where the purchaser, who alone had made inquiry and given notice to the debtor, or to a trustee holding the fund, (as in this instance,) would be preferred over the prior purchaser who neglected to give notice of his assignment and warn others not to buy."

In *Loveridge* v. *Cooper*, 3 Russ. 58, the lord chancellor says:

"Where personal property is assigned, delivery is necessary to complete the transaction, not as between the vendor and the vendee, but as to third persons, in order that they may not be deceived by apparent possession and ownership remaining in a person who, in fact, is not the owner. This doctrine is not confined to chattels in possession, but extends to choses in action, bonds, etc. In *Ryall* v. *Rolles*, 1 Ves. Sr. 348, it is expressly applied to bonds, simple contract debts, and other choses in action. In cases like the present, the act of giving the trustee notice, is, in a certain degree, taking possession of the fund; it is going as far towards equitable possession as it is possible to go; for, after notice given, the trustee of the fund becomes a trustee for the assignee who has given him notice."

The principle of all these latter cases is that the first purchaser of the chose in action, who neglects to give notice to the debtor, or trustee holding the fund, and does not take possession of the evidences of the debt, acquires but an imperfect title as respects third persons, and by his laches is, in a sense, a contributory party to the fraud perpetrated by his vendor in the subsequent sale to another purchaser of the same debt or fund; and where the latter has used all due diligence by inquiry and notice, the equity of the latter is to be preferred over that of the former. 1 Dan. Neg. Inst. § 748*a*. Many of the authorities upon this general subject are reviewed in the opinion of the court, in *McNeil* v. *Tenth Nat. Bank*, 46 N. Y. 325.

The equities of Hatch & Sons in this case are plainly superior, through the laches of the first assignee, and an order should, therefore, be entered for the payment of the dividend to them.

In re STATE INS. CO.*

(*Circuit Court, E. D. Missouri.* March 21, 1883.)

1. BANKRUPTCY—LIMITATIONS (REV. ST. 5057)—MISTAKE OF LAW.

Where a creditor was led by an erroneous decision of a circuit court to believe that he could not enforce his claim against a bankrupt estate, and on that account failed to present it until the decision of the circuit court was overruled, about four years and a half after the cause of action accrued against the assignee, *held*, that his mistake as to the law was no excuse for the delay, and that his claim was barred by the limitations of the bankrupt act.

Bill to review the action of the district court in the matter of the State Insurance Company, bankrupt, upon the petition of A. J. Stillwell,

*Reported by B. F. Rex, Esq., of the St. Louis bar.

creditor, in which he asks for an order of court commanding the assignee of said bankrupt to make a report showing the interest accrued upon claims allowed against the estate of said bankrupt during the litigation and subsequent to the adjudication, and the actual amount of collectible assets of the estate, and also for an order making another assessment on the stockholders of said bankrupt for the purpose of paying such interest. It appears, from the pleadings and the evidence presented to the district court, that the State Insurance Company is a corporation; that it was adjudicated a bankrupt on September 20, 1875; that the estate has not yet been closed; that the petitioner herein had presented a claim against said estate for the amount of $8,806.97, and that the same had been allowed; that all claims presented and allowed had been paid in full, except interest, and that an interest demand equal to 4 per cent. of said claims had been paid July 16, 1880; that the district court had ordered assessments on the stockholders of the bankrupt amounting to 60 per cent. of the face value of their stock; that the last assessment had been made on the nineteenth of December, 1877; that said assessment and all other assets, except the remaining 40 per cent. due from said stockholders, had been collected so far as possible and used in paying allowed claims; that litigation from which assets were expected was determined adversely to the assignee in the year 1881; and that the petitioner had requested the assignee to ask for another assessment, but that the assignee had declined to do so.

Mr. Stillwell did not file his petition until June 10, 1882. He alleged as an excuse for his delay that he had supposed that further sums might be collected on the original assessment, and that it had been decided and held, until the late decision of the United States supreme court in *Scoville* v. *Thayer* established a contrary doctrine, that the statute of limitations of two years ran in favor of said stockholders from the date of the adjudication without any call or assessment. The district court having denied the petition, the petitioner filed a petition for a review here.

William R. Walker, assignee of the estate of said bankrupt company, demurred to the petition on the following grounds, viz.:

"(1) That said petition for review shows on its face such gross laches on the part of petitioner as to disentitle him to the relief asked by him in his said petition; (2) that the granting of such relief would have the effect of protracting indefinitely the final settlement of said estate, which would be entirely contrary to the policy of the bankrupt law, as repeatedly expounded

by the supreme court of the United States; (3) that the proceeding brought herein by petitioner is not maintainable, because the same was not brought within two years from the time when petitioner's cause of action, if any, accrued against the assignee, and said assignee sets up and claims the benefit of section 5057 of the Revised Statutes of the United States, title, 'Bankruptcy;' (4) that said petition is in other respects vague, indefinite, and uncertain, and insufficient."

Leonard Wilcox, for petitioner.

Walker & Walker, for assignee.

McCRARY, J., (*orally.*) It is a rule of the bankrupt law, under which the affairs of this company were settled, that all the claims against the estate shall be presented within two years after proceedings begun. To expedite the settlement of the affairs of the insolvent concern is as much an object of the law as fairness and equality. In view of this rule, I think that in waiting four years and a half before presenting his claim the petitioner was guilty of such laches as will act as a fatal bar to his claim. That by relying upon the correctness of Judge DILLON'S opinion petitioner is able to present sufficient cause to excuse his negligence, I cannot admit. It is unfortunate oftentimes that parties are led into error by a mistaken notion of the law; but yet, for its own preservation, it is presumed that every individual is cognizant of the law; and a mistake from this cause can be no valid foundation for a claim, nor can it act as an excuse for what is clearly laches. Again, to open the affairs of the company by allowing this claim, would entail an almost unlimited number of lawsuits, for each apparently-satisfied creditor would return for the interest upon his claim. The sum of the interest, which has been increasing for seven years and a half, would now amount to an enormous figure, and would become a grievous burden upon the stockholders, which would not have been the case if the creditors, by exercising proper vigilance and diligence, had claimed the interest at the time that they did the principal, for then the difference would have been but slight. In view of these considerations I must affirm the judgment of the district court.

UNITED STATES v. THORNE.

(*Circuit Court, S. D. New York.* February 9, 1883.)

CRIMINAL PROCEDURE.

Where the accused was ready for trial and attended court during the term fixed for his trial, and pressed the district attorney to try his case, but the district attorney omitted to call up the case, without sufficient reason existing for such omission, a motion to discharge accused on his own recognizance was refused, he being on bail at the time.

H. E. Tremaine, for the motion.

W. P. Fiero, Asst. Dist. Atty., opposed.

BENEDICT, J. This is a motion by the accused to be discharged on his own recognizance, or that his trial do immediately proceed. The ground of the application is that the accused was ready to be tried at the February term, and attended court during the term, and pressed the district attorney to try his case, but the district attorney omitted to call up the case, although the trial might have been had, and no sufficient reason existed for omitting to call up the case. The affidavits show that the accused was in court, pressing for a trial of his case at the February term, and I am by no means satisfied with the reasons assigned by the district attorney for his omission to call up the case. So far as the business of the court is concerned there was abundant opportunity to try the case at the February term, and I think it ought to have been called up. I do not, however, think it advisable to discharge the accused upon his own recognizance at this term. He is on bail, and the bail given will stand until the next term in March. If, at the opening of that term, an early day be not fixed by the district attorney for the disposition of the case, the present motion may be renewed.

UNITED NICKEL CO. v. PENDLETON.

(*Circuit Court, S. D. New York.* February 1, 1883.)

1. PATENTS FOR INVENTIONS — ELECTRO-DEPOSITION OF NICKEL — CHEMICAL EQUIVALENTS.

Where defendant's solution is amenable to the same laws as that of the plaintiff, and to give the same result must be used under the same conditions and be free from the same impurities, and be made according to the same principles as that of the plaintiff, it is a chemical equivalent of the plaintiff's solution.

2. SAME—SIMILAR PROCESS AND MODES OF WORKING.

Where the defendant did not vary the process or the mode of working, or its essential conditions, but applied a new solution, worked in the same way and under the same conditions as the solution of the plaintiff, it is an infringement of plaintiff's claim.

3. NEW PRODUCTS—PATENTABLE.

A new product or article of manufacture is patentable as a manufacture; and where the patent describes the product and the mode of making it, having certain characteristics which are defined, and stating that they were never produced before, it is a sufficient specification of a claim.

Dickerson & Dickerson, for plaintiff.

Frost & Coe, for defendant.

BLATCHFORD, Justice. This suit is brought for the infringement of claims 1 and 4 of letters patent No. 93,157, granted to Isaac Adams, Jr., August 3, 1869, for an "improvement in the electro-deposition of nickel." The patent was before this court in *United Nickel Co.* v. *Harris*, 15 Blatchf. C. C. 319, and in *United Nickel Co.* v. *Manhattan Brass Co.* 16 Blatchf. C. C. 68. It was also before Judge SHEPLEY, in *United Nickel Co.* v. *Anthes*, 1 Holmes, 155, and in *United Nickel Co.* v. *Keith*, Id. 328.

Claims 1 and 4 are as follows:

"(1) The electro-deposition of nickel by means of a solution of the double sulphate of nickel and ammonia, or a solution of the double chloride of nickel and ammonium, prepared and used in such a manner as to be free from the presence of potash, soda, alumina, lime, or nitric acid, or from any acid or alkaline reaction. (4) The electroplating of metals with a coating of compact, coherent, tenacious, flexible nickel, of sufficient thickness to protect the metal upon which the deposit is made from the action of corrosive agents with which the article may be brought in contact."

In the *Anthes Case*, in May, 1872, the validity of the patent was sustained, and infringement was adjudged of claim 1, as the defendant had used the solutions of the patent.

In the *Keith Case*, in February, 1874, the validity of the patent was again sustained, and infringement of claim 1 was adjudged, because of the use, in the electro-deposition of nickel, of a solution of the double sulphate of nickel and ammonia, although such solution contained a small proportion of tartrate of ammonia, and a small proportion of ammonia, the first of these being an inert substance in the solution, and the second being speedily eliminated by evaporation when the solution was used.

In the *Harris Case*, in October, 1878, the patent was held valid. Claim 1 was held to be a claim to the electro-deposition of nickel by means of any solution of the double sulphate of nickel and ammonia,

or of any solution of the double chloride of nickel and ammonium, however such solution may be prepared, provided such solution is so used as to be free, while the electro-deposition of nickel is going on, from the presence of potash, soda, alumina, lime, or nitric acid, or from any acid or alkaline reaction. Infringement of that claim was adjudged, and it was held that, although a sulphate or a chloride of potash or soda might be introduced into either of the named solutions, yet, if the solution was so used, in the electro-deposition of nickel, that the sulphate or the chloride would not be decomposed, the claim was infringed. Infringement of claim 4 was also adjudged, and that claim was held to be a claim to the product or coating named in it, having the qualities described in it, when such product or coating is produced by employing the invention covered by the first claim.

In the *Manhattan Brass Co. Case*, in March, 1879, infringement of claim 1 was adjudged, and it was held that that claim was infringed, although the salts of potash and soda were introduced into the solution, provided the solution was not so used as to liberate free potash or free soda.

In the present case questions arise which were not under consideration in the other cases. In none of those cases was claim 4 involved separately from claim 1, because in all of them infringement of claim 1 was adjudged, and in all of them no solution was under consideration but the solutions named in claim 1. The present defendant uses another solution. The answer avers that he is making, using, and selling a nickel-plating solution, consisting of oxide of nickel and acetic acid, forming an acetate of nickel solution, which solution contains an excess of acid and has an acid reaction, and that he does this under letters patent No. 232,615, granted to him September 28, 1880, and in the manner described and claimed therein. The evidence supports this averment. In addition to this the record contains an admission by the defendant that a certain padlock offered in evidence by the plaintiff was electroplated by the defendant after the plaintiff's patent was issued and before this suit was brought, and that it is a metallic article, covered with a coating of compact, coherent, tenacious, and flexible nickel. The evidence shows that it is the article claimed in claim 4 of the plaintiff's patent. It does not appear whether it was plated in the defendant's solution or not. The specification of the defendant's patent says:

"The object of my invention relates to a new and improved process of preparing solutions of oxide of nickel and acetic acid for nickel-plating purposes. I am aware that solutions of oxide of nickel and acetic acid have been used

to some extent in nickel-plating; but these solutions have not hitherto been so successful as to give satisfactory results, the work plated in them being imperfect, ununiform, and often covered with a deposit of black oxide of nickel. I have discovered the causes of these difficulties and the method by which they can be obviated. These difficulties in the preparation and use of solutions of oxide of nickel and acetic acid may arise from the impurities of the materials used, the cure of which is obvious to all, but are principally due to two facts: *First*, that when acetic acid is added to oxide of nickel the chemical changes taking place between constituent parts of these materials require some time, and if, as is now the practice in making said solutions, water is added to the combined acids and nickel before the chemical changes have fully taken place, chemical action is delayed and continues slowly during the use of the solution in plating; *second*, that this class of solutions—that is, acetate of nickel solutions—require to be prepared with an excess of acid and to be kept markedly acid while in use; otherwise the solution will not give satisfactory results. I prepare my solution as follows: I prefer to make it in quantities of 50 gallons, as this is a proper quantity for ordinary tanks used in nickel-plating, though either great or less quantities may be prepared at one time, if desired. To prepare 50 gallons of said solution, I take about 20 pounds of oxide of nickel, and add to it about 10 gallons of acetic acid. I then allow this mixture of oxide of nickel and acetic acid to stand for such length of time that the gases generated by their chemical action are thoroughly evolved and pass off. In preparing said solution I would recommend that at least 24 hours should be allowed to elapse before adding the water to the mixture. The mixture of oxide of nickel and acetic acid may be placed on a stove or sand-bath for the purpose of hastening the chemical changes in the mixture by heating it. After allowing the mixture to stand for such length of time as to allow the gases to pass off, the water is added, and the solution is then ready for use. In preparing solutions of greater or less quantities than 50 gallons, the quantities of oxide of nickel and acetic acid are, of course, varied; but the same relative proportions are preserved between them. Great care should be taken in the preparation and use of this solution, that it shall contain at all times an excess of acetic acid, and if, in making and testing it, the solution is found not to have an acid reaction, sufficient acetic acid should be added to produce a markedly acid reaction. These solutions, thus prepared and used, do not become depleted in using, and require no addition of nickel to keep up their strength, other than that derived from the nickel of the anode. As no materials are used in the preparation of these solutions but oxide of nickel and acetic acid, they are free from sulphates and chlorides of nickel, and any of the compounds of ammonium and any other salts."

The claims of the patent are these:

"(1) In the art of nickel-plating, an acid solution of acetate of nickel, consisting of oxide of nickel and acetic acid, said solution having an excess of acid. (2) The method of making acid solutions of acetate of nickel consisting in slowly digesting oxide of nickel and acetic acid with or without heat, so as to have an excess of the acid in solution, substantially as described."

It is apparent from a reading of this specification, that the novelty in the invention, if there be any, consists in the making of the solution, either as to the method or the resulting solution or both. The starting point is to make a solution of oxide of nickel and acetic acid. Metallic nickel is not taken, but oxide of nickel already prepared from metallic nickel. The fact is stated that solutions of oxide of nickel and acetic acid had been before used to some extent in nickel-plating, but unsuccessfully and unsatisfactorily, the work plated being imperfect, ununiform, and often covered with a deposit of black oxide of nickel. It is then stated that these difficulties in preparing and using solutions of oxide of nickel and acetic acid may arise from the impurities of the materials used, "the cure of which is obvious to all." One of these materials is oxide of nickel, but whether the obvious cure of the impurities in it, resulting from impurities in the metallic nickel from which it is made, or impurities resulting from the method of treating it to obtain the oxide, is the cure made known by Adams in his patent or not, is not suggested. It is very certain, from the evidence, that no cure for the deleterious impurities was ever suggested before that made known by Adams in his patent, and that he was the first person who made known what such impurities were. An important passage in the specification of the defendant's patent is that in which he says that, "as no materials are used in the preparation of his solutions but oxide of nickel and acetic acid, they are free from sulphates and chlorides of nickel and any of the compounds of ammonium and any other salts."

The defendant's solution is an acetate of nickel solution resulting from the treatment of oxide of nickel with acetic acid. The solution is free from the injurious substances specified in the Adams patent as injurious, unless the addition of an excess of acetic acid is a departure from the precautions pointed out by Adams. The defendant's solution is free from potash, soda, alumina, lime, and nitric acid, and is a pure solution, in the sense of being free from those substances, which substances, Adams states, in his patent, must be eliminated, either by dispensing with their use or effectually removing them if they are employed. The defendant's specification requires freedom from all foreign metallic salts. The evidence shows that a pure acetate of nickel, used without an excess of acetic acid, will, under proper conditions of strength of current and strength of solution, produce such a reguline deposit of nickel as Adams' patent contemplates, and that the absence of any acid or alkaline reaction in the acetate produces the best results especially as to the quantity of

metal deposited with a given battery power in a given time. An excess of acetic acid impairs the efficiency of the solution. It is shown that the presence of an acid reaction, by turning litmus paper red, by no means indicates the presence of free acid, so as to make a practically injurious departure from neutrality, in the direction of acid reaction. On the other hand, it appears that an excess of acetic acid has the effect to neutralize the deleterious properties of such alkaline substances as soda, potash, and lime, which, if finding their way into the solution, will injure the quality of the deposit. Such excess of acetic acid does not neutralize such impurities as hydrochloric acid, sulphuric acid, or nitric acid, and they must be prevented from getting into the solution at all. The defendant's mode of making the acetate precludes their introduction otherwise than through the use of the dips, and the Adams patent especially enjoins that they must not be introduced through the dips.

At the time of Adams' invention it was known that the addition of a slight excess of acid to a simple salt of nickel would prevent the deposit of oxide of nickel upon the cathode, by taking up the oxide, and thus act in the same manner as ammonia salts in the solutions of the Adams patent. Under the foregoing premises, as a simple acetate will produce a greater deposit of nickel for the same amount of current in a given time than will a simple acetate with a slight excess of acetic acid, and as such slight excess of acetic acid will prevent the injurious deposit of oxide of nickel in case certain alkaline impurities are present, and as that result is accomplished in the same way as by the use of ammonia salts in the solutions of Adams' patent, those solutions and the defendant's solution are equivalent in nickel-plating, and in their mode of operation and in the character of the deposit.

The fair reading of the Adams specification is that, in order to obtain the best results, the solution should be as nearly neutral as possible, and should be especially free from acid. The invention of Adams, as shown in his specification, so far as respects sulphuric and hydrochloric acid, was that the presence of such quantities of those acids as would be likely to get into the solutions named in claim 1, in preparing and using them, would prevent any useful result. Infringement of the claim cannot be avoided by introducing such small quantities of any of the injurious substances named by Adams as will produce no practical injurious effect.

But there is another view of claim 1 which leads to the same conclusion. Practical nickel-plating, as an art, had its origin in the

Adams patent. Before that, because of the properties of nickel, it had been suggested that successful, practical nickel-plating would be a very useful invention. The invention made by Adams, and set forth in his specification, covers the art of practical nickel-plating as now practiced. Before Adams, persons trying to plate with nickel proceeded as with gold, silver, and other metals, and failed. Adams discovered that it was necessary to avoid, in nickel-plating, the use of what was either not hurtful or was beneficial in other plating, and pointed out clearly what must be avoided. He mentions certain solutions which he says will give the best results of any solutions then known. He describes in detail the mode of preparing those solutions so as to get rid of the injurious substances. His invention applies to all nickel-plating solutions which act electro-chemically like the solutions he mentions, for the facts he develops are true of all such solutions. It applies to the defendant's solution, for that is the equivalent, electro-chemically, as regards nickel-plating, of the solutions mentioned by Adams. The defendant's solution is amenable to the same laws, and, in order to give the best results, must be used under the same conditions, and be free from the same impurities, and be made and used according to the principles laid down by Adams. Before Adams no product possessing the properties described by him as those of his product was known. He introduced a new process, that of claim 1, as well as a new product or manufacture, that of claim 4. In attempts at nickel-plating before, acids had been used which were known solvents of nickel. Adams used those acids to prepare his solutions. When he speaks of acid reaction in his specification, and in claim 1, he must be regarded as referring only to the acids he had spoken of as used to clean the articles to be coated, or as solvents of nickel, namely, nitric, sulphuric, and hydrochloric acids. Those are the acids which he mentions as used to make salts of nickel, the metal being dissolved in the acids. Hence, the acid reaction spoken of by Adams includes only the mineral acids referred to by Adams, those being the acids, and the only acids, which could get into the solutions referred to by Adams, or into any plating solutions then known. Adams did not invent these solutions of claim 1. He showed how to prepare and use them successfully. The solution is the vehicle whereby the nickel is conveyed from the anode to the cathode, holding in suspension the nickel to be deposited, and supplying the place of the deposited nickel by taking other nickel from the anode. The real invention was in discovering the proper conditions for the use of such vehicle,

not the particular chemical composition of the vehicle. Any proper vehicle used with those conditions would do the work. Any vehicle in the use of which those conditions should not be observed would not do the work. The actual chemical composition of the solution, so long as it should be a good working solution, was and is unimportant. The only material point was its freedom from the injurious constituents indicated by Adams. In this view, the defendant's solution is an equivalent, in the sense of the patent law, for the solutions of claim 1. It accomplishes the same results by the same electro-chemical mode of operation, by the same process, with the absence of the same injurious elements. If claim 1 of the Adams patent claimed the discovery of a new solution, as does claim 1 of the defendant's patent, the question would be a different one. But the claim is a claim to a new method of using solutions, requiring specified conditions, by the absence of specified injurious elements. The defendant uses his solution in the same way, avoiding those injurious elements, and observing the prescribed conditions. The oxide of nickel with which the defendant starts is now an article of commerce, prepared to be used to make nickel-plating solutions, and is made so as to be free from the injurious substance specified by Adams. In making it the use of nitric acid as a solvent is avoided.

The case of *Tilghman* v. *Proctor*, 102 U. S. 707, is an authority for the conclusion that, on the foregoing facts, claim 1 of the Adams patent ought to have the construction above indicated, and that, so construed, it is infringed by the defendant. It is a claim for a process which Adams invented. He describes a mode, and the best mode then known, of carrying it out with success. All that the defendant has done is not to vary the process, or its mode of working, or its essential conditions, but to apply a new solution worked in the same way and under the same conditions. It must, therefore, be held that infringement of claim 1 is established.

As to claim 4 it is distinctly a claim to a product or article of manufacture, and patentable as a manufacture. It was a new product, never known before Adams' invention. As already said, that claim was never construed, in any case before referred to, where a decision was made sustaining claim 1. Notwithstanding anything said in the *Harris Case*, the conclusion I have now reached is that claim 4 is a valid claim, irrespective of any employment of the invention covered by claim 1, and that that claim has been infringed. It is contended that claim 4 claims a result, an idea, an abstract principle, and that its invalidity is shown by the decision in the case of *O'Reilly* v. *Morse*,

15 How. 62. But a patent for a process or a product is a different thing from a patent for a principle, as explained by Mr. Justice BRADLEY in *Tilghman* v. *Proctor, ubi supra,* in commenting on *O'Reilly* v. *Morse.* A manufacture or product, if new, may be claimed irrespective of the mode of making it.

In *Cohn* v. *U. S. Corset Co.* 93 U. S. 366, a patent for a corset having certain features, and which did not describe any process of making it, was defeated by a prior description of the corset. In the present case the patent describes the product, and the mode of making it, and claims it. The text of the specification sets forth as one of the inventions deposits of nickel having certain characteristics, which are defined, and it states that they were never produced before.

There must be a decree for the plaintiff as to claims 1 and 4, for an account and an injunction, as prayed in the bill, with costs.

DUNBAR and others *v.* WHITE and others.*

(Circuit Court, E. D. Louisiana. March, 1882.)

1. PATENT LAW—REISSUED PATENTS.
   A reissued patent which enlarges an original patent, *i. e.*, which makes the invention patented other and more inclusive than the original letters patent, is void as against intervening rights and the public as well.
2. SAME.
   The object of the law on the subject of patents is to advance the interests of the public by securing certain exclusive rights to patentees, and among these rights is that of changing, by a surrender and reissue, the language, where the idea remains the same.

Albert H. Leonard and *J. W. Gurley,* for complainants.

Joseph P. Hornor and *Francis W. Baker,* for defendants.

BILLINGS, J. The case has been heard, and is submitted for a final decree upon bill, answer, exhibits, and depositions. The bill is to protect the rights of a patentee, and is for an injunction and account. Upon the hearing for a preliminary injunction, I directed that defendants should be required to keep an account of all their transactions which should be had, which could be included within the rights granted to complainants. This decree in effect maintained the validity of the complainants' claim.

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

The sole question in the case is this: In a case where the plaintiff's right to recover against the defendant would have been perfect under an original patent, can a surrender and a reissue invalidate that right? Complainants' original patent was granted June 20, 1876. Defendants' patent was issued April 6, 1880. Complainants' reissued patent bears date December 6, 1881. The legal propositions which affect this case were, as it seemed to me at the prior hearing, and as it seems to me after the present hearing, the following:

1. A reissued patent which enlarges an original patent, *i. e.*, which makes the invention patented other and more inclusive than the original letters patent, is void as against intervening rights and the public as well.

2. Where a patentee in his original claim and specifications describes his invention in part by specifying a material to be used, but declares that the sole utility or availability of that material in connection with his device is that it has two properties; and in his reissued patent in his claim and specifications, in the description of his invention, substitutes for his former specification of a material to be used as a part of his device, a description of materials which may be used by specifying only those which have the two properties in which he had formerly declared the utility or availability of the material which he then named consisted, there is no enlargement of the thing patented, and the reissued patent is, therefore, valid.

3. Where, as in this case, the original claim and specifications were for a textile fabric as an envelope for the shrimp, in connection with other things, and it was declared that the sole object of its use was to prevent contact (that is, to secure separation) without discoloration; and in the reissued patent, in the claim and specifications, it is declared that any enveloping material may be used which will separate and not discolor,—the change is only that of substituting the description of a thing by naming it, with the addition of its essential quality,—the description of the thing by naming its qualities.

4. The object of the law on the subject of patents is to advance the interests of the public by securing certain exclusive rights to patentees, and among these rights is that of changing, by a surrender and reissue, the language where the idea remains the same.

5. Let there be an account taken before the master of the sales of the defendants in violation of complainants' patent, and a report thereon, and let the injunction be made perpetual during the continuance of complainants' patent.

REAY, Ex'r, etc., v. RAU.

(Circuit Court, S. D. New York. March 14, 1883.)

PATENTS FOR INVENTIONS—INFRINGEMENT—EVIDENCE OF.

Where defendant was called by plaintiff in rebuttal of his own testimony, and it was insisted that defendant, by one answer in regard to a date, established an infringement which had not been the subject of previous testimony, and that this answer was to overthrow his uniform denial of the infringement, and of the infringing device having been made during the life of the patent, without the knowledge and permission of the patentee, *held*, that such testimony is not sufficient to make out a case of infringement.

Arthur v. Briesen, for plaintiff.

Edward Fitch, for defendant.

SHIPMAN, J. This is a bill in equity praying for an injunction and an account, and is founded upon the alleged infringement by the defendant of reissued letters patent No. 2,529, dated March 26, 1867, and of original letters patent No. 41,395, dated January 26, 1864; each of said patents being for improvements in envelope machines, and each having been issued to George H. Reay, the plaintiff's testator, as inventor The original of the reissued letters patent was issued August 25, 1863. The bill was filed October 11, 1880, after the expiration of No. 2,529, and shortly prior to the expiration of No. 41,395. The bill does not allege that the defendant has for sale, or was using or was intending to use or to sell, any infringing machines which were made during the term of the patent No. 2,529, in infringement of it. If such an allegation had been made, it would have been untrue. When the bill was filed, the defendant, who is a manufacturer of this class of iron work, had no patented machines on hand. When the patent expired he had one machine in stock, which he had made in accordance with the understanding, and the usual course of business between the patentee and himself, that he should keep machines in stock, so that orders might be promptly filled.

The facts of this case do not bring it within the decision of Judge WHEELER in *Diamond Rock Boring Co.* v. *Sheldon*, 1 FED. REP. 870, but are within his decision in *Diamond Rock Boring Co.* v. *Rutland Marble Co.* 2 FED. REP. 355. There are in this branch of the case no allegations upon which to base a prayer for an injunction against the defendant's use or sale of machines. There is, therefore, no occasion to inquire whether the first-named decision is inconsistent with the subsequent opinion of the supreme court in *Root* v. *Ry. Co.* 105 U. S. 189.

Infringement of patent No. 41,395 was not shown. In rebuttal of the defendant's testimony, the plaintiff called the defendant, and now insists that he, by one answer in regard to a date, established an infringement which had not been the subject of previous testimony, and that this answer is to overthrow his uniform denial of his having made the infringing device during the life of the patent without the knowledge and permission of the patentee. Such testimony is not sufficient to make out a case of infringement.

The bill should be dismissed.

McCloskey *v.* Hamill.

(*Circuit Court, S. D. New York.* February 19, 1883.)

Patent Law—Dismissal of Bill.

Where the subject of the patent in controversy in this case has been decided by the circuit court for this district not to be patentable, such decision is conclusive on this court, and the bill will be dismissed.

James C. Cloyd and *Wm. J. Underwood, Jr.*, for plaintiff.

Howard A. Sperry, for defendant.

Shipman, J. This is a bill in equity to restrain the alleged infringement of letters patent No. 220,767, which were issued to John McCloskey on October 21, 1879, for an improved plumbers' trap of soft metal. This patent has been twice the subject of examination by Judge Wheeler, in the circuit court for this district. *McCloskey* v. *Du Bois*, 8 Fed. Rep. 710, and 9 Fed. Rep. 38. The facts which the plaintiff proved upon the second hearing are the same which he relies upon in this case. Judge Wheeler's opinion was that the alleged invention, which is the subject of this patent, is not patentable. That must be taken to be the law of this circuit until either a state of facts is proved which shall present a different case, or until the conclusion of law upon the facts as now shown shall be overruled by the supreme court. My own examination of the case leads me to concur in the result which Judge Wheeler reached. The intention of the plaintiff in bringing this bill was probably to present the case in such a clear and accurate manner that the conclusion of Judge Wheeler might be properly examined by the supreme court.

The plea is sustained and the bill is dismissed.

HYATT *v.* SOUTHWORTH.

(Circuit Court, N. D. Ohio. February Term, 1883.)

PATENTS—REISSUE INVALID—CLAIM TOO BROAD—LACHES.

In Equity.

Arnold Green, for complainant.

M. D. & L. L. Leggett, for defendant.

DECREE.

This cause came on to be heard on this fourteenth day of February, 1883, upon the bill of complaint, the plea of the defendant, certified copies of original patent No. 68,332, granted to Elizabeth Adelaide Lake, August 27, 1867, and of the reissue of the same, No. 9,883, granted September 27, 1881, to Elizabeth A. L. Hyatt, and argument of counsel; and thereupon it is ordered, adjudged, and decreed as follows, to-wit:

(1) That said reissued letters patent No. 9,883, upon which said bill of complaint is based, is invalid and of no effect, for these reasons: *First*, because said reissue contains matter not embraced in the original; *second*, because the claims in said reissue are broader than the claims of the original; *third*, because the patentee has been guilty of laches in permitting more than 14 years to lapse between the date of the original and that of the reissue.

(2) That said plea be sustained, and said bill of complaint be dismissed.

(3) That the costs in this suit be assessed against the said complainant, and that an execution issue therefor as in a case at law.

THE ACORN.

(District Court, W. D. Pennsylvania. May Term, 1883.)

SEAMEN'S WAGES—SHIPPING WITHOUT ARTICLES—VERBAL AGREEMENT.

If the master of a vessel dispenses with shipping articles and disputes arise as to the rate of wages to be paid the mariners, the court will incline to allow their claim to the rate paid by other like vessels leaving the same port at the same time on the like voyage. If the seamen can be held to a less rate, by reason of a verbal contract, such contract must be clearly established.

In Admiralty.

Geo. C. Wilson, for libelants.

D. T. Watson, for respondent.

ACHESON, J. The evidence shows, and, indeed, the answer admits, that when Duffy and Poe, two of the libelants, were shipped on the Acorn, no express agreement was entered into, and nothing was said as to the rate of compensation for their services. But, according to the clear weight of the evidence, on the first evening after the voyage commenced, Cavanaugh, the first mate, who had hired the hands, stated in the presence of all the libelants, in answer to an inquiry of another of the crew, that the boat would pay the deck hands the same wages as other boats going out on that rise did. It is established beyond dispute that other boats like the Acorn, on that rise, paid their deck hands the rate of wages claimed by the libelants, viz., at the rate of $45 per month. This seems to have been the prevailing rate, and clearly Duffy and Poe are entitled to be paid at that rate.

It is, however, alleged, and Cavanaugh testifies, that Conway was expressly hired at the rate of $40 a month. This the latter denies, and testifies that when he shipped nothing was said as to the rate of compensation. It is certain that no express bargain was made with any other of the deck hands on that trip; and Cavanaugh is successfully contradicted as to what transpired, in respect to the rate of wages, between him and Roger Williams, in the presence of the other deck hands, the first evening the boat was out. Upon the whole I think the weight of evidence is on the side of Conway. Moreover, if the master of a vessels dispenses with shipping articles, and disputes arise as to the rate of wages to to be paid the mariners, the court will incline to allow their claim to payment at the rate paid by other like vessels leaving the same port at the same time on the like voyage. If the seamen can be held to a less rate by reason of a verbal contract, such contract must be clearly established.

Let a decree be drawn in favor of the libelants for the amount of their respective claims, with interest and costs.

SPEIDELL *v.* HENRICI and others, Trustees, etc.

(*Circuit Court, W. D. Pennsylvania.* February 28, 1883.)

1. EQUITY—LIMITATION OF SUITS.
   Courts of equity refuse to interfere where the suitor has allowed a considerable lapse of time before bringing his action, from considerations of public policy and from the difficulty of doing justice, when the original transactions have become obscured by time and evidence is lost.
2. SAME—DILIGENCE AN ESSENTIAL CONDITION TO EQUITABLE RELIEF—LACHES.
   A suitor in equity is required to be "prompt, eager, and ready" in the pursuit of his rights. Diligence is an essential condition of equitable relief, and laches and negligence are always discountenanced.
3. SAME—TRUSTS—OPERATION OF LAW OF LACHES.
   Where a valid express trust has been created, and is recognized or treated by both parties to it as subsisting, mere delay upon the part of the *cestui que trust* may not defeat his remedy for the enforcement of his rights under the trust; but when a trustee denies the right of the *cestui que trust*, and his relation to the latter in respect to the trust property becomes adverse, from that time the right of the *cestui que trust* to relief is subject to the operation of the law of laches.

In Equity.

John Barton, H. Markworth, and *Wm. Reinecke,* for complainant.

George Shiras, Jr., and *C. S. Fetterman,* for defendants.

Before MCKENNAN and ACHESON, JJ.

MCKENNAN, J. This bill is filed by Elias Speidell, a citizen of the state of Ohio, against Jacob Henrici and Jonathan Lenz, as trustees of the Harmony Society, located in Beaver county, Pennsylvania. It alleges—

That the complainant's father and mother resided in the kingdom of Wurtemberg, Germany, up to about the year 1804, were engaged in farming, were without any education, but were devout Christians and members of the established Protestant church of the country, and earnest seekers after spiritual light and their own salvation. That, at the same time, one George Rapp lived in the same neighborhood and was a man of education superior to that of the simple farming people, "of great intellectual power, clear-sighted, sharp-witted, eager for superiority, and a born leader of men." That about the year 1800 the said Rapp began to preach clandestinely to many of his fellow-countrymen, including the complainant's parents, that the Lord had chosen him as their spiritual leader; that the second advent of Christ and the beginning of the millenium, as taught by the revelation of St. John, were near at hand, and that in order to be saved from eternal damnation it was necessary for them to separate from the established church of their country and to form a settlement of themselves under his guidance and control. That by means of his preaching and personal influence over his disciples he caused about 300

families of them to separate from the established church and to believe in and accept him as their only spiritual leader and a necessary medium of their salvation. That he impressed them with the belief that it was necessary for their salvation that they should convert all their possessions into cash, leave their country, and, as the chosen of the Lord, form a colony by themselves in the Holy Land or in the United States of America, in which places Christ would first reappear on earth. That accordingly about 125 families sold all their land and possessions for cash, emigrated to the United States and settled in Butler county, Pennsylvania, upon a wild, uncultivated tract of land selected by him at Harmony, where the complainant was born in the year 1807; and there they founded a colony or voluntary association, called and known as the "Harmony Society," and became wholly subject to the absolute power and control of said Rapp in both temporal and spiritual affairs. That before their arrival at Harmony the heads of families had severally paid their own expenses and kept separate their own means, but that said Rapp fraudulently pretended to his followers that they could not escape eternal damnation unless they would renounce their mode of living in separate and exclusive homes for each family, and yield up all their possessions, as had been done by the early Christians, and intrust them to him as their apostle, "to be placed in a common fund of said Harmony Society in the keeping of said Rapp as their trustee," and would live henceforth as a community, doing such work for it as he should direct, "the avails thereof to form part of said common fund," investing him and his successors with the leadership of said community, the management of all said trust funds, and the disposition of themselves and of their wives and children, they to receive in return only the necessaries of life. That accordingly the parents of the complainant, "in the year 1805, yielded up all their possessions to the said common fund of said Harmony Society," contributing thereto about $1,000, and thenceforth lived in a common household with the rest of said Rapp's followers, submitting themselves to his control "to do such work for said community as he directed, and allowed the avails thereof to form part of said common fund," receiving only the necessaries of life in return; "for none of which they or any of them ever received or were promised any other consideration than the pretense that by complying with the teachings of said Rapp they would not be damned," and that they would be led by him to eternal salvation. That said Rapp received and accepted said trust fund and its accretions, "not as his own, in trust for the members of said families and the contributors to said fund, and for their common benefit," and always acknowledged said trust and disclaimed any greater interest therein than that of any other contributor thereto, or any other right to the management and control thereof than by virtue of his apostolic leadership of said community. That about the year 1807 he fraudulently and corruptly pretended to his followers "that there had been no difference of the sexes, nor any seed of death in man, until both were brought about by original sin;" "that all intercourse of the sexes, even in wedlock, was polluting, and that they could not and would not be saved from eternal damnation except by adjuration of matrimony and of all sexual indulgence by those of his followers who were single, and by a cessation of all conjugal intercourse by those already married." That accordingly thence-

forth all the married and single members of said community abjured all sexual indulgence and lived as if single. That the complainant was reared in and as part of said community, and was, from his earliest infancy, taught to believe, and accepted as true, the doctrines aforesaid propounded by said Rapp, and consistently practiced the same. That from the time he reached the age of 12 years until he was 24, a period of 12 years, he contributed his labor to said trust fund and received nothing in return save the necessaries of life. That the said contributions of the complainant to the common fund, deducting his subsistence, are largely in excess of the sum of $500, and that by interest and profits they now largely exceed the sum or value of $30,000. That about the year 1815 the said community removed to Posey county, Indiana, where, about the year 1816, the complainant's parents died, and that about 1825 it removed to Beaver county, Pennsylvania, the complainant still being a member of it, and that it remains there now. That said Rapp ruled over said community from 1805 until his death in 1847, exercising absolute dominion over all its affairs. That, in order to keep the members of the community in "an ignorant and degraded condition," he interdicted the acquirement of any knowledge of the English language by them, or access to books in that language, or association with any but inmates of the community. That in the year 1818 the said Rapp destroyed the records of the original contributions to said trust fund in 1805, to prevent any knowledge coming to the younger members of the community, and that he studiously concealed from the contributors "all money transactions made by him, and habitually destroyed the records thereof." "That the whole of said system of said Rapp was repugnant to public policy and the laws of the land, and more especially in this: that no inmate of said community was permitted by said Rapp to marry therein, and that whoever was about to enter into the married state was compelled by said Rapp to leave said community; and that the complainant, in the year 1831, being about to enter into the married state, had to leave and did leave said community, though said Rapp did permit, as an exception, a few of his favorites to marry in said community, and to remain therein; and until the complainant so left said community he was kept under such duress and restraint by the iron rule of said Rapp that he did not know and had no means of ascertaining the iniquity and degradation thereof, and the impious and blasphemous character of the teachings of said Rapp." That said trust fund now exceeds in value $8,000,000, and the net profits thereof have for many years exceeded the sum of $200,000. That, at the death of said Rapp, Romelius L. Baker and Jacob Henrici succeeded him as trustees of said trust. That on the death of said Baker, in 1868, he was succeeded by Jonathan Lenz; and that said Jacob Henrici and Jonathan Lenz are now the trustees and managers of all the estate of said Harmony Society, and now acknowledge said trust, and disclaim any greater interest therein than any other contributor to said trust fund.

And the bill prays—

That the trust be rescinded as resting upon fraud and iniquity, and as being contrary to public policy and the laws of the land; that the persons interested in its assets be remitted to their original rights; that discovery be made of

the names and places of abode of the other persons interested in the assets; that an account be taken of the trust funds, and the complainant's share therein; that he have compensation for his contributions to the trust fund; and that a distribution of said trust funds be had.

To this bill the respondents have demurred for the following causes:

(1) That the cause of complaint is barred by the statute of limitation; (2) that the causes of complaint are stale, and ought not, therefore, to be taken cognizance of; (3) generally that no case is stated for relief.

It is to be noted that the foundation of the complainants' claim to relief is his alleged membership of the Harmony Society, and the performance of work and labor in its behalf for a period of 12 years prior to 1831, amounting in value to a sum exceeding $500. In that year he severed his connection with the society, thus emancipating himself from the bondage in which he had been held, and was entirely free and competent to assert his legal rights. If he wished to obtain compensation for his labor, an action at law was *then* available to him to recover it. If he desired to assert a claim upon the property of the Harmony Society, as one of its beneficiaries, a court of equity was *then* open to him for the administration of appropriate relief. But he rested in entire inaction for more than 50 years, not even having made a demand upon the society, in any form, until the seventh of May, 1882.

And it is also to be noted that, for 17 years after the scales fell from his eyes and he was convinced that marriage was not a mortal sin, during the life of Mr. Rapp, against whose character and memory the most vigorous epithets of reproach are directed with unsparing reiteration, he made no movement whatever to obtain an account of the trust and of his own interest in it. And yet Mr. Rapp, as the founder of the society and of the trust, and the sole manager of all its business, was peculiarly capable—if he was not the only person who could do so—of furnishing all required information touching all its affairs, and especially of the nature, condition, and administration of the trust. Besides, the complainant does not seek compensation for his labor alone—for that he might have been remitted to his legal remedy; but the fundamental prayer of his bill is that the trust be abrogated as founded in imposture and hence unlawful in its beginning; and yet for 50 years he was quiescent.

Ought the bill, then, to be entertained?

A suitor in equity is required to be "prompt, eager, and ready" in the pursuit of his rights. Diligence is an essential condition of equitable relief, and unexplained negligence is never encouraged.

"Nothing can call forth a court of equity into activity but conscience, good faith, and reasonable diligence. When these are wanting, the court is passive and does nothing. Laches and negligence are always discountenanced, and, therefore, from the beginning of this jurisdiction, there was always a limitation of suits in this court." *Smith* v. *Clay*, Amb. 645, quoted with approval in *Brown* v. *County of B. Vista*, 95 U. S. 160.

So, also, says Mr. Justice SWAYNE in the case last referred to:

"The law of laches, like the principle of the limitation of actions, was dictated by experience, and is founded in a salutary policy. The lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and other means of proof. The rule which gives it the effect prescribed, is necessary to the peace, repose, and welfare of society. A departure from it would open an inlet to the evils intended to be excluded."

And again:

"Courts of equity refuse to interfere after a considerable lapse of time, from considerations of public policy, from the difficulty of doing entire justice, when the original transactions have become obscure by time, and the evidence may be lost, and from the consciousness that the repose of titles and the security of property are mainly promoted by a full enforcement of the maxim, *vigilantibus et non dormientibus jura subserviunt*." 1 Story, Eq. Jur. § 529.

Unless, then, these principles of law are inapplicable to the present case, the complainant has lost any title to relief which he may have had. It is urged that this is an express, continuing, and subsisting trust, and that, therefore, no lapse of time will impair the complainant's right to relief. Such a trust is set up in the bill, and the demurrer admits it to be of that character; and we must, therefore, so treat it.

But it is alleged to have been an imposture, and unlawful in its inception, and the main relief sought is that it be "rescinded and held for naught" on that ground. Was, then, there no duty of diligence on the part of the complainant under these circumstances? This is forcibly answered by Judge WOODWARD in *Price's Appeal*, 4 P. F. Smith, 482:

"And if he had gone for rescinding it, and had convinced the court that it was a catching bargain that ought not to be enforced against him, still he would have encountered that principle of equity that refuses relief to stale demands, and which requires conscience, good faith, and reasonable diligence in parties complainant. In *Roberts* v. *Tunstall*, 4 Hare, 262, the vice-chancellor assumed that the deed in question there might have been impeached on both grounds assumed against it, if the transaction had been of recent occurrence, but on the authority of several cases refused to interpose after 18 years delay to sue, and declared that the principle of the decisions is, that after so

great delay the injured party must be held to have waived his right to relief,—a principle which presupposes a right to set aside the transaction independently of that fact."

Doubtless, where a valid express trust has been created, and is recognized or treated by both parties to it as subsisting, mere delay on the part of the *cestui que trust* may not defeat his remedy for the enforcement of his rights under the trust. But there is abundant authority for the statement that when a trustee denies the right of the *cestui que trust*, and his relation to the latter, in respect of the trust property, becomes adverse from that time, the right of the *cestui que trust* to relief is subject to the operation of the law of laches. 7 Johns. Ch. 90.

The trust alleged here was instituted for the equal and exclusive benefit of the members of the Harmony Society. It was part of the religious as well as secular polity of the society. Fellowship in the society was the only recognized title to participation in its benefits. When that fellowship ceased, from whatever cause, all further interest in the trust and all the privileges of membership were necessarily lost and were denied. From that time forth the relations of the withdrawing member and the society, as to all the incidents of membership, were adverse. This was the attitude of the complainant and of the society towards each other. He adjured a tenet of its religious creed, and proposed to violate one of its fundamental rules. He was, therefore, compelled to leave it, and thenceforth ceased to exercise any of the privileges or to enjoy any of the benefits of membership, but was, as to all these, placed in adverse relations with it. And yet, for more than 50 years, he acquiesced in this hostile denial of his right, never questioning the validity of the trust, or making any claim to a participation in it. Negligence such as this, so long-continued and so expressive, must be considered as a waiver of his right to relief.

We do not discuss or consider the first and third causes of demurrer, because we regard the second as decisive of the case. The demurrer, therefore, is sustained upon the second cause assigned, and the bill must be dismissed with costs; and it is so ordered.

EXPRESS TRUSTS. It is generally true that statutes of limitation do not apply to express and continuing trusts. These are not cognizable at law but only in equity, and there the trustee cannot, during the continuance of the

fiduciary relation, set up the statute of limitations against his *cestui que trust*.(*a*) Nor are direct and continuing trusts barred in equity by any rule as to laches, or lapse of time analogous to statutory rules of limitation at law. Lapse of time is no bar to enforcing a trust admitted or proved to be continuing and in existence.(*b*) But the general rule just stated is subject to exceptions in three classes of cases, wherein the statute of limitations or lapse of time will bar even an express trust (1) where there is a concurrent remedy at law in which there is a fixed limitation; (2) where there is an open denial of the trust, with notice, which requires action by the *cestui que trust*, and afterwards a lapse of time which would amount to a bar in law; (3) where there are circumstances shown which, with lapse of time, raise a presumption that the trust has been extinguished.(*c*)

If the trustee denies the right of the *cestui que trust*, and claims adversely to him, this amounts to an abandonment of the fiduciary character. It is a renunciation of the trust. So where there is a settlement and a receipt given by the *cestui que trust* to the trustee. The trust ceases as to all matters prior to the settlement. And from the date of renouncing the trust, or of settling and balancing its accounts, time begins to run against the *cestui que trust*, during which his silence and acquiescence may operate to bar his rights if he finally undertakes to assert them, either at law or in equity.(*d*)

Great delay in seeking to enforce a trust will always have great weight against the trust, especially where the nature and character of the trust has become obscure, or the acts of the parties or other circumstances give rise to presumptions against it.(*e*) But the question, does a trust exist? must always depend upon the nature of the trust, the relative situation of the parties to the subject-matter of the trust, their relations to each other, and upon all concomitant circumstances, of which lapse of time is but one.(*f*) Among the cases wherein lapse of time has largely determined the court to hold that no trust has been established, or that the trust established was different from that claimed or was barred by lapse of time, are the following: Where, in the absence of bad faith, rent was received by trustees instead of interest at the ordinary rate (which interest would have amounted to more than the rent) for a period of 30 years, ending more than 20 years before suit was brought, it was decided that the rent must be deemed a substitution and satisfaction for such interest during the same period.(*g*) In *Mumford* v. *Murray*(*h*) the representatives of one *cestui que trust*, under a conveyance in trust to pay debts, filed a bill for an account against the trustee. He objected that certain creditors, *cestuis que trust* under such deed, should have been made parties to the bill. But it appeared that no claim had been made by such creditors for 20 years, during which time the trust fund had been almost constantly in controversy, and the trustee defendant had repeatedly stated to the

(*a*) Lawson v. Blodgett, 20 Ark. 195; Young v. Mackall, 3 Md. Ch. 398; Fishwick v. Sewell, 4 Har. & J. 393; Shibla v. Ely; 6 N. J. Eq. 181.

(*b*) McDonald v. Sims, 3 Ga. 333; Dow v. Jewell, 18 N. H. 340.

(*c*) Paschall v. Hinderer, 28 Ohio St. 568.

(*d*) Murdock v. Hughes, 15 Miss. 219; Williams v. First Presby. Soc. 1 Ohio St. 478; Dean v. Dean, 9 N. J. Eq. 425; Wellborn v. Rogers, 24 Ga. 558.

(*e*) Taylor v. Blair, 14 Mo. 437; Mitchell v. O'Neil, 4 Nev. 504; Robertson v. Maclin, 3 Hayw. 70.

(*f*) Dean v. Dean, 9 N. J. Eq. 425; Atty. Gen. v. Old South Soc. 13 Allen, 474.

(*g*) Atty. Gen. v. Old South Soc. 13 Allen, 474.

(*h*) 6 Johns. Ch. 1.

plaintiff that such creditors had been satisfied. It was decided that the defendant was precluded from making the objection.

An assignment by an administrator to his individual creditor of choses in action belonging to his intestate, without any actual fraud, may raise a constructive trust on the part of the creditor; but a court of equity will not declare it to exist after a lapse of 20 years from the time when the transaction became known.(*i*) Where 70 years had elapsed since a sale of stock alleged to have been in trust for a person dead at the time of filing the bill, who was not ignorant of nor deceived as to the facts, and who never claimed under the alleged trust, it was held that equity would not interfere to establish the trust.(*j*) So, where a party abandons or refuses to acknowlege a trust and holds land adversely, the statute of limitations will run against claimants to such land in equity as well as at law.(*k*) Where three several holders of notes secured by a trust mortgage severally bought parcels of the mortgaged land sold on execution under a paramount judgment, and a holder of other notes secured by the mortgage, who knew of the purchases, after waiting nine years, brought suit to charge such purchasers as trustees, his claim was held barred by laches.(*l*)

Instances of the enforcement of trusts, notwithstanding the lapse of long periods of time, are the following: While a son was absent and his whereabouts unknown, his mother became his guardian and received his estate. Upon her death her distributees took it with knowledge of the manner in which she held it, and agreed to hold it subject to the claim of the son or his representatives. The latter subsequently claimed the property and it was decided that the distributees took it subject to the trust in favor of the son, and, not holding it adversely, could not set up the statute of limitations, and that they were liable for profits.(*m*) In *Griffin* v. *Macaulay*(*n*) it is decided the *cestui que trust* (creditor) under a deed, whose interest thereunder was admitted, was not guilty of laches because he did not compel an account by suit from the trustees for more than 20 years after the deed was made, and then permitted the suit to abate, and did not file another bill until after the lapse of another 20 years.

Under an agreement between and A. and B. in 1837, B. took a transfer of a land certificate to hold one-half in trust for A. The patent was issued in 1847, and B. acknowledged the trust in 1848. The first act of hostility to A.'s claim was the sale of the land by B.'s administrator in 1852, and the suit to enforce the trust was begun in December, before the payment of the purchase money. It was decided that the claim was not stale.(*o*) Land of a debtor was sold under a deed of trust, in the absence of the trustee, and bought by a creditor for one-half its value, who took possession at once, making no improvements, and holding the property five years and a half, receiving a large rental. It was decided that this period of delay did not cut off the debtor's right to redeem.(*p*) Where some of the devisees of an undivided tract of land re-

(*i*) Morris v. Duke, 2 Pat. & H. 462.
(*j*) Halsey v. Tate, 52 Pa. St. 311.
(*k*) Baumer v. Straup, 21 Md. 328; Merriam v. Hassam, 14 Allen, 516; Marr v. Chester, 1 Swan, 416.
(*l*) Knox v. Randall, 21 Minn. 479.
(*m*) Moor v. Shepard, 2 Duv. (Ky.) 123.
(*n*) 7 Grat. 476.
(*o*) Hodges v. Johnson, 15 Tex. 57.
(*p*) Spurlock v. Sproule, 72 Mo. 503.

covered possession of the whole tract in an action to which the rest of the devisees were not made parties, it was held that the heirs of the latter devisees, who brought suit to recover the shares of their ancestor within a short time after they had knowledge of their interest in the land, were not barred, though about 18 years had elapsed since the first devisees had entered into possession.(*q*) Where a bill shows an undoubted equitable title in the complainants, and seeks a divestiture of the outstanding naked legal title in the heirs of the deceased trustee, a defendant who is alleged to be in possession, and committing waste, but whose possession is not shown to be hostile to the complainants, cannot set up the staleness of the complainants' demand, though it appears to be more than 30 years old.(*r*)

CONSTRUCTIVE TRUSTS. In cases involving constructive trusts a different rule prevails. Lapse of time, especially when coupled with occupancy and improvement of the property by the alleged trustee, has been held a bar to the enforcement of a resulting trust in many cases, even though the fraud was evident, and the right to relief originally clear.(*s*) The following periods of time have been held to bar actions to establish and enforce resulting trusts: 17 years;(*t*) 19 years;(*u*) 20 years a bar;(*v*) 21 years;(*w*) 25 years;(*x*)

(*q*) Hume v. Long, 53 Iowa, 299.

(*r*) Shorter v. Smith, 56 Ala. 208.

(*s*) Sunderland v. Sunderland, 19 Iowa, 325; Newland v. Early, 3 Tenn. Ch. 714; Trafford v. Wilkinson, 3 Tenn. Ch. 701; Douglas v. Lucas, 63 Pa. St. 11; Hall v. Doran, 13 Iowa, 368; Best v. Campbell, 62 Pa. St. 478; Brown v. Guthrie, 27 Tex. 610; Strempfler v. Roberts, 18 Pa. St. 283; Robertson v. Macklin, 3 Hayw. 70; Buckford v. Wade, 17 Ves. 97; Delane v. Delane, 7 Bro. P. C. 279; Clegg v. Edmonson, 8 De G., M. & G. 787; Groves v. Groves, 3 T. & J. 172; Peebles v. Reading, 8 Serg. & R. 484; Graham v. Donaldson, 5 Watts, 471; Haines v. O'Connor, 10 Watts, 315; Miller v. Blose, 30 Grat. 744; Jennings v. Shacklett, 30 Grat. 765; King v. Purdee, 96 U. S. 90; Midner v. Midner, 26 N. J. Eq. 299; Smith v. Patton, 12 W. Va. 541; Harden v. Parsons, 1 Ed. 145; Villines v. Norfleet, 2 Dev. Eq. 167; Portlock v. Gardner, 1 Hare, 594; Beckford v. Wade, 17 Ves. 97; Chalmer v. Bradley, 1 J. & W. 59; Cholmondely v. Clinton, 1 J. & W. 151; Smith v. Clay, 3 Bro. Ch. 639; Hawley v. Cramer, 4 Cow. 117; Dobson v. Racey, 3 Sandf. Ch. 61; Powell v. Murray, 3 Edw. Ch. 644; Anderson v. Burchell, 6 Grat. 405; Colman v. Lyne, 4 Rand. 454; Irvine v. Robt, 3 Rand. 549; Gould v. Gould, 3 Story, 516; Hough v. Richardson, 3 Story, 659; Veasie v. Williams, 8 How. 134; Hallett v. Collins, 10 How. 174; Wagner v. Baird, 7 How. 234; McKnight v. Taylor, 1 How. 161; Piatt v. Vattier, 9 Pet. 405; Andrew y. Wrigley, 4 Bro. Ch. 124; Blennerhassett v. Day, 2 B. & B. 118; Gregory v. Gregory, Cowp. 201; Jac. 631; Selsey v. Rhodes, 1 Bligh, N. S. 1; Champion v. Rigby, 1 R. & M. 539; Ex parte Granger, 2 Deac. & Ch. 459; Collard v. Hare, 2 R. & M. 675; Norris v. Neve, 3 Atk. 38; Pryce v. Byrn, 5 Ves. 681; Morse v. Royal, 12 Ves. 355; Medlicott v. O'Donnell, 1 B. & B. 156; Hatfield v. Montgomery, 2 Port. 58; Bond v. Brown, 1 Harp. Eq. 270; Edwards v. Roberts, 7 Sm. & M. 544; Peacock v. Black, Halst. Eq. 535; Steele v. Kinkle, 3 Ala. 352; Smith v. Clay, Amb. 645; Bond v. Hopkins, 1 Sch. & Lef. 413; Hovenden v. Annesley, 2 Sch. & Lef. 630; Stackhouse v. Barnston, 10 Ves. 466; Ex parte Dewdney, 15 Ves. 496; Kane v. Bloodgood, 7 Johns. Ch. 93; Dexter v. Arnold, 3 Sumn. 152; De Couche v. Savetier, 3 Johns. Ch. 190; Murray v. Coster, 20 Johns. 576; Provost v. Gratz, 6 Wheat. 481; Hughes v. Edwards, 9 Wheat. 489; Elmendorf v. Taylor, 10 Wheat. 168; Miller v. McIntire, 6 Pet. 61; Sherwood Sutton, 5 Mason, 143; Williams v. First Presby Soc. 478.

(*t*) Baker v. Read, 18 Beav. 398; Emerick v. Emerick, 3 Grant, 295; Hite v. Hite, 1 B. Mon. 177.

(*u*) Bruce v. Child, 4 Hawks, 372.

(*v*) Norris' Appeal, 71 Pa. St. 124; Walker v. Walker, 16 Serg. & R. 379; United States Bank v. Biddle, 2 Pars. Eq. 31; Perry v. Craig, 3 Miss. 525; Field v. Wilson, 6 B. Mon. 479; Thompson v. Blair, 3 Murphy, 593; Ward v. Van Bakkelen, 1 Paige, 100; Farr v. Farr, 1 Hill, Eq. 391; Bruce v. Child, 4 Hawks, 372; Ferris v. Henderson, 12 Pa. St. 54; McDowell v. Goldsmith, 2 Md. Ch. 370; Smith v. Clay, 3 Bro. Ch. 639n; Hovenden v. Annesley, 2 Sch. & L. 636; Stackhouse v. Barnston, 10 Ves. 466; Pryce v. Byrn, 5 Ves. 681; Bright v. Legerton, 29 Beav. 60; 2 De G., F. & J. 606; Hodgson v. Bibby, 32 Beav. 221; Browne v. Cross, 14 Beav. 105; Re McKenna, 13 Ir. Eq. 239; Clanricarde v. Henning, 30 Beav. 175; Scott v. Haddock, 11 Ga. 258; Obel v. Bishop, 1 De G., F. & J. 137.

(*w*) Selsey v. Rhoades, 1 Bligh, N. S. 1.

(*x*) Blennerhassett v. Day, 2 B. & B. 118.

27 years;(*y*) 30 years;(*z*) 38 years;(*a*) 40 years, and the death of all the parties;(*b*) 46 years;(*c*) 50 years.(*d*) On the other hand, the following lapses of time has been held not to be a bar: 11 years;(*e*) 12 years;(*f*) 18 years.(*g*)

The true view is that the lapse of time is only one circumstance of the many from which the conclusion of laches must be drawn. Each case is to be determined by its own facts.(*h*)

EXCUSES. The lapse of time or laches which will bar the enforcement of a trust may be excused; as, for example, by lack of knowledge on the part of the *cestui que trust*, his absence from the country, his disability, such as infancy, insanity, or coverture. The delay may even have been caused by the defendant himself, in which case it is, of course, no bar to the action.(*i*) Mere lapse of time will not bar infant heirs from relief on a constructive trust originating in fraud. In this case the three children of the intestate were all under 12 years of age at the time of the administrator's fraudulent sale of the land of the deceased, through a by-bidder, to himself in 1844. The administrator remained in possession until his death, in 1859. Against his devisee the three heirs, in 1861, brought a bill for a reconveyance, and an account of the rent and profits. There was no showing of the date of their discovery of the fraud or of acquiescence in the wrong, but a presumption arose from their age, sex, and distant locality that there was no such laches as would bar relief.(*j*) And even children must act with reasonable promptness. If a child, seeking to enforce against a parent a trust resulting from a conveyance from the child to the parent, obtained by the parent's exercise of improper influences, waits until the parent has died, or until third parties have acquired rights, the remedy will be barred by lapse of time and laches.(*k*) But want of evidence is not an excuse for delay after notice ; (*l*) nor is poverty and inability to prosecute any excuse.(*m*)

Receipt of a part of the property due from the trustee is not a waiver of the rights of the *cestui que trust* to the whole of the trust property.(*n*) Nor is mere neglect to sue for a few years a bar.(*o*) And a *cestui que trust* must

(*y*) Hayes v. Goode, 7 Leigh, 486.

(*z*) Harrod v. Fountleroy, 3 J. J. Marsh, 548; Bond v. Brown, Harp. Eq. 270; Page v. Booth, 1 Rob. Va. 161; Phillips v. Beldon, 2 Edw. Ch. 1.

(*a*) Powell v. Murray, 10 Paige, 256.

(*b*) Prevost v. Gratz, 6 Wheat. 481.

(*c*) Maxwell v. Kennedy, 8 How. 210.

(*d*) Anderson v. Barwell, 6 Grat. 405.

(*e*) Mulhallen v. Murum, 3 Dr. & W. 317.

(*f*) Newman v. Early, 3 Tenn. Ch. 714; Butler v. Haskell, 4 Des. 651.

(*g*) Grisby v. Mousley, 4 De G. & J. 78; Bell v. Webb, 2 Gill, 263.

(*h*) Michoud v. Girod, 4 How. 561; Wafford v. Wilkinson, 3 Tenn. Ch. 701; Boone v. Chiles, 10 Pet. 177; Pyce v. Byrn, 5 Ves. 681; Carpenter v. Canal Co. 35 Ohio St. 307; Provost v. Gratz, 6 Wheat. 481.

(*i*) Sears v. Shafer, 6 N. Y. 268; Richardson v. Jones, 3 G. & J. 163; Doggett v. Emerson, 3 Story, 700; Callendar v. Collgrove, 17 Conn. 1; Phalen v. Clarke, 19 Conn. 421; Henry Co. v. Winnebago, 52 Ill. 299; Hallett v. Collins, 10 How. 174; Rider v. Bickerton, 3 Swans. 81n; Michoud v. Girod, 4 How. 561; Ferris v. Henderson, 12 Pa. St. 49; Pickett v. Loggan, 14 Ves. 215; Purcell v. McNamara, Id. 91; Aylewood v. Kearney, 2 B. & B. 263; Murray v. Palmer, 2 Sch. & Lef. 487; Warner v. Daniels, 1 W. & M. 111; Bowen v. Evans, 2 H. L. Cas. 257; Trevelyan v. Charter, 11 Cl. & Fin. 714; Napton v. Leaton, 71 Mo. 358. See Henry v. Conn, 12 Ohio, 193; Geaton v. Geaton, 4 Bradw. 579.

(*j*) Miles v. Wheeler, 43 Ill. 123.

(*k*) Taylor v. Taylor, 8 How. 201; Brown v. Carter, 5 Ves. 877; Crispell v. Dubois, 4 Barb. 393; Wright v. Vanderplank, 2 K. & J. 1; 8 De G., M. & G. 133.

(*l*) Parkam v. McCravy, 6 Rich. Eq. 114.

(*m*) Perry v. Craig, 3 Mo. 516; Locker v. Armstrong, 2 Dev. & B. 174; Maxwell v. Kennedy, 8 How. 210; Roberts v. Tunstall, 4 Hare, 357.

(*n*) Thompson v. Finch, 22 Beav. 316; 8 De G., M. & G. 560.

(*o*) Hanchett v. Briscoe, 22 Beav. 495.

have actual knowledge of the breach of trust before acquiescence can be inferred, and it is not the duty of the *cestui que trust* to make inquiry.(p) Nor can a *cestui que trust* sue until his interest falls into possession.(q)

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(p) Thompson v. Finch, 22 Beav. 325; 8 De G., M. & G. 560; Life Ass'n of Scotland v. Siddall, 3 De G., F. & J. 73; Provost v. Gratz, 6 Wheat. 481; Mellish's Estate, 1 Pars. Eq. 486; Beeson v. Beeson, 9 Barr. 300.

(q) Knight v. Bower, 2 De G. & J. 421, 443; Life Ass'n of Scotland v. Siddall, 3 De G., F. & J. 72.

TYSEN and others *v.* WABASH RY. Co. and others.*

(*Circuit Court, D. Indiana.* February 16, 1883.)

1. RAILROAD CONSOLIDATION—INDIANA STATUTE OF—POWER AND LIABILITY OF CONSOLIDATED COMPANY UNDER.
   The result of consolidation under the statute is that the statute becomes part of the contract of consolidation; the consolidated company assumes the liabilities and succeeds to the rights of the constituent companies. The consolidated company is substituted for them. Unsecured debts of the latter remain unsecured debts of the former. The consolidated company may execute a mortgage upon all of the consolidated property, which would be paramount to the unsecured debts of the constituent companies.
2. VENDOR'S LIEN—DEBT OF THIRD PERSON—WHEN A LIEN.
   When the consideration for the conveyance of property is the payment by the vendee of the debt of a third person, a lien exists upon the property conveyed for the benefit of such third person.
3. SECURITY—LIEN—EQUITY EFFECTUATES INTENT, REGARDLESS OF FORM.
   Whenever it fairly appears from an instrument, notwithstanding its form, that it is intended to afford a security, an equitable lien exists in favor of the person in whose behalf the provision is made.

In 1862 the Toledo & Wabash Railway Company, of Ohio and Indiana, made an issue of bonds to the amount of $600,000, with interest payable semi-annually at 7 per cent., and principal payable May 1, 1883. Each bond bore upon its face the name, "equipment bond," although they were not especially secured upon any equipment of the company. At the time of their issue the company was liable for bonds to the amount of $5,900,000, secured by mortgages. In 1865 the Toledo & Wabash Railway Company became consolidated with other companies in Illinois, and the Toledo, Wabash & Western Railway Company was formed. In the articles of consolidation one of the "bases and conditions" thereof was stated to be, as to all bonds, that they "shall, as to the principal and interest thereon, as

*Reported by Charles H. McCarer, Asst. U. S. Atty.

the same shall respectively fall due, be protected" by the new company. The equipment bonds were included in the indebtedness of the Toledo & Wabash Company, which the new company was to "protect" and pay.

On the first day of February, 1867, the Toledo, Wabash & Western Company executed its bonds, amounting to $15,000,000, and a trust deed upon all its property to secure them. This was done to fund the company's indebtedness, which, including the equipment bonds, amounted to $13,300,000, and to raise $1,700,000 to purchase additional equipment. In this mortgage it was recited "that of the amount of said bonds so made and issued there should be retained $13,300,000, to retire, in such manner and upon such terms as the directors of such company may from time to time prescribe, a like amount of the bonds of the various companies herein above enumerated and described, and representing the aforesaid funded debt." The equipment bonds appeared in the list of bonds described in the mortgage, which were to be taken up by the new issue. After a small part of the old bonds had been exchanged for new ones, this funding scheme seems to have been abandoned.

In 1873 the Toledo, Wabash & Western Railway executed a mortgage for $5,000,000, and in 1875 proceedings were instituted to foreclose under it, and a sale took place June, 1876, of all the property in Ohio, Indiana, and Illinois, "without prejudice to any claim that may be made by the holders of the bonds called the equipment bonds."

Interest on the equipment bonds was regularly paid up to and including that due first November, 1874. But the purchasers at the sale of 1876, and their successor company, the Wabash Railway Company, having declined and refused to pay further interest, or in any way to recognize these bonds, this suit was begun in 1878 in the Fountain circuit court of Indiana. It was immediately removed by the railway company to the United States circuit court. The Wabash Railway Company having since been consolidated with the St. Louis, Kansas City & Northern Railway Company, the consolidated company, the Wabash, St. Louis & Pacific Railway Company, was joined as defendant in possession.

Charles W. Hassler, for plaintiff.

Wager Swayne and *Baker, Hord & Hendricks*, for respondent.

GRESHAM, J. No lien of any kind existed in favor of the holders of the equipment bonds prior to the consolidation in 1865. It cannot be disputed that before this consolidation, which was authorized

by law and untainted by fraud, the Toledo & Wabash Company might have executed a mortgage upon all its property, which would have been paramount to all its unsecured indebtedness, including the equipment bonds. The statute authorizing the consolidation of railroads and their possessions was in force when the equipment bonds were issued and sold, and it became a part of the contract between the Toledo & Wabash Company and the purchasers of those bonds. The purchasers must therefore be held to have contemplated, at the time they bought their bonds, that the Toledo & Wabash Company could, and possibly would, consolidate with other railroad companies. The result of a consolidation under the statute is that the consolidated company assumes the liabilities and succeeds to the rights of the constituent companies. That being so, it follows that the consolidated company may execute a mortgage upon all the consolidated property, which will be paramount to the unsecured indebtedness of the constituent companies. *McMahan* v. *Morrison*, 16 Ind. 172; *Indianapolis, C. & L. R. Co.* v. *Jones*, 29 Ind. 465; *Jeffersonville, M. & I. R. Co.* v. *Hendricks*, 41 Ind. 50; *Paine* v. *Lake Erie & L. R. Co.* 31 Ind. 283.

Was there anything in the terms of the consolidation of 1865 that gave to the holders of the equipment bonds a security or lien which they had not before? Did the consolidated company take the property and franchises of the Toledo & Wabash Company with an incumbrance which did not rest upon them before?

It was competent for the constituent companies to agree upon their own terms of consolidation provided they were not in violation of the statute authorizing consolidation. The property and rights of the Toledo & Wabash Company, at the time of the consolidation, were estimated to be worth $10,000,000. Part of the consideration for the transfer of this property to the consolidated company was the payment of the $600,000 of equipment bonds. The consolidation agreement contains the following:

"It is further agreed that the bonds and other debts herein above specified and not otherwise provided for in this agreement shall, as to the principal and interest thereon, as the same shall respectively fall due, be protected by the consolidated company according to the true meaning and effect of the instruments or bonds by which such indebtedness of the several consolidating companies may be evidenced."

The equipment bonds are embraced in the schedule of bonds and debts referred to in this clause. The agreement to pay these bonds as part of the purchase price of the property put into the consolida-

tion by the Toledo & Wabash Company was made for the benefit of the equipment bondholders, who thus acquired an equitable lien on such property. This lien is good against all persons, except subsequent purchasers without notice.

When the consideration for conveyance of property is the payment by the vendee of the debt of a third person, a lien exists upon the property conveyed for the benefit of such third person. *Nichols* v. *Glover*, 41 Ind. 24; Story, Eq. 1244; *Clyde* v. *Simpson*, 4 Ohio St. 445; *Vanmeters* v. *Vanmeters*, 3 Grat. 148; *Harris* v. *Fly*, 7 Paige, 421; *Hallett* v. *Hallett*, 2 Paige, 15.

It was no doubt the intention of the legislature in passing the statute authorizing the consolidation of railroad companies that the consolidated company should be substituted for the constituent companies and that the unsecured indebtedness of the latter should remain unsecured indebtedness of the former. While this is the result of a consolidation under the statute, as already stated, the consolidation may be on such terms as suit the contracting parties, provided these terms do not violate the statute. One of the stipulations of the consolidation agreement was payment by the consolidated company of the equipment bonds. The language of this part of the agreement, considered in connection with the terms and recitals of the consolidated mortgage, the consolidation agreement of 1868, the deed of further assurance and the prompt payment of interest on the equipment bonds, semi-annually as it became due for eight years after 1865, shows that something more was intended than the mere assumption of an unsecured indebtedness. The proceeds of the equipment bonds had been expended in the betterment of the property of the Toledo & Wabash Company; that company was to pass out of existence, and its entire property was to become part of the possessions of the consolidated company. For this reason, it may have been thought just to the owners of equipment bonds that they should have security in the nature of a lien on the property superior to any rights that might thereafter be acquired. We may assume that it was well understood by all the parties to the consolidation agreement of 1865 that the consolidated company, by the mere force of the statute which authorized its creation, was bound to pay all the debts of the constituent companies. No one understands that better than the counsel who drew up the consolidation agreement. If nothing more was contemplated by the clause quoted from this agreement than a promise to pay the equipment bonds as unsecured indebtedness, why was the word "protect" used? If the counsel of the defendants are correct in their interpretation of that

word, its use was wholly unnecessary. Whenever it fairly appears from an instrument, notwithstanding its form, that it is intended to afford a security, an equitable lien exists in favor of the person for whose behalf the provision is made. Jones, Mortg. 162.

The Wabash, St. Louis & Pacific Company now owns and operates the property which the Toledo, Wabash & Western Company acquired from the Toledo & Wabash Company, and denies its liability on the equipment bonds. There is nothing to prevent the holders of these bonds from asserting against the present owners of this property the equitable lien which they were entitled to under the consolidation agreement of 1865. All subsequent interests have been acquired with knowledge of this agreement.

These are briefly my reasons for holding that the equipment bonds are a charge upon the property now owned by the Wabash, St. Louis & Pacific Company, which originally belonged to the Toledo & Wabash Company.

A decree will be entered declaring such a charge, and for accrued interest.

The case would have been decided at an earlier day but for a statement made by the complainant's counsel that the matter in dispute might be amicably adjusted.

Motion for rehearing, argued before Justice HARLAN and Judge WOODS, was denied, and decree ordered to be entered in accordance with Judge GRESHAM'S decision.

RAINEY v. BALTIMORE & O. R. Co. and others.

(Circuit Court, W. D. Pennsylvania. March 26, 1883.)

RAILROAD — CONSTRUCTION — LOCATION — INJUNCTION — THREATENED INJURY TO LAND-OWNER.

Where, during the progress of the construction of a line of railway over a tract of land, a dispute arises between the land-owner and railroad company as to the true location of the railway under a written grant of way, and the question of fact is disputable and depends upon parol testimony, the court will not arrest the construction of the road by preliminary injunction, but will reserve the determination of the question for final hearing, no injury being threatened the land-owner which may not be compensated pecuniarily; but the court will require ample security to be given the land-owner for all damages recoverable by him in case of a final decision adverse to the company.

In Equity. *Sur* motion for a preliminary injunction.

John Dalzell and *Hon. J. S. Black*, for complainant.

George Shiras, Jr., D. T. Watson, and *Knox & Reed*, for defendants.

Before McKENNAN and ACHESON, JJ.

ACHESON, J. On the twenty-ninth day of September, 1880, the Baltimore & Ohio Railroad Company and the complainant entered into a written agreement, whereby the company covenanted "to construct and complete, or cause to be constructed and completed by a company authorized so to do, at the earliest practicable period, and not later than the thirtieth day of November, 1880, a branch railroad extending from and connecting with some point on the line of the Pittsburgh & Connellsville Railroad, north of Connellsville, to the mouth of Dickinson run, on the south bank of the Youghiogheny river, and to connect the same with the siding" of the complainant; "said branch road to be of the same gauge and character as the Pittsburgh & Connellsville Railroad." On the part of the complainant, the agreement contains the stipulation following, to-wit:

"Said Rainey agrees to give said first parties, [the Baltimore & Ohio Railroad Company,] or the corporation building said branch road, free of cost, a right of way for said branch road over the property of said Rainey, extending along the bank of the Youghiogheny river, on the north of his siding, at a proper distance therefrom; reserving, however, to said Rainey and his assigns the right of crossing said track."

The agreement embraces provisions touching other matters, none of which it is necessary to recite, save the concluding clause, which is in these words:

"It is further agreed by said first party that upon any failure or default made in regard to carrying out in good faith the covenants and guaranties herein stated, that then it will forthwith redeem and pay in cash said traffic bonds and interest, and forfeit any rights acquired by virtue of this contract, excepting that there shall be no forfeiture of said right of way for said branch road."

The Baltimore & Ohio Railroad Company commenced building this branch road in the summer or early fall of 1880, but it was not until July, 1881, that the rails were laid from the point of junction with the Pittsburgh & Connellsville Railroad to a point on the complainant's property opposite his coke ovens then erected. Connection was then made with the complainant's siding in front of his coke ovens, and the railroad extended westwardly over his property the distance of some 200 feet beyond the point of connection. The line of rail-

road so constructed over the complainant's property was along the bank of the Youghiogheny river, on the north of the complainant's siding as it then existed, and was at a proper distance therefrom. The railroad company then suspended the further construction of its road over the complainant's property, but the evidence tends to show that work on other portions of the line of road was thereafter prosecuted without interruption.

From the time the connection was made with the complainant's siding, as above mentioned, he has shipped his coke over the railroad so far as built to the Pittsburgh & Connellsville Railroad.

On October 5, 1882, the railroad company resumed work upon the complainant's property and commenced to extend its road over the same westwardly from the point it had reached in July, 1881; but a conflict in respect to the true line of location immediately arose between the parties and their respective employes. After July, 1881, the complainant had extended his siding westwardly, and he was engaged in its further extension in that direction when the railroad company recommenced work at that point. The complainant's land in many places rises very abruptly from the Youghiogheny river, and along the entire river front the ground suitable for railroad tracks lies within narrow limits. Hence the conflict betwen the parties, the complainant claiming the right to construct his extended siding and the railroad company its road upon substantially the same line. The real dispute between the parties is just here. Other questions have, indeed, arisen and are involved in the case, but this is the root of the controversy.

The complainant insists that the siding mentioned in the written agreement was not a siding then existing or visibly located upon his property, but a prospective siding thereafter to be constructed through his entire property, according to a survey and location already made, and of which he claims the Baltimore & Ohio Railroad Company then had knowledge. On the other hand, the defendants, denying such knowledge, maintain that as early as February, 1880, the entire line for said branch railroad had been surveyed, located, and finally and legally adopted, and that the same was visibly and plainly marked upon and through the complainant's land; that this location was known to him at and before the time the agreement of September 29, 1880, was executed; that before said date the complainant had located and defined his siding upon the ground, and the same was then actually graded, and was the siding referred to in the agree-

ment; that the parties contracted with reference to that siding, and the route for the railroad westwardly thereof, as then located and marked upon the ground, and that in the construction of the road the defendants have conformed and are conforming to that location.

In December last we heard and refused a motion for a preliminary injunction against the Baltimore & Ohio Railroad Company to restrain it from constructing the said branch road over the complainant's property on the line of location claimed by it. But, while refusing the motion, we required the company to give the complainant ample security for the payment of all damages recoverable by him in case the right claimed by the said company upon his property should, on final hearing, be decided adversely to it. This we did because, upon the affidavits then submitted to us, we regarded the question of fact as to what was the true location of the railroad over the defendant's property, under the agreement, as disputable. We were of opinion that we could not safely pass upon that question, or take action in respect to it, until final hearing, when, if our decision were in favor of the complainant, we could compel the railroad company to remove its track and restore the complainant's premises to their former condition, and make him adequate compensation in damages. No injury was or is threatened to the complainant that may not be thus compensated, whereas to arrest the railroad company in the construction of its road might result in embarrassments and losses very difficult of pecuniary recompense. Keeping in mind the well-known principle which requires courts of equity, in the granting or withholding of a preliminary injunction in a case involving a controverted question of fact, to balance the inconveniences and injury likely to be incurred by the respective parties, our conclusion was that in the present instance such injunction should be denied.

Recently the complainant amended his bill by making the Pittsburgh, McKeesport & Youghiogheny Railroad Company a party defendant, and by introducing new matter. We thereupon allowed the complainant to renew his motion for a preliminary injunction, and it has been again fully and ably argued, and the case reconsidered.

Having carefully re-examined the grounds of our former refusal to grant a preliminary injunction, we are entirely satisfied of the soundness of the conclusion we then reached. Indeed, the additional affidavits submitted on the part of the defendants confirm us in the view that we should forbear making any decree affecting the rights of the parties until final hearing.

As to the new questions raised by the amendment, it need only be said that we do not deem it proper at this stage of the case to discuss them, or express our views in respect thereto.

The motion for a preliminary injunction is denied.

FERGUSON and others *v.* DENT and others.

(*Circuit Court, W. D. Tennessee.* March 21, 1883.)

1. EQUITY PRACTICE—INFANT DEFENDANTS—COSTS—RECEIVER.
   Where a bill is filed to avoid deeds for fraud, and the property is placed in the hands of a receiver, the current expenses of minor defendants for costs of litigation will not be paid out of funds in the hands of the receiver.
2. SAME—GUARDIAN AD LITEM—DEFENDING IN FORMA PAUPERIS—INDIGENT MINORS.
   Although it is the settled practice in Tennessee that infants can neither sue nor defend *in forma pauperis*, such is not the rule of the federal courts of equity, in which they may so sue or defend.

In Equity.

T. B. Edgington, for plaintiffs.

George Dent and *C. W. Frayser*, for defendants.

HAMMOND, J. This bill seeks to avoid certain conveyances from the ancestor of the plaintiffs to the ancestor of the defendants, for alleged fraud in their procurement. A receiver has been appointed, and the property is now in his possession. The defendants are taking proof before an examiner of this court. Application was made to require the examiner to await the final result for the payment of his fees, which was refused unless the defendants would take the oath prescribed for indigent suitors applying to sue without costs. This was declined, whereupon application was made to pay the examiner's fees out of funds in the hands of the receiver, which was likewise refused. But it being stated that three of the defendants are minors, represented by their guardian *ad litem*, the application was reserved as to them.

The guardian *ad litem* is one of the adult defendants, a brother of the minors, and a lawyer of this court, making these applications, while the other adult defendant is their mother. There is nothing definitely shown as to the actual circumstances of these defendants, though the defendant making this application offers to produce affidavits of want of means to pay the expenses of taking the proof,—whether

because it is inconvenient to spare the money from other uses, or for want of resources of property, does not appear. Counsel for the plaintiffs states in his brief that the proof already taken in this cause tends to show that defendant who is the mother of the others is a person of abundant means, considered in relation to this application. The refusal to take the pauper's oath by either of the adult defendants must be taken as conclusive, so far as their own circumstances are concerned. While it does not appear what interest these minors have in any of the property specified in the brief as belonging to the mother, counsel for plaintiffs states that they, or some of them, "are now in Virginia, at college," and the appointment of their brother by the chancery court of the state from which this cause was removed, as guardian *ad litem*, assumes that he is a person of substance sufficient to undertake their defense at his own cost, which is generally the undertaking of a next friend or guardian *ad litem*, though he has, where there is property of the minor, a right to expect that the regular guardian, or the court of ordinary or chancery having control of the person and property of the minor, shall reimburse him, or furnish him the means to conduct necessary litigation. A court of chancery, exercising a plenary jurisdiction over these subjects, would find a way to compel the appropriation of sufficient means for this purpose, perhaps; but it is plain this court has no such plenary jurisdiction over the property of these minors, if any they have. It would have power to remove a guardian *ad litem*, or next friend, who was unable or unwilling to protect the minors by paying for them their costs of litigation, and to appoint some person of substance, who would discharge these ordinary duties of that relation; and, failing this, it might suspend further proceedings against the minors until it could send a next friend or guardian *ad litem* to the state courts having jurisdiction of their person and property, to secure such guardianship as would protect them. But, whatever can be done in that direction, it is plain that, no matter what their condition may be, there is no more power in this court adjudicating strictly according to the right and justice of the matter, to pay the expenses of the litigation in behalf of these minors out of the funds in the hands of the receiver, than there would be to pay their school expenses, or their ordinary expenses for support.

If the allegations of the bill be true, the property in dispute belongs to the plaintiffs, and should not be burdened with the support of the defendants, either to pay their costs of defense or any other of their necessary expenses. Possibly, if both plaintiff and defendant were

really indigent, and the property in dispute were all that either owned, and it appeared to belong to either the one or the other, the court might require the receiver to pay the absolutely-necessary costs of court of both sides, though I do not know that this could be allowed. But such a state of facts does not appear in this case, and possibly the property in dispute here may belong to an assignee in bankruptcy, and to neither of the active parties to this suit. The defendants, it is true, were in possession and are entitled to all the benefits that situation would give them; but the court has already, by appointing a receiver, determined that the defendants were not, in this case, entitled to enjoy the fruits of possession during the pendency of this suit.

This is as far, perhaps, as I need go in deciding the precise application made to pay the costs of taking defendant's proof out of the funds in the receiver's hands. It is apparent that if this be done in behalf of the minors it will result in benefit to the adults as well, while if what the plaintiffs say about their circumstances be true, their refusal or inability to take the pauper's oath compels them out of their sufficient substance to defend this suit at their own expense, and there is nothing wrong or unjust in allowing the minors to reap the benefit of this compulsion.

By nature and by law, these adults owe this duty to the minors under the circumstances of this case. It is possibly true, as urged by counsel for the plaintiffs, that, until the minor defendants appear to be indigent persons by their own oath or that of some one in their behalf, the question of their right to sue or defend as such does not arise. But it is the duty of the court at all times to watch over the interests of minors, defendants or plaintiffs, and the court is itself the guardian of their rights.

The plaintiffs deny that the minors, if indigent, can defend as paupers by guardian *ad litem*, but I have reached a different conclusion. If, therefore, these minors have been rendered really indigent by what would be a desertion of their defense by their mother or brother and guardian *ad litem*,—if these be able to pay costs and expenses as alleged,—or by a deprivation of the possession of the property in dispute in this case, they should be let in to defend *in forma pauperis*, unless they be dispauperized by a showing to the contrary.

The common law, unlike the civil law, while allowing poor persons to sue *in forma pauperis*, did not permit them to defend in that form. 1 Tidd, Pr. (3d Am. Ed.) 97, 98. And infant defendants were liable for costs, while the insolvency of a next friend did not throw the burden

of costs on an infant plaintiff. Id. 99, 100. Courts of equity, however, like the civil law, made no distinction between plaintiffs and defendants in this respect, nor any between adults and infants. 1 Daniell, Ch. Pr. (5th Ed.) 37–44, 74–75, 154–156.

In Tennessee practice it has long been settled that, under the statutes of this state, a minor can neither sue by his next friend, nor by his guardian *ad litem* defend *in forma pauperis*. 3 Meigs, Dig. (2d Ed.) 2099; *Cargle* v. *Railroad Co.* 7 Lea, 717; *Sharer* v. *Gill*, 6 Lea, 495; *Musgrove* v. *Lusk*, 5 Bax. 684; *Green* v. *Harrison*, 3 Sneed, 130; *McCoy* v. *Broderick*, Id. 201; *Cohen* v. *Shyer*, 1 Tenn. Ch. 192. But we have already determined in this court that even in practice at law we are not to be governed in this matter by the state statutes, and more certainly we are not so governed in practice in equity. The rule is the same in admiralty, both these courts following the more liberal rule of the civil law. *Bradford* v. *Bradford*, 2 Flippin, 280, and note.

The result is that the application to pay the costs of the minor defendants out of the funds in the hands of the receiver is denied; but they may have leave, if really indigent, to defend *in forma pauperis*, upon a proper application in that behalf.

So ordered.

ADMIRALTY—POOR PERSONS SUING IN—JURATORY CAUTION. See note collecting authorities and showing forms of proceeding for indigent suitors in admiralty in the case of *The Ouachita Belle*, 2 Flippin, 282, *in notis*.

COBB *v.* PRELL.

(*Circuit Court, D. Kansas.* January, 1883.)

1. OPTION CONTRACTS—INTENTION OF PARTIES.

When it is the intention of the parties to contracts for the sale of commodities that there shall be no delivery thereof, but that the transactions shall be adjusted and settled by the payment of differences, such contracts are void.

2. SAME—BURDEN OF PROOF.

It is the duty of the courts to scrutinize very closely contracts for future delivery; and if the circumstances are such as to throw doubt upon the question of the intention of the parties it is not too much to require a party claiming rights under such a contract to show affirmatively that it was made with actual view to the delivery and receipt of the commodity.

3. SAME—CONTRACTS HELD VOID.

As the evidence in this case establishes the fact that the parties did not intend the actual delivery of the corn contracted for, but did intend to speculate upon the future market and to settle the profit or loss of defendant upon the basis of the prices of grain on the third of May, 1881, as compared with the prices at which defendant contracted to sell, the contracts sued upon are void, and plaintiff cannot recover.

At Law.

Everest & Waggener, for plaintiff.

J. R. Hallowell and *J. T. McCleverty*, for defendant.

MCCRARY, J. In this case a jury was waived and the cause was tried by the court. It is an action at law in which the plaintiff claims damages for breach of contract. The complaint alleges that during the months of February, March, and April, 1881, the defendant, who is a grain dealer residing at Columbus, Kansas, authorized the plaintiff, who is a commission merchant at St. Louis, Missouri, to sell for him certain quantities of corn to be delivered to the party or parties to whom the plaintiff might sell the same, at the option of defendant, during the month of May, 1881. The complaint further alleges that the plaintiff contracted for the sale of said corn to be delivered during said month of May; but that defendant, failing to deliver said corn, the plaintiff having contracted to sell the same in his own name, was obliged to and did pay the damages resulting from such failure, to-wit: the difference between the price of corn at the place of delivery on the thirty-first day of May and the price at which defendant had agreed to sell and deliver the same, amounting in the aggregate to $2,945.25, for which, with interest, he prays judgment.

The answer alleges that the contracts set out in the complaint were option or marginal contracts, and that said plaintiff well knew them to be such, and so made the contracts of sale of said corn, not expecting to receive of the defendant any portion of the amounts of corn for delivery, but expecting to pay any losses or receive any gains that might accrue for or against said defendant; that said contracts were made for the purpose of speculating on the rise and fall of prices, the plaintiff to receive commissions for said transactions; and that said contracts were mere wagers on the fluctuating of the prices of grain in the market of the city of St. Louis.

The case therefore turns upon the questions, whether or not it was the intention of the parties that the corn should be delivered. If such was the *bona fide* intention, then the plaintiff is entitled to recover; but if, on the other hand, it was understood that the defendant

was not required to deliver the corn, and that the transactions should be adjusted and settled by the payment of differences, then the contracts were void and the plaintiff cannot recover. Upon this controlling element in the case, as might reasonably be expected, the testimony of the plaintiff and defendant is in conflict. Under such circumstances we are obliged to determine the controversy by reference to the actions of the parties in connection with the transactions and their contemporaneous declarations, especially those in writing, having a bearing upon the subject. If we can learn from these what interpretation the parties themselves have put upon their own contract, we shall find a satisfactory guide in determining the case.

The evidence satisfactorily shows that the plaintiff was largely engaged at and about the time of these transactions in dealing in options. He was also largely engaged in buying and selling grain for actual delivery. It appears that he adopted and had in use two blank forms upon which statements of account were rendered to his dealers, one of which was used when the grain was actually delivered, and the other when it was not delivered, and the settlement was made upon the basis of the differences. In the former statement, as might be expected, we find charges for freight, inspection, insurance, weighing, storage, and commissions. These are charges which necessarily entered into the transaction where the grain was shipped and delivered. In the latter statements these items do not appear. They show only the number of bushels of grain bought, the price at which bought, and the month of delivery; the price at which the same was sold, and the net loss or gain. There are in evidence 34 of these last-named bills, used in the settlement of option deals between June 26, 1881, and July 30, 1881, all representing transactions between plaintiff and defendant. Of the bills representing actual sales from the defendant to plaintiff between September 18, 1880, and April 19, 1881, there are 57; so that it appears that the course of dealing between the plaintiff and defendant was such that sometimes the grain contracted for was to be delivered, and at other times it was not to be delivered, and the transactions were to be settled upon the basis of margins. It only remains to be determined whether the transactions in controversy belong to the former or to the latter class. If the question were to be determined upon the testimony of the parties themselves, conflicting as it is, in connection with the facts already stated, it would probably depend upon the question: upon which party rests the burden of proof? And I am inclined to the opinion that, without reference to other evidence, the plaintiff would fail.

It is the duty of the courts to scrutinize very closely these time contracts, and if the circumstances are such as to throw doubt upon the question of the intention of the parties, it is not too much to require a party claiming rights under such a contract to show affirmatively that it was made with actual view to delivery and receipt of the grain. *Barnard* v. *Backhaus*, 9 N. W. Rep. 595.

It appearing that the parties were in the habit of dealing in options, and the evidence being equally balanced upon the question whether these were option contracts or not, the court would be obliged, I think, to say that the plaintiff has failed to make out his case by a preponderance of evidence. But whether this be so or not, a reference to the written evidence, to be found in the correspondence of the parties at and near the time of the transaction, strongly corroborates the defendant. A number of letters, written about the time of these transactions, and evidently referring to them, are in evidence, and an examination of them will show that the plaintiff was constantly insisting, not upon the shipment of the quantity of corn purchased by him, but upon the payment of margins, either in cash or by the shipment of enough corn to cover margins. February 11th, plaintiff writes to defendant, referring to the transactions between the parties as "option deals." April 22d, he writes, "We had to put up over $2,000 on your deals," etc. May 2d, he says, "You must ship us some corn as a margin." May 7th, he says, "If you can't ship us any corn to cover margins, please send us $500." May 18th, he writes, "We draw $500 on you. This is margins for your corn deals, which we hope you will pay. This will leave you about $300 behind to make corn deals up to market." May 27th, he says, "We have written you and drawn on you for margins."

Perhaps the most significant letters bearing upon this question are those of May 30th and 31st, the dates on which the time for the delivery of the corn expired. If it was a *bona fide* transaction, and plaintiff was expecting the delivery of the corn, we should expect to hear him, in these letters, complaining or expressing surprise that the time was about expired and the corn had not been delivered. But, on the contrary, a reference to the letters of those dates will show that the only complaint was that defendant had not furnished the margins. Thus, on May 30th, plaintiff writes, "We cannot carry these deals when you not only refuse to give us margins, but seem to pay no attention to our demands." On the 31st plaintiff writes to explain the manner in which he had closed out the May corn, and expressing regret at the serious loss to the defendant, but says noth-

ing to indicate that he expected the corn to be shipped. Upon all of the evidence, I am of the opinion, and therefore find the fact to be, that the parties did not intend the actual delivery of the corn contracted for, but did intend to speculate upon the future market, and to settle the profit or loss of the defendant upon the basis of the prices of the grain on the thirty-first of May, 1881, as compared with the price at which defendant contracted to sell. Such being the fact, the law is well settled that the plaintiff cannot recover. *Melchert* v. *Am. Un. Tel. Co.* 11 FED. REP. 193; *Gregory* v. *Wendell*, 39 Mich. 337; *Pickering* v. *Cease*, 79 Ill. 328; *Barnard* v. *Backhaus, supra.*

Judgment for defendant.

HARDESTY *v.* PYLE.

(*Circuit Court, W. D. Pennsylvania.* March 21, 1883.)

1. RAILROAD MORTGAGE—ROLLING STOCK.

   Rolling stock does not necessarily become affixed to the railroad upon which it is placed. Therefore, a mortgage, although in terms covering future-to-be-acquired rolling stock, does not attach to the rolling stock of a third person subsequently placed on the road under a contract with a company then operating it.

2. EXECUTION—LEVY UNDER WRIT.

   A sheriff's return to a writ of *fi. fa.*—"And I have, therefore, by virtue of the same written writ, levied upon all the right, title, interest, and claim of the S. & M. Railroad Company, of, in, and to the S. & M. Railroad, in Somerset county, and state of Pennsylvania, and upon all the property, real, personal, and mixed, including locomotive, cars, * * * now in the regular use of the said S. & M. Railroad Company, in the conducting of its business as a carrier"—imports a seizure of the locomotive and cars, and in an action of trespass against the sheriff, is conclusive evidence against him of such seizure.

3. SAME—AGREEMENT AS TO ROLLING STOCK SEIZED.

   The attorneys at law of the plaintiff, (the owner of the rolling stock,) in that capacity merely, and without special authority so to do, signed an agreement as the basis of a consentable decree in an equity suit, to which the plaintiff was a stranger, and in which he had no interest, which provided, *inter alia*, for the withdrawal of exceptions to the sheriff's sale, filed by the railroad company, (the defendant in the execution,) and the confirmation of the sale, and the return of the locomotive to the railroad, and its delivery to the sheriff's vendee; the preamble of the agreement reciting, "Whereas, it is desirable that the relative rights of all parties interested or concerned should be determined at law;" and the sixth clause of the paper declaring, "The rights of R. S. Hardesty [the plaintiff] to any title or claim to the rolling stock, if he has any legal right, shall be determined according to law. This agreement is not to prejudice any right he may, and which can be, legally established to the rolling stock." The sheriff was not a party to the equity suit or the agreement. *Held*, that the

agreement must be construed as reserving to the plaintiff all his legal remedies, and did not operate as an estoppel to bar his action of trespass against the sheriff.

Sur motion on the part of the defendant for a new trial.

Wm. M. Hall and *Geo. W. Guthrie*, for motion.

H. W. Wier, for plaintiff.

Before McKENNAN and ACHESON, JJ.

ACHESON, J. 1. We cannot give our assent to the proposition that the rolling stock in question was bound by the first mortgage of the first corporation. That company never owned any rolling stock, and none passed to the purchaser of the railroad at the sale under the company's second mortgage. The locomotive and cars were acquired after that sale, and after the incorporation of the second company. Moreover, the jury have found that they were not the property of the second company, but were purchased and owned by Coffroth, Uhl & Sanner, and that their title became vested in the plaintiff before the trespass complained of. It is true the first mortgage in terms covered the "future-to-be-acquired" rolling stock of the company, and, doubtless, it would have attached to engines and cars subsequently acquired by the mortgagor and placed upon the road. But none of the cases relied on by the learned counsel gives countenance to the notion that such mortgage grasps the rolling stock of third persons, temporarily used upon the railroad, under a contract between them and a company subsequently operating the road. Such rolling stock does not become affixed to and a part of the railroad. *U. S.* v. *New Orleans R. R.* 12 Wall. 362. It remains "loose property, and susceptible of separate ownership." Id. 365. Speaking of the rights of railroad mortgagees in after-acquired cars, Chief Justice WAITE, in *Fosdick* v. *Schall*, 99 U. S. 251, said: "The mortgagees take just such an interest in the property as the mortgagor acquired; no more, no less." Here the mortgagor never had any interest in the locomotive and cars, and the verdict establishes that at the time of the sheriff's levy they were the individual personal property of the plaintiff.

2. But the defendant insists that it was error to hold that the sheriff's return to the writ of *fi. fa.* imported a seizure of the locomotive and cars. The return, after reciting demand and non-payment, proceeds in the words following:

"And I have, therefore, by virtue of the same written writ, levied upon all the right, title, interest, and claim of the Somerset & Mineral Point Railroad Company of, in, and to the Somerset & Mineral Point Railroad, in Somerset

county, and state of Pensylvania, and upon all the property, real, personal, and mixed, including locomotive, cars, hand-cars, tools, engine-houses, depot, water-station, siding, and switches now in the regular use of the said Somerset & Mineral Point Railroad Company in the conducting of its business as a carirer, and the rights, franchises, privileges, and rights of way of said company incident, appurtenant, or in any wise appertaining or connected therewith. Taken in execution as the property of the Somerset & Mineral Point Railroad Company at the suit of John Roth," etc.

This return is drawn with much precision, and, we think, admits of but one interpretation. While the seizure was of the right, title, and interest of the defendant in the execution in and to the described railroad, as respects the "locomotive, cars," etc., "in the regular use" of the defendant "in the conducting of its business as a carrier," the levy, by very exact language, was upon the things themselves, and not merely upon the defendant's interest therein. It, as is now claimed, the intention was simply to levy upon the right, title, and interest of the defendant company in the railroad and its appurtenances, together with the corporate franchises, as an entirety, different phraseology would have been employed. We do not see how, under the terms of the levy, the plaintiff could have removed the locomotive and cars without defying the authority of the sheriff and becoming a trespasser against him. *Welsh* v. *Bell*, 32 Pa. St. 12 Our construction of the return is consistent with, and is fully justified by, the conduct of the sheriff. By the uncontradicted evidence it was shown that after the levy and before his sale he locked the wheels of the cars. It is idle to say that this was but to prevent the cars being run off in violation of an injunction in another proceeding. The sheriff had no process in his hands, other than the writ of *fi. fa.*, which gave him any color of authority to touch the cars.

If the construction given to the levy was correct the charge to the jury as to its effect was undoubtedly accurate. A levy by the sheriff upon the goods of a stranger to the execution is the exercise of dominion over them sufficient to constitute a trespass, though there be no actual taking or touching of the goods. *Welsh* v. *Bell, supra; Wintringham* v. *Lafoy*, 7 Cow. 736; *Miller* v. *Baker*, 1 Metc. 27. And the sheriff's return that he levied is conclusive evidence against him that he seized and took the goods into his possession. *Welsh* v. *Bell, supra.* So, also, in *Paxton* v. *Steckel*, 2 Pa. St. 93, it was held that the sheriff's return "attached 24 pieces of iron, etc., in the possession of J. Stettler," subjected the sheriff to an action of trespass, and was conclusive evidence against him.

It is, however, urged that constructive seizure is predicable only of a lawful execution, and that there can be no such thing where the writ or levy is void. But if this be conceded we do not see how it helps the defendant. There is absolutely no foundation for the insinuation that the execution here was unlawful. It was the ordinary writ of *fieri facias* against a corporation. The counsel assume that under the Pennsylvania statutes a levy upon the railroad and franchises of a corporation cannot be made under such a writ, but only upon an *alias* or *pluries* writ after a return of *nulla bona*. We do not know that this has been authoritatively decided, and do not feel called on to express any opinion as to what is the correct practice. We incline to think that such levy made on the first *fi. fa.* would, at the most, be but an irregularity, and by no means a nullity. But however this may be, the writ here unquestionably authorized the sheriff to levy on personal property, which he proceeded to do, as his return clearly shows; and the plaintiff's grievance is that the levy embraced his goods and chattels. Surely it is a poor answer for the sheriff to make that his levy, as a whole, was broader than his writ warranted.

3. The defendant contends that the court erred in refusing to charge that the agreement of January 8, 1879, estopped the plaintiff from suing the sheriff in trespass. But if the construction which the defendant claims for that instrument be the true one, it might well be doubted whether Messrs. Rupple and Hay, in their mere capacity of attorneys, could bind the plaintiff by their signature. *Holker* v. *Parker*, 7 Cranch, 436; *Gable* v. *Hain*, 1 Pen. & W. 264; *Willis* v. *Willis*, 12 Pa. St. 159; *Stokely* v. *Robinson*, 34 Pa. St. 315. The agreement did not in any wise benefit the plaintiff, and was made in an equity suit (as the basis of a decree therein) to which he was an entire stranger, and in which he had no interest. Nor had he any concern with the rule for an attachment for contempt, the pendency of which was the occasion of the agreement. Moreover the defendant (the sheriff) was no party to that suit or to the agreement. It is then very questionable under the decisions whether Messrs. Rupple and Hay, without special authority so to do, could thus release or destroy the plaintiff's right of action against the defendant.

But the paper does not profess to do so, and we think it is not fairly open to a construction which would produce that result. The parties to the agreement were not dealing with any question between the plaintiff and the defendant. The main purpose in view was to purge a contempt of court and secure a return of the locomotive which

had been run off by Newmeyer and McCaleb under a claim of right, but in violation of an injunction. The sixth clause of the agreement declares: "The rights of R. S. Hardesty to any title or claim to the rolling stock, if he has any legal right, shall be determined according to law. This agreement is not to prejudice any right he may have and which can be legally established to the rolling stock." The whole paper is to be read in the light of the concluding paragraph of the preamble, viz.: "And, whereas, it is desirable that the relative rights of all parties interested or concerned *should be determined at law.*" This furnishes the key to the true intention of the parties. A consentable decree was to be entered in the equity suit and all parties left to their legal remedies. In our opinion it would be a perversion of the agreement to hold that it bars the plaintiff's action against the sheriff for his trespass.

4. Since the hearing of this motion I have carefully read the testimony bearing on the question of damages to see whether there is good reason for the allegation that the verdict is excessive under the evidence. Upon this branch of the case the plaintiff examined six witnesses and the defendant two. The two witnesses on the part of the plaintiff, who testified concerning the locomotive, not only had personal knowledge of its condition, but were machinists who for many years had been employed in the building of locomotives. They were quite as competent to testify as to value as were the defendant's witnesses, so far as appeared. Deducting from the verdict the interest included therein, would give $11,000 as the value the jury placed on the rolling stock. As it consisted of a locomotive, one passenger car, a baggage car, and two gondola cars, the valuation is not apparently extravagant, and we have been furnished with no new evidence to show it to be excessive. It is a mistake to say that in respect to the damages the jury blindly followed the plaintiff's witnesses. The verdict would have been larger by $2,000 or $3,000 if the jury had adopted the *minimum* figures of those witnesses. In point of intelligence the jury was rather above the average, and we are not convinced that the verdict did the defendant injustice.

What has been said covers the grounds for a new trial which counsel most discussed. We do not think the other reasons assigned call for special remark. After a careful consideration of the whole case, we are of opinion that the motion for a new trial should be overruled, and judgment entered on the verdict. And it is so ordered.

THIRD NATIONAL BANK OF SYRACUSE *v.* TOWN OF SENECA FALLS.

(*Circuit Court, N. D. New York.* 1883.)

1. MUNICIPAL BONDS—ISSUE OF—TRANSFER FOR PURPOSE OF SUIT.
   Courts are not permitted to invalidate transactions between vendor and vendee upon a mere presumption or conjecture of fraud. A party seeking the dismissal of a suit on the ground that the claim was transferred for the purpose of making a case within the jurisdiction of the court, must establish the invalidity of the transfer by sufficient proof.
2. SAME—AMENDATORY ACTS.
   An act which amends a general law by extending its provisions, cannot properly be called "a private or local bill," and hence would not come within the terms of the section of a state constitution which provides that no "private or local bill" which may be passed shall embrace more than one subject, which shall be expressed in the title.
3. SAME—OMISSION OF IMMATERIAL STATEMENTS.
   Omissions of immaterial statements in a petition or other document, provided for by statute, are not sufficient to invalidate it, provided that all the material statements conform to the statute, and are free from ambiguity and doubt.
4. SAME—RECITALS IN MUNICIPAL BONDS—ESTOPPEL.
   Where municipal bonds recite on their face that they are issued pursuant to the statute providing therefor, the town is estopped, in an action by a *bona fide* holder, from questioning the truth of the recital. It cannot take advantage of irregularities committed by its own agents.
5. SAME—RATIFICATON—ESTOPPEL.
   Where a town has received railroad stock, and issued therefor its bonds, and has paid the interest on such bonds for a succession of years without objection, it is estopped by its own acts, which amount to a ratification and confirmation,
6. SAME—QUESTIONS PRELIMINARY TO ISSUE OF BONDS.
   The judgment and determination of a town officer, charged by law with the duty of deciding the questions preliminary to the issue of bonds, is conclusive until reversed in a direct proceeding by an appellate court.

Hiscock, Gifford & Doheny and *George F. Comstock*, for plaintiff.

Patrick J. Rogers, Cornelius E. Stephens, and *James L. Angle*, for defendant.

COXE, J. This action is brought upon interest warrants originally attached to bonds alleged to have been issued by the defendant. It is urged by the defendant that the suit should be dismissed pursuant to the fifth section of the act of March, 1875, on the ground that the demands in suit were improperly and collusively transferred for the purpose of creating a case within the jurisdiction of the court. This question should not be decided upon conjecture; the court is not permitted to speculate as to the nature of the transaction between vendor and vendee. If suspicion were allowed to take the place of proof, it is not unlikely that a conclusion favorable to the defendant's theory

might be reached. The evidence, however, establishes a valid transfer. *Allen* v. *Brown*, 44 N. Y. 228; *Stone* v. *Frost*, 61 N. Y. 614; *Sheridan* v. *The Mayor*, 68 N. Y. 30. No authority is produced holding a dismissal proper unless the proof establishes something more than is developed here. *Lanning* v. *Lockett*, 10 FED. REP. 451; *Marion* v. *Ellis*, Id. 410; *Collinson* v. *Jackson*, 14 FED. REP. 305.

The amendment—passed in 1870—to the general bonding act of 1869, extended its provisions to the three counties of Seneca, Yates, and Ontario, which were originally excepted from the operation of the act. Defendant contends that the amendatory act is in contravention of section 16, art. 3, of the constitution of New York, which provides that "no private or local bill, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title." This position cannot be maintained. An act which amends a general law by making it more general, cannot properly be called "a private or local bill."

Criticism is made that the verification of the petition addressed to the county judge of Seneca county is defective because it is susceptible of a construction at variance with the requirements of the bonding act. It is asserted that the affiant states simply that the petitioners are a majority of the tax-payers, and not that they are a majority of the tax-payers *whose names appear upon the last* preceding tax-list, as required by the statute; that the verification might be true, even though a majority of the tax-payers, whose names appeared on the last tax-list, did not, in fact, unite in the petition.

It is also said that the last paragraph of the affidavit, viz., "Deponent further says that all the allegations in said petition are true, to his own knowledge or belief," relates to and qualifies all preceding allegations, so that the whole affidavit must be considered as if made on information and belief.

Even if the defendant were in a position to raise these questions, it is thought that the objections are not well taken; that the verification and petition, when considered together, conform sufficiently to the statute, and are free from ambiguity and doubt. The petition states everything positively, and everything required by the statute; this is conceded, at least the petition is not assailed because of any irregularity or omission in this respect. Regarding the verification, the statute provides that the petition is to be "verified by one of the petitioners;" no precise form is designated or required. The averments complained of, even though they bore the construction sought to be given them by the defendant, were not necessary and may be

treated as surplusage. Nothing is there stated inconsistent with prior allegations admitted to be adequate.

There was, doubtless, no necessity for the statement that at the date of the jurat the petitioners were a majority, but if there was sufficient in the affidavit without it, it is not easy to see how the proceedings were injuriously affected, more than they would be by an allegation that the petitioners were all taxed upon real estate, or were all over 21 years of age. If such statements were immaterial, they surely were innocent.

As to the other propositions argued by the defendant, it may be said generally that where the bonds recite on their face that they are issued pursuant to the statute, the town is estopped, in an action by a *bona fide* holder, from questioning the truth of the recital; it cannot take advantage of irregularities committed by its own agents. The court is not permitted to controvert the judgment of the officer charged by law with the duty of deciding the questions preliminary to the issue of the bonds. His determination is conclusive until reversed in a direct proceeding by an appellate court. These propositions have been so often and so recently decided by this court, and by the supreme court, that it is not thought necessary to enter into any general discussion of the principles upon which they rest. There can be little doubt that the law as stated is the law which this court is compelled to follow. But in addition to these general considerations there are other reasons which must preclude this defendant from questioning the validity of the proceedings before the county judge. The bonds were issued in July, 1871; the first default in the payment of interest occurred in January, 1876. Having received and retained the stock of the railroad company, and having paid nine installments of interest on the bonds, the town is concluded by its own acts, which amount to a ratification and confirmation. *Whiting* v. *Town of Potter*, 18 Blatchf. 165, 180, and cases cited; [S. C. 2 FED. REP. 517.]

It follows that there must be a judgment in favor of the plaintiff for the amount demanded in the complaint.

HARRIS and another *v.* HANOVER NAT. BANK.

(*Circuit Court, S. D. New York.* 1883.)

1. BILLS AND NOTES OF INSOLVENTS—MUTUAL MISTAKE—ATTACHMENT.
   When bills of an insolvent bank, or the notes of a party who has previously failed, are transferred in payment of a debt or sold as solvent paper, both parties being ignorant of the failure and innocent of fraud, the creditor or buyer may repudiate the payment or sale, upon a tender or return of the dishonored note, and recover the amount due.
2. SAME—CASE STATED.
   The plaintiffs were the owners of a promissory note made by a firm in New Orleans. The note was sold by note brokers of New York to the defendant. On the same day, an hour before the sale of the note, an attachment, upon which their establishment was seized, was issued against the makers of the note by local creditors. The money received by the note brokers for the note being paid into court, the question remained whether the plaintiffs or the defendant, both parties being ignorant of the attachment and acting in good faith, should bear the loss. *Held*, that the defendant might rescind the contract for the purchase of the note and recover back what it paid therefor, on the same principle that the plaintiffs would have been allowed to rescind had the note been paid for the day following in bills of an insolvent bank.
3. SAME—INSOLVENCY.
   When a firm is unable to meet its obligations and allows its property to be taken under an attachment on the charge of fraud, which it does not deny, it is legally if not actually insolvent.

James S. Stearns, for plaintiffs.

Thomas S. Moore, for defendant.

COXE, J. Prior to November 29, 1881, the plaintiffs were the owners of a promissory note for $1,508.28, made by Levi & Co., of New Orleans. On that day, and after 11 o'clock A. M., the note was sold by Hess Brothers, note brokers of New York, to the defendant. On the same day, and at about half past 10, New York time, an attachment was issued against Levi & Co., in a suit commenced by local creditors, upon a demand for $5,035,—$2,500 becoming due November 26, and the balance December 13, 1881. The establishment of Levi & Co. was seized and closed by the sheriff. The firm, however, considered themselves in business, and did, in fact, continue to draw checks and collect bills—outside of the store—until December 2d, when their first note went to protest. Hess Bros. having paid the money into court, the question to be determined is whether the plaintiffs or the defendant—all parties being ignorant of the attachment and acting in good faith—should bear the loss. A somewhat careful examination has failed to discover an adjudica-

tion clearly and unequivocally sustaining the position contended for by the plaintiffs, the facts being similar to those developed here.

The almost unbroken line of authority seems to establish the doctrine that if bills of a broken bank, or the notes of a party who has previously failed, are transferred in payment of a debt, both parties being ignorant of the failure and innocent of fraud, the creditor may repudiate the payment, upon a tender or return of the dishonored note, and recover the amount due. It is a mutual mistake of fact. *Lightbody* v. *Ontario Bank*, 11 Wend. 9; *Ontario Bank* v. *Lightbody*, 13 Wend. 101; *Young* v. *Adams*, 6 Mass. 182; *Thomas* v. *Todd*, 6 Hill, 340; *Harley* v. *Thornton*, 2 Hill, (S. C.) 509; *Fogg* v. *Sawyer*, 9 N. H. 365; *Westfall* v. *Braley*, 10 Ohio St. 188; *Roberts* v. *Fisher*, 43 N. Y. 159; *Baldwin* v. *Van Deusen*, 37 N. Y. 487; *Houghton* v. *Adams*, 18 Barb. 545; *Townsends* v. *Bank of Racine*, 7 Wis. 185; *Leger* v. *Bonnaffe*, 2 Barb. 475; *Stewart* v. *Orvis*, 47 How. Pr. 518. It is true that in many of these cases the debased or worthless paper was given in payment of a preexisting debt, while in the case at bar the delivery was the result of a bargain and sale.

In the former circumstances, an obligation existed to pay the debt in money—in coin; in the latter, the vendor was simply required to transfer the note—the note of a live and not of a defunct copartnership. In this respect the cases differ, and this element of strength is wanting in the defendant's argument. And yet, upon an analysis of the reason upon which these decisions are based—viz., mutual mistake—it is not easy to discover any difference in principle. The plaintiffs supposed that they were selling solvent paper; the defendant supposed that it was purchasing such paper, and payment was made on this supposition. Both parties were mistaken. While the note was yet in the possession of the plaintiffs, and owned by them, it became worthless, or greatly impaired in value. Both parties being honestly in error, why, upon principle, should not the defendant have the same right to rescind that the plaintiffs would have, had the note been paid for the day following, in the bills of an insolvent bank? But in some of the authorities cited—the last three, for instance—the distinction referred to does not exist, and the facts closely approximate those existing here.

The plaintiffs contend further that the levying of the attachment did not, in contemplation of the law, amount to a failure on the part of the makers of the note, neither was it evidence of insolvency. It is thought that this position is not tenable. The attachment was granted in a suit *ex contractu*, upon a debt then due, on the ground

that Levi & Co. were disposing of their property with intent to defraud their creditors. The sheriff took possession of their establishment, seized their entire stock, and turned them into the street. Four days afterwards their notes went to protest, and there is no evidence that they resumed business thereafter. If the firm was not legally extinct, it certainly was stricken with a commercial paralysis. It was unable to meet its obligations as they fell due; it suffered its property to be taken on a charge of fraud which was not denied; it was legally if not actually insolvent. *Webb* v. *Sachs*, 15 N. B. R. 168; *In re Hauck*, 17 N. B. R. 158; *Harrison* v. *McLaren*, 10 N. B. R. 244; *In re Ryan*, 2 Sawy. 411.

The case of *Otis* v. *Cullom*, 92 U. S. 447, relied on by the plaintiffs, can hardly be regarded as controlling. There was in that case no mistake of fact. If a mistake existed it was one of law. After the purchase of the bonds the courts decided that the law did not authorize their issue. There was no guaranty, express or implied, that the law was constitutional. The plaintiff knew the facts and chose to take the risk of the bonds being subsequently declared invalid. In precisely the same manner the defendant here took the risk of all subsequent infirmities.

The questions in this action are by no means free from perplexities and doubt. The weight of authority, however, seems to sustain the positions taken by the defendant.

It follows that judgment should be entered awarding the money in court to the defendant.

PHELPS, Jr., *v.* MERRITT.

(*Circuit Court, S. D. New York.* February 19, 1883.)

SCHEDULE M, § 2504, REV. ST., CONSTRUED.

The words "the whole quantity" (schedule M, § 2504, Rev. St.) refer to merchandise shipped by one consignor from one place and to the particular kind of fruit damaged, and not to the whole invoice aggregating several varieties of fruit.

Memorandum of Decision.

Mr. Jones and *Mr. Heath*, for plaintiff.

Mr. James, Asst. Dist. Atty., for defendant.

COXE, J. I think the plaintiff is entitled to recover. The fair and reasonable interpretation of the statute is the one recently adopted

by the treasury department. The words "the whole quantity" are now construed "as referring only to the merchandise shipped by one consignor from one place, and to the particular kind of fruit damaged." I have examined with care the authorities cited, and am inclined to follow the decision of Ex-Attorney General MacVeagh, in the *Pohl Case*, (reported in Decisions of the Treasury Dept. Document No. 172, page 239,) as the latest expression on the subject. As I concur, not only in the conclusion reached by him, but also in the reasoning of the opinion, I have thought it unnecessary to enter into any extended discussion of the question involved, which is precisely similar in both cases.

In re WERDER, Bankrupt.

(*Circuit Court, D. New Jersey.* March 28, 1883.)

BANKRUPTCY—ASSETS—MEMBERSHIP IN PRODUCE EXCHANGE.

Membership in a produce exchange is property which passes to the assignee in bankruptcy as assets of the debtor's estate.

Bill of Review.

A. Marks, for bankrupt.

Hamilton Wallis, for assignee.

MCKENNAN, J. The bankrupt is a certificated member of the New York Produce Exchange, and the only question presented by his bill is, whether his membership in that institution is an asset, available to his creditors, through his assignee, or not. If it is, the order made by the district court, of which the bankrupt complains, was right. I regard the question as conclusively settled by the opinion of the supreme court in *Hyde* v. *Woods*, 94 U. S. 523. Mr. Justice MILLER, speaking for the court, there says:

"There can be no doubt that the incorporeal right which Feun had to this seat when he became bankrupt was property, and the sum realized by the assignees from its sale was valuable property. Nor do we think there can be any reason to doubt that, if he had made no such assignment, it would have passed subject to the rules of the stock board, to his assignee in bankruptcy, and that, if there had been left in the hands of the defendants any balance, after paying the debts due to the members of the board, that balance might have been recovered by the assignee."

It is futile to contest the authoritativeness of this statement by the criticism that it was unnecessary to the decision of the question be-

fore the court, and, therefore, was only the individual opinion of the judge who spoke for the court. But it was not only proper, but necessary, to ascertain and determine the nature and character of the interest claimed by the plaintiff that the court might pronounce judgment upon the merits of the controversy between the parties. The plaintiff was the assignee of a bankrupt member of the San Francisco Stock Exchange. If the bankrupt's membership in that institution was a mere personal privilege, and in no sense property, then it did not pass under the assignment, and the plaintiff could not maintain any action touching it for want of title. But to consider the merits at all, and to determine the legal rights of the parties in reference thereto, it was necessary for the court to define the character of the subject of the controversy, and so to pass upon the validity of the claim of the defendants to the proceeds of its sale; they, therefore, held it to be property, which passed under the assignment in bankruptcy, subject to the rules of the exchange, which provided for the prior appropriation of the proceeds of its sale to debts due to its members, and hence that such appropriation was not within the scope of the provisions of the bankrupt law against preferences.

Regarding the opinion, then, as authoritative, it rules this case, and it is, therefore, ordered that the bill be dismissed with costs.

UNITED STATES *v.* JESSUP.

(*District Court, D. Maryland.* March 24, 1883.)

1. INDICTMENT FOR TAKING EXCESSIVE FEE IN PENSION CASE—ACT OF JUNE 20, 1878.

   Held, that the penalty provided by Rev. St. § 5485, is applicable to act of June 20, 1878, entitled, "An act relating to claim-agents and attorneys in pension cases."

2. AMENDATORY ACTS TO REVISED STATUTES—HOW CONSTRUED.

   Held, that amendatory acts of congress are to be construed as enacted with reference to the existing system of laws on the subject to which they pertain, and, if possible, to be construed as part of that system.

Demurrer to Indictment.

A. Stirling, Jr., for the United States.

J. Morrison Harris, for Jessup.

MORRIS, J. This indictment charges that the traverser in May, 1880, did unlawfully demand and receive from a pensioner of the United States for services in a pension-claim case a greater sum than

$10, to-wit, $1,400, contrary to the statutes of the United States. The question raised by the demurrer is whether there was any penalty for taking a greater fee than allowed by law for prosecuting a pension claim after the passing of the act of June 20, 1878, and prior to the act of March 3, 1881. It is a question which the reported decisions show has been decided both ways by federal courts. It was ruled by Judge GRESHAM in a well-considered opinion reported in *U. S.* v. *Dowdell*, 8 FED. REP. 881, that the penalty provided by section 5485 of the Revised Statutes was applicable to the act of June 20, 1878. The contrary was held by Judge BAXTER in *U. S.* v. *Mason*, 8 FED. REP. 412, and by Judge NIXON in *U. S.* v. *Hewitt*, 11 FED. REP. 243.

Looking at the purpose of the legislation on this subject it appears certain that in passing the act of June 20, 1878, reducing the fee which an attorney could receive in any pension case to $10, congress assumed that the penalties prescribed by section 5485 were applicable, and intended that they should be, and that such was in fact the legal effect of the enactment would have seemed to me equally plain but for the decisions of the two very experienced and able judges who have held otherwise.

Under the "Title 57, Pensions," in the Revised Statutes, there were codified and brought together all the then existing provisions of law relating to pensions, and under "Title 70, Crimes," was placed as section 5485, the section of the original statute providing the punishment of agents or attorneys who should violate the section forbidding them to take a greater fee than the pension law allowed. The title 57 then contained all the laws on the subject of pensions, so that when section 5485 declared what penalty should be inflicted for taking a greater fee "than is provided in the title pertaining to pensions" it was equivalent to declaring the penalty for taking a greater fee than was provided by the laws relating to pensions.

The act of June 20, 1878, was entitled "An act relating to claim agents and attorneys in pension cases." By it congress repealed section 4785 of the title pertaining to pensions, and in lieu thereof, and by an enactment plainly intended as a substitute for it, declared it to be unlawful for an agent or attorney to take a greater fee in any case than $10, which was a less sum than had been allowed in some cases under section 4785. I think that the act of June 20, 1878, was intended to be, and became a part of, the general system of law pertaining to pensions as contained under that title in the Revised Statutes, and section 5485 was also part and parcel of that system. That section 5485 was placed under the title "crimes" was a mere

convenience of location, and nothing more, as is declared by section 5600.

When in the Revised Statutes there is found a general system of law regulating a subject it would seem that subsequent legislation by congress on the same subject must be understood as enacted with reference to that system, and to be construed as part of it if it can be so construed. This was held by the supreme court in *Wilmot* v. *Mudge*, 103 U. S. 217. As stated in that case there was a clause of the brankrupt act of 1867, by which it was declared that no debt created by fraud should be "discharged under this act." In 1874 congress legislating on the subject of bankruptcy passed an act providing for a composition proceeding which should discharge the bankrupt, and declared in express terms that the composition should be binding *on all creditors*. Notwithstanding the positive language of this last act it was held that under it debts created by fraud were not discharged, and for the reason that all the statutes, sections, and provisions passed by congress on the subject of bankruptcy were to be interpreted as parts of one entire system, and if possible by any reasonable interpretation all were to be made to stand together.

If the present case were of a civil nature it would hardly be contended, I think, that the act of 1878 is not to be construed as part of the system of law relating to pensions, nor that congress supposed and intended that what by that act was declared unlawful was not to be punished by the penalties denounced against the same offense by the penal section of that system.

It is urged, however, that in a criminal case a law so highly penal is to be construed strictly, and is not to be enlarged by construction. If the act of 1878 is a part of the general law relating to pensions, there is no room for construction and no doubt as to the punishment prescribed by congress for doing what it declared to be unlawful. To hold that the act of 1878 did not become, as soon as it became a law, a part of the general system of law relating to pensions is, it seems to me, to defeat the clear intention of congress, and to adopt a rule for construing amendments to the Revised Statutes which would soon, by creating unnecessary doubts and difficulties, destroy the usefulness and certainty of that code of laws. Under such a rule of construction, unless in every instance in which congress undertakes to make any change in any section of the Revised Statutes relating to penal offenses the most exact care is exercised to observe in what language other sections refer to the section to be altered, and how the penal sections in other parts of the Code refer to the offense, there would always

be a likelihood of some loophole through which the crime would escape punishment. If subsequent acts are to be interpreted as having been passed without reference to the sections of the Revised Statutes regulating the same subject, the advantages of a codification of the laws will soon be lost, and the purposes of the codification defeated. I think it is important, not unnecessarily, to adopt a rule leading to such consequences. A case involving a difficulty somewhat of this nature recently came before the circuit judge of this circuit, and is reported in 13 FED. REP. 798, (*U. S.* v. *One Raft of Timber.*)

While examining this question, having occasion to turn to section 5485, I notice that the following sections, 5488 to 5493, relate to the punishment of defaulting disbursing officers of the United States, and that section 5494 provides that a transcript of the books of the treasury shall be sufficient evidence of the balance due by the officer, upon a trial under the provisions of "the six preceding sections." Should congress repeal one of those six sections for the purpose of re-enacting it with some trifling change, it seems to me it would be overstrained to say that the rule of evidence provided by section 5494 was not to be applied to the new act because it was not literally one of the "six preceding sections" to which by its terms section 5494 applies. Other instances will, I think, readily suggest themselves to any one familiar with the Revised Statutes. If the rulings in the two cases hereinbefore cited in which contrary views on this question now before me have been held, were binding upon me, I could cheerfully yield to them as authorities, or if after considering those decisions I could say that I felt a doubt as to the interpretation of the law I should give the traverser the benefit of that doubt, but this is a case in which it is my duty to exercise my own best judgment and decide accordingly, notwithstanding any natural distrust of my own conviction because it is opposed to that of two judges of such known learning and ability.

Demurrer overruled.

UNITED STATES *v.* CAMERON and others.*

(*Circuit Court, E. D. Missouri.* April 7, 1883.)

1. DEPOSITIONS IN CRIMINAL CASES—Rev. St. § 866.
   Section 866 of the Revised Statutes, which authorize a *dedimus potestatem* to take depositions according to common usage, to be issued in any case in which it is necessary, in order to prevent a failure or delay of justice, applies to criminal as well as civil cases.
2. SAME—"COMMON USAGE."
   The words "common usage," as used in said section, refer to the usage prevailing in the courts of the state in which the federal court may be sitting.
3. SAME—"FAILURE OR DELAY OF JUSTICE."
   The question whether the order is necessary in order to prevent a "failure or delay of justice" is for the court to determine in each case upon the facts presented.
4. SAME.
   Where witnesses for the defendants, whose testimony was material, resided hundreds of miles beyond the limits of the district in which the case was to be tried, and where the defendants were unable to pay the cost of bringing them to the place of trial, *held*, that the necessity for making an order for a *dedimus potestatem* to take their depositions sufficiently appeared.

Indictment for Conspiracy to Defraud the United States of 100,000 acres of land. Motion of defendants for a *dedimus potestatem* to take the depositions of witnesses residing in Iowa, Wisconsin, and Dakota.

William H. Bliss, Dist. Atty., for the Government.

Dyer, Lee & Ellis, for defendants.

MCCRARY, J. Section 866 of the Revised Statutes of the United States provides that "in any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage. * * *"

The district attorney insists that this statute does not authorize the action called for by the present motion; and he has, in a learned and elaborate argument endeavored to establish the proposition that this statute applies only to civil causes. We do not concur in this view. Under the terms of the statute a *dedimus* may issue "in *any case* where it is necessary, in order to prevent a failure or delay of justice," not in any civil case, nor in any case at common law, in equity or in admiralty, but in "any case" which includes criminal as

*Reported by B. F. Rex, Esq., of the St. Louis bar.

well as civil proceedings. This provision was originally enacted as a proviso to section 30 of the judiciary act of 1789, as follows:

"Provided that nothing herein shall be construed to prevent any court of the United States from granting a *dedimus potestatem* to take depositions according to common usage when it may be necessary to prevent a failure or delay of justice, *which power they shall severally possess.*"

The judiciary act of which this proviso is a part was an elaborate statute relating to proceedings in the federal courts in both civil and criminal cases. If we were called upon to determine the true meaning of the proviso as it stood in the original act, the question might be to some extent doubtful. If the proviso be limited in its application to the subject-matter of the section in which it is incorporated, it would apply only to civil proceedings, while if applied to the entire act it would extend to criminal proceedings as well. It might well be argued that the proviso was intended to be as broad as the act, and to confer a power upon the courts of the United States to grant a *dedimus* in any case, civil or criminal, when necessary to prevent a failure or delay of justice. The words "nothing herein" in the proviso might well be construed as equivalent to the words "nothing in this act." This would be the broader and more liberal construction; and in a case where the benefit of the statute is invoked in favor of a person accused of crime, we think it should be so construed. But, however this may be, we are entirely clear that congress, in the enactment of the Revised Statutes of the United States, has adopted this interpretation by enacting the words of the proviso as a separate and independent section, and by so changing the form and phraseology of it as to leave no room for doubt. The provision now appears in the form first above quoted as the first clause of section 866 of that Revision. That section is incorporated into chapter 17, entitled "Evidence." The chapter deals with the general subject of evidence in both civil and criminal causes, some of its provisions referring to the latter in express terms, and others by necessary implication. The section, as it stands in this chapter, is limited only by the subject-matter of the chapter itself. The form is changed by dropping the words "provided that nothing herein shall be construed to prevent any of the courts of the United States from granting a *dedimus potestatem*," and by inserting instead the words "in any case where it is necessary," etc. The intent to make the power general and applicable to all cases seems to us to be very apparent.

The case falls, therefore, within the terms of the statute, unless it is excluded by the latter part of the clause above quoted, which is as

follows: "Any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage." What are we to understand by the words "common usage?" We think the better opinion is that they refer to the usage prevailing in the courts of the state in which the federal court may be sitting. They mean common usage in the courts which administer justice in the same community. They cannot mean a usage known and recognized only at common law, as we think, because at the time when the statute was enacted it was common usage to take depositions under statutes, and at the present time any other practice in the courts of the states is practically unknown.

Sound policy undoubtedly demands that a party accused of crime in a federal court shall have the same rights with respect to obtaining evidence in his defense as are enjoyed by persons accused in the state tribunals. We think the statute should be interpreted, in the spirit of this policy, in favor of the accused. It is, besides, to our minds quite improbable that the words "common usage" would have been employed by the author of the judiciary act of 1789 as synonymous with "common law."

That act, as is well known, was drawn with great care and skill, and if it had been intended to limit the power to issue a *dedimus* to cases where it was authorized by the common law, this intent would have been expressed in unequivocal terms. The words "common usage" are never employed by accurate writers as equivalent to "common law."

In the case of *Buddicum* v. *Kirk*, 3 Cranch, 393, this provision of the act of 1789 is construed by reference to the laws of Virginia regulating the taking of depositions, and the suggestion that the words "common usage" referred to, "common law," and not to usage sanctioned or authorized by statute, was not made. The case of *U. S.* v. *Reid*, 12 How. 361, relied upon by the district attorney, decides that the thirty-fourth section of the judiciary act, adopting state laws as rules of decision in federal courts, applied only to civil action at common law. By its terms it was made applicable only to "trials at common law," and these words were held not to include a criminal prosecution. It was also held that in the trial of a criminal cause held in one of the original 13 states the admissibility of evidence depended, under the judiciary act, upon the law of the state where the trial was held, as it was at the time of the passage of that act in 1789. This rule, however, has never been applied to the states admitted into the union after the passage of the judiciary act, nor can

it be, for the reason that a state can have no laws prior to its existence as a state. But we are not dealing with the thirty-fourth section of the judiciary act, but with section 866 of the Revised Statutes of the United States, which, in its present form, became the law of the land in 1874; and, for the purposes of the question now before us, we are, we think, justified in holding that the words "common usage," as found in this section, refer to the usual and customary mode of proceeding at the time of the adoption of the Revision, which for many purposes, and we think for this purpose, must be regarded as an original enactment. Such being the true construction of the statute, we are at liberty to look into and follow the common usage of the courts of Missouri in similar cases, whether sanctioned by common law or statute. Upon looking into the laws of Missouri and the practice of her courts, we find for many years they have authorized the taking of depositions in criminal cases on behalf of the defense, and that for perhaps half a century such has been the common usage in this state. The question whether the order is necessary to prevent a failure or delay of justice is for the court to determine in each case upon the facts presented.

In the present case we are of the opinion that the necessity sufficiently appears. The witnesses reside hundreds of miles from the place of trial, their testimony appears to be material, the defendants are unable to pay the cost of bringing them here to testify, and the court has no authority to pay this expense from the public treasury, because the witnesses reside beyond the limits of the district. We do not say that all these facts must necessarily appear, but we are clearly of the opinion that, appearing, they are sufficient.

It is to be observed that it is enough if the court is satisfied that the taking of depositions will prevent delay of justice. This is a wise provision, for without it the trial of criminal causes might be postponed indefinitely. No court would be inclined to force a defendant to trial in the absence of his witnesses, and without their testimony. If they reside in a distant state, and the defendant is a poor man, what is to be done? The government will not, and the defendant cannot, produce them. A subpœna may be issued and duly served; but would any court compel a witness to travel at his own expense to a state far distant from his home in order to give testimony? If so, what is to be done if the witness is unable to pay the expense of the journey? If the court cannot order depositions to be taken, and the witnesses are duly served and fail to appear, the cause for continuance would seem to be sufficient, and it might recur at every term of

the court during the life-time of the defendant. In such a case it is clearly necessary to prevent a delay, if not a failure, of justice, that the order for a *dedimus* should be made.

It is insisted that this construction of the statute will enable defendants in criminal cases to manufacture evidence by taking depositions of accomplices and others, who will swear falsely; but the danger in this direction is little, if any, greater than that which would exist if the witnesses were all produced in court, for the government can always cross-examine, and its attorney can readily ascertain, the reputation for truth and veracity of witnesses examined, and, if it is bad, can show it to be so upon the trial. On the other hand, if depositions cannot be taken, the danger of doing injustice to defendants in some cases would be very great indeed. The life or liberty of a party accused may depend upon the testimony of a witness thousands of miles away from the place of trial, and whose presence there cannot be procured, because the government will not pay the expense; and neither the witness nor the accused is able to do so.

It is also suggested that witnesses examined under a *dedimus* issued in a criminal case are not liable to the pains and penalties of perjury; but this argument presupposes that there is no authority of law for taking testimony in such cases by deposition, which, in our opinion is not so.

The result is that the motion in this case must be granted, and it is so ordered.

TREAT, J., concurs.

UNITED STATES *v.* STICKLE.

(*Circuit Court, W. D. Wisconsin.* 1883.)

1. USE OF POST-OFFICE TO DEFRAUD—REV. ST. § 5480.

One who advertises under various titles for agents to sell goods and distribute circulars without any intention of employing such agents, but intending to incite persons who meet with such advertisements or circulars to send him 15 cents in postage-stamps and $2.50 in money for agent's outfits or sample cases, with the intention of cheating and defrauding the persons sending such postage-stamps or money, or a portion of it, by converting such stamps or money to his own use, without intending any equivalent for the same, and to carry out this fraudulent device, takes a letter and packet from the post-office, and deposits a packet in the post-office, is guilty of the misdemeanor described in section 5480 of the Revised Statutes of the United States.

2. SAME—WHAT MUST BE SHOWN—REASONABLE DOUBT.

As the offense consists in the concocting of a scheme or artifice to defraud individuals of their property and money, and in the employment of the post-office department in carrying into execution such scheme or artifice, to warrant a conviction the jury must be satisfied, beyond a reasonable doubt, of the intention of the accused to defraud, and of the use of the post-office for that purpose.

3. SAME—EVIDENCE OF INTENT TO DEFRAUD.

In determining the intention of the accused, it is proper for the jury to consider all the facts and circumstances in evidence, the nature and quality of his advertisements and circulars, and the statements and representations therein contained, their truth or falsity in different particulars, whether he filled orders for goods or not, and the quality of such orders, and his conduct in the premises generally.

4. SAME—FORMER CONVICTION—CONFESSION.

The fact that the accused on a former occasion was accused of a similar offense, pleaded guilty to the charge, and was convicted thereof, although such conviction would be a bar to any subsequent prosecution for that offense, may be considered by the jury as a confession on his part at that time, tending, with other circumstances in his conduct, to show the character of the business he had at that time been establishing and carrying on, and has since carried on; and in this connection the jury should also consider his explanation of his reasons for pleading guilty.

The defendant, George S. Stickle, was put on his trial in this court, on information being filed under section 5480 of the Revised Statutes, for a fraudulent use of the post-office of United States.

The evidence being closed, the court charged the jury as follows.

H. M. Lewis, Dist. Atty., for plaintiff.

E. W. Keyles and *B. W. Jones*, for defendant.

BUNN, J. Section 5480 of the Revised Statutes of the United States, under which this information is drawn, provides that if any person having devised, or intending to devise, any scheme or artifice to defraud or to be effected, by either opening or intending to open correspondence or communication with any person (whether resident within or outside the United States) by means of the post-office establishment of the United States, or by inciting such other person to open communication with the person so devising or intending, shall in and for executing such scheme or artifice, or attempting so to do, place any letter or packet in any post-office establishment, or take or receive any therefrom, such person so misusing the post-office establishment shall be punished by a fine of not more than $500, and by imprisonment for not more than 18 months, or by both such punishments.

It will be seen from this provision that the substance of the offense described is the using of the post-office department for the purpose of

carrying into execution a scheme or artifice devised or intended to be devised to defraud. The United States have not jurisdiction of the offense commited within a state, and under the state laws, of obtaining money or other property by means of false and fraudulent pretences or devices. And it is only, in general, when the mails of the United States are employed for the purpose of effecting such fraudulent schemes or devices, or for devising them or carrying them out when devised, that the United States government will take cognizance of the transaction.

The offense described in the statute and charged in the information is a misdemeanor simply, and not a crime of a high grade or a felonious character. Nevertheless the charge is one of importance to both parties. It is of great importance to the prisoner, if innocent of the charge, that he should be acquitted by the verdict of the jury. It is also important to the government and the public welfare that he should not escape punishment, if found to be guilty to the full satisfaction of the jury. You will therefore address yourself to a careful and thorough consideration of the evidence in the case, for it is only by this means that you can arrive at a safe and just conclusion upon the issue involved, which is the guilt or innocence of the defendant of the offense charged in the information.

The question is almost wholly one of fact for the jury, and the court has no desire to discuss the evidence relied upon by the parties. That has been already done thoroughly and ably by counsel on both sides, and it will be fresh in your memories when you come to retire to consider of your verdict.

I only desire to call your attention to the charge made in the information, to what the prosecution is called upon to establish in order to be justified in claiming a conviction, and to some of the leading points in the testimony and their bearing upon the main issue. The substance of the charge, briefly stated, is this:

That the defendant, on the first day of August, 1882, devised a scheme to defraud; that as a part and parcel of this scheme he advertised in the newspapers throughout the different states, and by means of printed circulars distributed, falsely representing himself as an importer of teas and coffee, and a wholesale dealer in the same, and under different titles, as the American Tea Company, the United States Tea Company, the United States Importing Company, and his own name of George S. Stickle, soliciting and offering to employ agents to sell teas and coffees, and to distribute his circular, at $100 per month, expenses paid, and to distribute circulars only at $50 per month; and requesting persons wishing to be so employed to send him 15 cents in postage stamps by mail. And further, as part of the same scheme to defraud, that he offered in

such advertisement and circulars to such an agent an outfit, with full instructions, upon the receipt of $2.50, all the while not intending to employ agents at all, but devising that scheme for the purpose of getting people to forward to him through the mails 15 cents in postage stamps and the $2.50 in money orders or registered letters intending to defraud such people of these sums and converting them to his own use. And it is further alleged, after setting out much more fully than I have here attempted to do, the scheme alleged to have been devised by the defendant to defraud, that the defendant, Stickle, for the purpose of executing said scheme and artifice to defraud and attempting so to do, did, on the third day of August, 1882, take and receive from the post-office at Madison, Wisconsin, a certain letter ond packet mailed at the post-office in the village of Broadhead, in Green county, by one Jay L. Dawson, and addressed to the said United States Importing Company, Madison, Wisconsin. And for the same purpose did, on the twenty-third day of September, 1882, place a packet in the post-office at Madison, inclosed in an envelope, postage paid, and addressed to James Garland, Richland Center, Wisconsin.

This, in brief, is the nature of the charge made in the information, and which the prosecution must establish by evidence in order to claim a conviction at your hands. So far as the overt act of using the United States post-office department is concerned, the prosecution is confined to the two instances charged in the information, that of August 3d and September 23d; that is, the defendant cannot be found guilty upon any other, and it must establish to your satisfaction one or the other of these cases.

The evidence in relation to the defendant's business in Madison, and which is relied upon by the prosecution to show the fraudulent device alleged to have been entered into by him, has relation to and covers a somewhat longer period of time. And though the admission of this evidence has been characterized somewhat unnecessarily as a loose way of trying the case, I am clearly of the opinion it was entirely necessary and proper to show the real character of the defendant's business at the time charged in the information, and his real intent in relation to the particular transaction charged therein. A fraudulent device or scheme is of the essence of the charge under the statute, and the proofs of such a fraudulent device can frequently be made only from a variety of facts and circumstances often very inconclusive when standing alone, but more or less potent and convincing when taken together, one circumstance with another or others. It appears from the evidence that the defendant has once before, at the last June term, been before this court on a similar charge, the offense alleged to have been committed in March or April last, and that he plead guilty to the information, and was thereupon convicted and punished.

As I have already told you on the trial, the defendant cannot be again convicted of the offense charged in that case. There is no thought or attempt on the part of anybody to do this. That conviction may be taken by you and considered as a complete bar to any unlawful use of the post-office department prior to June, when that information was filed. The charge in the case now on trial relates to a later period, to-wit, to an unlawful use of the post-office department in August and September, 1882. But I think it entirely competent in order to determine the true character of the defendant's business in August and September, 1882, that the history of the facts attending the establishment and conduct of the business previously, should go to the jury for what they are worth. So far as these facts throw any light upon the charge made in the information, it is entirely proper that they should be considered by the jury.

The jury will bear in mind that the essence of the charge is the concocting or devising of a scheme or artifice to defraud individuals of their money and property, and the employment of the United States post-office establishment in the instances named, to effectuate such device. And these two propositions it is incumbent on the prosecution to establish in proof. After what has been said, it is quite unnecessary to say to you that it is not essential for the prosecution to show that the defendant has not filled the orders for teas and coffees made upon him. That is no essential part of the plaintiff's case, nor if proved by the prosecution would it constitute any offense against the government. It is not an offense under any law to fail to fill orders for goods, or to send goods on an order which is inferior to the sample used on the sale. Of course if you should find that he filled his orders promptly, and with goods as good as the samples, it would be a circumstance to be construed in favor of the defendant; or if the orders were not filled, or filled with inferior or worthless goods, that circumstance might be construed in determining the true character of the business.

If the defendant, as charged, devised a scheme to defraud by advertising under various letters for agents to act for him in selling goods and distributing circulars, when he did not expect or intend to employ any agents, with the intent to incite any and all persons who might meet with such advertisements or circulars, as charged, to send him 15 cents and $2.50 for an agent's outfit or sample case, as charged, with the intent to cheat and defraud the persons sending him postage stamps and money, or a portion of it, and converting them to his own use without intending any equivalent for the same,

and to carry on this fraudulent device he took a letter and packet from the post-office at Madison from Jay L. Dawson, as charged, or mailed one to James Garland, in September, as set forth, this would make the offense complete, though it should appear that the defendant had filled to the letter all his orders made upon him for goods to be sold. And in determining the intention of the defendant it is proper to consider all the facts and circumstances in evidence, the nature and quality of the defendant's advertisements and circulars, and the several representations and statements therein contained, their truth or falsity in different particulars, and the conduct of the defendant in the premises.

It will be the duty of the jury to exercise their best judgment upon the facts and circumstances proven and appearing in the case. I do not see that there is very much conflict in the testimony. None I presume that will give the jury very much trouble. But as I look upon the case, the most considerable burden and duty of the jury will consist in giving the due and proper effect to facts and circumstances for the most part undisputed. It is for you to say what these facts show, and how they satisfy you upon the issue of the defendant's guilt. It will be for you to say from these facts what the real nature of the business was he was conducting in August and September, 1882; what was the real intention of the defendant in advertising through the newspapers of the country as he did, and in sending and distributing those different circulars? Was it to employ agents throughout the country to sell teas and coffee and distribute circulars, and by this means to establish a legitimate business of selling these goods? or was the prime motive on his part to induce a great number of persons to send him the 15 cents called for in the advertisement, and afterwards the $2.50 for an agent's outfit, or sample case, so called, for the purpose of defrauding such persons out of their property and money, and without any intent or expectation of employing them as agents with a large salary? Where did he expect and intend that his profits should come from, and was his intent fraudulent, or lawful?

Upon the matter of the defendant's former conviction, your good sense will prevent your giving too great weight in favor of the government to the evidence on that subject. It is only evidence of a confession or admission on the defendant's part, at that time tending, with other circumstances in his conduct, to show the character of the business he had at that time been establishing and carrying on, and has since carried on in Madison. Of course the jury will guard

against drawing from it any necessary inference of an unlawful use of the mail since that time by him, or any intent to concoct or conceive a scheme or device to defraud. But you will give just such weight to the fact as tending to show the character of his business at the time to which the present information relates, as you think in justice you ought. And of course it will also be proper for you to consider the statements of the defendant in regard to his pleading guilty to that charge, that he did it to save expense, and so forth. Of course, a person charged with crime might plead guilty, and suffer a conviction, when he fully believes himself innocent. Whether the defendant did so or not it will be proper for the jury to consider in this part of the case.

After full and faithful consideration of all the facts in the case, it will be for you to say how you are reasonably convinced. What impression does the evidence, taken as a whole, make upon your mind? It is incumbent on the prosecution to satisfy you of the guilt of the defendant, beyond a reasonable doubt. The government does not expect or desire a conviction at your hands, unless you are fully convinced of the defendant's guilt. On the other hand, if you are so convinced, you should follow your convictions and return a verdict of guilty.

The further responsibility of the case lies with you, and I have full confidence that you will give it that judicious consideration which both parties are entitled to at your hands, and render a verdict which shall satisfy your best convictions and the evidence in the case.

COBURN and another *v.* CLARK.*

(*Circuit Court, E. D. Missouri.* March 12, 1883.)

1. PATENTS—EFFECT OF DECISIONS AS TO VALIDITY—PRELIMINARY INJUNCTION.
   Where a motion is made for a preliminary injunction for an alleged infringement of a patent, which has been held valid without collusion in a contested patent case, the validity of the patent will be considered settled for the purposes of the motion.
2. SAME.
   Where, however, the decision does not show what claims were held valid, nor what would be an infringement, the following questions are left open, viz.: (1) What are the contrivances covered by the patent? (2) Has the defendant infringed the same?

*Reported by B. F. Rex, Esq., of the St. Louis bar.

Motion for a preliminary injunction to restrain the defendant from infringing two letters patent of the United States, one being for an "improvement in cases for transporting eggs," and the other for an "improvement in egg-boxes." The first of said patents contains two and the other three claims.

Overall & Judson, for complainants.

John M. and *Ch. Krum*, for defendant.

TREAT, J. It is unadvisable on a preliminary motion to express an opinion concerning the merits of a controversy to be determined at final hearing. It seems that the United States circuit court of the southern district of New York has held, on final hearing in a case before it, that plaintiffs' patents are valid, the decree in which case is for the purposes of this motion to be considered conclusive. It also appears that Judge MCCRARY, of this circuit, acting upon such adjudication, and possibly other matters presented, has awarded preliminary injunctions.

Under such rulings nothing remains but to grant similar orders, provided the alleged infringements are the same, substantially or colorably. It has been the course of proceedings here for more than 20 years, and elsewhere, to accept a decision in a patent case, when made on the merits, without collusion or on mere default, as an adequate basis for a preliminary injunction, so far as the validity of the patents is involved; leaving open for inquiry on such motion solely the question of infringement.

Under the rules governing such motions the decisions upholding the Stevens and Bryant patents must control. But what are those patents; that is, what do they cover? It is very easy to grant an order perfunctorily that defendant shall not infringe plaintiff's patents; but such a perfunctory order leaves open the whole subject of controversy. The defendant may deny an infringement, and, consequently, if his course of business does not infringe, what effect has the order? He is enjoined not to do what he has not done and what he does not propose to do. Hence the injunction order in such form would be a mere *brutum fulmen*. It is, therefore, essential to ascertain whether the defendant has *prima facie* infringed a valid patent, for the complainant has no right to drag into a court of equity as a defendant one who is not answerable to equitable proceedings. The defendant has a right to stand on his denials.

The primary inquiry is, the patents being considered valid, on what construction thereof plaintiff's rights are based. For the pur-

poses of this preliminary investigation the patents must be considered valid, but there remains the question as to the true construction of the patents; *i. e.*, for what devices were the patents lawfully granted. It is to be noted that there has been, at least as to one of the patents, a disclaimer and a reissue, from which the matter patented has to be determined.

It is not proposed now to go behind the decision made in the southern district of New York (which settled nothing definitely as to what was really patented) which hold the patents valid. Nor is it proper to consider otherwise than as authoritative the interlocutory views of Judge McCrary, in this circuit, upon the patents in question. Hence there remain only two propositions to be considered: *First*, what are the contrivances covered by the patents? *Second*, has the defendant infringed the same?

It is held, for the purposes of this motion, that the plaintiffs have an exclusive right to the combination of more than two trays in a case; and also to the interlocked form of the separated trays. The injunction order will go against the infringement of said *combination*, and also of the construction of said interlocked form of trays. There are many suggestions proper concerning interlocutory orders in cases of this kind, which, if made, might be considered not in accord with the views expressed by many *nisi prius* courts, but which ought to be weighed more fully than has heretofore been done. For instance, a court in final hearing may decide a patent valid, which patent contains many claims, and the construction of which patent, as to one or many of the claims, is not disclosed, especially as to the alleged infringement of one or more of said claims. Is it to be taken for granted that the court held the patent valid as to each and every claim, when possibly the alleged infringement was as to one of the claims alone, and that claim was alone under consideration?

The cases now before the court are illustrative. Here are various patents,—one for combinations and another for mechanical devices. The patents have been held valid; but as to what? What construction has been given to the respective patents, and as to what alleged infringement? What shall now be held as concluded for the purpose of the present motions, unless it is disclosed what some other court decided in respect to each of the essential matters pertaining thereto? These questions are complex, and not perfunctory. An examination of the cases cited with regard to the very patents in question furnish very little light with regard to the subjects now in dispute.

A more seaching inquiry is needed for preliminary injunctions than a mere perfunctory order, covering, in an indefinite manner possibly, all the claims of a patent, and all possible infringements of valid or invalid claims, when it is impossible to determine from a final decree what was in detail decided.

The true rule should require it to be shown what claim was held to be valid; the validity of that specific claim having been brought into question. It may be that the court on final hearing passed on only one of many claims, and that the alleged infringement in such a case pertained only to that specific claim. How is it as to other claims on which no decision has been made? Must a court, on a motion for a provisional injunction for alleged infringement of some other claim, deem itself concluded when no court has passed upon the specific inquiries? There should be a careful investigation of the precise points decided, and of the alleged infringement; otherwise great wrongs may be perpetrated against one or the other of the parties litigant. Preliminary injunctions are not to be granted, it may be destructively, to defendants merely because an indefinite decision has been made by some court whose views are not disclosed in its decree; and, on the other hand, when plaintiff's rights have been fairly determined, should piracy be tolerated *pendente lite?*

These general views are expressed in the interest of all parties to like controversies.

An examination of the several decisions in the United States circuit court for the southern district of New York fails to furnish any construction of the several patents whereby the action of this court can be aided; nor is it shown with distinctness what claims were held valid, nor what would be an infringement of claims held valid.

Without further comment, the injunction order will be issued as herein stated, leaving for final hearing matters looking to the validity of the respective patents.

TURRELL *v.* BRADFORD and others.

(*Circuit Court, S. D. New York.* March 22, 1883.)

1. SUBCOMBINATION CLAIMS IMPORTED INTO REISSUES.
   Such claims are void, upon the principle declared in *Bantz* v. *Frantz*, 105 U. S. 160.
2. RIGHT OF REISSUE TO COVER SUCH CLAIMS LOST, BECAUSE OF UNREASONABLE DELAY, THE DEFENDANT NOT USING THE ENTIRE COMBINATION.
   These claims in the reissue for the subcombinations are void, being granted many years after date of the original patent, and after the invention of another device which did not use the entire combination—original claim—of that patent, and when "the right to have the correction made" had been "abandoned and lost by unreasonable delay."

George C. Frelinghuysen, for plaintiff.

A. J. Todd, for defendant.

SHIPMAN, J. This is a bill in equity to restrain the defendants from the alleged infringement of reissued letters patent, granted May 30, 1876, to the plaintiff, as assignee of the executors of John Lovatt, for an improved skate. The original patent was issued on May 29, 1860, to John Lovatt, as inventor, and was extended on May 28, 1874, to May 30, 1881. Two intermediate reissues have been granted, one on November 10, 1868, and the other on April 6, 1875. The bill was filed on January 30, 1880. The defendants' skate is known as the "Acme Club Skate." It is described in letters patent to John Forbes of July 2, 1867. The Lovatt invention was a skate wherein the sole clamps and heel clamps were securely fastened to the sole and heel by the operation of one adjustable screw, whereas, previously, the mechanisms for sole clamps and heel clamps were separate and acted independently of each other. His skate has a pair of laterally-sliding sole clamps and a pair of laterally-sliding heel clamps, which are operated by means of a screw moving longitudinally with reference to the skate, and acting upon V-shaped grooves in such manner that "when one pair of clamps closes upon the heel or sole, the clamp-operating mechanism is not arrested in its movement, but is continued so as to close the other pair of clamps." This peculiarity is pointed out in the specification of the original patent. By the agency of the V-shaped grooves, the longitudinal motion of the screw communicates a lateral motion to the clamps.

The single claim of the original patent was "the combination of the movable V-slotted blocks, E, E, with the clamps, D, D, D, D, and

the screw rod, G, when the same are arranged substantially in the manner and for the purpose herein set forth.

The four claims of the present reissue are as follows:

"(1) The combination, in a skate, of laterally-sliding clamps for grasping the sole, a plate or rest for the foot, and mechanism for moving and holding the clamps substantially as specified. (2) The combination, with the clamps for grasping the sole and clamps for grasping the heel, of mechanism acting between such clamps in opposite directions, so that one set of clamps acts as a resistance in closing the other set of clamps, substantially as set forth. (3) The combination, in a skate, of laterally-moving clamps, pins, inclined slots, and mechanism for operating and holding such clamps, substantially as set forth. (4) The combination, in a skate, of a plate or rest for the foot, laterally-sliding clamps, mechanism that moves and holds such clamps and transfers a longitudinal motion into a transverse motion, and clamps for grasping the heel, substantially as specified."

It will be perceived that the reissue divides the entire combination of the original claim into the various subcombinations which, it was believed, were shown in the specification and drawings of the original patent. The same construction was given to this reissue by Judge NIXON, (*Turrell* v. *Spaeth*, 14 O. G. 377.) The claim of the original patent was for the combination of the operative mechanism, viz., the screw and the blocks, or equivalent mechanism acting in substantially the described manner, with the two sets of the laterally-sliding clamps; and included, as a part of the mechanism, its method of action between the clamps, so that one set of clamps acted as a resistance in closing the other set of clamps, and it also included the transfer of a longitudinal into a transverse motion.

The first claim of the reissue omits the heel clamps. The second claim is for sole and heel clamps so combined with the described or equivalent mechanism for moving and holding these clamps that one set shall act as a resistance in closing the other set. The third claim is for laterally-sliding clamps, pins, inclined slots, and mechanism as described for operating such clamps. The laterally-sliding clamps of this claim were probably intended to include only one pair of clamps, whether sole or heel clamps, and by the mechanism was intended the mechanism to operate the pair of clamps which might be employed. If the claim should be construed so as to include both pair of laterally-sliding clamps, then it would also include the method of operation by which one set of clamps acted as a resistance in closing the other set.

The fourth claim is for a plate for the foot-rest, laterally-sliding clamps, and the described mechanism that moves and holds such

clamps and transfers a longitudinal into a transverse motion, and heel clamps for grasping the heel. It omits the requirement of the second claim.

The defendants' skate has laterally-sliding sole clamps, a longitudinally-sliding heel clamp in front of the heel, and fixed stops on the rear side of the heel-plate to hold the heel of the boot, both sets of sliding clamps being moved by one operation of a lever and an eccentrically pivoted cam. It is admitted that the skate does not infringe the second claim, because one set of clamps does not act as a resistance in closing the other set. Not having this peculiarity, this skate would not have infringed the original patent.

It may well be admitted that it infringes the first, third, and fourth claims, and that it may contain the respective subcombinations which are included therein, because those claims are void upon the principle declared in *Bantz* v. *Frantz*, 105 U. S. 160. The original patent was granted May 29, 1860. The first reissue was granted in 1868, the second in 1875, and the third and present reissue on May 30, 1876, 16 years after the patent was originally issued.

The defendant's skate was patented in 1867. Under the original patent those who did not use the entire combination, which included all the subcombinations mentioned in the reissue, were not infringers. These claims of the reissue are void, having been granted many years after the date of the original patent, and after the invention of another device which did not use the entire combination of that patent, and when "the right to have the correction made" had been "abandoned and lost by unreasonable delay." *Bantz* v. *Frantz*, 105 U. S. 160.

The bill is dismissed.

SPAETH *v.* GIBSON.

(*Circuit Court, S. D. New York.* March 19, 1883.)

PATENTS FOR INVENTIONS—IMPROVED SKATE—AMERICAN CLUB SKATE.

The operative locking mechanism is the lever, which operates as the ordinary toggle-joint does after the parts have passed centers and is automatically held in against the runner by the pressure of the clamps, and the hook-like action alone of one of the links would not keep the clamps closed or locked, but the efficient locking cause is the toggle-joint and lever, the use of which in defendant's device will be enjoined.

Arthur v. Briesen, for plaintiff.

A. J. Todd and *Benj. F. Thurston*, for defendant.

SHIPMAN, J. This is a bill in equity to restrain an alleged infringement of reissued letters patent which were granted on February 18, 1879, to the plaintiff, as assignee of Charles T. Day, for an improved skate commonly known as "The American Club Skate." The original patent was issued to said Day, as inventor, on July 11, 1871.

The invention is described in the specification of the reissue as follows:

"This invention consists in the combination in a skate of movable clamps for grasping the sole, and longitudinally-sliding clamps for grasping the heel at the back part thereof, a stationary spur or abutment for the breast of the heel, and a hand-lever adapted to operate both sets of clamps; also, in the combination in a skate of the heel and toe clamps, and of a lever swinging on a pivot which is situated on one side of the center line of said clamps for the purpose of holding the clamps firmly in their closed position; and, further, in the combination, with movable clamps for grasping the sole, longitudinally-sliding clamps for grasping the heel at the back part thereof, and with a hand-lever adapted to operate both sets of clamps, of a regulating screw for adjusting the clamps to heels and soles of different sizes."

The reissue contains four claims, of which the first and fourth only are said to have been infringed. These claims are as follows:

"(1) The combination, in a skate, of movable clamps for grasping the soles, of longitudinally-sliding clamps for grasping the heel at the back part thereof, a stationary spur or abutment for the breast of the heel, and a hand-lever adapted to operate both sets of the clamps, substantially in the manner herein shown and described. (4) The combination, with movable clamps for grasping the sole, longitudinally-sliding clamps for grasping the heel at the back part thereof, a stationary spur or abutment for the breast of the heel, and with a hand-lever adapted to operate both sets of clamps simultaneously, of a regulating screw for adjusting the two sets of clamps to soles and heels of different sizes, substantially as set forth."

The original patent contained a single claim, which was as follows:

"The eccentrically-pivoted lever, E, combined and arranged with the heel and toe clamps of a skate substantially as specified."

The lever of the claim is thus described in the original specification:

"As the pivot, Z, by which the lever is attached to the stem of the heel clamp, is eccentric in its position, and so arranged that when the lever is closed against the runner it will lie without the line of traction connecting the pivots of the toggle, D, and swivel, D', it follows that the lever will be automatically held in against the runner by the pressure of the clamps. Therefore there is no danger of the lever being thrown outward and tripping the wearer."

It will thus be seen that the claim and the specification of the original patent required that the hand-lever, which operates both sets of clamps simultaneously, should be eccentrically pivoted. The history of the patent shows that the patentee was compelled to limit his inventions, in view of his previous patent of December 28, 1869, to the combination of heel and toe clamps with a lever thus pivoted. The lever of the reissue must be construed to be the eccentrically-pivoted lever of the original patent.

The advice which was relied upon as anticipating the Spaeth skate was the skate of Alpheus S. Hunter, patented June 22, 1869. The two skates are organized in a substantially different manner in this respect. In the Hunter skate, (making use of the language of Mr. Brevoort, one of the plaintiff's experts,) "two adjustments are absolutely essential, while in the skate shown in the Spaeth reissue one adjustment is all that is ever required, and the difference arises from the use in the Spaeth skate of *longitudinally-sliding* heel clamps and sole clamps, which are so drawn together by a lever as to permit one set of clamps to be arrested, while the other set of clamps is capable of further advancement."

The defendant's skate is described in the patent of Everett H. Barney of October 11, 1881. The point wherein it is claimed to differ from the Spaeth skate is that what is called by the plaintiff the lower toggle link is called by the defendant a flat hook, which he says is caused to hook over the pivot of the sole clamp, and his expert says: "By means of said hook only the clamps are then retained in a locked position without any aid from said lever, and the latter may then, without in the least affecting the positive locking of the clamps, be entirely disconnected from said hook and swing freely on said sole-clamp pivot." I am of opinion that the operative locking mechanism is the lever which operates as the ordinary toggle-joint does, after the parts have passed centers, and is "automatically held in against the runner by the pressure of the clamps." I do not think that the hook-like action alone of one of the links would keep the clamps closed or locked, but that the efficient locking cause is the toggle-joint and lever.

Let there be a decree for an injunction and an accounting.

MATTHEWS *v.* SPANGENBERG.

(*Circuit Court, S. D. New York.* February 1, 1883.)

PATENTS FOR INVENTIONS—VIOLATION OF INJUNCTION.

Where defendant has been guilty of a contempt in disregarding the injunction of the court, but the act of contempt does not appear to be at all willful or defiant, but merely the exercise of a supposed right under advice taken and given in good faith, it does not deserve punishment as such, but he should make the orator whole as to the damages sustained thereby.

In Equity.

A. v. Briesen, for orator.

Philip Hathaway, for defendant.

WHEELER, J. This cause has now been heard upon motion of the orator for an attachment against the defendant for an alleged violation of the injunction heretofore granted, restraining the defendant from infringing letters patent, reissued No. 9,028, granted to the orator, dated January 6, 1880, for a soda-water apparatus. On the papers it appears that the defendant has continued the use of an apparatus called the Gee Invincible apparatus, which was at the hearing in chief adjudged to be an infringement, except that he has not used the parts which draw syrup; and that he has paid to the orator the damages found by the master to have been sustained by use of this apparatus by the defendant. It is argued for the defendant that this payment has freed the use of this machine from the operation of the patent. The damages recovered by the orator are not for a sale for use, which would probably free the whole use, nor for the use now complained of, which would probably be a satisfaction for that use and entitle the defendant to have it, but were for a prior use of the infringing device, and made satisfaction only for that use. The use complained of has not been paid for, and is not justified by the payment made for something else.

A part of the patent is for that part of the apparatus for containing and drawing the syrups; and a part for that part containing and drawing the waters. As the defendant has not, since the injunction, used the former part, he has not infringed that part of the patent. The qualities of the liquids have nothing to do with the working of either part. The syrups could any of them be contained and drawn in the parts for the waters, and the waters in the parts for syrups, as well as in the parts assigned to them in use, so far as the liquids themselves are concerned. The patent is not for storing and draw-

ing particular liquids, but is for apparatus for storing and drawing liquids in particular modes.

As to that part of the patent which covered apparatus for the waters and was held to be valid, the defendant infringes it, although he does not use the other part. The sixth claim of the patent is for a combination of parts. It would not be infringed but by use of that combination. The parts drawing syrups enter into the combination in the same way, and have there the same office that the corresponding parts drawing waters do. The use of either is the use of the combination, without the use of the other. The defendant, by using those parts for drawing waters, has used so much of the patented invention. He must, therefore, on this showing as presented, be adjudged guilty of a contempt.

The act does not appear to have been at all willful or defiant, but merely the exercise of a supposed right under advice, taken and given in good faith, and is not considered to deserve punishment as such. He should merely make the orator whole.

The defendant is adjudged guilty of the contempt charged, and is sentenced therefor to pay the damages sustained by the orator thereby, to be ascertained by the master, to the orator, with the costs of these proceedings.

THE PENNSYLVANIA.*

(District Court, E. D. Pennsylvania. February 14, 1883.)

1. ADMIRALTY PRACTICE — APPORTIONMENT OF COSTS WHERE DAMAGES ARE DIVIDED.

   Full costs in admiralty proceedings do not always follow a judgment for partial damages.

2. SAME—LIBEL FOR COLLISION—JOINT NEGLIGENCE.

   Where a collision resulted from joint negligence and the libelant recovered a judgment for half damages, there being no cross-libel, or allegation of damage in respondent's answer, the costs may also be divided.

Motion for Allowance of Full Costs to Libelant.

The owners of the schooner S. B. Hume recovered a judgment for half damages upon a libel for collision against the steam-ship Pennsylvania, reported in 12 FED. REP. 914, and the decree reserved the question of costs, whereupon the libelant moved for an allowance of full costs.

*Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.

Alfred Driver and *J. Warren Coulston*, for libelants.

Full costs should be allowed where a recovery of damages is had and there is no cross-libel and no allegation of damage in respondent's answer, (*Rathburn* v. *Steam-tug Thompson*, unreported, BROWN, J., U. S. Dist. Ct., S. D. N. Y., second circuit; *Sapphire*, 18 Wall. 51; *Rival*, 1 Spr. 128; *Denike*, 3 Cliff. 117; *Mary Patten*, 2 Low. 196; *Baltic*, 3 Ben. 195; *Paterson*, Id. 299; *Avid*, Id. 434; *City of Hartford*, 11 Blatchf. 72, 290; *Vanderbilt* v. *Reynolds*, 16 Blatchf. 85; *Mason* v. *Steam-tug Murtaugh*, 3 FED. REP. 404; *William Cox*, Id. 645; 9 FED. REP. 672; *Sylvester Hale*, 6 Ben. 533; *David Dudley*, 11 FED. REP. 522; *Excelsior*, 12 FED. REP. 195; *Abby Ingalls*, Id. 217; *James M. Thompson*, Id. 189;) and also for printing brief, (*Neff* v. *Pennoyer*, 3 Sawy. 335.)

Morton P. Henry, for respondent.

Costs should be divided where partial damages are awarded and no equitable reason exists to the contrary. *Vanderbilt* v. *Reynolds*, 16 Blatchf. C. C. 90; *America*, 92 U. S. 432; *Farnley*, 8 FED. REP. 629. *The Sapphire*, 18 Wall. 51, in which half damages and full costs were recovered, is not inconsistent, since costs may be given for equitable reasons.

BUTLER, J. The libelant—admitting the question to be one for the court's discretion, determinable on equitable considerations—that costs may be given a libelant who fails to recover, and withheld from another who succeeds—asks an award of full costs in this case, on the ground that it is equitable, as he asserts, to do so whenever, as here, damages from collision—the result of concurrent fault of both parties—are sustained by the libelant's vessel, alone, and apportioned by the court—(in the absence of special circumstances;) and that this is so fully recognized in admiralty that such a disposition, under such circumstances, has become a rule of uniform application. That no such rule existed until within recent years, I understand to be admitted. An expression in *The Mary Patten*, 2 Low. 196–9, is cited as the starting point of this departure, and several subsequent cases, in Massachusetts and New York, are referred to as evidence of its general adoption. Whether such a rule has been adopted in Massachusetts and New York need not be considered, in the view I entertain of the question. The expression in *The Mary Patten*, cited as the foundation and reason of the rule, is as follows:

"There is one aspect of the case [the question of costs] which does not appear to have received sufficient attention. If the loss is suffered by one vessel alone, and her owner brings his libel, [being guilty of concurrent fault,] he

will recover half damages; and there is no reason why he should not, in general, recover full costs. It is the ordinary case of the prevailing party recovering less than he asks for, and if there has been no tender or offer of amends, and no equity peculiar to the particular case, it is according to sound and reasonable law, in all courts, that he should recover full costs."

With the highest regard for the learned judge who said this, and the consequent bias in favor of whatever he may say, I am unable to discover the justice of this position. The analogy invoked is drawn from proceedings at *law*, where the rule respecting costs is unbending, and its operation, frequently, inequitable. Were we to follow out the analogies on this line, the libelant, under the circumstances stated, would recover nothing whatever—either of damages or costs. It is only by reason of the equitable principles on which admiralty proceeds, that one guilty of contributory fault can recover any part of the resulting loss. The *law*, unable to gauge his just share in the responsibility, leaves him to bear the entire burden. The analogy invoked is, therefore, inapplicable, if not unfortunate. Because it is equitable to allow a recovery of half damages, under such circumstances, it by no means follows that it is also equitable to allow a recovery of full costs,—a large part of which, generally, if not invariably, results from the libelant's unjust and unsuccessful effort to recover double the amount of damages due.

In every contested collision case, wherein mutual fault is found by the court, each contestant is in part, and to exactly the same extent, successful, each establishing the fact of fault in the other, and thus escaping half the loss. Every such case contains two distinct issues, each involving precisely the same amount. What support, therefore, can be found in equity for requiring the respondent in such cases to bear all the costs—those resulting from the issue found in his favor, as well as those from the other found against him? If the respondent's vessel be also injured, it is conceded that such a requirement would be unjust. But what possible relation does this circumstance bear to the question? How does it affect the justice or injustice of compelling the respondent to bear the costs of an issue in which he has successfully resisted an unjust demand? If the respondent's vessel is injured, this additional loss is also divided. If it escapes injury, his loss, nevertheless, equals that of the libelant. In either event he bears half of all sustained. This half is what he is presumed to have inflicted. When he pays it, and the costs occasioned by denying his share in the fault, the demands of justice are fully satisfied. Exactly what proportion of the costs resulted from this denial and the

issue formed upon it, and what from the other, cannot generally, if ever, be ascertained,—any more than can the exact proportion of injury resulting from the respective faults of the parties. The court does not attempt to ascertain it, but infers the amount resulting from each to be equal, and therefore divides it, as it does the damages. The opposite view, urged by counsel for the libelant, would, in my judgment, not only be inequitable but mischievous in other respects. It would tend to encourage unjust claims, by allowing the claimant to experiment at the expense of his antagonist without risk to himself. The libelant may usually know when he is guilty of contributory fault, and doubtless does. If he may deny and conceal his fault, and demand and sue for the damages resulting from it, as well as from the respondent's, with immunity from risk of disadvantage respecting costs, it is not too much, I think, to say that the average libelant will do so.

Nor do I think the alleged rule is any better grounded in authority than in reason. The uniform practice in this district has been against it; and I do not find the practice to have been different elsewhere,—unless, indeed, in Massachusetts and New York. Without citing other cases—(*Hay* v. *Le Neve*, 2 Shaw, Scotch App. Cas. 395; *Foster* v. *Miranda*, 1 Newb. 229; *The Monarch*, W. Rob. 21; *The Rival*, 1 Spr. 128; *Lennox* v. *Winisimmet Co.* Id. 160; *The Favorita*, 4 Ben. 134; *Vanderbilt* v. *Reynolds*, 16 Blatchf. 80, 81, 86, 90, 91,) —in which this practice has been pursued, it is sufficient to mention *The America*, 92 U. S. 432, where this question of costs was before the supreme court,—as lately as 1875,—and where all the conditions necessary to the application of the rule here invoked, were present. No cross-libel was filed, nor did the answer or testimony suggest any injury to the respondent's vessel. And yet the supreme court,—(reversing the court below, whose decree awarded full damages and costs,)—finding both parties in fault and awarding half damages, *divided the costs.* It is true the question is not discussed in the opinion, but the court was called upon to consider it; and the case therefore shows the court's understanding of the practice, and a decision based upon it.

The earlier case of *The Sapphire*, 18 Wall. 51, decides nothing respecting costs; nor do I understand the general observations of the judge, dropped in passing, to be inconsistent with the practice subsequently followed in *The America.* The only question before the court was whether its mandate, previously issued, had been obeyed.

This mandate was to divide the damages. Nothing was said respecting the disposition already made of costs. The subsequent observations of the judge on this subject were mere suggestions in justification of the disposition made,—manifestly with no thought of passing on the question, or deciding anything. The circuit court, having determined in the first instance that the respondent alone was in fault, doubtless was still of opinion that he was mainly so, at least, and therefore, probably, allowed its former disposition of costs to remain—when entering the decree for half damages, as ordered by the mandate. Precisely what is meant by the expression in the opinion, "doubtless they [the costs] generally follow the decree," is uncertain. Is it that the disposition of costs, generally, follows the disposition of damages,—the former being divided between the parties, where the latter are, thus following the principle or rule of the decree? Or is it that full costs are generally awarded a libelant who recovers half damages? It must be further observed that the judge points out a special and controlling circumstance in favor of the disposition there made. "The costs allowed libelant were incurred in his effort to recover what has been proved to be his just demand," says the judge. Certainly, if the costs were *all* incurred, as is here found, or assumed, in establishing the respondent's fault, and consequent liability to half damages,—(no part in resisting the unjust demand for double this amount,—founded on the false allegation of blamelessness in libelant,)—no other disposition of them could be made. In any view, however, that may be taken of *The Sapphire*, the force of the decision in *The America* must remain unimpaired.

I do not find in the case before me any special circumstance calling for a departure from the usual practice. The suggestion that the principal fault was the respondent's; that the libelant's was slight, and virtually unimportant, cannot be accepted. The libelant was guilty of willful disregard of the law, in a matter material to the collision that followed. It was not the case of oversight, imprudence, inadvertence, or other ordinary negligence; but was a deliberate disregard of the statute. No torch was on board; no provision had been made respecting it. As seems to be too common with such vessels, this provision of the law was, doubtless, esteemed unreasonable and unnecessary, and therefore unworthy of regard. In recovering one-half the damages sustained and one-half the costs of ascertaining the controverted facts, the libelant gets all he can justly demand.

THE NETO and Cargo.

(*District Court, S. D. Florida.* March 2, 1883.)

1. SALVAGE—AMOUNT AWARDED.

Measure of reward in cases of salvage where the peril to the salved vessel was great depends upon the circumstances of the case and the award is in the sound discretion of the court; it is not to be measured positively by the value of the property in peril, yet this may always be taken into account in determining the amount, as the owners are benefited in that proportion, and a small percentage assists in compensating salvors for services that are frequently performed where the property is so small that adequate remuneration cannot be given without a hardship to the owner.

2. SAME—PRECEDENTS.

Although each cause is disposed of upon its own merits, the discretion of the court should be guided by general principles, and in applying them should, as far as practicable, where circumstances show a similarity of reasoning and common point of agreement as to amount, consider the precedents of adjudicated cases.

Amounts awarded in cited cases.

In Admiralty.

Jeff. B. Browne, for libelants.

G. Bowne Patterson, for respondents.

LOCKE, J. This steam-ship laden with a valuable cargo of cotton, bound from Galveston to Liverpool, went ashore on Pulaski reef, a small rocky shoal, the most north-easterly of the Tortugas group, the evening of January 30th, and when boarded by the libelants, with two vessels and eighteen men, the next morning, was lying hard ashore on a rough and rocky bottom with the wind and sea pressing her further aground, with 16½ feet of water under her bows, 17 under her stern, and from 12 to 14 feet amidship. A ridge of rock with from 12 to 14 feet, extended across at a short distance from her stern, and there was a shoal with 15 feet off her starboard quarter, and another, with about the same depth, a little forward, off the starboard bow. She was drawing before going ashore 18 feet 3 inches. She had struck the reef at about right angles swinging around, and must have surged backward and shoreward until she was in a very dangerous position. The weather was bad, with a strong breeze and high sea, and the libelants were unable to do anything the first day to assist her. She thumped somewhat heavily, and at times the sea broke over her. The next day, the wind and sea having somewhat abated, the libelants carried out a heavy anchor with chain, and an 11-inch hawser into deep water, took one load, 80 bales of cotton, about five miles to

Garden Key, then loaded both their vessels, discharging in all about 200 bales; but finding it necessary to lighten her still more, the master having consulted with libelants, they jettisoned between five and six hundred bales. By heaving constant strains on the windlass, about 3 o'clock the afternoon of the third day, at high tide, the steamer came off.

The position of the vessel, the nature of the bottom where she lay, the force of the wind and sea while she was aground, show her condition to have been one of considerable danger. Every moment she was resting on the bottom was one of unquestioned peril. The master was unable to do anything to relieve her from the bottom. He candidly admits that with the wind and sea as they were he could not carry an anchor with his boats, and every ton jettisoned until that had been done would have but served to drive the vessel further up into shoal water, while the shoals on the bow, quarter, and astern rendered it impossible to use her propeller with advantage. She was out of the way of passing steamers, with no assistance nearer than Key West, about 65 miles, and no means of communication.

The wind and sea increased the night and next day after she came off, and I can but believe that had the salvors not rendered the aid at the time they did, she would, by another tide, have been so bilged and broken as to have necessitated an entire discharge of cargo and probably a total loss of the vessel. They rendered the property an especially needed and valuable service. There are though some circumstances connected with it which must prevent the highest rate of salvage compensation, not from any fault of the salvors, but on account of their inability to save to the owners in an undamaged condition the entire property found in peril by them.

The fact that to save the ship it was necessary to jettison five hundred bales of cotton, although detracting nothing from the credit of the libelants for what they did, yet must reduce their compensation from what it might otherwise have been. Had there been a sufficient number of vessels present to save to the owners the amounts which must now be lost in the damage to jettisoned cotton, and salvage on it, providing it is all saved, an extraordinarily large salvage could have been more easily paid than can a comparatively small one under the present circumstances. I do not intend to imply that what was done was not for the best, and that the cotton should not have been jettisoned; on the contrary, I am satisfied that it was only by said jettison the rest was saved, but it was the insufficient number of the salvors which necessitated it. Although the presence and aid of

the salvors I consider to have been indispensable to the rescue of the property, and that they enabled the appliances of the steamer to be used with great advantage, yet the greater part of the actual labor performed was by means of the steam-power.

Under the circumstances what may be considered just and fair salvage or amount to be awarded? It is unnecessary to review the principles of salvage and the grounds, reasons, or theory of its allowance or amount, as they have been so often stated and enlarged upon. Although all courts cite the same rules and decide upon the same principles, there is probably no class of causes in which precedents are examined and compared with less satisfaction than in those of salvage.

The learned judge in *The Waterloo*, Blatchf. & H. 124, remarks:

"The want of fixed principles of compensation is the source of serious perplexity to courts and of uncertainty to parties in interest. * * * Probably, nowhere can judicial discretion be less intelligently and satisfactorily exercised than in matters of salvage."

Although each cause is disposed of upon its own particular merits, and is referred to the discretion of the court which acts in the matter, this discretion should, as far as possible, be guided and controlled by certain general considerations which have been found to enter into the estimates made by courts; and whenever several causes are found so nearly parallel in their circumstances as to offer a line of precedents, or different circumstances can be so explained as to show a similarity of reasoning and a common point of agreement as to amount, such should be considered in reaching a conclusion, although not, perhaps, necessarily accepted as binding.

Salvage services rendered in different localities are apt to be diverse in their nature—the character of the salvors engaged, the needs of the property assisted, or the probabilities of loss or the arrival of other help; and where causes can be selected from the same district it may not be amiss to accept suggestions and examples which may be drawn from them.

In this, as in all such cases, there seems to be a wide difference of opinion as to the value of the services rendered, or rather the amount that should be given for them; and it may be permissible in this connection to examine a few cases found in the records of this court, which, if not parallel in all respects, yet are sufficiently similar to assist somewhat in determining the question presented here.

In December, 1848, the steamer Anglo-Saxon was found badly ashore in an exposed condition near Cape Florida. The salvors with

three vessels and forty-three men went to her assistance and by carrying out anchors, lightening her of cargo, and throwing overboard coal and wood, after three days hard labor got her afloat. Judge MARVIN considered that she was in great danger and the service especially valuable, and gave a salvage of 40 per cent. upon $30,000.

In April, 1867, the British steamer Gladiator went ashore on Florida reef within sight of Key West. Eight vessels with sixty-six men went to her assistance. The master declined aid until he had thrown overboard about 160 tons of coal and iron, when finding she did not float he accepted the services of the salvors; they carried out an anchor, and took out two loads of cargo when she came off without damage. There were no particular circumstances of peril. Judge BOYNTON awarded the salvors 9 per cent. on an estimated value of $160,000.

The same month the steamer William Taber was run ashore full of water also within sight of Key West; 10 vessels with 103 men relieved her of a portion of her cargo, pumped her out with a steam-pump, and brought her to Key West. There were no circumstances of peculiar peril affecting the award of salvage, although there was a question as to the cause of the disaster, and 10 per cent. on a valuation of $169,730 was given.

In October of the same year the George Cromwell, having broken her shaft and split her stern post so that she was leaking badly, was run aground on a portion of the reef about 25 miles from Key West; 19 wrecking vessels, with 136 men, and a small steamer with a steam-pump went to her aid, took out the greater portion of her cargo, pumped her free, and brought her to port. In that case 25 per cent. on an appraisement of $87,214 was awarded.

In December, the same year, the Perit ran ashore on Molasses Reef, about 100 miles from Key West. The master threw overboard about 50 tons of coal, carried out a kedge and succeeded in backing her about her length, but not getting afloat, accepted the assistance of nine vessels with forty-nine men; they took out two loads of cargo, carried out a large anchor, and heaved her off. The weather was fine and she lay on a smooth and even, though hard, rocky bottom. Eight per cent. was given on a value of $115,000.

In January, 1868, the steamer Mary went ashore in about the same locality. The master carried out an anchor and succeeded in getting his vessel afloat, but in backing astern again got aground, and finding himself unable to relieve her the second time, accepted the assistance of seven vessels, carrying fifty-four men, who, by carrying out a

heavier anchor and lightening the vessel by taking out cargo and coal, some of which was thrown overboard, succeeded in getting her off in an undamaged condition. In this case the weather was bad, and the vessel rested directly upon a large boulder nearly amidship, which rendered her position one of peculiar peril. The court awarded 18 per cent. on a valuation of $31,480.

In the same year the steamer Rochester got ashore on a shoal near Cape Florida where the bottom was quicksand. The master carried out his anchor but in so doing sunk his boat; he endeavored to heave the steamer off but failed, and the weather being bad and threatening he accepted the assistance of two vessels and thirteen men that went out to him. The wind was high and the salvors had much difficulty in getting her afloat on account of the anchors coming home when a strain was put upon them, but the vessel being on soft sandy bottom was in no great or unusual peril. One-eighth of the valuation of $9,000 was given as salvage.

The steamer General Meade went ashore on Maryland Shoal about twenty miles from Key West. Six vessels carrying sixty-three men went to her assistance and by loading two schooners with cargo and carrying out a heavy anchor heaved her afloat. There was considerable wind and sea and while coming off she knocked her rudder out of place, and the salvors were compelled to employ one of the schooners to steer her while coming to port. Salvage of $16,000 was awarded on a value of $166,000.

In September, 1870, the steamer Juniata was driven ashore by a hurricane above Cape Florida. She was hard and fast aground on a bank of quicksand. Ten vessels carrying 56 men went to her relief, took out a considerable portion of her cargo, and got her off by an anchor and her propeller. She was in comparative safety for the time being, so hard ashore on a smooth bottom that she could neither roll or thump, but she was utterly helpless, and there was a great deal of labor and considerable skill required to get her off. Judge McKinney allowed a salvage of $17,500 on a value of $149,875.

In February, 1873, the Wilmington struck on a portion of the Florida reef, about 95 miles from Key West. The master commenced throwing overboard cargo, but finally accepted the aid of the salvors who, by carrying out an anchor and lightening the vessel still more by taking cargo on board their vessels, succeeded in getting her off. Her situation on the reef was, in some respects, similar to that of the case at bar, as the wind was pressing her further aground, and there was a shoal on the quarter which rendered it impossible to back

her off, even by lightening, without the assistance of an anchor. After relieving her the salvors saved from the water about $16,000 worth of cargo, which the master had jettisoned before accepting their aid and after their leaving, about $950 worth more was dived up from the bottom. Salvage, 10 per cent on $75,000 estimated value of vessel and cargo on board, 30 per cent. on that saved afloat as jettisoned, and 50 per cent. upon that subsequently dived up, or that which went adrift and was afterwards found derelict, was given.

In September, 1875, the City of Waco was ashore on the Florida reef on a rough rocky bottom resting partially on a boulder or rocky head which made her position particularly dangerous. Ten wrecking vessels with about sixty men went to her assistance, and by carrying out an anchor and lightening her of considerable cargo heaved her off in an uninjured condition. The steamer and cargo were considered to be worth about $250,000 and a salvage of $16,000 was awarded.

In October, 1876, the City of Houston was driven by a hurricane over the Florida reef and over a second or inside rocky ridge upon which, with ordinary high tides there was but seven and a half feet of water, into five feet, she drawing before going ashore fourteen feet. The bottom where she lay was soft and she for the time in no danger of further damage, but she was so far lost to her owners as to require immediate and active exertions to float her, as it was within a few days of the highest tides of the season, and the draught of the steamer, light, was eight feet. Twenty-four vessels, one of which was a steamer, and nearly three hundred men were engaged in the service for about a week. They took out all of the coal and nearly all of the cargo, leaving barely enough to shift from one end of the vessel to the other, by which means and the assistance of a steamer they succeeded in working her over the shoal and brought her to Key West. Although the property was in no danger of immediate destruction or further loss, the court considered it a salvage service *eo nomine* and not a simple compensation *pro opere et labore*, and gave $17,500 on a valuation of about $400,000.

In December, 1881, the British steam-ship Hector, laden with cotton valued at about $300,000, went ashore on the quicksands but a few miles from where this vessel lay. She was hard and fast ashore with the sand piled badly around her, and in considerable danger. The weather was bad, and she was in an exposed condition. Nineteen wrecking vessels, one being a steamer, several of the smaller class, with nearly 200 men, were engaged in the service. They dis-

charged 381 bales of cotton, carried out a 5,000-pound anchor and got her off ready to proceed on her voyage with no damage to vessel or cargo. The court awarded a salvage of $20,000.

In April, 1882, the Spanish steamer, the Buenaventura, west ashore also on the quicksands, but further in among the shoals, diminishing her immediate danger from the sea, but rendering a pilotage service more necessary. A United States quartermaster schooner fell in with her, and the master and crew rendered her most valuable assistance by carrying out an anchor, taking on board 175 bales cotton, and, when she came off, piloting her some five miles through intricate and dangerous channels into deep water. In this case, as in the one at bar, the schooner was unable to receive as much cotton as was necessary to lighten the steamer, and about 150 bales were jettisoned. There were a small number engaged in the service, and the actual labor performed was slight, with no risk to the property of the salvors, it being a government vessel, but it was of great value to the property in jeopardy, and required a peculiar knowledge of the locality, channels, and shoals. The property was estimated to be worth about $200,000; the court awarded $3,000, $400 of which was to repair damage done to the schooner while coming alongside to take the anchor, the rest to be divided among her officers and crew.

Among these cases no one is similar in all respects to the one at bar, yet they have certain points of resemblance which may assist in considering this question of amount. They were all steam-ships stranded upon the Florida reef, and all assisted by licensed professional wreckers; all were aided by carrying out anchors and lightening of more or less of their cargoes. In all cases a large proportion of the actual labor performed, has been by the steam-power of the vessel assisted. It is true these cases are taken from the records of one court, but I find that the amounts awarded compared favorably with those given by other courts under like circumstances. It is true that salvage is not to be measured positively by the value of the property in peril, yet this may always be taken into account where determing an amount, as the owners are benefited in that proportion, and a small percentage assists in compensating salvors for services that are frequently performed where the property is so small that adequate remuneration cannot be given without a hardship to the owner.

A larger amount may therefore be allowed where the value of the property is large. In this case the amount involved will permit a lib-

eral compensation without being burdensome to the property, and I consider that $9,625 will in view of all the circumstances be a fair and just, but liberal award, and the decree will follow for such amount with costs.

The Drew.

(*District Court, S. D. New York.* March 20, 1883.)

1. Common Carrier—Delivery—Negligence.
   Common carriers are bound to make delivery of goods according to their address. They are answerable for frauds upon themselves, but not for frauds upon the shipper, of which they are not chargeable with notice.
2. Same—Two Persons of Same Name.
   Where goods were shipped by the steamer D., addressed to "J. K., Albany," without any street address, and there were two persons in Albany of that name, one an old tradesman of good repute, who, on tender of the goods, refused them as not intended for him, and the goods were afterwards delivered from the steamer to the other person of that name, who had had a store there for a few weeks previous, where he had received goods purchased, and he was, in fact, the same man who purchased the goods of the shipper in New York, but who, shortly after the delivery, abandoned his store and disappeared, *held*, though presumptively a swindler, and though the shipper supposed the purchaser was the other tradesman of the same name, yet that the steamer was not chargeable with any knowledge of these facts, and was not liable as upon a delivery of the goods to the wrong person, but, upon refusal by the other "J. K.," was warranted in delivering them upon the claim of the former.

In Admiralty.

Kurzman & Yeaman, for libelants.

W. P. Prentice, for claimant.

Brown, J. The libel in this case was filed to recover $179, the value of certain goods sold by the libelants to J. Kastendike, Albany, and shipped to his address by the steam-boat Drew, May 3, 1880, on the ground that they were delivered in Albany to the wrong person.

A few days previous to the shipment a man calling himself J. Kastendike, of Albany, called at the libelants' store in New York, desiring to purchase goods. He selected what he wanted, and left his references with the libelants. Inquiry was made of one of the mercantile agencies, and, the report being satisfactory, the goods were shipped in two boxes marked "J. Kastendike," or "Jos. Kastendike, Albany." There was a tradesman by the name of John Kastendike in Pearl street, Albany, who was well known there, and of good repute, and responsible, though not known to the libelants, and the replies to

the libelants referred to that tradesman. The evidence also shows that there was another man who had a store in Central avenue, Albany, with the sign "J. Kastendike," where one of the witnesses for the libelants testified that for two or three weeks previous he had at various times delivered goods forwarded by the American Express Company.

On the arrival of the Drew at Albany, on the morning of May 4th, the goods were sent from the steamer to the Pearl-street merchant, who had left the day before for New York. His wife and son, knowing, as they testify, that the goods could not be for them, refused to receive the boxes, and they were taken back to the steamer. On the same day a truckman employed by the Central-avenue man applied to the boat, exhibited a bill for them, received the goods, receipted for them, and took them to the store at Central avenue, and delivered them there, with the bill, to the same man from whom he received the bill. The libelants claim that this was a delivery to the wrong person, for which the carrier is responsible.

One of the libelants testified that the the two boxes were addressed "J. Kastendike, Pearl St., Albany;" but his testimony, as I understand it, is based upon his presumption from their usual course of business, and not from observing the direction on the boxes themselves. The shipping clerk who put up the goods and directed them was not produced as a witness, though without any fault of the libelants. The only other evidence that the goods were addressed to Pearl street is a receipt for them, signed by the proper agent of the Drew, dated May 3d. This receipt now contains the words "Pearl St." as a part of the address. About two weeks after shipment, when the libelants first apprehended any trouble in regard to the payment for the goods, it was presented to the freight agent of the Drew, and two witnesses who then saw it testify that the words "Pearl St." in the receipt were in different-colored ink, and presented a fresh appearance, as though the ink was scarcely dry, so as to excite remark at the time. The face of the receipt itself suggests strong suspicion that it was not written at the time the rest of the address was written. The words "J. Kastendike, Albany, N. Y.," are written underneath each other, in a free, easy hand, on three equidistant lines. The words "Pearl St." are crowded in between the first two lines, and between the ends of the words "Kastendike" and "Albany," and they are written in a constrained, cramped hand, where the paper is roughened and the letters somewhat blurred.

Opposed to this evidence that the goods were addressed to Pearl street, there is the positive evidence of the carman who delivered them at the Central-avenue store, and the wife of the Pearl-street merchant who rejected the boxes, both of whom testify that the address, "Pearl St.," was not on the boxes. Two witnesses from the steamer testify to the same thing; and their evidence is somewhat corroborated by the entry in the steamer's manifest of May 3d, and the delivery-book of May 4th, in which the direction is entered without any street address. The weight of evidence, notwithstanding the receipt, which cannot stand as an unimpeached voucher, is, in my opinion, altogether to the effect that the goods were addressed to Albany only, without the designation of any street.

I am not entirely satisfied even that the purchaser gave the libelant his address as at Pearl street, although that fact is testified to by one of the libelants, near the close of his testimony. On the direct examination he stated that the references of whom he inquired "located" him in Pearl street. There is no doubt, therefore, but that the libelants, when they shipped the goods, supposed the purchaser was the Pearl-street man; but no card or memorandum from the purchaser, no entry by the libelants made at the time, is produced, showing that the address of Pearl street was given. The bill of the goods forwarded by them does not contain it; and the reply of the mercantile agency, which is in writing and produced, does not so state, as the libelants were understood at first to testify. The envelope containing the bill returned from the Pearl-street man is not produced; its return from the Pearl-street store is no evidence that it was specifically addressed there, since it would naturally have gone to him, as an old and well-known merchant, without such specific address.

But I do not find it necessary to pass upon this question, since the other undisputed facts in the case, coupled with the conclusion of fact that I have stated above, namely, that the goods were addressed only to J. Kastendike, Albany, without the designation of the street, are sufficient to exempt the steamer from liability. That the purchaser of the goods was a swindler may be assumed; but there is no evidence, and it cannot be taken for granted, that his name was not J. Kastendike. He evidently was dealing in Albany under that name, and, there being no evidence to the contrary, it must be assumed that such was his name. The case is, therefore, one of delivery by the carrier to the very man who had bought the goods in person; a

delivery at the purchaser's store in the city where the boxes were addressed, without any intimation by the shipper of any intention that they should be delivered to any different person or at any different place. This would seem to be a perfect fulfillment of a carrier's obligation.

Counsel for the libelants contend that several authorities in this country show that the consignee must "identify himself as the real man of that name, and as the person entitled to the goods." If this doctrine were applied in the sense claimed, it would make carriers insurers not only against frauds upon themselves, but insurers against frauds upon the consignor, of which they had no knowledge or grounds of suspicion. There is no question that the carrier must deliver to the person addressed, and must answer for the consequences of any mistakes, fraud, or forgeries practiced upon himself. Hutch. Carr. §§ 344, 350. But the person addressed in this case was the man to whom in fact the delivery was made, although the seller erroneously supposed him to be the Pearl-street man. There are several cases where the purchaser has personated some fictitious person or firm to whom the goods were addressed, in which the carrier has been held liable for delivering them to a person other than the person or firm addressed, or at a wholly different place from that designated. *Price* v. *Oswego Ry. Co.* 50 N. Y. 213; *Winslow* v. *Vt. & M. R. Co.* 42 Vt. 700; *Amer. Exp. Co.* v. *Fletcher*, 25 Ind. 492; *Amer. Exp. Co.* v. *Stack*, 29 Ind. 27; *Stephenson* v. *Hart*, 4 Bing. 476; *Duff* v. *Budd*, 3 Brod. & B. 177. An examination of these cases shows that in every one of them the court held the carrier liable only on account of some negligence on his part. See, also, *Zinn* v. *N. J. Steam-boat Co.* 49 N. Y. 442.

Where the name of a consignee is a fictitious name, there is negligence in delivering the goods, because proof of identity should be required before delivery, and the requirement of that proof would disclose the fraud and prevent the delivery of the goods. In the Indiana cases the want of ordinary diligence in ascertaining the party intended is the ground of decision; and in the two English cases cited it is the same. But in the present case there is no fictitious name, nor any question about the identity of the person to whom delivery was made as the very person who had bought the goods and who answered to all that was designated in the address on the boxes; and the mere fact that the seller supposed the purchaser was the Pearl-street man, when the address in no way indicated him rather than the other, cannot charge the carrier with negligence in making de-

livery to the real purchaser after the other man had refused them. I fail to find any case in which a carrier has been held liable in respect to a fraud practiced upon the consignor, except where there was plain dereliction of duty in the carrier, or such suspicious circumstances brought to his knowledge as charges him with negligence in making the delivery.

This subject was carefully considered in the case of *McKean* v. *McIvor*, L. R. 6 Exch. 36. The court there say:

"If the carrier deliver at the place indicated, or does what is equivalent to delivery there, he does all he is bound to do. He obeys the sender's directions, and is guilty of no wrong. To make him liable there must be some fault, and when he has carried out the directions of the sender, the mere fact that he has delivered the goods to some person to whom the sender did not intend the delivery to be made is not sufficient to support the allegation that he has converted them."

There was nothing upon this shipment to indicate to the carrier that the goods were designed for the Pearl-street merchant rather than the one who had his store in Central avenue. In the case of *The Huntress*, 2 Ware, 89, WARE, J., says:

"It is certain, also, that the goods ought to be plainly and legibly marked, so that the owner or consignee may be easily known; and if, in consequence of omitting to do it, without any fault on the part of the carrier, the owner sustains a loss, or any inconvenience, he must impute this to his own fault." *Robinson* v. *Chittenden*, 69 N. Y. 525; *Roberts* v. *Chittenden*, 88 N. Y. 33.

In like manner, where there are two persons in business of the same name in the same city, and the sender of the goods does not distinguish which is intended by the street number, and where the goods on tender have been rejected by the one, no fault can be imputed to the carrier in making delivery to the other, who on presentment of a bill for them appears to be the vendee. The fault is in the shipper in not making the directions specific. Conceding that the purchaser of these goods was a swindler, the carrier had no knowledge of it, and there was nothing to charge him with knowledge or suspicion of it. Carriers by water are not bound to seek the consignee on land, nor to institute inquiries at his store, or of the public, concerning his circumstances or previous history or probable credit. *Zinn* v. *N. J. Steam-boat Co.* 49 N. Y. 442; *Witbeck* v. *Holland*, 45 N. Y. 13.

The mere fact that the purchaser had occupied his store only some two or three weeks, so far as the evidence shows, although it may have been longer, even if it had been known to the carrier, was not

in any way incompatible with his being the *bona fide* purchaser of the goods, and the person to whom delivery was intended by the vendor to be made. The goods having been shipped without any bills of lading, no documentary evidence of title was required. It does not appear whether the bill for the goods presented was genuine or forged. Had the goods been addressed to Pearl street it would have been negligence and a violation of the sender's orders to deliver them to any different person elsewhere. As they were not so addressed, when they were rejected there, the carriers were warranted in the inference that they were intended for the Central-avenue man of the same name, who was the purchaser in fact. So far as I can perceive, the carrier is not chargeable with knowledge of any suspicious circumstances, and must, therefore, be absolved from liability.

Judgment for the claimants, with costs.

RAWSON *v.* LYON and others.

(*District Court, S. D. New York.* March 15, 1883.)

PRACTICE—SECURITY FOR COSTS.

By the long-standing practice in courts of admiralty, parties prosecuting or defending or intervening are required to give a stipulation for costs. In actions *in personam*, such security was formerly obtainable under the express rule, when the process was by warrant, which was at the option of the libelant. Now that the process by warrant is abolished in ordinary cases, the requirement of security for costs should still be maintained under the supreme court rule 25, and an amendment of the old rule 44 of this court should be made, in order that no doubt may exist as to the proper practice.

In Admiralty.

Benedict, Taft & Benedict, for libelant.

Scudder & Carter, for respondents.

BROWN, J. There is no question that the ordinary practice in admiralty has long been to require a stipulation for costs from a respondent on entering his appearance and answering in an action *in personam*. Judge BETTS, in his book on Admiralty Practice, says: "This stipulation must be filed when a defendant comes in to defend, although the first process was a citation and not a warrant." Page 40. This is in accordance with the ancient practice. Clerke, Praxis, tits. 5, 11; *Pharo* v. *Smith*, 18 How. Pr. 47. When suits were commenced by warrant, rule 17 of this court expressly required bail to

be taken for $100 above the sum claimed; and this was to cover costs. When warrants were abolished by supreme court rule 48, as the ordinary process for commencing actions, rule 17 was no longer expressly applicable to ordinary suits *in personam;* but the ordinary practice in this court to give security has remained as before, although it appears to have been occasionally omitted.

In all other cases, libelants and defendants and intervenors are, by express rules, required to give security for costs, except in the special cases of seamen, salvors, or persons suing *in forma pauperis.* Rules 17, 38, 44, 45. There is no reason why the defendants in actions *in personam* should form an exception to the usual requirement to file security for costs, which, under the former process by warrant, was always obtainable.

Rule 25 of the supreme court expressly authorizes this court to require security in actions *in personam;* and the practice usually followed hitherto should be confirmed by an amendment to rule 44 of this court, so that there may be no doubt about the proper practice in future, or the obligation of the respondents to file security. That rule will be amended by adding at the end the words "and the like stipulation, with surety for costs in the sum of $100, shall be filed by the respondent in actions *in personam* at the time of entering his appearance or answer, or the same shall not be received unless otherwise specially ordered."

Motion granted.

GLOVER *v.* SHEPPERD and another.

(*Circuit Court, W. D. Wisconsin.* April 2, 1883.)

1. REMOVAL OF CAUSES—MOTION TO DOCKET—CAUSE, WHEN CONSIDERED ENTERED.

   When the papers are regularly transmitted from the state court to the clerk of this court and are on the files of the court on the first day of the first term after the filing of the petition for removal and bond, and proceedings have been taken in this court by both parties, although a formal motion to docket the case was not made, they must be considered as having been filed and the cause entered.

2. SAME—DIVERSITY OF CITIZENSHIP AT TIME OF APPLICATION.

   It is enough that the proper diversity of citizenship of the respective parties exists at the time the application for removal is made; it need not be shown to have existed at time suit was instituted.

3. SAME—ALLEGATIONS AS TO DIVERSITY OF CITIZENSHIP—AMENDMENT OF PETITION—WAIVER OF DEFECT.

   The allegation in a petition for removal that defendants are "*residents*" of Minnesota and Ohio instead of "*citizens*," is not a compliance with the statute; but the court may, where such defect is the result of inadvertence, allow the petition to be amended to correspond with the actual facts, especially where such defect has not been discovered, or objected to by the opposite party, and he has taken important steps in the cause, and prepared it for trial in the circuit court.

Decision on Motion to Remand Cause to State Court.

S. U. Pinney, for plaintiff.

C. C. Gregory (with *N. H. Clapp*) and *I. C. Sloan*, for defendant.

BUNN, J. This cause was commenced in the circuit court of St. Croix county, Wisconsin. On February 20, 1882, the defendants, being non-residents of the state, filed their petition in the state court for the removal of the cause to this court, and filed a proper bond as required by law. Thereupon the court granted the petition, and the original papers, with a complete transcript of the record and papers in the cause, were transmitted by the clerk of the state court to the clerk of this court, who received them and placed them upon the files in his office in March, 1882, and before the sitting of this court in June of the same year, but the papers were not marked as filed by the clerk, nor has any motion been formally made to docket the cause in this court. But the parties, soon after the papers were sent to this court, and in May, 1882, entered into a stipulation to take testimony in the case, and a special examiner was appointed by this court and testimony was taken and the case proceeded with by both parties as

properly pending in this court during the lapse of nearly three terms. In December, 1882, by stipulation of the parties, the case was set down for trial at the December term, 1882. The plaintiff now moves to remand the cause to the state court on three several grounds: *First*, that the case was not entered in this court on the first day of the June term, 1882, next after the petition and bond for removal were filed, and no motion was then made to docket the cause in this court; *second*, that the petition does not show the proper citizenship of the parties at the time of the commencement of the action; *third*, that the petition does not show that the defendants were citizens of states other than Wisconsin, where the plaintiff resides and is a citizen.

It is evident the first ground cannot prevail. It is customary to make a formal motion on the first day of the term to docket the cause, but the statute does not require this, nor that the papers should be formally filed on that day with pen and ink.

The papers being regularly transmitted to the clerk of this court, and being on the files of the court on the first day of the first term after the filing of the petition and bond, and proceedings already having been taken in this court by both parties, they must be considered as having been filed and the cause entered. The conduct of the plaintiff in entering into a stipulation to take testimony in this court, and in taking testimony and preparing for trial and in setting the case down for trial here, would constitute a waiver of any informality of this kind. And if the case could not be considered as entered on the first day of the term, the court might allow it to be done afterwards. *Jackson* v. *Ins. Co.* 3 Wood, C. C. 413; *Railroad Co.* v. *Kountz*, 104 U. S. 16.

The second ground also furnishes no sufficient reason for remanding the cause. The petition for removal contains the following allegations: That the plaintiff is, and at the time of the commencement of said action was, a resident and citizen of the state of Wisconsin, and resides at the city of Hudson in said state. This allegation is complete under any of the removal laws. That as to the citizenship of the defendants is more open to objection, and is as follows:

"That neither of the petitioners is a resident or citizen of the said state of Wisconsin, but that the petitioner, the said Harvey C. Shepperd, resides at Worthington, in the county of Nobles, and state of Minnesota, and that the petitioner, the said Henry B. Waldren, resides at Wendham, Portage county, in the state of Ohio, and that neither of the petitioners was a resident of the state of Wisconsin at the time of the commencement of the action."

It has been held under the original removal statute of 1789, though the necessity of such holding has been questioned and is not very apparent, that the allegation of citizenship must relate to the time of the commencement of the action. *Brown* v. *Keene*, 8 Pet. 112; *Ins. Co.* v. *Pechner*, 95 U. S. 183; S. C. 65 N. Y. 199.

It is difficult to find anything in the statute to render such a holding necessary; and, especially when the purpose of the law is considered, which was evidently to allow controversies arising between citizens of different states to be determined in the federal courts, as the constitution provides they may be, it would seem that a more liberal construction of the statute might have been adopted to further the object in view. Dillon, Rem. Causes, 88. But no doubt such was the law under the original removal provision of 1789.

But such has never been the holding under the act of 1866 or that of 1875. One evident purpose and effect of the act of 1875 was to enlarge the jurisdiction of the federal courts in removal cases, and to make the statute more nearly commensurate with the constitutional provision. Section 2 provides "that any suit of a civil nature, at law or in equity now pending or hereafter brought in any state court where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, * * * in which there shall be a controversy between citizens of different states, * * * either party may remove said suit into the circuit court of the United States. * * *" There are evidently no words here that can confine the removal to cases where the requisite citizenship exists at the time of the commencement of the action. Such a construction would defeat the language as well as the intent of the statutes. It is enough that the proper diverse citizenship of the respective parties should exist when the application for removal is made. *Johnson* v. *Monell*, 1 Woolw. C. C. 390; *Jackson* v. *Ins. Co.* 3 Wood, C. C. 413; *McGinnity* v. *White*, 3 Dill. 350; *McLean* v. *St. Paul & C. R. Co.* 16 Blatchf. 309; *Hewit* v. *Phelps*, 105 U. S. 393; Dillon, Rem. Causes, (3d Ed.) 88.

It remains to consider whether the third ground for remanding is well chosen, and if so whether there has been any waiver of the defect, and it is curable by amendment. The precise facts proper to have alleged were that at the time of making the application for removal the plaintiff was a citizen of Wisconsin, and the defendant Shepperd was a citizen of Minnesota, and defendant Waldren of Ohio. The allegation in regard to the plaintiff is sufficient, though it contains considerable superfluous matter. The allegation in regard to the defendants is defective in that it alleges that the defendants were *residents* of

Minnesota and Ohio, instead of *citizens*. The defendants' counsel insist that it must follow from the allegation that neither of them were citizens of Wisconsin, but that one was a resident of Minnesota and the other of Ohio; that they were either citizens of the United States or aliens. But I do not think that follows, even if such an inferential way of stating the case were allowable. They might for all that appears be citizens of a territory, or the District of Columbia, in either of which cases this court could not take jurisdiction. See *Hepburn* v. *Ellzey*, 2 Cranch, 445; *New Orleans* v. *Winter*, 1 Wheat. 91; *Barney* v. *Baltimore*, 6 Wall. 287; *Schwab* v. *Hudson*, 11 C. L. R. 372; *Cissil* v. *McDonald*, 16 Blatchf. 150. But I cannot concede that an allegation in the alternative, that defendants were citizens of certain of the United States, or aliens, would be good. Whatever the ground of jurisdiction be, whether citizenship or alienage, it should be stated directly and positively, and not in the alternative, or in such a manner as to leave the court to reason the case out from premises alleged; and such has always been the rule. 76 N. Y. 207; 9 C. L. R. 324; *Goddard* v. *Bosson*, 21 Kan. 139. An allegation of residence, in legal acceptation, is not equivalent in these cases to an allegation of citizenship. A man may be a resident of a state and be a citizen of another state, or of the District of Columbia, or of a foreign country; though it was held in *Gassies* v. *Ballon*, 6 Pet. 761, that an averment that the defendant was a naturalized citizen of the United States and resided in Louisiana, and the plaintiff was a citizen of France, was enough to give jurisdiction to the court. See *Parker* v. *Overman*, 18 How. 137. But that is not an authority here, because there is nothing to show that these defendants are citizens of the United States at all. So that I think if the objection to the defect in the allegations of the petition has not been waived, and there is no power of amendment in the court in such cases, the cause must be remanded to the state court. And this brings me to the most important and delicate question in the case; whether such a defect can be waived by the parties or cured by amendment, to make the petition correspond with the actual facts.

There is no room for any reasonable doubt, even upon the record, that this was a proper case for removal to this court. There has been no collusion, nor any attempt to get a case into this court that does not properly belong here. It is simply an endeavor in entire good faith on defendants' part to remove a case to this court, when the requisite facts as to citizenship existed, both at the commencement of the action and the filing of the petition, but resulting in a

failure from want of use of the proper legal phraseology to bring the case within the requirements of the statute. The pleaders, when attempting to set out the citizenship of the parties, have inadvertently used the words "resident" and "citizen" indifferently in their popular senses as being synonomous terms. The defect has not been discovered, or, if discovered, no notice taken of it, until the lapse of nearly three terms of this court since the transmission of the papers, and until the cause has been proceeded with and evidence taken in this court under stipulation of parties, and until the case is set down for trial and supposed to be ready for trial. The record sent from the state court also shows, in an affidavit made on the part of the plaintiff to obtain an order for the publication of the summons against them as non-residents, that one of them resides in Minnesota and the other in Ohio, and that they were neither of them residents of Wisconsin.

The defendants now ask to amend the petition, and stand ready to verify all the facts necessary to give jurisdiction to this court. In the circumstances of the case, and after a careful view of the question and the authorities, I am of opinion that it is within the power and discretion of this court to grant the amendment, and that it is a proper case for the exercise of that discretion.

In *Parker* v. *Overman*, 18 How. 141, the petition for removal did not contain the proper averment as to the citizenship of the parties, and the defect was as in this case. It was alleged that the plaintiff resided in Tennessee and the defendant in Maryland. But the supreme court say that as the record was afterwards so amended as to show conclusively the citizenship of the parties, the court below had, and this (the supreme) court have, undoubted jurisdiction of the case. This looks much like a direct sanction by the supreme court of such an amendment, and perhaps is authority enough; and yet, as it has been common to assume that the question is so far jurisdictional as to disarm the court of its usual power to grant relief by amendment, it may be well to cite further authority, and also to see how the case stands upon principle.

In *Gold Washing & Water Co.* v. *Keyes*, 96 U. S. 202, the court says: "For purposes of the transfer of a cause the petition for removal which the statute requires performs the office of a pleading." And this is undoubtedly its true character. And further, in the same case, the court say: "The record in the state court, which includes the petition for removal, should be in such condition when the removal takes place as to show jurisdiction in the court to which it goes. If it is not, and the omission is not afterwards supplied, the suit must be

remanded;" clearly recognizing the power of amendment to supply defects in the record. When pleadings have already been put in in the state court, the petition is in the nature of a supplemental complaint or answer, alleging the facts showing jurisdiction in the federal court. If the suit had originally been brought in the United States court, the declaration or bill of complaint would have performed the same office of setting forth these facts. But no one in such case would ever think of questioning the power of the court to allow an amendment of any allegation relating to the citizenship of the parties, or any other allegation, the purpose of which should be to show jurisdiction in the federal court. But where is the distinction between the two cases? Whether the case is commenced in the state or federal court, it is essential that the record should show on its face all the facts necessary to give jurisdiction to the court. But the requirement is quite as imperative in the one case as the other. But in cases originally brought in this court the authority is uniform that such amendment of jurisdictional facts will be allowed. And the statute certainly seems broad enough to cover any pleading, process, or proceeding. *Connolly* v. *Taylor*, 2 Pet. 556, by MARSHALL, J.; *Jackson* v. *Ashton*, 10 Pet. 480, decided by STORY, J.; *Kelsey* v. *Railroad*, 14 Blatchf. 89; Bump, Fed. Proc. 148, and cases cited.

In one case the plaintiff, in his petition, by inadvertence of his attorney, described himself as a citizen of the state where the suit was brought, so that it appeared affirmatively on the record that plaintiff and defendant were citizens of the same state. The removal was had, and in the federal court the plaintiff was allowed by Mr. Justice BRADLEY to amend his petition to correspond with the fact. *Borchlay* v. *Levee Com'r*, 1 Wood, C. C. 254. See, also, to like effect, *Houser* v. *Clayton*, 3 Wood, C. C. 273, where Mr. Justice BRADLEY says there is no good reason why a defendant should not be allowed to amend his petition, if, by inadvertence, it is imperfect as first presented.

So in *Hodgson* v. *Bowerbank*, 5 Cranch, 303, decided by MARSHALL, J., the defendants were described in the petition as late of the district of Maryland, merchants, but were not stated to be citizens of Maryland. The plaintiffs were described as aliens. The allegation as to defendants was held fatal as not showing defendants citizens of some particular state, but the court afterwards allowed the record to be amended by consent. As consent could not of itself confer jurisdiction, it is evident, if the record could be amended by consent so as to bring the case within the constitutional provision, it could be so

amended in a proper case on motion without consent. See, also, the late cases of *Deford* v. *Mahaffy*, 13 FED. REP. 481, and *Wooldredge* v. *McKenna*, 8 FED. REP. 650.

In a recent unreported case decided by Judge BLODGETT, *Young et al.* v. *Miller et al.*, there was found to be a material defect in the removal bond, which was drawn and conditioned according to the old statute, while the removal was asked for under the act of 1875. The state court had approved the bond and ordered the removal. It was held, upon objection for the first time taken in the United States court, that the party asking for the removal should be allowed to file a new bond conforming to the statute.

In *Davies* v. *Lathrop*, 13 FED. REP. 565, it was held by WALLACE, J., that a party loses his right to object to the removal of an action in a case like this by going to trial without raising the objection. That is not an authority here, and yet, if in that case the question was so far jurisdictional that the defect could not be cured by amendment, it is difficult to see how it could be cured by waiver. Whether by taking important steps in the cause and preparing it for trial in this court would deprive a party of the right to take advantage of such a defect or not, it is quite clear that it furnishes abundant motive for the exercise of a liberal discretion on the part of the court to allow an amendment of the record, if the court have power to allow such amendment; and I believe it has.

Section 3 of the act of 1875 was intended to provide a method of procedure for transferring a cause by either party to the federal court, where there should be a controversy between citizens of different states, or a question arising under the constitution or laws of the United States. The purpose was to provide proper and reasonable means for securing a trial in that court, which has proper jurisdiction of the case. No one's rights are menaced; no one's rights are to be divested or taken away. The object is to secure a right which both parties alike have, by the constitution and laws, to have the case litigated and determined in one court rather than another; and to construe a law which provides a mere procedure for certain cases as being in the strictest sense mandatory, is, in my judgment, to disregard all the analogies of the law in other similar cases.

The motion to remand will be overruled, upon the defendants amending their petition so as to show the facts in regard to the citizenship of the defendants necessary to bring the case within the statute.

NORTHERN INS. CO. *v.* ST. LOUIS & S. RY. CO.*

(*Circuit Court, E. D. Missouri.* March 26, 1883.)

1. JURISDICTION OF CIRCUIT COURT—ACT OF MARCH 3, 1875.
An assignee of a non-assignable cause of action cannot maintain a suit thereon before a circuit court where his assignor could not have done so.
2. SAME—ASSIGNMENT OF CAUSES OF ACTION ARISING ON TORTS.
The act of 1875 does not abrogate the common-law rule as to assignment of causes of action arising on torts.

Demurrer to the Petition.

F. M. Estes, for plaintiff.

Noble & Orrick, for defendant.

TREAT, J. The only question to be considered is jurisdictional. Certain persons, insured by a fire risk, sustained a loss through the alleged wrongful acts of the defendant; their underwriter paid the loss and took an assignment of their rights of action against the defendant. The assignors (the persons insured) were and are citizens of the same state as the defendant. The sole question is whether the plaintiff, as assignee of such a cause of action, by subrogation or otherwise, can sue in a United States court in its own name, the assignee being a citizen of this state?

It is not proposed to review the many cases decided under the acts of 1789 and 1875, but merely to state generally the views held by this court. Under the act of 1789, it is conceded, no assignee or assignor to the use of the assignee of a cause of action like that under consideration could maintain the right of action in a United States circuit court. Under its provisions no assignee could proceed in a United States circuit court when the assignor could not, excepting only "in case of foreign bills of exchange." So stood the law until the act of 1875, whereby the jurisdiction was greatly enlarged as to citizenship of the parties, yet containing this provision: "Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law-merchant and bills of exchange."

The act of 1789 gave jurisdiction when a suit was between a citizen of the state where it was brought and a citizen of another state, with a proviso that no cognizance should be had of "any suit to re-

*Reported by B. F. Rex, Esq., of the St. Louis bar.

cover the contents of any promissory note or other chose in action in favor of an assignee unless a suit might have been prosecuted in such court to recover said contents if no assignment had been made, except in cases of foreign bills of exchange." The proviso in the act of 1875 so far enlarged the act of 1789 as to embrace all negotiable promissory notes under the law-merchant, and all bills of exchange.

The history of judicial decisions, from the case of *Swift* v. *Tyson*, 16 Pet. 1, down to *Goodman* v. *Simonds*, 20 How. 343, and illustrated by the many cases of municipal bonds, will serve to show the scope of the enlarged provisions of the act of 1875, so far as commercial paper is concerned. It is contended that inasmuch as by the act of 1789 jurisdiction was conferred, with the exceptions therein enumerated, of all cases between a citizen of the state where brought and a citizen of another state, therefore the jurisdiction by the act of 1875 was enlarged to cover all controversies between citizens of different states, with only the exception stated in the proviso of the latter act.

In the act of 1789 one of the parties must have been a citizen of the state where suit was brought, and in the act of 1875 difference of citizenship was alone necessary. In the act of 1789, despite citizenship, no suit could be brought "in favor of an assignee" on a promissory note or chose in action, except, etc. As the law then stood, and as it now stands, in many states, the assignee, in ordinary choses in action, cannot sue in his own name, but must sue in the name of the assignor, to his own use. In some states that rule has been changed so that the real party in interest may sue.

Was it intended by the act of 1875 to abrogate the rule as to the assignments of causes of action on torts, so that an assignee thereof might sue in a United States circuit court, while restricting assignees of choses in action under contracts to a more stringent rule? It is true, the formal language of the act of 1875 is less restrictive than that of 1789, but it is also true that many states by express enactment enforce the common-law rules as to the non-assignability of actions for torts. Where they are non-assignable, only the person wronged can sue, and jurisdiction will be determined accordingly. Such is this case. The Missouri statute, in permitting the real party in interest to sue, declares that the statute "shall not be deemed to authorize the assignment of a thing in action not arising out of contract." Hence there could not, *a fortiori*, be an assignment of the tort in question whereby the assignee could maintain a suit in its own name in the United States court. 74 Mo. 521; 13 Wall. 367.

There may possibly be cases elsewhere under assignments of torts

where the assignee can sue in his own name. Under such a state of the law the question might become doubtful where the two acts in question are to be construed. The act of 1789 covered cases where the assignee had to sue in the name of the assignor. The manifest intent of the law was to leave such parties to the forum where their causes of action arose. Was it, then, the purpose of the act of 1875 to permit assignees of all causes of action, unless founded on contract, to pursue their supposed rights in federal courts in their own names, whether the causes of action were or were not assignable? It is said some circuit courts, laying special stress on the omission in the act of 1875 of the general words "choses in action" contained in the act of 1789, have intended that assignees of *all* rights of action, except those founded on contracts, may now proceed in the United States courts when difference of citizenship exists. If there are such cases, they fail to observe the general doctrines as to "choses in action," and the common-law right to sue thereon, and the manner in which such suits should be brought. But no case cited goes to the extreme claimed by plaintiff. If suits are brought, as under the old rule, in the name of the assignor, no difficulty occurs, for the act of 1875 is, in this respect, in full accord with the act of 1789. It is only on the hypothesis that an assignee may sue in his own name, as permitted by many state statutes, that a difficulty arises.

It is, however, to be supposed that congress had in view the general law, and not the special-practice acts of one or more states. Hence, if an assignee, claiming the right to sue in his own name, brings suit when his assignor could not do so, his right so to do cannot be upheld, irrespective of the rule as to collusive proceeding. 104 U. S. 209. Especially must this be the case when the Missouri statute governs. It was not the purpose of the acts of congress to change the nature of obligations and to declare those assignable which under the local laws were non-assignable. Those acts were not designed to create or transfer or legislate upon rights of parties, but only, within the limits prescribed, to permit parties thereto to have their controversies heard in United States courts. When a chose in action is by the local law assignable, and suit is brought by the assignor to the use of the assignee, or by the assignee, then the jurisdictional question is the same as under the act of 1875, except as to promissory notes, etc.

The act of 1875, in referring to suits founded on contracts, does not intend to change the rule in the act of 1789 by distinguishing between choses in action founded on contract, so as to exclude them,

and so-called choses in action founded in tort, which are generally non-assignable, so as to admit the latter. Any other view would be subversive of the entire spirit of the federal statutes, and even call for such an interpretation of them as would make non-assignable causes of action assignable in quality and for jurisdictional purposes,—an interpretation inconsistent with all sound rules of law as heretofore understood and enforced. The causes of action sued on are, under the Missouri statute, non-assignable, and therefore the plaintiff cannot maintain this suit. Demurrer sustained.

McCRARY, C. J., concurs.

TOWN OF AROMA *v.* AUDITOR OF STATE and others.

(*Circuit Court, N. D. Illinois.* March 2, 1883.)

1. MUNICIPAL BONDS—VALIDITY OF EXECUTION—RULE OF CONSTRUCTION.
   That full value has been paid for municipal bonds will not remedy failure to conform their execution to the terms of the act under which they were issued; but any doubt as to the construction of the statute should, under certain circumstances, be resolved in favor of *bona fide* holders.
2. SAME—PROPER SIGNING.
   Examination of the use of the terms "town" and "township," in sections 16 and 17 of the act of April 19, 1869, (Illinois,) and in the statute relating to township organization, makes it reasonable to construe certain bonds which had been issued by a town organized under the township system, and which had been signed by the town clerk, and not by the county clerk also, but by the supervisor of the town, as properly subscribed.
3. SAME—CERTAIN ISSUE HELD GOOD IN LAW.
   Bonds authorized before the constitution of 1870 (Illinois) took effect, and issued thereafter by a majority of the voters in such a town, at an election called by the clerk of the town and not of the county, reciting compliance with all other requirements of law as to such special elections, and so signed, on which interest had been paid for several years by the town and county, their object having been in fact accomplished, *held* valid under the act of 1869, and within the reservation of the constitutional prohibition.

In Equity.

Robert Doyle, for plaintiff.

Thomas Mather, for defendants.

DRUMMOND, J. This is a bill filed by the town to declare certain bonds which were issued in favor of the Kankakee & Indiana Railroad Company, in 1870, void, on the ground that the election authorized to be held under the act of April 19, 1869, was not called by the

proper authorities, in this: that it was called by the clerk of the town instead of the clerk of the county, and because the bonds were signed by the supervisor of the town instead of by the supervisor of the county. Another objection was made that the bonds were issued after the constitution of 1870 took effect. This last objection cannot be maintained if the bonds in other respects are valid, because the law under which the subscription was made, was passed and the vote taken before the constitution took effect; and the right was reserved to the town in the constitution to execute bonds which had been previously authorized under existing laws by a vote of any municipal corporation. The principal objection seems to be that the bonds were signed by the supervisor of the town instead of the county clerk, as it is claimed they should have been. The town clerk called the election, and it is not controverted but that at an election of the town of Aroma a majority of all the legal voters of the town voting at the election were in favor of the subscription.

Section 16 of the act of 1869 declared that any incorporated town, or any township, under the township organization system, along the route of said road, might subscribe to the capital stock of the company. Section 17 declares: "If it shall appear that a majority of all the legal voters of such town, township, or village voting at such election have voted for subscription, it shall be the duty of the supervisor of such town, or the chief executive officer of such incorporated town, and the county clerk, for and in behalf of such township or village, to subscribe to the capital stock of said railroad company." The section further provides that he shall execute to the railroad company bonds which shall be signed "by such chief executive officer, supervisor, or county clerk, and attested by the town clerk, where there is one."

There does not appear in these sections to be observed throughout the distinction which is claimed to exist between an incorporated town—that is to say, one incorporated independent of the law as to township organization—and a town incorporated under that law; because it will be observed, from the language already quoted from section 17, that it speaks of the supervisor of the town, and the chief executive officer of an incorporated town, and of the county clerk for and in behalf of the township. The corporate name of a town, under the law of township organization, is the name of the town as a town and not as a township, (chapter 139, § 38, Rev. St.,) and the only legal distinction between the two is where a town is incorporated under a general law or by special statute, or where one is incor-

porated under the statute relating to township organization. In each instance they are called towns. The bonds in this case, issued by the town of Aroma, were signed by the town clerk and by the supervisor of the town, and recited that they were issued by virtue of the law of April 19, 1869, and that a special election was held in the town on April 23, 1870, at which election a majority of the legal voters participating at the same voted for the subscription, and that the special election was, by the proper authority, then and there duly declared carried for subscription; and that all the other requirements of the law in relation to such special election were duly complied with.

It is admitted that the defendants are *bona fide* holders for value of certain bonds, issued as stated; and it is further admitted that, under special laws of the state applicable to such case, taxes were levied for several years upon the property of the town to pay the interest on the bonds—one year's interest having been paid by the county authorities and the other year's by the state authorities. And the question in the case is whether the bonds in the hands of the defendants, under the facts stated, are valid as against the town, and whether it is competent for the town to have them declared void on account of the objections made.

It is insisted that the county clerk should have subscribed the bonds, instead of the supervisor of the town of Aroma, because section 17 declares that the county clerk, for and in behalf of such township or village, is to subscribe for the capital stock, and he shall execute the bonds to the railroad company; but then the language which precedes that is, that shall be the duty of the supervisor of such town, or the chief executive officer of such incorporated town. Now, the corporation that was created under the law was not the township of Aroma, but it was the town of Aroma, and the language of the statute in respect to the supervisor of such town was quite as applicable to the supervisor of Aroma, as when it speaks of the county clerk, for and in behalf of such township; and it will be seen that in the same clause the supervisor of the town and the chief executive officer of the incorporated town are both named; and therefore the supervisor of the town can have no meaning unless it is applicable to a town created under the statute relating to township organization.

There is another view which may be taken of the principal question involved in this case, and that is whether the word "town," in the statute, means a township at all; and, *vice versa*, whether a township does not necessarily mean a territory according to the govern-

ment survey. The statute relating to township organization (chapter 139, § 6, Rev. St.) declares: "After a majority of the legal voters of a county have decided in favor of township organization, that the commissioners appointed shall proceed to divide such counties into *towns*, making them conform to the *townships* according to the government surveys; and it would seem not to be an unreasonable inference, from the language of the sixteenth and seventeenth sections of the statute already referred to, that the law intended to authorize townships, which had not been formed into towns under the statute, to subscribe for the capital stock of the railroad company. The sixteenth section speaks of an incorporated town and a township as being authorized to subscribe for the capital stock of the company. The seventeenth section speaks of towns, townships, and villages, and it seems to me there is great force in the position, even admitting that it is somewhat difficult to reconcile the various parts of the two sections, that the word "town" refers to a town created out of a township—a corporation under the statute; and, if that be so, then there can be no objection either to the signatures of the bonds or to the subscription to the stock of the railroad company or to the giving of notices of election.

It must be borne in mind that the parties sought to be prevented from enforcing their claims upon the bonds in this case have purchased and hold them in good faith for value, by virtue of the law under which they were issued, and the facts recited in the bonds. The plaintiff seeks to avoid liability upon the bonds on the ground that they are not enforceable in law and under the facts of the case. Undoubtedly, if it were clear that the bonds had been issued without authority of law, the fact that the holders had paid value for them would not avail, but in cases where there may be said to be a doubt as to the true construction of a statute, and, if that is so in this case, then, under the circumstances which have been detailed in evidence, and about which there is no controversy, the doubt ought to be resolved in favor of the *bona fide* holder of the bonds; and if the statute is susceptible of two constructions, then, under the circumstances, that construction should be given which should carry out in good faith the contract between the parties. Now, the town has acted throughout on the assumption that the clerk of the town was the proper person to give the notice, and that the supervisor was the proper person to subscribe to the capital stock of the railroad company and to execute to the company the bonds contemplated by the law, and that the clerk of the town was the proper person to attest the bonds.

This view of the case is very much strengthened by the fact that the property has been assessed for a series of years for the payment of interest due on the bonds; that the money has been collected, so far as we know, during those years without any legal objection being interposed to the collection until the filing of this bill. Add to this that there is no controversy but that a majority of the voters of the town voting at the election called was in favor of the subscription to the railroad stock and to the issue of the bonds; and when to this is also added the recital in the bonds, and that all the other requirements of law in relation to the special election were duly complied with,—it would seem as though it were not competent for the town now to rely upon the defense which is interposed in this case. Unlike some of the cases which have come before the court, in this case they have obtained the object which they sought: the road has been finished and is in operation, and the citizens of the town consequently have had the full benefit to their property of a completed railway.

The bill must, therefore, be dismissed.

See *Town of Pana* v. *Bowler*, 2 Sup. Ct. Rep. 704.

METROPOLITAN GRAIN & STOCK EXCHANGE *v.* CHICAGO BOARD OF TRADE and another.

(*Circuit Court, N. D. Illinois.* March 12, 1883.)

1. EX PARTE INJUNCTION—MOTION TO DISSOLVE.
   A motion to dissolve an *ex parte* injunction may be made before answer.
2. BOARD OF TRADE—RIGHT TO EXCLUDE REPORTERS OF TELEGRAPH COMPANIES—MARKET REPORTS.
   A board of trade, composed of merchants dealing in the products of the country, who solely for their own convenience provide a room where they meet to transact business, although incorporated under the laws of the state, is not a public corporation, and is not obliged to allow the reporters of a telegraph company on the floor of its exchange for the purposes of collecting and transmitting the reports of the markets therefrom.
3. TELEGRAPH COMPANIES—NOT BOUND TO COLLECT AND TRANSMIT INFORMATION.
   It is no part of the duty of telegraph companies to collect and transmit information; and while they are bound, if they voluntarily follow that class of employment, to do it with fidelity during the continuance of their contract, when they terminate such contract no person can compel them to enter into another, or continue it when they wish it terminated.

In Equity.

Lyman Trumbull and *Leonard Swett*, for plaintiff.

Lawrence, Campbell & Lawrence, for defendants.

BLODGETT, J. The bill in this case was originally filed in the circuit court of Cook county, on the thirtieth of December last, praying an injunction restraining the defendant, the Mutual Union Telegraph Company, from breaking the connection of its wires and instruments on the floor of the exchange room of the board of trade with the telegraphic instrument in complainant's office, and that the board of trade be enjoined and restrained from in any manner interfering with the sending by the telegraph company by means of its wires and instruments to complainant's office of reports of the prices of commodities and transactions on the board of trade. An *ex parte* order was made by one of the judges of the circuit court, directing the issue of a writ of injunction according to the prayer of the bill. The case was subsequently removed to this court, where the record was filed on the ninth of February last, and a motion is now made for a dissolution of the injunction so granted by the state court. On the hearing of this motion it was objected that defendant's answers, not being under their respective corporate seals, and not being verified by the oath of a proper officer of the respective defendants, the court could not entertain this motion. The seal of the board of trade was attached to its answer at the hearing, and since the hearing, by leave of the court, the answer of the telegraph company has been withdrawn from the files and its seal affixed, so that this objection may be considered as obviated by what has been done since it was stated.

I was, however, disposed to treat the case as not coming within the rule urged, for the reason that the injunction was granted without notice to the defendants, and I understand the practice, both in the state court and this court, is to allow a defendant who has been enjoined by an *ex parte* injunction to move its dissolution at once, without requiring him to put in an answer as a condition upon which such motion will be heard. In other words, it seems to me the court should consider the question as to the further continuance of this injunction in the same way it would consider and act upon a motion for injunction when the defendant has notice, and both parties are heard. The bill in this case waives the answer under oath, and, for the purposes of the case, is a mere pleading. Complainant has waived the right which is given a complainant in a court of equity to search the consciences of the defendants as to the facts on which it seeks relief, and it may well be doubted whether the old rules, formulated before the practice of waiving defendant's answer under oath was adopted,

are to be so strictly enforced as formerly. Being of opinion, therefore, that the motion to dissolve, in the present condition of the record, should be entertained, I proceed to consider it briefly on its merits.

The Chicago Board of Trade is an organization or guild of persons dealing mainly in the agricultural products of the west and northwest, which find a market in the city of Chicago. The board is a corporate body acting under a charter granted it by the legislature of the state of Illinois. It does not, and is not by its powers, authorized to deal in any kind of commodities, but it has provided a large exchange room, fitted up with suitable accommodations, where its members meet at stated times and buy and sell among themselves. Among the accommodations thus provided by the board for the use of its members, and paid for out of the annual dues or assessments of its members, or from other income belonging to the board, are reports of the markets in most of the important commercial centers of the world, and it is presumable that most of the dealings in this exchange room, between members of the board, are, to some extent at least, influenced by these market reports. The Mutual Union Telegraph Company owns and operates telegraph lines between Chicago and New York, as well as several other important cities. For some time past this telegraph company has had wires running into this exchange room, and kept instruments, operators, and reporters there to gather and report the ruling market prices as they were from time to time shown during the daily sessions by transactions between members of the board dealing there. The telegraph company also had a wire running from this exchange room to a Morse instrument in complainant's place of business, and has for upwards of a year sent over its wires to complainant's office reports of the opening prices and all changes of prices during the daily session of the board for the leading commodities dealt in there. And complainant's business has been and is to deal, to some extent at least, with persons frequenting its office, in the same class of commodities as are dealt in by members of the board of trade. Complainant, while it has had these reports of prices on the board from the telegraph company, has paid therefor at the rate of $25 per week, and avers its willingness and ability to continue to pay therefor whatever price shall be required.

It further appears that some time in December last the Chicago Board of Trade notified the telegraph company that it should not allow the operators and reporters of the telegraph company, after the first of January, to attend the daily sessions of its members in the ex-

change room, and send reports therefrom to complainant and other persons transacting business upon the same methods and system as complainant. The telegraph company notified the complainant of the action of the board of trade in the premises, whereupon complainant filed the bill now before the court and obtained the injunction as stated. The board of trade contends: (1) That it has the right to exclude persons from the floor of its exchange who come there for the purpose of collecting and sending out reports of the market as the same is developed by transactions between its members; that it is under no obligation to allow the agents of the telegraph company to attend upon the exchange for the purpose of collecting and reporting prices therefrom. (2) That complainant uses the market reports so obtained, through the agency of the telegraph company, mainly, if not wholly, for the purpose of making, or encouraging others to make, gambling contracts as to the rise or fall in price of the commodities dealt in on the board.

While the telegraph company insists that it has no right to keep its reporters, operators, wires, and instruments upon the floor of the exchange, except by permission of the board of trade, and that, when it was notified that it must desist from supplying complainant with its reports, it had no other course to adopt but to notify complainants that its reports would be stopped, it also insists that it is no part of its corporate duty or business to collect and send these market reports, and that it is under no obligations to complainant or the public to do this kind of work, except of its own volition.

The material question, as it seems to me, is whether the board of trade is obliged to allow reporters of the telegraph company on the floor of its exchange for the purposes of collecting and transmitting reports of the market therefrom. Complainant insists that the public have a right to the information afforded by these market reports, and that, because the two defendants are corporations, the board of trade is obliged to allow reporters on its floor, and the telegraph company is obliged to transmit such reports to whoever requires them and is willing to pay for them. The board of trade is a private corporation. It exercises no franchise which clothes it with any of the duties of a public corporation; it has no power of eminent domain, and no such duties are charged upon it toward the public as have heretofore been held by the courts to characterize or distinguish a public from a private corporation. It is only an association of merchants dealing in the products of the country, who, solely for their own convenience, provide a room where they meet to transact business. They have a

right to exclude all other persons from the meetings of the board, or to admit only such as they choose. If out of compliment they give one person a ticket to their floors, it furnishes no reason why they should issue a similar ticket to another, any more than because one of its members invites a guest to dine at his house the whole public have the same right to an invitation. As the proof shows, the board, at great expense, secures for the use of its own members reports of the market rates in other parts of the world. The claim of complainant, if allowed, would make these reports public property, and give the persons not members of the board, and who, perhaps, never could attain the position of membership of this body, all the advantages of membership. That is to say, if a person who has been expelled from this body for violation of its rules and regulations, can thus compel the board of trade to allow the telegraph company to send to his office in this city or elsewhere reports of transactions on the board, he has all the benefits of a membership from which he has been excluded by, perhaps, his own misconduct. It is absurd to say that information thus obtained for private use becomes public property, merely because it is collected and paid for through the agency of a private corporation. Transactions on the board are not public only so far as the board or its members see fit to make them so. Undoubtedly, the members of the board who act as agents, brokers, or factors for others, can be compelled by their principals to disclose prices to them, but not to the public. It is only those acting on the board for others—their principals—who can be required to make disclosures of their transactions, and then not to the public, but only to those for whom they are acting. Members of this board can go "on change" and deal with each other privately, and are not compelled to let the public know the prices at which they deal. The mere fact that they have been in the habit of informing the public of prices is no evidence that they are obliged to do so if they do not see fit to do it. In fact, we often see, as a matter of common knowledge and information, quotations made of large transactions between different dealers on the board in commodities, at prices not made public, thereby showing clearly that they exercise their own option of withholding from the public information as to their prices.

The proof shows that the telegraph company has been permitted by the board to have its reporters, operators, and instruments upon the floor of the exchange for the purpose of obtaining and sending out information as to prices, but as the telegraph company enjoyed this privilege only at the will and sufferance of the board, there can

be no doubt of the power of the board to close its doors against the employes of the telegraph company whenever it sees fit to do so; and it necessarily follows that when the board excludes the telegraph company from the exchange the company must cease to send reports to complainant. In other words, the arrangement by which the complainant got the reports being at the sufferance of the board, the telegraph company can send them only by permission of the board. The telegraphic instrument in complainant's office and the wires by which it is connected with the main line can no longer be used for the purpose for which they were placed there, and therefore it cannot harm complainant to have them removed.

The further reason which was urged in behalf of the telegraph company, that it is no part of the duty of the telegraph company to collect and transmit information, seems to be cogent and forcible. If they volunteer to follow that class of employment they are bound, perhaps, to do it with fidelity while their contract continues; but whenever they terminate their contract no person can compel them to enter into another, or to continue it when they wish it terminated. The defendant gave the complainant due and ample notice of more than a week, of its intention to withdraw its reports, and therefore terminate its contract with the plaintiff, which, it seems to me, it had the right and power to do, and I do not know of any power which can enforce and compel the telegraph company to gather news and transmit it when it ceases voluntarily to enter upon and continue in that class of business. If the telegraph company has assumed any contract obligations to the complainant which it is unable or unwilling longer to fulfill, complainant has an ample remedy at law for the damages sustained.

The view I take of the rights of the board of trade in the premises makes it unnecessary to consider the second point made by the defense, namely, that complainant uses the reports for gambling purposes. The injunction will be dismissed.

LAWRENCE *v.* NORTON.*

(*Circuit Court, N. D. Texas.* December, 1882.)

ASSIGNMENT TO CREDITORS.

An assignment for the benefit of creditors, under the laws of Texas, wherein the assignor has expressly reserved an interest to himself, to the exclusion of his creditors, is, on its face, null, void, and of no effect.

In Equity. On demurrer.

This action is one for damages for trespass, in seizing and converting certain goods, alleged by the plaintiff to have belonged to him. Plaintiff sets out his ownership, as derived under a certain deed of assignment, in these words and figures, to-wit:

The State of Texas, Kaufman County: This indenture made the twenty-fourth day of October, A. D. 1881, between S. W. Wallace of the first part, I. G. Lawrence of the second part, and the several creditors of the party of the first part, who shall hereafter accede to these presents, of the third part, witnesseth: That whereas the party of the first part is indebted to divers persons in considerable sums of money, which he is at present unable to pay in full, and he is desirous to convey all his property for the benefit of his creditors: Now, the party of the first part, in consideration of the premises, and of one dollar paid to him by the party of the second part, hereby grants, bargains, sells, assigns, and conveys, unto the party of the second part, and his heirs and assigns, all his lands, tenements, hereditaments, goods, chattels, and choses in action, of every name, nature, and description, wheresoever the same may be, except such property as may be by the constitution and laws of the state exempt from forced sale. To have and to hold the said premises unto the said party of the second part his heirs and assigns. But in trust and confidence, to sell and dispose of said real and personal estate, and to collect said choses in action, using a reasonable discretion as to the time and mode of selling and disposing of said estate, as it respects making sales for cash or on credit, at public auction or by private contract, taking a part for the whole, when the trustee shall deem it expedient so to do. Then in trust to dispose of the proceeds of said property in the manner following, viz.:

First. To pay the costs and charges of these presents, and the expenses of executing the trusts herein declared, together with all taxes which are a charge upon any of said property.

Second. To distribute and pay the remainder of the said proceeds to and among all the parties of the third part who will accept thereof, in full satisfaction of their claims against said party of the first part, ratably, in proportion to their respective debts.

Third. To pay over any surplus, after paying all parties of the third part who shall accede hereto, as aforesaid, in full, to the party of the first part, his executors, administrators, or assigns; and the party of the first part hereby

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

constitutes and appoints the party of the second part his attorney, irrevocable, with power of substitution, authorizing him in the name of the party of the first part, or otherwise, as the case may require, to do any and all acts, matters, and things to carry into effect the true intent and meaning of these presents, which the party of the first part might do if personally present; and the party of the second part, hereby accepting these trusts, covenants to and with each of the other parties hereto, to execute the same faithfully; and the party of the first part hereby covenants with the said trustee, from time to time, and at all times when requested, to give him all the information in his power respecting the assigned property, and to execute and deliver all such instruments of further assurance as the party of the second part shall be advised by counsel to be necessary in order to carry into full effect the true intent and meaning of these presents; and the parties of the third part, by acceding hereto, and by accepting the benefits herein conferred, hereby and thereby agree to and with the said party of the first part, to release him from any and all claim or claims, debt or debts, demand or demands, of whatever nature, which they respectively have and hold against him; and this assignment is made for the benefit of such of the parties of the third part only as will consent to accept their proportional share of the said estate of the said party of the first part, and discharge him from their respective claims.

Witness our hands, this twenty-fourth day of October, A. D. 1881.

[Signed] S. W. WALLACE,
I. G. LAWRENCE.

Then follow separate acknowledgments and lists of liabilities and assets.

Henry & Hill, for complainant.

Crawford & Smith, for defendant.

PARDEE, J. The demurrer presents the question whether the foregoing assignment is fraudulent on its face, and therefore void as against the assignor's creditor. If it is valid, and shall be carried out, and the trust administered according to the terms specified, its effect against creditors who do not grant the exacted release will be to delay them, according to the discretion of the assignee, for an indefinite period, in their remedies against the property upon faith of which they gave credit, if their remedies are not entirely lost; and, finally, after this indefinite delay, remit them to proceedings against their original debtor, after his assets have been converted into ready cash and put in his pocket beyond the reach of writs of *fieri facias*.

In short, in such case, the debtor has enacted a forced stay law, during the discretion of his agent, to enable him to convert his property into such convenient shape that he may enforce other terms (to suit his convenience) with his already delayed creditors. If the assignment is held valid, but the trust is administered according to the state laws, which, it is argued, have the effect to validate all as-

signments, curing all frauds, in act or intent, and, to a certain extent, making a contract for the assignor, the effect is practically the same, except that if there is any surplus, after preferred creditors and expenses, etc., are paid, it may be paid into court to be litigated for.

In this latter case, as to the administration under the state law, a number of curious queries suggest themselves, which, if they were satisfactorily answered, might induce creditors to view assignments under the law with more favor. When and where is the assignment to be recorded? When is it to take effect? How long may the assignee carry it in his pocket? Suppose that no creditor accepts the terms of the debtor, could the assignment be set aside? If so, when? After the full administration of the assignee, or at the expiration of four months? When is a dividend to be paid to accepting creditors? When the assignee can pay 10 per cent. of the accepting creditors' claims, or when he has funds in hand sufficient to pay 10 per cent. "of the debt due by the assignor?" Suppose the assignee can collect only enough, after reasonable compensation, necessary costs and expenses, and attorneys' fees, at discretion, are paid, to pay 9 per cent. of the debts due by the assignor?

Many other questions suggest themselves, but all, including the foregoing, throw no light on this case, they being referred to only because the policy of the law has been discussed at the bar, and very ably justified and defended too.

The assignment aforesaid makes several dispositions and conditions in conflict with the law which is relied on to maintain it, but the chief objection made to its validity is that the assignment is not complete of the assignor's interest, but that the assignor reserves an interest in his own favor in the property assigned.

The act of March 24, 1879, (Texas Laws, Acts 1879, *c.* 53, p. 57,) provides:

"Section 1. That every assignment made by an insolvent debtor, or in contemplation of insolvency, for the benefit of his creditors, shall provide, except as herein otherwise provided for, a distribution of all his real and personal estate, other than that which is by law exempt from execution, among *all* his creditors in proportion to their respective claims; and, however made, shall have the effect aforesaid, and shall be construed to pass all such estate, whether specified therein or not, and every assignment shall be proved or acknowledged and certified, and recorded in the same manner as is provided by law in conveyance of real estate or other property.

"Sec. 3. Any debtor, desiring so to do, may make an assignment for the benefit of such of his creditors, only, as will consent to accept their proportionate share of his estate, and discharge him from their respective claims; and,

in such case, the benefit of the assignment shall be limited and restricted to the creditors consenting thereto; the debtor shall thereupon be, and stand, discharged from all further liability to such consenting creditors, on account of their respective claims, and, when paid, they shall execute and deliver to the assignee, for the debtor, a release therefrom."

Upon the construction of these two sections, and upon the common law, the validity of the aforesaid assignment depends. See article 3128, Rev. Code Texas.

It seems that by the section aforesaid two classes of assignments are allowed: Under the first section, assignments for the benefit of all the creditors, which are aided by the law, and naturally would be favored by the court; under the third section, assignments for the benefit of preferred creditors, who are preferred on their own election under stress of a penalty forfeiting their whole claim, which assignment is not in terms aided by law, and naturally is not favored by the courts. Prior to the act of 1879, an assignment, such as the one now under consideration, would have been adjudged void on its face, because therein the assignor reserved an interest in the estate assigned. See the leading cases in Texas—*Baldwin* v. *Peet*, 22 Tex. 708, and *Bailey* v. *Mills*, 27 Tex. 434. Also, *Barney* v. *Griffin*, 2 N. Y. (Comst.) Ct. App. 365; *Leitch* v. *Hollister*, 4 N. Y. (Comst.) Ct. App. 211.

In the last cited case it is said:

"The effect of such an assignment is to withdraw the property of the debtor from legal process, and to compel creditors to await the execution of the trust before they can reach the surplus reserved to the former. As those who are excluded from the benefits of the assignment cannot enforce its execution, they are necessarily hindered and delayed, and consequently, in legal contemplation, defrauded. It is of no consequence whether the surplus is large or small, or whether anything remains after the payment of the preferred creditors; the creation of the trust shows that a surplus was in the contemplation of the parties, and its reservations for the benefit of the assignor is a fraud upon creditors."

These cases, and the arguments so clearly expressed, have lost no force by lapse of time. The statute aforesaid was passed in the light of them, and I think it must be construed in harmony with them. Counsel have handed in two late decisions of the supreme court of Texas, not yet reported, in which that learned tribunal has passed upon two cases arising under the statute aforesaid. The first—*Blum* v. *Wellborne*—goes to the extent of holding that an assignment that evidences an intention to pass to the assignee all of the property of the debtor, subject to forced sale, for the purpose of distribution

among creditors, and is executed in substantial compliance with the requirements of the act, will be aided by the law as to form, and will not be avoided by fraud between the assignor and assignee in secreting and appropriating portions of the property assigned.

In the second case—*Donalu* v. *Fish Brothers*—it is held that the law cannot make an assignment for the debtor, but that it aids an assignment which evidences an intention of the debtor to comply with its provision; that the provisions of the third section of the act of 1879 must be construed in harmony with the principles laid down by the courts of the several states, in which it has been held, in the absence of a statute, that such restrictions upon the rights of the creditors generally might be imposed by the debtor; and that an assignment containing such restrictions, which does not of itself, or with the aid of the law, transfer all the debtor's property for the benefit of his creditors, is void upon its face.

Following these two cases, as to the construction to be given to the act of 1879, keeping in mind that the law cannot make a contract for the debtor, and that where a debtor seeks to force exactions from his creditors under the third section of the act, he must resign all of his property not exempt, I feel warranted in holding, under the lights to which the court refers me, and hereinbefore cited, that as in the assignment before the court, the assignor has expressly reserved an interest to himself, to the exclusion of his creditors, the same is, on its face null and void, and of no effect.

Under the principles of the civil law, declaring that the property of the debtor is the common pledge of all the creditors, which principles are sound in justice and equity, all laws and acts preferring creditors ought to be strictly construed, and always avoided, when not in strict compliance with the terms of the law. On general principles, therefore, I am of the opinion that the third section of the act of 1879, allowing an unfair and partial assignment, should be strictly construed, and, therefore, that the assignment in this case should be held null and void.

The other points argued need not be considered.

The demurrer to the amended original petition is sustained.

McCormick, J., concurs.

ILLINOIS TRUST & SAVINGS BANK OF CHICAGO, ILL., *v.* FIRST NAT. BANK OF BUFFALO and another, Receiver, etc.

(*Circuit Court, N. D. New York.* March 16, 1883.)

1. DRAFT—DEPOSIT IN BANK FOR COLLECTION—FRAUDULENT CONVERSION.
   Where complainant sent a draft to a bank for collection charged with a trust to pay the proceeds thereof when collected to complainant, the bank being insolvent at the time, and its officers knew of its insolvency, and that the bank would be obliged to suspend within a day or two, and the bank received the draft of an agent of the owner to remit the proceeds thereof, when converted into a draft on another bank to the credit of complainant, but instead of so remitting the proceeds thereof, it kept the same, and mingled the proceeds of such draft with its own funds, *held*, that such conversion by the bank was fraudulent, but that in an action by complainant for the recovery of such proceeds, it is incumbent upon the complainant to trace the fund misappropriated into the hands of the receiver substantially appointed for the insolvent bank, before the latter can be charged with recognizing complainant's equitable title thereto.
2. SAME—FUNDS IN HAND OF TRUSTEE.
   A *cestui que trust* cannot follow his fund into the hands of an assignee in bankruptcy, or of an executor of such trustee, but must occupy the position of a general creditor of the estate, unless he can identify his fund.
3. SAME—RIGHT TO FOLLOW TRUST FUND—WHEN CEASES.
   The right to follow a trust fund ceases when the means of ascertainment and identification fail, as where the subject-matter is turned into money, and mixed and confounded in a general mass of property of the same description.

In Equity.

Monroe & Ball, for complainants.

Crowley, Movius & Wilcox, for defendant.

WALLACE, J. The theory of this bill is that the receiver holds the proceeds of a certain draft for $6,527.75, sent to the First National Bank of Buffalo by complainant for collection in April, 1882, charged with a trust to pay over the same to the complainant.

It may be assumed that the First National Bank of Buffalo was insolvent when it received the draft for collection; that its officers knew of the insolvency; and that the bank would be obliged to suspend within a day or two; and it may be further assumed that the bank received the draft merely as an agent to collect it of the drawers and remit the collected proceeds, when converted into a draft on New York, to the Bank of New York, to the credit of the complainant. Instead of remitting the proceeds to the Bank of New York the First National Bank of Buffalo kept them and mingled them with the general funds of the bank, the draft having been paid in money, and the money having been put by the bank with its other moneys indiscrim-

inately. All this took place before the bank closed its doors or any proceedings were instituted to compel it to go into liquidation. When the title of the receiver accrued assets came into his hands more than sufficient for the payment of the draft. Whether any of the moneys collected upon the draft came to the receiver's hands could not, from the nature of the case, be ascertained.

It was undoubtedly a fraudulent act on the part of the defendant bank, in its condition of hopeless insolvency, to convert the proceeds of the draft by mingling them with its own funds so that their identity was destroyed. Assuming that there was a trust relation between the complainant and the defendant bank, and not merely the relation of creditor and debtor, it is incumbent upon the complainant to trace the fund misappropriated by the defendant bank into the hands of the receiver before it can charge him with the duty of recognizing the complainant's equitable title.

There is an insuperable difficulty in doing this which must defeat the complainant's right to relief. All the moneys and assets of the defendant bank, when they were received by the receiver, came to him as a trust fund for all the creditors of the bank, without preference, subject to the prior lien of the United States, by force of the provisions of the statutes under which the receiver was appointed; and it would be a violation of law upon his part to set aside any portion of these assets for the complainant, unless its portion is capable of identification, or of being definitely traced and distinguished from the funds of the general body of creditors. A *cestui que trust*, under such circumstances, must be able to point out his fund, or the proceeds which are specifically derived from it, and trace it through its transformations so as to show that it is not a fund or product to which all other creditors have an equal right to resort. From the nature of the fund and the manner in which it was appropriated that cannot be done here. Money ordinarily has no ear-mark. It is not ordinarily the subject of replevin or detinue. "The writ lieth not for money out of a bag or chest; and so of corn out of a sack, and the like; these cannot be known from others." Co. Lit. 286*b*.

Accordingly the cases hold that if a trustee has converted a trust fund into money and mingled the proceeds with his other moneys, so that they were indistinguishable, the *cestui que trust* cannot follow his fund into the hands of an assignee in bankruptcy, or of an executor of such trustee, but must occupy the position of a general creditor of the estate. *Whitcomb* v. *Jacob*, 1 Salk. 160; *Trecothick* v. *Austin*, 4 Mason, 29; *Ex parte Mordaunt*, 3 Dea. & C. 351; *Kip* v. *Bank of*

New York, 10 Johns. 63; *Bank of Commerce* v. *Russel*, 2 Dill. 215; *Re Coan Manuf'g Co.* 12 N. B. R. 203; *Re Janeway*, 4 N. B. R. 100.

In Story, Eq. Jur. § 1259, the doctrine is stated thus:

"The right to follow a trust fund ceases when the means of ascertainment fail, which, of course, is the case when the subject-matter is turned into money and mixed and confounded in a general mass of property of the same description."

On the morning of the day when the defendant bank received the proceeds of complainant's draft it had cash on hand of about $40,000. It received during the day about $28,000 from depositors, and it paid out $61,000. Every dollar that was received from depositors on that day was as fraudulently taken from them as the complainant's money was from it. Each depositor has, at law, an equal right with the complainant to insist upon the repayment of the money that belongs to him; and the same right would exist in equity, except for the existence of a trust relation between the complainant and the defendant bank, which is more theoretical than substantial.

The bill is dismissed.

HAGGART *v.* RANGER.*

(*Circuit Court, N. D. Texas.* December, 1882.)

SALE UNDER DEED OF TRUST.

The mere fact that a person who executed a deed of trust when sane, afterwards became of unsound mind, prior to and at the time the sale was made, under and according to such deed of trust, is no ground for setting aside such sale, no element of fraud being presented in the bill, and the inadequacy of the price realized not appearing to have resulted from any improper act of the trustee or of the *cestui que trust*.

In Equity. On demurrer.

The bill in this case charges that on the twenty-eighth of December, 1874, the complainant executed and delivered to the defendant his promissory note for the sum of $3,522, due June 1, 1875, and on the same day he executed and delivered to the defendant a deed of trust, conveying to Thomas M. Jack and Marcus F. Mott, as trustees, 44 sections (28,160 acres) of land, in Shackleford, Callahan, Stephens, Palo Pinto, Jack, and Knox counties, to secure the payment of said note; that the said trustees, Jack and Mott, acting under said con-

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

veyance to them, sold all of the said lands on the twenty-ninth of March, 1879, and the defendant (being still the holder of the note) became the purchaser of all the lands at about the price of 10 cents per acre, and the lands were conveyed to him by said trustees, on the second of April, 1879.

The bill charges, further, that for eight months before the date of said sale, and for many months thereafter, the complainant was affected with unsoundness of mind, to such an extent as incapacitated him for attending to business, and rendered him incompetent to make contracts, or to take any care of his business affairs; that this fact was well known to the defendant and to said trustees at the time of the making of said sale; that at that time the lands were worth two dollars per acre, on a general average; and that the defendant had said sale made that he might absorb all of said mortgaged property in the satisfaction of his debt, which, the bill charges, he could not have done, as the defendant well knew, but for the fact that complainant was rendered helpless by reason of his then existing unsoundness of mind. Wherefore complainant asks to be relieved by having said sale set aside, upon such terms as the court may deem equitable, and as shall adequately meet the claims of defendant upon complainant, growing out of said transactions.

To this bill defendant interposes a general demurrer, that it presents no ground for granting the relief asked; and special demurrer, that it does not show that complainant was of unsound mind at the time he executed and delivered said note and deed of trust.

Sawnie Robertson, *C. G. Payne*, *H. Barksdale*, and *D. A. Williams*, for complainant.

Z. Hunt and *Abner S. Lathrop*, for defendant.

McCormick, J. We think the demurrer well taken. The power to sell the lands given in the deed of trust mentioned is certainly such a power as would be held at common law to have coupled with it an interest in the lands mentioned in the power, and would authorize its execution even after the death of the donor of the power. In this state it is held that such a power cannot be executed after the death of the donor, but this rule here is based on the Texas statutes regulating the administration of the estates of deceased persons. These statutes give priority to funeral expenses, expenses of last sickness, allowances to the family, etc., over all other indebtedness, (except, perhaps, for purchase money,) and they make special provision for the execution of just such contracts and liens as this by administration. *Robertson* v. *Paul*, 16 Tex. 472.

In the case just cited, the power under consideration was precisely similar to the one given Jack and Mott, under consideration by us in this case, and Judge WHEELER, in his opinion in that case, clearly indicates his opinion that in Texas, the common law being the rule of decision here, such a power could be executed after the death of the grantor, but for its contravening our system of administration of decedents' estates.

A careful examination of the Texas statutes does not disclose any such provisions in reference to insane persons, or in regard to the management of the estates of persons of unsound mind, as those provisions of the law regulating the administration of the estate of deceased persons, which have been held in *Robinson* v. *Paul, supra*, and in subsequent cases in the Texas Reports, to cause the power to determine upon the death of the grantor. It is not necessary for us to consider what might have been the effect upon this power had the complainant been found insane by proper inquest, and guardianship of his estate granted by the proper court. We are clearly of opinion that the condition of complainant presented by the bill was not such as arrested or suspended the power granted by him in the deed of trust. No element of fraud is presented in the bill. The mere fact of making the sale while complainant was in the condition alleged, with knowledge thereof on the part of the defendant and of the trustees, is all that is charged in that direction.

The inadequacy of price complained of does not appear to have resulted from any improper act of defendant. From all that appears, the sale was made precisely as the complainant had provided it shoud be made, and the defendant became the purchaser because he was willing to give more for the land, and at the sale offered more for the land than any one else offered, and no reason suggests itself to us for setting aside the sale on that ground.

The demurrer is sustained.

PARDEE, J., concurs.

DAHLMAN v. JACOBS and others.*

(*Circuit Court, E. D. Missouri.* March 29, 1883.)

1. EQUITY—CREDITOR'S BILL.
   A creditor at large, who has not established his demand at law, cannot maintain a suit in equity, either to set aside a conveyance executed by an insolvent debtor, or obtain a decree that such conveyance shall stand for a general assignment, under the state statutes, for the benefit of all such debtor's creditors.
2. SAME—REMEDY AT LAW.
   A court of equity has no jurisdiction, even where the demand has been duly established, if the plaintiff can obtain a full, complete, and adequate remedy at law.

In Equity. Demurrer to bill.

This is a suit brought by Max Dahlman against Joseph M. Hayes, Amelia Jacobs, and Henry Jacobs, her husband, to have a certain instrument executed by the two last-named defendants held and decreed to be and operate as a deed of assignment for the benefit of all the creditors of said Amelia Jacobs, under the laws of the state of Missouri, and for other relief. The bill states that said instrument purports to be a mortgage of all the separate estate and property of said Amelia Jacobs, and to have been executed for the purpose of securing a debt due from her to Joseph M. Hayes, the mortgagee, and alleges that at the time said instrument was executed, Mrs. Jacobs was carrying on business in St. Louis under the name of A. Jacobs, and had a separate estate; that she was insolvent, and at the time said instrument was executed was indebted to other creditors besides said Hayes, among whom was the defendant, to whom she owed the sum of $1,442.82, as appeared by an itemized account therewith filed. The only question decided by the court was as to its jurisdiction.

Patrick & Frank, for plaintiff.

D. Goldsmiths, for defendants.

TREAT, J. A general demurrer has been interposed, which involves two questions: *First*, whether a creditor at large can maintain the bill, either to set aside defendants' conveyance or to decree that it shall stand for a general assignment for the benefit of all the creditors; *second*, if the plaintiff has the proper standing, whether the conveyance in question falls within the provisions of the Missouri statute as to assignments.

The counsel have exercised extraordinary diligence in presenting and collating cases on the second point. The questions on that point,

*Reported by B. F. Rex, Esq., of the St. Louis bar.

if they had to be considered, would involve a review of the many decisions cited, especially those of the supreme court of Missouri, on the Missouri statute. The plaintiff, however, is, by the express averments of his bill, a creditor at large, without a lien or trust upon the property in question, and hence falls within the well-settled rules that his demand must first be established at law; and it must also appear that he has not full, complete, and adequate remedy at law, before he can invoke proceedings in equity. His account is an open one, and it may be if tried at law, where it should be, his demand would fail, or if not in its entirety, to an extent that would reduce the same below the jurisdiction of this court. This court cannot be driven, *first*, to ascertain whether he has a legal demand which belongs to common-law courts, and thus, having usurped common-law jurisdiction, proceed, after giving what is equivalent to a common-law judgment, to enter upon the other or equitable inquiry involved. Without reviewing what are elementary authorities on this point, it must suffice to refer to *Case* v. *Beauregard*, 99 U. S. 119, and 101 U. S. 688.

It is obvious that the plaintiff in this case has full redress at law, if he has any demand against the defendants. It is sufficient, however, for the purposes of this demurrer, that he has not, under the allegations of his bill, a cause of action cognizable in equity. The demurrer will be sustained.

McCRARY, C. J., concurs.

In re Extradition of WADGE.

(*District Court, S. D. New York.* March 27, 1883.)

1. EXTRADITION—AUTHENTICATION OF DOCUMENTS.
   The authentication of documents in extradition proceedings, which would be received "in similar proceedings" in the demanding country, when aided by oral proof of handwriting, and by proof showing the purpose for which they are issued, is sufficient under section 5 of the act of August 3, 1882.
2. SAME—TREATY WITH GREAT BRITAIN.
   Under the treaty with Great Britain, the latter is entitled to extradition on evidence of the offense sufficient to justify commitment here. The accused, though entitled to examine witnesses in his defense, is not entitled to a full trial here.
3. SAME—PRACTICE—JUDICIAL DISCRETION.
   It is not the practice before committing magistrates to receive the depositions of foreign witnesses taken abroad on the part of the defense. *Held*,

therefore, that the commissioner, in extradition proceedings, rightly refused an adjournment applied for by the accused to enable him to obtain the depositions of witnesses in his defense from the country of the demanding government, and that his refusal was not such an abuse of judicial discretion as to be remedied by *habeas corpus*.

4. TRIAL—ACT OF AUGUST 3, 1882, CONSTRUED.

The word "trial," in section 3 of the act of August 3, 1882, must be confined to such a preliminary hearing only as was already allowable under the existing practice.

Habeas Corpus.

F. F. Marbury, for the British government.

L. F. Post and *E. T. Wood*, for accused.

BROWN, J. The prisoner having been held for extradition, under the treaty with Great Britain, on a charge of forgery, has been brought before me on *habeas corpus* and *certiorari*. The authentication of the documents excepted to is made in the exact language of the statute of August 3, 1882, § 5, and by the proper officers, and the signature of the police magistrate is also verified by oral proof. It is likewise shown that the documents were authenticated for the purpose of being used in these extradition proceedings. From the oral evidence, therefore, in connection with the authentication, the intention is clear to certify that these documents are such as would be received in similar proceedings in the demanding country; and that is sufficient. *In re Henrich*, 5 Blatchf. 414, 424; *In re Farez*, 7 Blatchf. 345, 353; *In re Fowler*, 18 Blatchf. 430; [S. C. 4 FED. REP. 303.]

The only other exception is to the refusal of the commissioner to adjourn the proceedings before him in order to enable the accused to procure depositions from England to establish an *alibi* at the time when he is charged with having uttered the forged bill.

Article 10 of the treaty with Great Britain (St. at Large, "Public Treaties,"etc., 320) provides for the surrender of the person accused "upon such evidence of criminality as, according to the law of the place where such fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had there been committed."

According to the practice here, before committing magistrates, (2 Rev. St. N. Y. *708, §§ 13–20; N. Y. Crim. Code, §§ 188–221; *In re Farez*, 7 Blatchf. 345, 357,) as well as by the provisions of section 3 of the act of August 3, 1882, (*c.* 378,) while it is the duty of the magistrate before whom extradition proceedings are pending to take such evidence as may be offered on the part of the accused, and to allow

him reasonable time for that purpose, it seems to me clear that this cannot embrace, as a matter of right on his part, an indefinite postponement of the proceedings for the purpose of obtaining testimony upon commission, or by deposition, as regards the commission of the crime alleged, from foreign countries; and especially from the very country which is seeking his extradition for trial there. If this were recognized as the legal right of the accused in extradition proceedings, it would give him the option of insisting upon a full hearing and trial of his case here; and that might compel the demanding government to produce all its evidence here, both direct and rebutting, in order to meet the defense thus gathered from every quarter. The result would be that the foreign government, though entitled by the terms of the treaty to the extradition of the accused for the purpose of a trial where the crime was committed, would be compelled to go into a full trial on the merits in a foreign country, under all the disadvantages of such a situation, and could not obtain extradition until after it had procured a conviction of the accused upon a full and substantial trial here. This would be in plain contravention of the intent and meaning of the extradition treaties, which are designed to secure a trial in the country where the crime was committed, through the extradition of the accused, upon sufficient proof, according to our law, to justify a commitment here. *In re Farez*, 7 Blatchf. 359. Nor is there any warrant, so far as I am aware, according to the law or the practice before committing magistrates in this state, for receiving testimony by commission or by the depositions of foreign witnesses taken abroad; all the provisions of the law and statutes, as above cited, contemplate the production of the defendant's witnesses in person before the magistrate, for examination by him.

The phrase in section 3 of the act of August 3, 1882, "that he" (the accused) "cannot safely go to *trial* without them," (witnesses,) cannot be construed as giving a right to a full trial in violation of treaty stipulations; but it must be confined to such a preliminary hearing only as was already allowable under the existing practice, viz., such as is appropriate to a hearing having reference only to a commitment for future trial.

The evidence of criminality in this case was sufficient. There is no question as to the commissioner's jurisdiction. The determination of questions of adjournment, like other questions of practice, belong properly to the discretion and judgment of the commissioner. *In re Macdonnell*, 11 Blatchf. 79, 100, 170. His decisions on such questions cannot be reviewed on *habeas corpus*, unless they amount to a

clear denial of a legal right through a manifest abuse of discretion. *President* v. *Patchen*, 8 Wend. 47, 64. That is not the case here. His judgment in declining to postpone these proceedings after they had been pending 11 days, for the purpose of obtaining depositions from witnesses in England, instead of remitting the accused to his trial there, where these witnesses could be produced in person and their credibility examined, or witnesses in rebuttal conveniently obtained, was, in my opinion, proper and just. To have allowed such depositions and a postponement of the proceedings until they could be taken and produced here, would, it seems to me, involve a disregard of the plain meaning and intention of the treaty.

The writ of *habeas corpus* is therefore dismissed, and the prisoner remanded.

Affirmed on appeal to the United States circuit court.

UNITED STATES *v.* PACIFIC EXPRESS CO.

(*District Court, D. Kansas.* April Term, 1883.)

1. EXPRESS COMPANY—FAILURE TO DELIVER MONEY.
   In an action against an express company for the loss of money delivered to it, to be carried to and redelivered at a certain place, it is only necessary to prove the delivery of the money to the company and its failure to redeliver the same.
2. SAME—BURDEN OF PROOF.
   In such a case the burden of proof rests upon the plaintiff, and he has to establish by a preponderance of evidence that the allegations in his petition are true.
3. JURY JUDGES OF CREDIBILITY OF WITNESSES—TESTIMONY OF EMPLOYES.
   The jury are the exclusive judges of the credibility of witnesses, and in considering the weight to be attached to the testimony of certain witnesses, they may take into consideration the fact that they are the employes of the party in whose behalf they are testifying.
4. SAME—CIRCUMSTANTIAL EVIDENCE.
   If circumstantial evidence preponderates, or overthrows or overcomes, in the opinion of the jury and in their judgment, the direct positive testimony of witnesses, they have the right to take that kind of evidence and give it all the weight it is entitled to.

At Law.

J. R. Hallowell, U. S. Dist. Atty., for plaintiff.

Everest & Waggener, for defendant.

FOSTER, J., (*charging jury orally.*) This case, as presented by the evidence, is essentially one resting upon facts, and upon the facts as

established by the evidence you are to render your verdict. The United States alleges in its petition that on or about the ninth of January, 1880, at the city of Leavenworth, by its authorized agent, it placed in the custody of the defendant, the Pacific Express Company, an iron safe, containing moneys of the United States to the amount of about $26,000, for the purpose of having the same shipped to Wellington, in the state of Kansas, and there to be delivered to Maj. Broadhead, and that said express company received said safe, with its said contents, for the purpose of conveying the same from the place of of shipment to its destination, and that during the time said safe was in the custody of said express company there was taken from the safe the sum of $20,000, and to recover that amount this suit is brought. The defendant company admits receiving said safe, but avers that it had no knowledge of its contents except statements of plaintiff's agent, Maj. Broadhead,—(if I make any mistake about the pleadings I hope counsel will correct me: I want to give the general purport,)—as appears from the bill of lading or receipt; that it had no knowledge of the contents of the safe, except from the statements of Maj. Broadhead; and avers that it delivered said safe and its contents at its destination, to Maj. Broadhead, the same as when it was received by it at Leavenworth. This makes a plain issue between the parties. The plaintiff alleges that the defendant did not deliver the safe with all its contents to Maj. Broadhead; the defendant claims that it did so deliver it. As a legal proposition, it is not controverted that the law holds the express company responsible for the safe delivery of the property at its destination, and there is nothing claimed or shown in this case to relieve it of that responsibility.

The express company fixes its charges for such services with this legal liability attached, and to compensate itself for the services rendered and the risk incurred in and about the business, it is governed largely by the value of the articles intrusted to its care. The greater the value, the greater the risk and responsibility incurred in its safe carriage and delivery. So far as this case is concerned, and the liability of the express company extends if it received the $20,000 package and failed to deliver it, it is not material what became of it. It matters not who took it, or when or how it was taken or stolen,—whether stolen by an employe of the defendant or by a stranger. The plaintiff is merely required to show that the money was delivered to the express company, and that it was not redelivered by that company. To put it brief, was the money delivered to

the express company? If so, was it returned? The safe and contents were in the possession of the defendant company when it was turned over to its agent, Mr. Martien, at Maj. Broadhead's office; from that time its liability commenced.

Your first inquiry would naturally be to determine the contents of the safe,—whether the $20,000 package was in it when delivered to defendant's agent; and upon that point I will briefly refer to the principal evidence; that is, as to the contents of that safe when delivered to the defendant company.

Maj. Broadhead and his clerk, Mr. Bassett, testify that the $20,000 package, together with other packages of money, amounting in the whole to the sum of $25,900, was placed in the safe. Maj. Broadhead testifies that he placed it in the safe with his own hands. Mr. Bassett says he was present and saw Maj. Broadhead put the $20,000 package in the safe. Here are two parties swearing positively to the money being placed in the safe. Maj. Broadhead tells you when and how and at what time he drew this money from the First National Bank; that he drew at several times on several different checks; that he first drew $15,000 from the bank and then $5,000, and put them together, making this $20,000 package. My memory is, he says he drew it on the seventh of January; that he took it back after he had done up that package and placed it in the bank for safe-keeping. Subsequently he drew the rest of it and did it up in packages; that on the day this safe was turned over to the defendant company he says he went to the bank and got the $20,000 package, and, as before stated, in the presence of Mr. Bassett, placed it in the safe. In corroboration of his testimony as to the drawing of the money and the delivery of the $20,000 package into the charge of the First National Bank for safe-keeping, his testimony is corroborated by Mr. Graybill, cashier of that bank. He corroborates him in reference to these drafts, drawing the money and placing the $20,000 bundle or package in the bank again for safe-keeping, and that he took it out at the dates he has stated. Now this is the evidence and proof as to the drawing of this money from the bank, the doing up of the package, and the placing of this money in the safe.

Now, Maj. Broadhead and Mr. Bassett, his clerk, testify, after detailing to you how the money was placed in the safe,—the smaller packages first, etc., and the $20,000 package on top—how the safe was closed and locked; how it was sealed; after putting his escutcheon over the key-hole, he placed the screw in to hold it in its place; then taking red sealing-wax, Maj. Broadhead says he held the

candle and Mr. Bassett used the wax, melting it and dropping it on the escutcheon, and then Maj. Broadhead taking his seal, with the initials, "J. A. B.," stamped it, thus making a seal upon the escutcheon. They testify the wax extended over and adhered to the safe, thus holding the escutcheon in its place; that previous to the putting up of this money, or about that time,—at any rate, the same day,—he mentioned to the express agent that he would have a safe to ship, and the agent had agreed to send up for it at his office; that is testified to also by the express agent; that he delayed somewhat in sending for the safe, and Mr. Bassett was sent down to the express office to hurry up the wagon, as they were tired waiting. Maj. Broadhead tells you, and in that he is corroborated by Mr. Bassett, that upon Mr. Bassett's returning to the office and saying the wagon would not be there until 1 o'clock, he told him to go to his lunch, and he would stay there, and Mr. Bassett absented himself for a short time, returning again about 1 o'clock. Mr. Bassett and Maj. Broadhead testify that the agent, Mr. Martien, came up with the express wagon for the packages. Maj. Broadhead testifies that he had become somewhat impatient waiting; he says to the agent, Mr. Martien, taking hold of the end of the safe, "Here is my safe and there is my bedding," and started off to his dinner. Mr. Bassett substantially corroborates that. Then Mr. Bassett testifies, and Mr. Martien has testified to the same thing substantially, that he called in this colored boy, or rather, before he called in this colored boy, that he went out and looked for somebody to help him take this package out, and he went down to Maj. Gibbons' office, expecting to find the messenger there, or the porter he had in his service; he did not find him; he then came back upstairs; then raised the window in Maj. Broadhead's office, and called out to this colored boy, Davis, to come up and help him carry the safe down stairs. As my memory serves me, Mr. Bassett's testimony and Mr. Martien's are substantially the same on that point about the colored boy going up and helping down these goods. Passing that by, the safe was taken down and delivered to the express company and placed in their office, as the evidence would show. I think the evidence of Mr. Martien and Mr. Shepperd, corroborated to some extent by Mr. Lockwood, is that the safe was all right—this seal perfect; Maj. Broadhead's seal was all right when it was delivered in the office, placed in the office about 1 o'clock in the afternoon, and Maj. Broadhead came in subsequently and got his bills of lading.

Now, so much upon that question,—and I have digressed a little upon that point,—but so much in main as to what was placed in that

safe. It was upon that point I desired to call attention in this connection. As to the $20,000 having been placed in the safe, I have briefly reviewed the evidence on that point. This information seems to rest, so far as positive proof is concerned, upon the statements of Maj. Broadhead and Mr. Bassett, his clerk. There is no evidence offered here to show that such were not the contents of the safe, or that their testimony is not correct.

After passing from the question of what was in the safe,—the next inquiry would be, was the package in the safe when delivered to Maj. Broadhead at Wellington? If you should find that the $20,000 was placed in the safe, was it in the safe when delivered to Maj. Broadhead at its destination at Wellington? The safe was not opened until it reached Fort Reno, and when opened the package of $20,000, under the testimony of Maj. Broadhead and Mr. Bassett, was not in the safe. They testify that when the safe was opened at Fort Reno the $20,000 was not in the safe. You have heard the testimony as to Maj. Broadhead receiving this safe at Wellington and giving his receipt for it; the manner in which it was transported to Fort Reno, by government transportation, in charge of an escort of troops. The testimony, as offered in this case and substantiated by both sides, at the time the safe was delivered to Maj. Broadhead at Wellington, there was a green seal put on, and placed all over his seal which he had placed on the safe; that his seal had been broken or mutilated, and that the agent of the defendant company had placed the seal of the company over this violated seal or broken seal, with green wax, and stamped it with the seal of the company; that was done at Atchison; and the testimony of Maj. Broadhead and his clerk is that the safe remained in that condition, with this green seal intact, from the time they took it from Wellington until they opened it at Fort Reno. This is testimony—I mean the positive direct testimony of those two gentlemen—of the contents of the safe when it was delivered to the express company, and what the contents of the safe were when it was redelivered by the express company to Maj. Broadhead. This is the testimony that is offered by the government, in this case, to show how it was when it was delivered to the express company and when it was received; because they claim the green seal was intact from the time it was received by them at Wellington, and on that there is no evidence on the part of the defense at all, and there is no use of going where there is no evidence. That that green seal remained the same, from the time it was received by Maj. Broadhead, at Wellington,

until opened at Fort Reno, is uncontradicted. Here, then, is the positive testimony of two witnesses, unimpeached and uncontradicted on the main point, to the fact that the money was in the safe when turned over to the express company, and that it was not in the safe when delivered back by the company. If you believe, from the testimony, this to be true, there is no escape from liability for the express company, and you are bound to find for the plaintiff, if you find their testimony to be true. Had the safe been delivered back to Maj. Broadhead, with his seal intact on the escutcheon, it would have been well-nigh conclusive that the contents of the safe were the same as when received by the company. But, unfortunately for the defendant, such, as it seems from the evidence, was not the fact. The seal had been broken, and the agent of the company at Atchison had placed the seal of the company over the broken mutilated seal of Maj. Broadhead. Whether it was so far broken as to release the escutcheon is not clear, and upon that point Mr. Lockwood, who was the agent of the company, *en route* from Leavenworth to Atchison, testified, in the first part of his deposition, that the escutcheon was in its place, and that he could not state whether it was still in its place or held there by the seal. In the latter part of his deposition he expresses the opinion or belief that the wax seal, or a portion of the seal, still adhered to the safe, and held the escutcheon in its place, after a critical examination at Atchison. I think that is the substance of his deposition.

Now, gentlemen of the jury, passing by positive evidence as to the contents of this safe, etc., what was it when it was delivered back? And, looking at these other circumstances, it has a material bearing in the case as to whether that seal was so far broken and destroyed that it no longer held the escutcheon at all, or whether it answered as a seal to hold it in its place. You have heard the testimony as to how this escutcheon was placed on the safe; you have seen it placed on the safe with the screw screwed down. You have seen and heard from the testimony that this screw which was placed on the safe, to some extent, at least, held the escutcheon. It is for you to determine whether it held the escutcheon in its place without the aid of the seal. And you are to determine from the evidence offered in this case by Mr. Lockwood whether or not he made such an investigation or examination of that seal on that escutcheon as to determine whether it was held in its place by reason of the screw, or whether he examined it sufficiently to be able to state that it was held there by the seal. It is proper for me to say in this connection that the testimony

of Mr. Lockwood, tending to support, as it does, a theory in this case which, if true, contradicts or establishes a state of facts contrary and inconsistent with the facts claimed by the plaintiff, and upon which they offered positive and direct testimony, situated as he was as an agent and employe of the company, having made, as he stated, but a slight or uncertain investigation as to the condition of that seal, his testimony should be taken with considerable caution upon that point. He was an employe of the company; he found the seal which covered this money, $26,000, or about $26,000, marked plainly upon the tag on this safe, violated and broken. He took the responsibility, instead of making an investigation as to whether that had been violated intentionally or by accident, of covering it up with the seal of the company. He and Mr. Ivers together, still another employe of the company, placed the seal of the express company over this mutilated seal. I simply recall these facts; I conceive it my duty to speak to you of the relative weight and importance of the testimony in this case. If the seal had been violated or broken intentionally by some party seeking to reach the contents of the safe, it would not be a rash presumption to conclude that they effectually violated the seal—effectually broke that seal. I say, if it should appear and you are satisfied from the evidence it was intentionally violated, it would not be rash from the evidence to conclude that the purpose was effected. If it was an accident, it might or might not have been effectually violated. And it may be that that question will come before you for your consideration; that is, the question as to how this seal became broken. The testimony all concurs on the part of the plaintiff and the defendant that at the time that safe was placed in the express company's office Maj. Broadhead's seal was intact. Mr. Shepperd, you will remember, who was agent, testified positively that when that safe was sitting in his office that the seal was intact. I think Mr. Lockwood says if there had been anything the matter with the seal he would have noticed it. So I think we may assume up to that point the seal was intact. Mr. Lockwood testifies when that safe was placed on the car, as soon as he drew it back where the light was thown on it he discovered the seal was broken. He testified that he made a careful search, and that no part of the sealing-wax could be found in the car anywhere about.

Now, gentlemen of the jury, if the testimony of Mr. Shepperd is true, when that safe was in his office the seal was intact, and the testimony of Mr. Lockwood is true, that when that safe was placed on the car that seal was broken,—I say, if these witnesses tell the truth,

the conclusion is almost irresistible that that seal was broken from the express office to the train, or else broken in the express office after the time Mr. Shepperd says the seal was perfect. Or it might have been broken putting it into the car. I will reach that directly.

You have heard the testimony of Mr. Martien, and the testimony of Mr. Hall, about transferring that safe from the express office to the car. They concur in their testimony, that that safe was the last thing placed on the express wagon—that safe and the safe of the express company. They say it was placed in the rear end of the wagon and was pushed in; that they drove down directly to the depot, and that they unloaded the safe upon the truck, which was wheeled to the north end of the depot,—the train was then approaching close by,—and that they two together picked up that safe and raised it up into the car. Now, where was that seal broken? How was it broken? You are to investigate that subject. It seems from the evidence of these drivers that nothing was placed on top of that safe going from the express office to the depot. Nothing placed on top; no baggage or anything of that kind; that nothing was piled on top of it on the truck. They lifted the safe and threw it on the edge of the car with some force, it being heavy. It is for you to determine from the evidence, gentlemen, whether or not that seal was broken, and when and where it was broken; whether it could have been broken raising the safe into the car and striking it on the car, or whether if so broken a part of the sealing-wax would not have remained on the safe or be in the car. These are all matters for your consideration. Mr. Martien testifies (I will not say positively—I think, at any rate) the seal was all right when they put it into the car.

Now, gentlemen, this is in brief and substantially what you have before you in reference to the breaking of that seal. As I have said before, Mr. Ivers testified substantially as Mr. Lockwood. He was agent of the company at Atchison. I make the same remarks on that as to Mr. Lockwood's testimony. You are to take that for all it is entitled to, and determine that question. The burden of proof in this case rests upon the plaintiff, as in all civil cases the plaintiff has to establish, by a preponderance of the evidence, that the allegations in the petition are true. I have gone over the testimony in regard to the seal and circumstances to some extent. Should you believe the positive testimony of the witnesses who have testified as to the contents of the safe when delivered or when given to the express company, or when it was returned, it is quite likely these facts may be somewhat immaterial. However, if you choose to pass

over that and make further investigation into these matters, I have briefly attempted to call your attention to the testimony and the salient points in the case. With that, gentlemen of the jury, you may take the case and decide it. It is a case of no little importance. I trust that you will feel the responsibility that is thrown upon you in reaching just and proper conclusions, from all the evidence in this case, fairly and without violence to the evidence, and without violence to your consciences, and render a verdict that you think the evidence fairly justifies in this case.

You are the exclusive judges of the credibility of the witnesses. You have the right to consider all the circumstances in the case. If circumstantial evidence preponderates, or overthrows or overcomes, in your opinion and in your judgment, the direct positive testimony of the witnesses, you have the right to take that kind of evidence and give it all the weight it is entitled to.

FULLER v. CITIZENS' NAT. BANK OF GALION, O.

(*Circuit Court, N. D. Ohio, E. D.* October Term, 1882.)

1. PRINCIPAL AND AGENT—NEGLIGENCE—LIABILITY.

   Where an owner of property lets the whole work of excavating and finishing a vault in front of his property to a party, as a contractor, to finish and complete the whole as a job, without reserving any control or direction over him in its construction, or over the construction of the work or the place where it was being constructed, or the mode of its execution or the workmen to be employed to do it, although such contractor is to be paid a reasonable compensation for the work when completed, or is to be paid by the day, and no fixed price is agreed on, and although the owner furnishes the material, he will not be liable for the negligence of such contractor in not providing suitable guards against danger to persons passing on the sidewalk. But if such owner reserves the control of the place of the excavation, or the control of the contract, or the right to direct him in the construction of the work, or does control him or direct him in the doing of the work, such contractor is the mere servant of such owner, and the owner will be liable for his negligence and carelessness.

2. NEGLIGENCE—REASONABLE AND PROPER CARE.

   Negligence is a failure to do what a reasonably-prudent person would ordinarily have done under the circumstances of the situation, or doing what such person under existing circumstances would not have done. Reasonable and proper care must have reference to surrounding circumstances. These may often demand a higher or lower degree of care and diligence of a party.

3. SAME—MATTER OF LAW AND FACT—PROVINCE OF COURT AND JURY.

   Negligence is a question of law and fact. The duty of the party is matter of law, and to be settled by the court. What was done by the party is matter of fact, and to be determined by the jury.

4. SAME—PREPONDERANCE OF EVIDENCE.

In an action for damages for an injury caused by negligence, it is incumbent upon the plaintiff to establish, by a fair preponderance of evidence, that the party charged with negligence, or his agent or servant, was guilty of the negligence complained of, to entitle him to recover.

5. SAME—MEASURE OF DAMAGES.

Where a jury find defendant guilty of negligence resulting in injury to plaintiff they should assess him such damages as they think will reasonably compensate him for the injury received, and may take in account in such assessment of damages his loss of time, bodily and mental suffering, expense of nursing and doctors' bills, diminished capacity to attend to business or work in the future, and permanent disability, occasioned by the injury, if such is shown by the evidence.

At Law.

Adams & Russell, for plaintiff.

C. H. Scribner and *Judge C. E. Pennewell*, for defendant.

WELKER, J., (*charging jury.*) The defendant, at the time of the injury complained of by the plaintiff in this case, was the owner and occupier of a building used for banking business on the east side of South Market street, in the town of Galion. It had caused the digging of an excavation in the sidewalk in front of the building, to be used as a coal vault for the use of the building. On the morning of the sixth of November, 1880, at about 4 o'clock, the plaintiff went from his hotel to the depot of the N. Y., P. & O. Railroad, to take the train then due, passing along on Market street, on the opposide side from the bank building. Missing the train, he returned towards the hotel, and passed along the sidewalk in front of the bank building, and in doing so fell into the excavation, and was injured by having his arm broken, and for which he sues the defendant. He alleges that the defendant in the construction of the vault, the same being open, did not place around the excavation a safe and proper fence to protect the public using the sidewalk, and particularly the plaintiff, from danger in falling into the same, and was guilty in that respect of negligence, and thereby, without the fault of the plaintiff, caused the injury of which he complains. The defendant denies the negligence charged, as well as the injury.

By way of a special defense, the defendant alleges that it made a contract with one David Tamlyn, a contractor and builder, to make a vault of certain dimensions in the sidewalk in front of its building, and complete the same, and to be paid for by it in such amount as it might be reasonably worth. It alleges that it had no control over the digging of the vault or its completion, except to furnish the greater part of the materials, and that, therefore, it is not liable for the neg-

ligence of the said contractor in the execution of the work. This answer is denied by the plaintiff, who alleges that the said Tamlyn was only the agent or servant of the defendant, and as such, it is liable for any negligence or want of care of Tamlyn that caused the injury to the plaintiff.

This issue involves a question of fact as well as one of law. The first is for you to settle from the evidence, and the law is to be settled by the court. It is conceded that Mr. Tamlyn in fact made the excavation into which the plaintiff fell, and was engaged in building it up for the defendant at the time. The defendant had the right to make, or cause to be made, the excavation in the sidewalk for use as a coal vault, connected with its banking house alongside of the sidewalk, if no ordinance of the town prevented it, and it is not claimed that there was such an ordinance.

It is important to determine in the first place the character of Tamlyn, and the relation he bore to the defendant in doing the work for it. You will then carefully examine the evidence, and from that determine what was the contract between defendant and Tamlyn, and then apply the facts thus found to the law as given you by the court, and thus you will be enabled to determine the issue. The defendant being a corporation, acts by its officers, and whatever was done by Mr. Green, its cashier, representing the bank, would be the act of the bank; and this authority to act for the bank may be given by parol, or by resolution of the board of directors. If you find from the proof that the defendant let the whole work of excavating and finishing the vault to Tamlyn, as a contractor, to finish and complete the whole as a job, without reserving any control or direction over him in its construction, or over the construction of the work, or the place where it was being constructed, or the mode of its execution, or the workmen to be employed to do it, then he would be an independent contractor, and the defendant is not liable for his negligence in not providing suitable guards against danger to persons passing on the sidewalk. The mere fact that Tamlyn was to be paid a reasonable compensation for the work when completed, or to pay by the day, and no fixed price agreed on, do not of themselves change his relation to the defendant; nor does the fact that the defendant was to furnish material with which the vault was be constructed change the relation. But if you find that the defendant reserved the control of the place of the excavation, or the control of Tamlyn, or the right to direct him in the construction of the work, or did control him or direct him in the doing of the work, then he was the mere agent or servant of the de-

fendant, and it would be liable for his negligence and carelessness, the same as if the defendant did it itself. The mere fact that the defendant remained in the possession of the banking house does not establish the fact of the control of the place of the excavation on the sidewalk. If the contract was for the completion of the vault as an entirety, neither party would have a right to terminate the contract before completion.

In determining the relation of the defendant to Tamlyn, it will be your duty to carefully consider the whole evidence in the case as well as the actions of the defendant and Tamlyn, during the time of the construction of the work. If you find this issue in favor of the defendant, it will be your duty to return a verdict in its favor, and you need not examine or consider the issue made as to the carelessness alleged against the defendant. But if you find for the plaintiff on this issue, it will be your duty to consider the evidence bearing upon the negligence alleged to have caused the injury; and the negligence of Tamlyn, if such agent and servant of the defendant, would be the negligence of the defendant itself. The negligence complained of is that suitable guards or inclosures were not placed by defendant around the excavation to prevent danger. Negligence is a failure to do what a reasonably-prudent person would ordinarily have done under the circumstances of the situation; or doing what such person under existing circumstances would not have done. Carelessness and negligence are relative terms—what might be negligence under some circumstances or time or place may not be so under other circumstances, at another time or place. Reasonable and proper care must have reference to surrounding circumstances. These may often demand a higher or lower degree of care and diligence of a party.

Negligence is a question of *law* and *fact*. The matter of law involves the duty of the party, and that of fact what was done by the party. The court settles the former; and it is your duty to determine the latter. The plaintiff had the right to the use of the sidewalk, in going from the depot to the hotel, unobstructed and free from danger, but in using it he must exercise reasonable and ordinary care to avoid dangerous obstructions if any such be found thereon. The defendant, having the right to make the vault as before stated, it was its duty, while so making the excavation and completing the vault under the sidewalk, to exercise ordinary care to avoid danger to those who might desire to pass over the sidewalk or along the street around it, by placing around the excavation suitable and proper guards or inclosures to reasonably assure safety to persons passing along it, and

to warn such persons of such excavation and the danger therefrom. The defendant was not bound to insure absolute safety to persons using the sidewalk. If it appear in the evidence that the plaintiff himself, by his own carelessness and neglect, contributed to the injury, there can be no recovery in his behalf. Under this issue, then, it is your duty to carefully consider the evidence and ascertain what was done by the defendant or Tamlyn in guarding the excavation to prevent danger to persons passing it, and to determine whether in that respect the defendant was guilty of negligence as before defined by the court.

If proper guards or inclosures were placed around the excavation on the evening of the fifth of November, when work thereon ceased, and during the night, and before the plaintiff came along and fell into the excavation, such guards or inclosures had been removed, or were broken down without the knowledge of the defendant or its agent, it is not responsible for any injury resulting from such removal.

It is incumbent upon the plaintiff to establish by a fair preponderance of evidence that the defendant, or its agent or servant, was guilty of the negligence complained of, to entitle him to recover. The weight of the evidence and the reliability of the witnesses are matters for you to settle, and of which you are the judges. If you find this issue in favor of the defendant, that it was not guilty of negligence, then your verdict should be in its favor. If you find the defendant guilty of the negligence charged, then it will be your duty to find for the plaintiff, and assess him such damages as you think will reasonably compensate for the injury received. The amount is entirely within your control. There are, however, several elements to be taken into account in such assessment of damages: such as loss of time occasioned by the injury, bodily and mental suffering, expense of nursing and doctors' bills, diminished capacity to attend to business in the future, and permanent disability occasioned by the injury, if such is shown from the evidence.

The jury returned a verdict for the plaintiff for $3,500. The argument on the motion for a new trial was heard by Judges BAXTER and WELKER,—the former by request of the trial judge,—and after consideration the above charge was approved by the circuit judge, and the motion for a new trial overruled by Judge WELKER, and judgment entered upon the verdict.

SUNNEY *v.* HOLT, Ex'r, etc.

(*Circuit Court, N. D. Ohio, E. D.* February Term, 1883.)

1. NEGLIGENCE—DEFINITION.

Negligence is the failure to do what a reasonably-prudent person would ordinarily have done under the circumstances of the situation, or doing what a person under the existing circumstances would not have done.

2. SAME—RECOVERY—CONTRIBUTORY NEGLIGENCE.

Where a plaintiff so far contributes to an injury complained of by his own negligence, or want of ordinary care and caution, that but for that negligence or want of care and caution on his part the injury would not have happened, he is not entitled to recover.

3. SAME—OWNER OF VESSEL—DEGREE OF CARE.

The owner of a vessel is required to exercise the usual and customary mode and care adopted by reasonably-prudent persons in control of vessels of like character, for safety to their employes from hatchways, usually adopted and used on board of vessels of the character of his, and under like circumstances, and if that was not done by the owner and his agents, such failure would be negligence, and if an employe was injured thereby without his own carelessness contributing thereto, the owner would be liable to damages therefor.

4. SAME—NEGLECT OF PORTER TO LIGHT VESSEL—CO-LABORER.

Where it is the duty of a porter on a vessel to place lights upon a vessel and about the hatchways, if left open, and by reason of his failure to place such lights an employe falls down a hatchway and is injured, although such porter may have been a co-laborer in performing his duty in regard to the lighting of the vessel, he is the agent of the owner of the vessel, and his negligence would be the negligence of such owner.

5. MASTER AND SERVANT—RISKS OF EMPLOYMENT

A party accepting the employment of a deck hand holds out to the employer that he is competent to discharge the duties of such employment, and incurs all the necessary and reasonable liabilities to accidents incident thereto, and if at the time of the hiring nothing is said as to his inexperience, the employer has a right to presume that he is familiar with all the duties of a deck hand; but if he informs the employer that he has no such experience, and no knowledge of the localities of the hatchways or of the gangways of the vessel, a greater degree of care would be required on the part of the employer to protect him from dangers that might be incidental to the employment under those circumstances.

6. NEGLIGENCE—WHAT JURY TO CONSIDER.

Where an injury is alleged to have been caused by falling through a hatchway on a vessel, left open at night and not properly lighted, the jury should consider what is the usual custom, manner, and mode of lighting up such vessels, then determine whether the hatchway was negligently left open or was properly lighted by the parties in charge of the vessel, and whether, under all the circumstances of the case, the party injured was not himself guilty of negligence.

7. SAME—MEASURE OF DAMAGES.

In such a case, where the jury find in favor of the plaintiff, they should assess him such damages as under the circumstances would be a reasonable compensation for the injury received, taking into consideration the physical pain

and suffering endured by him, his loss of time, his expenses for nursing and doctors' bills, his diminished capacity to attend to business or work in the future, and whether or not the disability occasioned by the injury is permanent.

At Law.

WELKER, J., (*charging jury.*) The plaintiff in this case was employed by the intestate upon the steam-barge Nebraska as a deck hand on some day in the month of November, 1877, and on the same evening, about 8 o'clock, while executing an order given by the captain in control of the vessel, owned in part by the intestate, fell into the open hatchway and was seriously injured, and for which he seeks to recover damages in this action. The plaintiff alleges that the intestate defendant, by his officers, was guilty of carelessness and negligence in allowing, after night, a hatchway on the vessel to be left open and without suitable and proper lights to guard against danger from it to those employed on the vessel, and particularly to the plaintiff. That the plaintiff was without fault and not guilty of any carelessness that contributed to the injury complained of. This negligence of the intestate and due care of the plaintiff are denied by the defendant. This allegation in the petition, and the denial by the defendant, form the issue that you are to decide and determine from the evidence you have heard on the trial.

To entitle the plaintiff to recover it must be shown to you that the injury complained of was occasioned entirely by the carelessness and negligence or improper conduct of the intestate defendant, through his agents having control of the vessel at the time. Negligence is the failure to do what a reasonably-prudent person would ordinarily have done under the circumstances of the situation, or doing what a person under the existing circumstances would not have done. If the plaintiff so far contributed to the injury complained of by his own negligence or want of ordinary care and caution as that, but for that negligence or want of care and caution on his part, the injury would not have happened, then he is not entitled to recover. One who, by his own negligence, has brought injury upon himself, cannot recover damages for it.

In settling the fact of carelessness and negligence on the part of the intestate, as well as that of the plaintiff, it is important to settle the relative duties of each. The intestate was required to use ordinary care in regard to the hatchway on the vessel in the night-time, and such as would reasonably guard and secure the safety of his employes on the vessel, and to guard against danger and injury to them in the performance of their work. In doing so it was his duty to

exercise and employ the usual and customary mode and care adopted by reasonably-prudent persons in control of a vessel of like character, for safety from the hatchways, usually adopted and used on board of vessels of the character of the Nebraska, and under like circumstances. If such usual care was employed, then the intestate performed his duty towards the plaintiff. But if that was not done by the intestate and his agents, then such failure would be negligence; and if thereby the plaintiff was injured, without his own carelessness contributing thereto, the intestate would be liable to damages therefor.

The intestate defendant cannot relieve himself of this responsibility by showing that it was the duty of the porter employed on the vessel by the intestate to place lights upon the vessel and about the hatchways, if left open, and that if none were so placed by the porter it was the negligence of the porter although the porter may have been a co-laborer with the plaintiff upon the vessel. In performing his duty in regard to such lighting of the vessel, he was the agent of the intestate for that purpose, and such negligence would be the negligence of the intestate. It was the duty of the plaintiff to use ordinary care and caution to avoid the injury, even though the intestate had been guilty of carelessness in not having the hatchway properly lighted. If it appear from the evidence that it was usual and customary in the use of such vessels after night to close the hatchway, or, if left open for work, to place lights in proper places to warn persons of the danger of an open hatchway, then, if the plaintiff, when he got upon the vessel near the hatchway, found no lights were placed there, he had a right in going forward to suppose the hatchway was properly closed, or if he did not know the locality of the hatchway, to suppose the deck was free from danger in passing over to execute the orders given by the captain.

The plaintiff in taking the employment of the intestate held out to him that he was qualified to discharge the duties he was to perform, and by the contract of hiring he incurred all the necessary and reasonable liabilities to accident incident to the position in which he employed himself to work for the intestate. If the intestate or his agent was not informed of his want of experience for the place he was to fill, then he had a right to presume he was properly familiar with his duties and the mode of their performance. If he was hired without anything being said by the plaintiff at the time of the hiring that he had no experience, the intestate or the officer representing the intestate had a right to presume he was familiar with all the duties that he would be required to perform as a deck hand on board of the ves-

sel. But if the agent of the intestate was informed at the time that the plaintiff had no such experience and had no knowledge of the localities of the hatchways or of the gangways of the boat, then a greater and a higher degree of care would be required at his hands to protect him from danger that might be incidental to the employment under those circumstances. If the plaintiff had knowledge of danger on the deck from the hatchway or obstruction, and it being dark, it devolved greater care on his part in approaching a place where danger might be met, and in doing so, he would be required to exercise a higher degree of care than he would under other circumstances.

You will see then, gentlemen, from these general instructions, that the important question or fact for you to determine is as to the condition of the hatchway at the time when the plaintiff fell into it, for it is conceded by the parties that he did fall into it.

Now, it is claimed on behalf of the plaintiff that the hatchway was left open, (and that seems to be conceded,) and that there were no lights there to guard him or notify him that there was danger of his falling into it. It is said on behalf of the defendant that the hatchways were properly lighted up. It is important for you, gentlemen, to look into the evidence of the witnesses in regard to what is the usual custom and manner and mode of lighting up these vessels, and then to determine as a question of fact whether the hatchway at the time was left open for purposes of work, or, if left open, whether it was lighted properly by the parties in charge of the vessel, and that is the principal question of fact that you are to determine in this controversy. If this vessel was properly lighted up at the time this plaintiff approached the neighborhood of the hatchway, in the execution of this order, it would require much evidence to show that he, without carelessness on his part, fell into it, and the intestate would have discharged his duty if he had properly lighted it up, and although it might be that the plaintiff fell in the hatchway, yet carelessness could be hardly imputed to the persons in charge of the vessel if it was so properly lighted up.

Now, gentlemen, take these general directions and apply them to the evidence before you, and it is for you to determine whether the plaintiff has made out his case,—whether he has shown the carelessness complained of in the petition, and whether the evidence, as a whole, shows that he was not himself guilty of negligence and carelessness. If you find in favor of the plaintiff on that issue, then your verdict will be for the plaintiff. But, on the other hand, if you find

that the defendant was guilty of carelessness, but that the plaintiff himself contributed to the injury complained of, then your verdict would be in favor of the defendant, for both of these things must be made out before the plaintiff, in a case like this, is entitled to recover.

If, then, you find in favor of the plaintiff on this question of fact, it will be your duty to assess him such damages as you think, under the circumstances, he is entitled to receive—such reasonable compensation for the injury that he received on the occasion complained of. The amount that a plaintiff, in a case like this, is entitled to recover is entirely within your control. You are to exercise your own sound judgment upon that subject, if you find for the plaintiff, in assessing the amount of damages.

There are, however, several elements to be taken into account in such assessments of damages, such as the physical suffering and pain endured, occasioned by the injury complained of, the loss of time occasioned by the injury, the expenses of nursing and doctor bills, diminished capacity to attend to business or work in the future, a permanent disability occasioned by the injury, if such be shown by the evidence.

The jury, after deliberation, returned a verdict for the plaintiff for the sum of $4,900.

A motion to set aside the verdict, and for a new trial, was filed by defendant, alleging, among other things, error in the charge of the court in declining to charge the jury that the negligence in failing to light the hatchway, if such failure was established, was the negligence of a co-laborer of the plaintiff, and that therefore the plaintiff could not recover.

By request of Judge WELKER, Judge BAXTER sat with him, and heard the argument on the motion for a new trial, and the circuit judge fully concurring as to the principles of law stated in the charge of Judge WELKER, the motion for a new trial was overruled by the latter, and a judgment entered on the verdict for the amount returned by the jury.

CENTRAL TRUST CO., Receiver, etc., *v.* COOK COUNTY NAT. BANK.

(*Circuit Court, N. D. Illinois.* April 16, 1883.)

1. BANKING—DISCOUNT OF NOTE OF PRESIDENT INDORSED BY BANK.
   Where a party discounts a note given by the president of a bank, with the indorsement of the bank thereon, supposing that he is dealing with and advancing the money to the bank, and not the president personally, the bank will be held liable for the payment of such note. *Claflin* v. *Farmers' Loan & Trust Co.* 25 N. Y. 293, distinguished.
2. SAME—RECOVERY OF LOAN—NO AUTHORITY TO DO BANKING BUSINESS.
   Although an association may not have power to do a general banking business, if a person borrows money from such association such money may be recovered in an action for money had and received. *Trust Co.* v. *Helmer*, 77 N. Y. 64, distinguished.

At Law.

Louis L. Palmer, for plaintiff.

Monroe & Ball, for defendant.

BLODGETT, J. The declaration in this case is against the defendant as maker of two notes for $25,000 each,—one dated November 19, 1874, payable 60 days after date, with interest; and the other dated December 29, 1874, payable on demand, with interest,—both executed on behalf of the defendant by Chauncey T. Bowen, and made payable at the New York State Loan & Trust Company office in New York; two notes for $25,000 each, dated September 1, 1874, made by B. F. Allen, payable to his own order, one in six and the other in seven months from date, indorsed by Allen to the defendant and by the defendant indorsed to the New York State Loan & Trust Company; one note for $5,000, dated September 24, 1874, made by the First National Bank of Wyandotte, Kansas, payable to the defendant bank four months after date, and payment guarantied by the defendants to the New York State Loan & Trust Company; and one note for $10,000, and 10 per cent. interest after due, dated September 28, 1874, made by B. F. Murphy & Co., payable to defendant four months after date, and the payment whereof is also guarantied by the defendant to the New York State Loan & Trust Company; and also for a balance of open account due from the defendant to the New York State Loan & Trust Company. The declaration also contains counts for moneys loaned and money had and received for the use of the plaintiff, and also for the use of the New York State Loan & Trust Company. The defendant's proof tends to show that the two Allen notes represent an advance made by the loan and trust company to

Allen for his own private purposes, in which the defendant bank had no interest whatever, and that the officers of the loan and trust company knew, at the time they made such advance, that the money was borrowed by Allen only and for his own use and business. But the proof on the part of the plaintiff shows, I think, by a decided preponderance, that the officers of the loan and trust company advanced the amount of those two Allen notes as a loan to the defendant; that Mr. Allen, acting as president of the defendant bank, obtained the money represented by the face of the two Allen notes, less the discount, as a loan to his bank; that the money so obtained was placed on the books of the loan and trust company to the credit of the defendant bank and afterwards drawn out by checks or drafts of the defendant, which were duly paid by the loan and trust company. And while the defendant's proof tends to show that the defendant passed the full proceeds of this loan, on its books, to the credit of Allen, yet the preponderance of proof is that the officers of the loan and trust company had no knowledge of the use the defendant made of the money; and even if they had known that the defendant passed the entire proceeds to the credit of Allen, I do not see that such fact alone would be notice to the loan and trust company that the loan was Allen's, and not that of the bank. The question is, to whom did the loan and trust company give credit when they advanced the money on this paper? and the preponderance of testimony, as I have already said, is that the credit was given to this defendant, and that the money was supposed to be advanced to the defendant by the officers of the loan and trust company. I think there can be no doubt from the proof that the loan and trust company, through its officers, supposed that they were dealing with and advancing money to the defendant bank.

This case differs, as I think, very widely in its facts from the case of *Claflin* v. *Farmers' Loan & Trust Co.* 25 N. Y. 293, cited and relied upon by defendant's counsel, and I do not deem it controlling. For the president of a bank, as shown in that case, to certify his own check on his own bank is a very different transaction from that of Allen's giving his own note, with the indorsement of the bank, for a loan to his bank. If the defendant bank, through its president as surety, desired to borrow money, in what more natural and business-like way could it have been done than for the president to give his own note, and place thereon the indorsement of his bank? As to the two notes for $25,000 each, made to the plaintiff by Bowen, it is admitted that they represent an actual loan by the loan and trust

company to the defendant, and it is conceded that the plaintiff should recover on them, unless the court shall deem itself bound by the case of *Trust Co.* v. *Helmer*, 77 N. Y. 64, where it is held by the New York court of appeals, in construing the charter of the New York State Loan & Trust Company, that it had no right to exercise banking powers. I am not disposed to question the soundness of that decision as applied to the facts there discussed. That was a complaint upon notes brought or discounted by the loan and trust company, and the court, on demurrer to the complaint, held that the loan and trust company had no power, under its charter, to deal in such notes, or to discount commercial paper. In the case at bar, however, there is no doubt the loan and trust company advanced $48,075 in money on account of the Allen notes, and $50,000 on account of the Bowen notes; and also that the defendant received from the loan and trust company the full amount represented by the Murphy & Co. and Wyandotte Bank notes.

I think, under all the testimony in the case, that the proof makes out a right on the part of the plaintiff to recover the money, with interest on the two Allen notes, which would be $48,075; from which should be deducted the $8,000 paid and indorsed on the notes; and the amount of the Bowen and Murphy notes, and also the Bank of Wyandotte's note.

I take this view of the right of the complainant to recover from the fact I cannot conceive that the case of *Trust Co.* v. *Helmer* goes far enough to hold that although this loan and trust company had not banking powers, yet, if a person borrowed money from them, that the loan and trust company cannot recover the money back in an action for money had and received. It seems to me it does not lie in the mouth of this bank to say to its creditor from whom it has obtained over $100,000, "You had no power to do a banking business, and therefore you shall not recover back the money we borrowed of you and agreed to pay you." True, they may not maintain an action on the discount technically, but the same principle is applicable here which the United States supreme court and circuit courts have so often applied where municipal corporations have no authority to issue bonds, yet if they do issue bonds and sell them and receive the money thereon, an action for money had and received will lie to recover back the money.

As to the open account sued upon, no recovery can be allowed upon it, as the proof satisfies me that this account is mainly made up of items growing out of personal dealings between Allen, the presi-

dent of the defendant bank, and Smythe, the president of the loan and trust company, and although charged to the defendant in an account rendered by the loan and trust company, yet it was so near the time of the failure of the bank that I do not think that the acquiescence of the bank in the correctness of the account should be presumed.

Judgment, $80,669.60.

CRONKHITE *v.* HERRIN.

(Circuit Court, W. D. Wisconsin. 1883.)

1. STATUTE OF LIMITATIONS—PARTIAL PAYMENT BY PARTNER—DISSOLUTION OF FIRM—VERDICT FOR DEFENDANT.
   As the only evidence offered to take the claim in this case out of the statute of limitations is a partial payment made by a partner after the dissolution of the firm, such evidence will be struck out on motion of defendant, and a verdict in his favor directed.
2. PARTNERSHIP—POWER OF PARTNERS AFTER DISSOLUTION.
   After dissolution of a partnership, one partner has no power to create or continue a debt as against his copartners, either by express agreement or by partial payments.

At Law. Decision on the motion to strike out evidence of payment of one joint debtor to take the case out of the statute of limitations.

Finch & Barber, for plaintiff. *William T. Vilas*, of counsel.

George W. Cate, for defendant. *S. U. Pinney*, of counsel.

BUNN, J. Since the decision of *Bell* v. *Morrison*, by STORY, J., in 1 Pet. 351, there could be little doubt, in this court, that upon the dissolution of a copartnership the power of one partner to bind the other partners wholly ceases, and that, as a correct application of that doctrine, one partner has no power to create or continue a debt as against his copartner, either by an express agreement or by partial payment; for, although the case was not one where the power to bind by the continuation of a debt by partial payment actually arose, but only the renewal of the debt after it was barred by the statute, it would be hard to distinguish the two cases on principle. And so, accordingly, we find that in New York, and other states where the authority and reason of *Bell* v. *Morrison* are admitted, the principle has been applied to cases precisely in the situation of the one at bar; that is to say, where it is sought to continue the obligation against

one joint contractor by means of a partial payment made by the other before the statute has fully run, so as to make the original obligation binding for the full period prescribed by the statute from the date of such payment. The principle is the same in the one case as the other; and the nature of the power in the hands of one joint contractor to bind the other is the same. And there can be no doubt that the statute of Wisconsin, which, in my judgment, simply expresses the true doctrine of the law on the subject in this country, was intended to cover, and does cover, both cases. It gives the full benefit of the statute of limitations to joint contractors, as against the effect of a payment made or promises to pay by a co-contractor. Its language is:

"If there are two or more joint contractors, * * * no one of them shall lose the benefit of the provisions of this chapter, so as to be chargeable by reason only of any payment made by any other or others of them."

This clearly applies to cases of payment before as well as after the statute has run. The only remaining question is whether there is anything in the written contract of dissolution, made by the partners on March 3, 1873, which prevents the application of the statute to this case. In my judgment, clearly, there is not. That agreement is very clearly expressed, leaving little room for construction. Its effect is this: (1) It dissolves the partnership from that day; (2) it provides that defendant, Herrin, shall assume and discharge the indebtedness of the firm of Cronkhite & Herrin to L. Yeomans and Anna Herrin; (3) that Cronkhite assumes and agrees to discharge all the other debts of the firm, and to save the firm and defendant, Herrin, harmless therefrom; (4) all the assets and property of the firm are to belong to Cronkhite; (5) Cronkhite is authorized, for a period of 60 days, to sign the firm name to notes taken as renewal notes, and which mature within that time, or in liquidation of other existing indebtedness of the firm.

It seems clear there is nothing in this contract of dissolution that any way enlarges the authority of Cronkhite to bind his former copartner, except to authorize him to give renewal notes for notes falling due within 60 days, and for the unliquidated indebtedness of the firm. By this very agreement Cronkhite assumes the debt in suit, together with all other of the firm debts, except those owing to Anna Herrin and L. Youmans, and agrees to save Herrin harmless from the payment of them. So that, instead of adding anything to Cronkhite's power to bind Herrin in respect to this claim, Herrin, as between the partners, was, upon a valid consideration, wholly dis-

charged from its payment. And certainly the effect of the provision in regard to the giving of renewal notes being express and specific in its terms, and giving Cronkhite power in the particular case to do what he would not otherwise possess power to do under the law, cannot be to extend the power beyond what is so expressly given, and what the law would otherwise have given. Its tendency would rather be in the direction of an exclusion of any power to bind his partner not so expressly given or possessed.

The case of the *Nat. Bank* v. *Colton* is relied upon by the plaintiff to show that the payment was made by Herrin, or by Cronkhite as agent for Herrin, and under his direction. But clearly that case is not in point here.

The supreme court of Wisconsin reserved the finding of the circuit court on the question of fact as to when and by whom a certain payment was made, and the decision is based upon the finding that Barnes made the payment of $585 as the agent and under the direction of Gormerly, and so the payment was binding in its effect upon Gormerly, as though made by him. And all the cases cited and relied on in that case are of that character.

In *Winchell* v. *Hicks*, for instance, (18 N. Y. 558,) when sureties on a joint and several note were called on for payment, and they directed the holder to call upon the principal for payment, and the principal made a payment on the note, it was held such an acknowledgment of liability as to arrest the running of the statute against the sureties. And so of all the other cases there cited. But the agreement of dissolution in this case does not in any sense make Cronkhite the agent of Herrin to make a payment on those notes. On the contrary, the evident effect of the agreement is that Cronkhite assumes these debts and agrees to pay them exclusively as his own debts. His payments, then, are made, not so much as agent for Herrin as on his own account.

I do not see that the contract adds anything to Cronkhite's authority to pay, or to bind Herrin by his payments. Without any such contract assuming the debt as his own individual debt, as between him and his partner he had, under the law, full authority to make payments as well for his partner as for himself, but had no authority to bind his former partner by partial payment so as to take the case out of the statute or continue the obligation as to Herrin. After the making of the contract he was still authorized to pay the debt, and in addition, as between him and Herrin he was solely bound to pay it. The contract, then, in the view I have taken, does not help to take the plaintiff's case out from the operation of the statute. The

evidence, therefore, of the partial payments made by Cronkhite, offered for the purpose of creating and continuing the obligation as against defendant Herrin, must be stricken out. And if, as intimated by plaintiff's counsel, they have no further evidence to offer, the court will direct a verdict for the defendant.

No further evidence being offered, the court directed a verdict.

VON COTZHAUSEN *v.* NAZRO and another.

(*Circuit Court, E. D. Wisconsin.* October, 1879.)

1. UNLAWFUL IMPORTATION THROUGH MAIL—WOOLEN SHAWL DUTIABLE—SEIZURE BY COLLECTOR—ACTION FOR CONVERSION.
   A knit woolen shawl sent as a present through the mail from Germany in a registered package on which was indorsed the contents of the package and the words "Suspected liable to customs duty," was opened by the party to whom it was addressed, at the post-office, in the presence of a deputy collector, who took it from her, had it appraised, and refused to deliver it until she had paid the appraised value or received permission from the secretary to pay the duty and to receive the package. In an action for wrongful conversion, *held*, that the article was dutiable; that its importation through the mails was unlawful, though the intent of the sender was innocent; that it was the duty of the proper officer, if he had reasonable cause to believe it was subject to duty, or had unlawfully been introduced into the United States, to seize it, and having done so, he was by law the custodian of the property; that the owner could only reclaim it by payment of the appraised value or appeal to the secretary of the treasury for relief; and that there was not a wrongful conversion of the property.
2. SAME—OWNERSHIP AS ENTITLING TO POSSESSION.
   Where property that is dutiable is imported contrary to law, it is liable to seizure, and it does not follow from the fact of ownership that the owner would be entitled to possession.
3. SAME—SECTION 2082, REV. ST.—MERCHANDISE NOT FOR SALE.
   Section 2082 of the Revised Statutes comprehends any merchandise imported contrary to law, and is not limited to merchandise sent or received for sale.

At Law.

This was an action to recover the value of a certain article of personal property which was sent to the plaintiff by a relative residing in Germany, in a sealed envelope, through the mail, and which it was claimed had been unlawfully converted by the defendants to their own use. The defense to the action was that the defendant Nazro was collector of customs, and that the defendant Payne was postmaster at the city of Milwaukee; that the article in question was subject to customs duty under the customs laws of the United States; that the duty not having been paid, the article was liable to seizure and

detention, and that the acts done by the defendant Nazro were done under color of his office, and by virtue of the laws of the United States, and that the defendant Payne acted under and by authority of the defendant Nazro as such collector, aiding and assisting him in respect thereof. The case was tried by a jury. The proofs were, in brief, that in the month of May, 1877, a sealed package, addressed to the plaintiff, came by mail to the Milwaukee post-office; that it came as a registered package, and that the plaintiff was notified of its arrival; that she went to the post-office to receive it, and receipted for it according to the usual practice in cases of delivery of registered letters or packages. The package was marked, "Suspected liable to customs duty," and the collector of customs was notified of its receipt. There was also an indorsement on the package indicating its contents. The package was then placed in the hands of Mrs. Von Cotzhausen, who opened it, and thereupon the deputy collector, who, on notification, was present, took it from her hands, and thereafter retained it, subsequently causing its contents to be appraised by the government appraiser. The article inclosed in the package was a knit shawl, made from fine wool, and was appraised at six dollars. It was sent, as the testimony tended to show, to the plaintiff, by her daughter-in-law residing in Germany, as a present or token of affection. Subsequently personal application was made to the deputy collector by the plaintiff for the article, and she was told that there were two courses for her to pursue; that she could pay the appraised value and take the package, or could apply to the secretary of the treasury for permission to pay the duty and receive the package.

The matter being placed in the hands of her counsel, the same alternative was submitted to him, and he declined to take either of the courses suggested. After some further negotiations this suit was brought, and the article in question has ever since remained in the hands of the collector, but no steps have ever been taken by him to procure a judicial adjudication of forfeiture. It appeared that in receipting for the package at the post-office, answering inquiries in relation to it, opening it in the presence of the deputy collector, surrendering it to his hands, and leaving it with him, the plaintiff acted upon the suggestion or under the requirement of those present. At the interviews of the plaintiff and her counsel with the deputy collector no offer was made to pay the duty if the property should be surrendered; and the plaintiff's counsel, Mr. Cotzhausen, testified that he was told at the collector's office that it was confiscated as smug-

gled goods. The seizure was made without regard to the intent of the party sending the package or that of the party expected to receive it. An entry of the seizure and appraisal was made in the collector's office, and the seizure was reported to the secretary of the treasury. The jury returned a special verdict by which they found—

(1) That the article in question was sent from a foreign country by mail, inclosed in a sealed envelope, addressed to the plaintiff at Milwaukee, and was transmitted by mail thus inclosed to its point of destination; (2) that the contents of the package were disclosed by writing placed upon it by the sender; (3) that the package was received at the Milwaukee post-office, and that the collector of customs was notified of its receipt; (4) that the package was placed in the hands of the plaintiff by a clerk in the post-office in the presence of the deputy collector, and that she opened it; (5) that the deputy collector then seized the article after it was so opened; (6) that the collector thereafter caused the article to be appraised by the appraiser for this collection district, and that he refused to surrender it to the plaintiff without payment of the amount of the appraisal; (7) that the article was not sent by mail for the purpose, or with intent on the part of the sender or the plaintiff, to avoid the payment of duties thereon; (8) that the value of the article on the twenty-first day of May, 1877, was four dollars.

On this verdict both parties move for judgment.

Cotzhausen, Sylvester & Scheiber, for plaintiff.

G. W. Hazelton, for defendants.

DYER, J. A proper disposition of the questions involved requires an examination of various statutes and regulations of the treasury department touching the collection of duties upon imported articles. And, *first*, it is not claimed, and upon the testimony there is no ground for claiming, that the transmission of the article in question through the mails, even if it is dutiable, was an act of smuggling. It was not a clandestine importation within the definition of that term. The jury has found that it was not sent with intent on the part of the sender or receiver to avoid the payment of duties thereon, and this finding is undoubtedly sustained by the fact that the contents of the package were indorsed on the envelope inclosing it by the sender.

I do not think there is room for doubt that the article is dutiable. It is a knit woolen shawl, and comes under one of the subdivisions of Class 3 in Schedule L, entitled "Wool and Woolen Goods," in title 33 of the Revised Statutes, which relates to duties upon imports.

By the detailed regulations for the execution of the treaty concerning the formation of a general postal union, concluded at Berne, October 9, 1874, which regulations were put into execution on the day

on which the treaty came into force, and have the same duration as the treaty, and have the force and effect of law, (paragraph 25, 19 St. at Large, 604) it is provided that "there shall not be admitted for conveyance by the post any letter or other packet which may contain either gold or silver money, jewels or precious articles, or *any other article whatever liable to customs duties.*"

By section 3061 of the Revised Statutes an officer of the customs is authorized to search and examine any person on whom he shall suspect there is *merchandise* which is subject to duty, or shall have been introduced into the United States in *any manner* contrary to law, whether by the person in possession or otherwise, and to search any envelope, wherever found, in which he may have a reasonable cause to suspect there is *merchandise* which was imported contrary to law; and if such officer shall find any merchandise on or about such person, or in any such envelope which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, he shall seize and secure the same for trial.

Section 3074 provides that in all cases of seizure of property subject to forfeiture for any of the causes named in any provision of law relating to the customs, when, in the opinion of the collector making the seizure, the value of the property seized does not exceed $500, he shall cause an appraisement of the same to be made in the manner prescribed, which appraisement shall be properly attested by the collector and the persons making the appraisal.

Section 3086 provides that "all merchandise or *property of any* kind seized under the provisions of any law of the United States relating to the customs shall, unless otherwise provided by law, be placed and remain in the custody of the collector to abide adjudication by the proper tribunal or other disposition according to law."

By section 3081 it is provided that "the collectors of the several districts of the United States, in all cases of seizure of any merchandise for violation of the revenue laws, the appraised value of which in the district wherein such seizure shall be made does not exceed $1,000, are hereby authorized, subject to the approval of the secretary of the treasury, to release such merchandise on payment of the appraised value thereof."

Section 3082 provides that "if any person shall fraudulently or knowingly import * * * into the United States * * * any merchandise contrary to law, or shall receive * * * such merchandise after importation, knowing the same to have been im-

ported contrary to law, such merchandise shall be forfeited, and the offender shall be fined * * * or be imprisoned * * * or both."

By section 251 of the statutes the secretary of the treasury is authorized to prescribe rules and regulations, not inconsistent with law, to be used in carrying out the provisions of law relating to raising revenue from imports, or to duties on imports.

On the ninth of July, 1875, the following amended regulation or order numbered 2375 was made by the post-office department, with the concurrence of the treasury department, and was by the latter department published September 1, 1875, for the guidance of officers of the customs:

"Ordered that section 52, *c.* 3, of the regulations of the post-office department, issued by authority of the postmaster general on the third of April, 1873, as modified by the order of the postmaster general of January 3, 1874, be modified and amended so as to read as follows:

"Section 52. When letters, sealed packages, or packages, the wrappers of which cannot be removed without destroying them, from a foreign country, are received through the mails at any post-office, and the postmaster has reason to believe that such letters or packages contain articles liable to customs duty, he shall immediately notify the customs officer of the district in which his office is located, or the customs officer designated by the secretary of the treasury to have access to the several post-offices to examine the mails arriving from foreign countries, of the receipt of such letters or packages, and the names of the persons to whom the same are addressed, and retain such letters or packages a reasonable time for the purpose of allowing such customs officer to examine them. Letters registered or ordinary or sealed packages, or packages, the wrappers of which cannot be opened without destroying them, can only be opened by the parties addressed; and when such letters or packages are received at the office of destination, stamped as hereinafter provided, the parties addressed should be notified by the postmaster at the office of delivery that such a letter or package has been received at his office, believed to contain articles liable to duty, and that the same will be returned to the office of the country from whence it came, unless the person to whom it is addressed shall appear at the post-office, at a time in said notice to be designated, not exceeding 20 days from the date of said notice, and receive and open the said letter or package in the presence of an officer of the customs; and postmasters are hereby instructed and directed to extend to custon-house officers all proper facilities, and permit customs officers specially designated for that purpose by the secretary of the treasury to have access at all times to their respective offices for the purpose of examining mail-matter received from foreign countries, in order to protect the customs revenue from frauds practiced through the mails:

"Provided, however, that nothing herein contained shall authorize or allow customs officers to seize or take possession of any letter or package while the

same is in the custody of a postmaster, nor until and after the same has been delivered to the person to whom it is addressed, unless the package, when examined, is found to contain articles liable to customs duty:

"And provided further, that no letter or package which is believed to contain articles liable to duty shall be detained at an intermediate office, when the discovery inducing that belief is made at such office, more than 24 hours, nor at the office of delivery a longer period of time than may be necessary for the person to whom such letter or package may be addressed to appear, after the notice hereinbefore provided has been given; but when an unsealed package is found, on examination, to contain an article or articles liable to customs duty, it should be delivered to the proper officer of the customs, and the postmaster should inform the person to whom it is addressed of its arrival in the mails and its delivery to the customs officer; and it shall be the duty of the postmaster at an office at which a letter or sealed package (addressed to an interior office) suspected of containing articles liable to customs duty shall arrive in the mails from a foreign country, before forwarding such letter or package to the office of destination, to cause the envelope or wrapper thereof to be plainly stamped across its face with the words 'Suspected liable to customs duty.' "

On the third day of May, 1877, the following order was promulgated by the treasury department:

"It appears from official reports received from various officers of this department that articles from foreign countries are frequently imported through the mail to the loss of the revenue. Such importations, with certain exceptions, are illegal, and the articles become subject to seizure and forfeiture for a violation of the revenue laws. Collectors of customs will therefore seize all such packages (with the exception of those hereinafter specified) delivered to them under the existing regulations of the postmaster general, embodied in printed decision No. 2,375 ;" which is the order or regulation last-before recited, as made by the postmaster general on the ninth of July, 1875. "If the importation be less than $50 in value, the collector will deliver the goods to the party entitled thereto, on payment of their appraised value, to be accounted for in the same manner as the proceeds of other forfeitures ; and if of $50 or more in value, he will report the case to the department for special instructions."

Certain importations by post from Canada, not exceeding a certain weight, were excepted from the operation of this order. It should be noticed in this connection that, by regulation of the treasury department made May 16, 1876, it was declared that—

"The general postal union concluded at Berne, October 9, 1874, is not construed by the department as exempting from customs duty * * * articles received in the mails from postal-union countries, which, by the laws of the United States, are subject to duty; or as changing in any particular the course of proceedings for the collection of customs duties on such articles, prescribed by section 52 of the post-office regulations, as modified by the order of the

postmaster general, dated the ninth of July last, and embodied in the printed decision of this department, No. 2,375."

These are the provisions of law and regulations of the department which it seems necessary to notice. And from them we learn, *first*, that the sending of this article by mail was forbidden, regardless of the intent of the sender. On its arrival at destination a course of procedure is prescribed relative to seizure and appraisement. When seized, the law places it in the custody of the officer to abide adjudication, with only the right on his part to release it on payment of the appraised value.

The regulations of the treasury department are such as are warranted by, and not inconsistent with, the law, and hence have the effect of law; and I do not see but what the officers complied substantially with the regulations.

The only point concerning which there may be doubt is this: Since section 3082 declares that if any person shall *fraudulently* or *knowingly* import any merchandise contrary to law, or shall receive it knowing it to have been so imported, the property shall be forfeited and the person punished, the question is whether there can be a lawful seizure if these elements of fraud or guilty knowledge are wanting? Counsel for plaintiff contends that the whole right is dependent upon the intent with which the property is imported. The attorney for the United States argues that the importation was contrary to positive provision of law; that the statute directs the seizure of all property imported contrary to law; that this article being dutiable it was seized in pursuance of the statute; that if a positive law was violated in importing the article, that fact rendered the article forfeited or forfeitable, regardless of intent. This, upon the principle that a party is presumed to know the law and will not be heard to plead ignorance of the law, and that guilty knowledge is only required to be shown as the basis for a criminal proceeding. That the provisions of this section (3082) are strictly penal is obvious. The supreme court has held (*Stockwell* v. *U. S.* 13 Wall. 531) that the design of this act was to punish as a crime that which before had subjected its perpetrator to civil or *quasi* civil liability, and that it is cumulative in its character to other provisions of law which had previously existed, rather than substitutionary.

Whatever may be the correct view of this question,—namely, the necessity of proving actual fraud or guilty knowledge for the purpose of obtaining ultimately a judicial adjudication of forfeiture,—these

conclusions, under the various provisions of law referred to, seem unavoidable: that this article was dutiable; that its importation through the mails was absolutely forbidden, and therefore unlawful, though the intent of the sender was innocent; that by express provision of law, because it was dutiable, and because of the manner in which it was sent, it became the duty of the proper officer, on arrival of the article at destination, to seize it, it being then only necessary to the seizure that he had reasonable cause to believe that it was subject to duty, or to have been unlawfully introduced into the United States; that the seizure being effected, the law made the seizing officer the custodian of the property; that by further express statutory provisions the owner could only reclaim it by payment of the appraised value, or appeal to the secretary of the treasury for relief; and that as the property was seized in conformity with law, and therefore came lawfully in possession of the seizing officer, there was not a wrongful conversion of it by the defendants.

Counsel for the plaintiff has called attention to section 3058 of the Revised Statutes, which provides that "all merchandise imported into the United States shall * * * be deemed and held to be the property of the person to whom the merchandise may be consigned, any sale, transfer, or assignment, prior to the entry and payment of the duties on such merchandise * * * to the contrary notwithstanding;" and upon this provision it is urged that the title of Mrs. Von Cotzhausen has not been divested; that she is the owner of the property, and therefore entitled to possession. But by the express terms of this provision the ownership is thus declared for the purpose of enforcing payment of duties, and the evident intent of the provision is to preserve the same liability to payment of duty in case of a sale or transfer of the property as existed under the original ownership; and, further, there is nothing in this section which is inconsistent with other provisions giving power of seizure even as against the original owner. If the property is dutiable, and has been imported contrary to law, and is consequently liable to seizure, it would not follow from the fact of ownership that the owner would be entitled to possession.

It is further contended that section 3082, which declares that, if any person shall fraudulently or knowingly import into the United States *any merchandise* contrary to law, such merchandise shall be forfeited, was not intended to embrace a mailable article such as that in question and sent for the purposes here disclosed, but was intended to embrace only merchandise designed for the market. I do not

think the section can be so construed. It comprehends *any* merchandise imported contrary to law, and is not limited to merchandise sent or received for sale. And as the term "merchandise" means any article which is the object of commerce, or which may be bought or sold in trade, it is plain that the article in question is an article of merchandise. Moreover, by section 2766 it is declared that "the word 'merchandise,' as used in this title, may include goods, wares, and chattels of every description capable of being imported."

Attention has been called to the sections of the Revised Statutes (3875, 3876, 3877, and 3878) defining mailable matter, and dividing it into classes; mailable matter of the third class including flexible patterns and samples of merchandise not exceeding 12 ounces in weight. But this, as I understand it, has reference to interstate mail matter, and is not intended to permit the transmission of articles therein enumerated which are subject to duty through the mails, from a foreign country, in disregard of the provisions of the postal-union treaty and of the regulations for its enforcement. And the force of this observation is apparent, when it is noticed that some of the articles designated in section 3878 as third-class mail matter are by the law imposing customs duties made dutiable. So, too, I do not think that section 3895, which provides for the return to the owner or sender of letters, packets, or other matter which may be seized for violation of law, was intended to be applied to dutiable articles sent through the mails from a foreign country, and the sending of which is forbidden by the postal-union treaty. Section 3991 provides, among other things, that "all laws for the benefit and protection of customs officers making seizures for violating revenue laws shall apply to officers making seizures for violating postal laws."

Authorities were cited on the part of the plaintiff to the effect that where there are serious ambiguities in the statute, the construction should be in favor of the importer, and that duties are not imposed upon a doubtful interpretation. But I do not find the article in question dutiable upon a doubtful interpretation of the statute.

Among the cases cited is that of *U. S.* v. *Thomas*, 2 Abb. (U. S.) 116, in which it was held that no penalty or forfeiture is incurred or can be enforced, simply because the duties on imported goods are not paid or accounted for before the importation is complete, and that it is by acts or omissions *subsequent* to the importation that forfeitures and penalties are incurred. The court, however, expressly except from the operation of this undoubtedly correct general principle the case where some law expressly declares the importation itself, or *the*

manner of making it, unlawful. And it is the manner in which the article here was sent—it being dutiable—which the regulations of the treaty expressly forbid. Judgment will be entered in favor of the defendants.

This judgment of the circuit court has been affirmed on writ of error by the supreme court of the United States. See 2 Sup. Ct. Rep. 503.

UNITED STATES *v.* KOBLITZ.

(*Circuit Court, N. D. Ohio, E. D.* April Term, 1882.)

1. DUTIES—RECOVERY OF—BURDEN OF PROOF.
   In an action to recover duties on imports, the burden of proof is on the government to show that defendant imported the articles without the payment of the duty required by the statute, and also to show the quantity so imported by him, and this must be done by a fair preponderance of evidence.
2. SAME—LIABILITY.
   If the articles were purchased by defendant after they had been imported and passed the custom-house, without the payment of duty by others, he is not liable for the duty, unless he connived at and is shown to be privy to the importation.
3. SAME—IMPORTER'S LIABILITY.
   The fact that dutiable goods were allowed by the customs officers to pass through the custom-house without payment of duties, will not relieve the importer from liability to action for such duties.
4. SAME—MEASURE OF RECOVERY.
   In an action for the recovery of duties on imports, the government is not entitled to interest on the unpaid duties. The amount of the recovery cannot exceed the amount claimed in the petition.

At Law.

Dist. Atty. Ed. S. Meyer, for the Government.

Judge W. W. Boynton and *Mr. Atkinson*, for defendant.

WELKER, J., (*charging jury.*) This action is brought by the government to recover from the defendant the duty required to be paid on woolen rags imported from Canada into the United States. The statute provides that on "woolen rags, shoddy, mungo, waste, and flock," imported into the United States, there shall be paid a duty of 12 cents per pound. In the petition the government claims that the defendant, at different times, from the twenty-seventh day of November, 1879, to the fifteenth day of June, 1880, imported from Canada into the United States, at Port Huron, in Michigan, in different quantities,

stated in the several causes of action in the petition, amounting in all to some 62 tons of woolen rags, on which duty was required to be paid, without having paid to the government such duty, amounting in all, at 12 cents per pound, to about the sum of $15,000, and for which judgment is asked. This is denied by the defendant in his answer.

This, then, is the issue you are to determine. Most of the questions involved in this case are questions of fact, which you must find from the evidence in the case. There are, however, some general principles of law involved, to which it is the duty of the court to call your attention, and which will enable you to properly consider and apply the facts, and so correctly determine the issue so made.

The burden of the proof is on the government to show that the defendant did import woolen rags without the payment of the duty required to be paid by the statute, and also to show the quantity so imported by him. This must be done by a fair preponderance of evidence. It need not be done, in this form of action, beyond a reasonable doubt, as in a criminal prosecution. In the importation of such rags the defendant is to be held responsible for whatever was done by his agents or employes under his direction. If Barras or others passed the rags or imported them without the payment of duty, by the direction of the defendant, it would be the same as if he did it himself. Importation means bringing goods into the United States from a foreign country. Some are allowed to come in free of duty, and others are charged with a duty. Cotton rags are not required to pay duty, and can, therefore, be imported without such payment. The government must show that the importations consisted of woolen rags. Unless such rags are shown to have been imported the government cannot recover.

With reference to a quantity of felt claimed by the government to have been imported by the defendant, it is claimed by the defendant that such felt is not included in the terms "woolen rags," and, therefore, not chargeable with duty as such woolen rags. If the evidence shows that the felt was made of wool, and consisted of clippings in a tattered and fragmentary form, such form of felt would be "woolen rags" within the provisions of the statutes, and as such liable to pay duty. If the rags were purchased by the defendant, after they had been imported and passed the custom-house, without the payment of duty, by others, he is not liable for the duty, unless he connived at, and is shown to be privy to, the importation, and so passing them without the payment of duty. The fact that dutiable goods were allowed by the government officers to pass through the custom-house

without the payment of the duty thereon required by law, does not relieve the persons who import them from the payment of such duty, and the government has a right by action to recover such duty. The exact dates of time of importation, or the quantity of woolen rags, are not material to be established as stated in the petition, so that the time is about that stated in the petition, and some quantity is shown to have been imported as charged in each cause of action of the petition, and not larger than the quantity so charged in each cause of action. The market value of woolen rags in Canada and in Cleveland is only material to show an inducement or want of inducement, of the defendant to import the rags, either in the avoiding or payment of the required duty. Nor is the value of the rags at the time of importation material; but their condition may be looked into to ascertain weight, with reference to the amount of duty to be paid.

In the establishment of facts, the weight of the evidence and reliability of the witnesses are matters entirely within your control. I cannot aid you in that consideration, otherwise than in calling your attention to some general rules laid down in the law to be considered in determining the truth and reliability of testimony, and which will enable you to properly consider the evidence.

[Here were given the usual tests of credibility of witnesses such as manner of witness, his interest and feelings, intelligence, knowledge, probability, contradiction and corroboration, character, etc.]

In cases involving the commission of crime, an accomplice is a competent witness. The degree of credit which ought to be given to such testimony is a matter for the jury to determine. In cases of felony it is unsafe to convict a defendant upon the testimony of an accomplice alone, and without corroboration.

In this action it is competent for you to consider the relation Barras and some other witnesses held in connection with the importation of the rags, as bearing upon their reliability as witnesses, and the credit to be given them.

If you find that the defendant did not import any woolen rags without the payment of duty, your verdict will be for the defendant. If you find that he did import such rags without payment of duty, then you will ascertain from the evidence the quantity so imported, and on such number of pounds so found, assess 12 cents per pound, and the result should be the amount of your verdict for the government. In determining the quantity you will not merely guess the amount, but require the government to show by evidence to your reasonable satisfaction as to such quantity so imported.

The government is not entitled to interest on such unpaid duties. The amount of the recovery cannot exceed the amount claimed in the petition.

Verdict for the plaintiff, $15,000.

Motion for new trial overruled. October term, 1882.

UNITED STATES v. JENKINSON.

(District Court, W. D. Pennsylvania. 1883.)

REVENUE LAWS—SALE OF MANUFACTURED TOBACCO—RETAIL TRADE.

Section 3363, Rev. St., provides, *inter alia*, that "no manufactured tobacco shall be sold or offered for sale unless put up in packages and stamped, as prescribed in this chapter, *except at retail, by retail dealers, from wooden packages stamped* as provided in this chapter." *Held*, that a sale by a retail dealer, in the course of his business, from a wooden package properly stamped, of part of the tobacco to another retail dealer, who proposed to sell it again, is a retailing within the excepting clause. The vendor is not answerable for the acts of the purchaser, and need not concern himself as to his intentions.

At Law.

Geo. C. Wilson, Asst. Dist. Atty., for the United States.

P. C. Knox, for defendant.

ACHESON, J. The defendant was arrested upon a warrant issued by a United States commissioner for an alleged violation of section 3363, Rev. St. There being no dispute as to the facts, by agreement between the government and defendant the case has been heard before me as upon a writ of *habeas corpus*. The law under which the arrest has been made is as follows:

"Section 3363. No manufactured tobacco shall be sold, or offered for sale, unless put up in packages and stamped as prescribed in this chapter, *except at retail by retail dealers from wooden packages stamped as provided in this chapter;* and every person who sells, or offers for sale, any snuff, or any kind of manufactured tobacco, not so put up in packages and stamped, shall be fined not less than $500 nor more than $5,000, and imprisoned not less than six months nor more than two years."

The defendant is a retail dealer in manufactured tobacco, lawfully engaged in the business in Allegheny City. Gilbreath Stitt is a like retail dealer at Apollo, in Armstrong county, Pennsylvania. Stitt sent to the defendant an order for goods, including a small quantity—

four or five pounds—of plug tobacco. The latter was taken by the defendant from a wooden package stamped as provided by law, and shipped to Stitt with the other goods. This sale of the four or five pounds of plug tobacco constitutes the alleged violation of law for which the defendant has been arrested. The position of the government is that a sale of manufactured tobacco by one retail dealer to another to sell again, is not a retailing within the excepting clause of the statute.

It does not appear, however, that the defendant knew it was Stitt's intention to sell this tobacco again. Perhaps that might be a reasonable conjecture, but it is not pretended that the defendant had any certain information on the subject. Indeed, it is not shown that Stitt resold any of the tobacco, or offered it for sale. The tobacco having been found by the deputy collector in Stitt's store, this criminal information was made against the defendant.

It will be perceived that I am not called on to determine whether or not Stitt would incur the penalties of section 3363, if he should sell or offer to sell this tobacco. The question for solution is, has the defendant violated the law? It is conceded he is an authorized retail dealer in manufactured tobacco, and that the package from which he sold this particular lot was a wooden package lawfully stamped. Assuredly, a sale of four or five pounds of tobacco from a bulk package is retailing, according to the common understanding. Is it any the less a sale by retail on the part of the vendor because the purchaser himself happens to be a dealer in tobacco? It seems to me, not. The retail dealer in manufactured tobacco is under no obligation to inform himself as to the purposes of a purchaser. If he has duly qualified himself to engage in the business and sell from packages lawfully stamped, he does all the law exacts of him. It would be an impertinence on his part to inquire into the intention of his customers. On that subject he need not concern himself. If they should undertake to make an unlawful disposition of the goods they purchase, they must answer for their own acts. This statute is highly penal, and, as was said in *U. S.* v. *Veazie*, 6 FED. REP. 867, it ought not to be extended by implication so as to include acts not plainly within its terms.

Upon the admitted facts I am of opinion that the government has no case against the defendant, *and he is therefore discharged.*

CLEVELAND, C., C. & I. RY. CO. *v.* McCLUNG.*

(Circuit Court, S. D. Ohio, W. D. March 16, 1883.)

1. COLLECTOR OF CUSTOMS—RECEIPT OF FREIGHT ON BONDED MERCHANDISE—ACT OF JUNE 10, 1880.

   It is not the official duty of a collector of customs to receive the freights due to carriers for transportation of merchandise in bond, in pursuance of the act of June 10, 1880; but if the collector agrees to receive such freight in lieu of giving notice to the carrier, as required by the statute, before delivering the goods to consignees, he would be liable for any amount so received for the use of the carrier.

2. SAME—WHEN LIABLE FOR ACTS OF DEPUTY.

   The receipt of such freights not being an official duty, a deputy could not render the collector liable for his acts by reason simply of his official relation to his superior. The collector would not be liable for freights collected by a deputy unless he had in some way authorized his deputy so to act, or unless he had so acted as to estop him from denying that the deputy was, in the matter complained of, acting by his authority for him.

3. SAME.

   If the collector knew that his deputy was receiving the freight due to the carrier, and permitted the carrier to receive the freight through his deputy in the belief that he was acting for him, or by his acts or declarations held out his deputy as his agent in the matter to receive the freight due to the carrier, in lieu of the notice required by the statute, he would be liable to the carrier for any amount so paid to the deputy.

4. COLLECTOR OF CUSTOMS — FREIGHT ON BONDED MERCHANDISE — WHEN NOT LIABLE FOR FAILURE TO GIVE NOTICE TO CARRIER.

   The plaintiff, not having alleged that the freight is unpaid, but, on the contrary, having alleged payment of the freight for his use and sued for its recovery, the carrier cannot recover damages by reason of the failure of the collector to give notice before delivering the merchandise to the consignees.

At Law.

Stallo & Kittredge and *Ramsey & Matthews*, for plaintiff.

Channing Richards, U. S. Atty., and *Henry Hooper*, Asst. U. S. Atty., for defendant.

BAXTER, J., *(charging jury.)* The act of congress of June 10, 1880, entitled "An act to amend the statutes in relation to immediate transportation of dutiable goods, and for other purposes," authorizes and provides for the transportation of such goods from the ports into which they are first brought to the several cities mentioned in the act, where the duties levied by law are to be ascertained and paid. It authorizes the delivery of such merchandise for transportation to some carrier designated by the secretary of the treasury. The same is to be transported in fastened cars, vessels, or vehicles, under the

*Reported by J. C. Harper, Esq., of the Cincinnati bar.

exclusive control of the officers of customs, and not to be unloaded or transhipped *in transitu* unless authorized by the treasury regulations. And whenever the proper officer of customs shall be duly notified in writing of the existence of a lien in favor of the carrier, for freight upon the goods so transported and in his custody, he is required, "before delivering them to the consignee or owner," to give seasonable notice to the party or parties claiming the lien, and such officer may refuse to deliver the same from any public or bonded warehouse, or other place in which they are deposited, until proof shall be made to his satisfaction that the freight thereon has been paid. Such are the provisions of the statute so far as they are material and pertinent to the issues to be passed upon in this action.

The plaintiff, in stating its causes of complaint, says that the defendant was, at the several times stated, collector of customs and surveyor of this port, and that it was a carrier designated by the secretary of the treasury, and authorized to transport dutiable goods under and pursuant thereto; that as such carrier, so authorized, it transported dutiable goods from the port or ports at which they first arrived to this port, for which the several amounts alleged are due to it; and that said goods were, on their arrival in this city, placed in defendant's custody and under his control as collector and surveyor; and that it duly notified him in writing of the existence of its lien thereon for transporting the same, as provided by said act. And the plaintiff then avers that it became and was defendant's duty to refuse to deliver said goods until the freight so due to it was paid. It then proceeds to charge that the said several consignees and owners of said goods paid to the defendant the several sums so due to it for freight, for its account and benefit, and then and thereupon caused said goods to be delivered to the consignees without notice to the plaintiff, whereby its lien for such freight was lost. It then says that the defendant, though often requested, has not paid said sums or either or any part of either of them, but that the same and every part thereof, with interest thereupon from September 8, 1881, remains due and unpaid, for which it demands judgment.

The defendant admits that he was surveyor and collector of this port, as charged, and concedes that the goods were carried by plaintiff, placed in his custody and under his control, and delivered, without notice to plaintiff, to the consignees, as is alleged. But he denies that he was notified in writing, or otherwise, of plaintiff's lien for freight, or that it became his duty not to deliver said goods until the freight due the plaintiff thereon was paid; and he denies that he

ever received for the account or benefit of the plaintiff, the freight due for the carriage of said goods and sued for in this action. Such are the issues made by the pleadings, and presented for your consideration and determination. The responsibility, gentlemen, of ascertaining and deciding upon the facts, devolves on you. The complainant has adduced evidence to show that, upon the arrival of the goods at this port, it made, or caused to be made, *memoranda*, describing the goods so carried by it, the consignees for whom it was brought, the place from where shipped, and the amount due thereon for freight, and filed the same in defendant's public office with his recognized deputy. It then adduces evidence tending to establish that such *memoranda* was intended as a written notice of its lien for freight, and that by a long and uniform course of dealing between it and the defendant's office, the same was recognized, received, and accepted by defendant's said deputy as a sufficient notice, under the statute, of the existence of plaintiff's lien for freight and its claim therefor. It further appears in evidence, and the fact is not denied by the defendant, that in accordance with a custom prevailing at the custom-office at this place for eight or ten years preceding the transactions involved herein, the consignees paid the freight due to the plaintiffs to defendant's deputy; that such payments were exacted and required as a precedent condition to the delivery of such goods, and that the deputy accounted with and paid the same to the plaintiff from time to time as the same was demanded. Such payments were made for the freight due plaintiff, and sued for herein, to defendant's said deputy, sometimes in money, but most generally in checks, including duties due to the government and freight due to the plaintiff, drawn by the consignees in favor of defendant, or of the "collector" or "surveyor" of the customs of this port, which were indorsed by defendant, by his said deputy, in his official capacity, and collected in the usual course of business; and that, upon the receipt of such money or checks, as stated, in payment of duties and freights, the goods were, by the orders of said deputy and the acquiescence of defendant, delivered to the respective consignees; but that neither defendant nor his deputy has accounted with or paid to the plaintiff the amounts so collected for it, or any part thereof.

Upon these facts the plaintiff contends that it was dealing with the defendant, the surveyor and collector of customs, through his authorized deputy and agent, and that the amounts so paid to and accepted by said deputy were, and are, in law and in fact, a payment to and receipt by defendant, and that it is entitled to a recovery therefor, as

for money had and received by defendant for its use. But if the jury shall find that the payments made to and received by the deputy were for any reason not payments to or receipt by defendant, and that the defendant is not liable therefor, then and in that event it insists that such receipt and acceptance of said payments by said deputy were unauthorized by it, that said payments were invalid; and that the defendant, in violation of the duty imposed on him by the law, wrongfully delivered said goods before the payment of the amounts due it for freight were paid and without the seasonable notice to plaintiff of the deliveries to be made, whereby it lost its lien therefor, and that it is entitled to recover from defendant the damages resulting from and sustained by it in consequence of defendant's failure to give the notice required by the statute. That is, the plaintiff contends, that if it is not entitled to recover for money had and received, as already stated, then it can recover for the failure on the part of defendant to give the notice required by law of his intention to deliver said goods, so that plaintiff could have taken legal and proper steps to have retained and enforced its lien thereon, and in that way secured payment of the freight due it for their transportation.

Let us now consider these propositions separately, and in doing this, it will, I think, best subserve the ends of justice to dispose of the last proposition first.

The duty of defendant, under the statute, to give seasonable notice to the carrier before delivering goods to owners or consignees, comes only when he has been duly notified in writing by the carrier of the existence of a lien for freight; and the object of such notice is to enable the carrier to interpose, and assert, and enforce the lien as a means of securing payment of the freight. It follows, if no such notice as prescribed by law has been served on defendant, or if it has, that the freight charged for the carriage of such goods have been paid, the defendant was under no legal duty to notify the plaintiff of his intention to deliver the goods to the consignees; and as he was under no obligation to give the notice, he is guilty of no official dereliction in not giving it, and liable to no damages for such alleged neglect. Hence, the plaintiff alleged that it had duly notified defendant, in accordance with the law, of the existence of its lien, and the defendant as obstinately denies the allegation. This is the issue made by the pleading. But upon the trial both agree that the *memoranda* hitherto mentioned and read in evidence were lodged by the plaintiff with defendant's deputy, at defendant's office, and

upon this concession the controversy takes a modified form,—the plaintiff contending that such *memoranda* were good, sufficient notices, while the defendant insists they are not the notices required by law, and that consequently they do not, in connection with the statute, impose any legal duty whatever upon defendant. Whether these *memoranda* are or are not *per se* such a notice as is prescribed by the statute, is a question of law, to be decided by the court. This and other legal questions as to how far, if at all, the defendant is liable for the acts of his deputy, have been very fully discussed *pro* and *con* in the argument, and if a decision of them, or of any one or more of them, were directly or remotely necessary to a correct determination of this suit, the court would instruct you in relation thereto. But these several questions are not involved in this controversy. Our duty is to consider and try the case made by the plaintiff's petition.

In order to authorize a recovery against defendant for failing to give him the seasonable notice required by the statute, before delivering the goods to the owners or consignees, there must be an averment that the freights due it, and for which it had a lien, were owing and unpaid; for if the freights had been paid, the plaintiff's lien thereon would be extinguished and defendant relieved of the statutory injunction to give the notice. There is no such averment in the plaintiff's petition in this case. On the contrary it distinctly avers that the consignees did pay the freight to the defendant; and, while it does not say in express terms that it authorized such payments to be made, by demanding and suing for the same, as it has been done, it ratifies and confirms the payments, and claims that the money was received for its account and benefit, and demands judgment therefor. This is in fact the *gravamen* of its complaint—the theory upon which its suit rests. Upon these averments and the legal consequences deducible therefrom, the court instructs you that we will have to try this case upon the hypothesis that the freight due from the consignees to the plaintiff, for the carriage of the goods in question, was paid before the goods were delivered by defendant to the consignees; and that defendant was, therefore, under no legal duty to give plaintiff notice of his intention to make such deliveries. The plaintiff will not be permitted, after averring payment of the freights, as it has done, to recover damages because defendant failed to give it notice of its intended deliveries. For this reason there is no necessity to pass upon the question as to the legal sufficiency of the alleged notice from the plaintiff to the defendant, of the existence of its lien, or for the court to express any opinion upon the numerous questions that have

been made and discussed in regard to the extent of defendant's liability for the act of his deputy. These may all be considered as eliminated from the case.

The vital question to be considered is one of fact to be decided by you, to-wit: Did the consignees, or any one or more of them, pay the freights due the plaintiff, or any part of it, to the defendant, for the account and benefit of the plaintiff? If such payments were made, the plaintiff is entitled to recover the amounts thereof, with interest, in this action, and you ought to so find. As it has been already stated, the plaintiff does not contend that such payments were made to defendant personally. The contention is that the payments were made to his (defendant's) deputy, under such circumstances as, in legal contemplation, makes them payments to the defendant. On the other hand, the defendant admits that the payments of the freights were made to and accepted by his deputy, and that the same have not been accounted for or paid by the deputy to the plaintiff. But he denies that he ever authorized his deputy to act for him in the premises, and insists that he is not in law liable to the plaintiff for any part of the freight so collected by his subordinate. Thus the controversy is still further narrowed down to an inquiry as to whether the deputy, in the several transactions mentioned, acted by express or implied authority as *defendant's* agent in the matter, or under such circumstances as would in law estop defendant from asserting the contrary.

The court instructs you that the defendant, as collector and surveyor of this port, was under no legal duty to collect freights due to the plaintiff. The law simply required him, when duly served with notice by the carrier of the existence of a lien upon the goods in bond for freight, to give the carrier seasonable notice, before delivering the goods in his custody and under his control to the owners or to the consignees, and imposed on him the duty to withhold delivery until satisfactory proof was furnished that freight had been paid. It was competent for the parties by express contract or a tacit understanding, resulting from an established course of business, for the benefit and convenience of both parties, to agree that a collector and surveyor might receive the freights due the carrier for account of the latter, and upon receipt thereof to deliver the goods to the owners or consignees, and that such receipt of the freight by him should be in lieu of the notice which the law required him to give the carrier in the contingency prescribed by the statute; and it may be that such tacit or implied agreement existed between these parties in this case. This is the question for your determination. The defendant was un-

der no official or legal obligation to undertake to thus act for the plaintiff. If he did so he was but acting in his private capacity, and not in the discharge of any official duty. It not being an official duty, his deputy could not thus act by reason simply of his official relation to his superior, and defendant would not be liable for such extra-official action unless he had in some way authorized his deputy so to act, or unless he has so acted as to estop him from denying that the deputy was, in the specific matters complained of, acting by his authority for him.

This is the question of fact referred to you. The plaintiff has made no effort to prove any express authority from the defendant to his deputy to act as his agent in the collection of freights due to it. But it has proven that the deputy had been making such collections for several years prior to defendant's induction into the offices of collector and surveyor, in March, 1881, and continued to do so till his dismission in September following. It has been said that such was the regular course of business in the office for 10 years, recognized and acquiesced in by the plaintiff and the importers. If defendant had knowledge of this custom, acquired from observation, from the business and books of his office, or through other sources, and acquiesced therein and permitted the plaintiff to make its collections through his deputy, in the belief that he was acting for and as defendant's agent, or by his acts or declarations represented or held him out as his agent in the matter, the plaintiff and defendant both understanding and tacitly or otherwise agreeing that the freights due the plaintiff should be paid in this way in lieu of the notice which the statute in the contingency prescribed, required the defendant, as collector, to give to the plaintiff, and which has been fully explained, he would be liable to the plaintiff for all sums so paid to the deputy for the plaintiff's use, and claimed in its petition, with interest, and you ought so to find. But if the deputy acted without authority from defendant, and the defendant did not know of his said action, nor hold him out to the plaintiff as his agent, nor do or say anything to mislead the plaintiff or its officers or agents, nor undertake or assume to collect plaintiff's freight, he would not be liable to plaintiff's demands, and your verdict ought to be in his favor. It is for you to ascertain how this fact is. I have not attempted to recite all the evidence produced and relied on by the respective parties, but it is all submitted for your consideration. It is your duty to give to it, and to each and every part of it, just such weight as in your judgment ought to be given to

it, and being guided by the principles of law given you in this charge, work out your own conclusions and report the result, in the form of a verdict, to the court.

Verdict for defendant.

In re McKINNEY, Bankrupt.

(*District Court, W. D. Pennsylvania.* April, 1883.)

1. BANKRUPTCY—TRUST ESTATE—LAPSE OF TIME AS A BAR.
   Mere lapse of time will not bar a claim against a trust estate, valid and in full life when the trust was created, so long as the estate is unadministered and the trust subsists.
2. SAME—STATUTE OF LIMITATIONS.
   The statute of limitations is no bar to proof in bankruptcy if it had not run against the claim at the commencement of the proceedings in bankruptcy.

In Bankruptcy. *Sur* exceptions to the register's report upon the claim of H. Oppenheimer.

Knox & Reed, for exceptants.

Levi Bird Duff, contra.

ACHESON, J. The adjudication in bankruptcy was on October 21, 1872, upon a petition filed September 28, 1872. The bankrupt's note bears date September 25, 1872, and was due 60 days thereafter. The tender of proof upon the note was made December 29, 1879. The period of limitation under the Pennsylvania statute is six years. It thus appears that more than the statutory period had run after the adjudiction, and after the maturity of the note, before the proof of debt thereon was tendered. It is a Pennsylvania contract and the parties thereto reside in this state. Is the statute of limitations a bar to the proof? The exceptants contend that it is, and they rely upon the decision of Judge DEADY, in *Nicholas* v. *Murray,* 5 Sawy. 320, who held that the statute of limitations of the state where the debtor is adjudged a bankrupt continues to run, after adjudication, against creditors. But the contrary has been determined, and I think with better reason, by Judge HUGHES, in *Re Eldridge,* 12 N. B. R. 540, and by Judge BRADFORD, in *Re Graves,* 9 FED. REP. 816. The latter cases are in accord with the English rule that the issuing of a commission in bankruptcy creates a trust for creditors against which the statute of limitations does not run. *Ex parte Ross,* 4 Glyn

& J. 46, 330. A like rule has obtained in cases arising under the insolvent law and under voluntary assignments, and in the administration of the estates of decedents. *Minot* v. *Thacker*, 7 Metc. 348; *Willard* v. *Clarke*, Id. 435; *West* v. *Creditors*, 1 La. Ann. 365; *Heckert's Appeal*, 24 Pa. St. 482; *McClintock's Appeal*, 29 Pa. St. 360; *McCandless' Appeal*, 61 Pa. St. 9. The underlying principle of these decisions is that mere lapse of time will not bar claims against the trust estate valid and in full life when the trust was created, so long as the estate is unadministered and the trust subsists. The principle is perfectly sound, and there is no good reason why it should not prevail in cases under the bankrupt law. The statute of limitations, operating upon the remedy, bars an action at law, but it does not extinguish the debt, and is no obstacle to the creditor who seeks his share of the assets in the hands of the assignee, where such creditor had a provable debt when the bankruptcy proceedings commenced. It is very true that section 4984, Rev. St., prescribes that in the circuit court, upon an appeal, the contested claim must be declared on and tried as in an action at law. And if, as assumed by the exceptants, the statute of limitations would be a good plea in bar to the declaration in the circuit court, then undoubtedly it ought also to operate as a bar to the proof of debt. But the assumption is unwarrantable, for the purpose of the issue and trial in the circuit court is not to obtain a judgment against the debtor, or the assignee personally, but to determine whether the creditor has a provable debt, and the amount thereof.

And now, April 4, 1883, the exceptions to the register's report are overruled, and the report is confirmed absolutely.

In re SCHNEIDER.*

(*District Court, E. D. New York.* March 24, 1883.)

BANKRUPTCY—ASSIGNEE'S CHARGES.

A former assignee of a bankrupt has not a prior claim for his compensation to that of a subsequent assignee in whose hands there are not sufficient funds to pay the charges of both.

Semble, that in that case the amount should be divided *pro rata* between the two assignees.

*Reported by R. D. & Wyllys Benedict.

In Bankruptcy.

Abbett & Fuller, for the motion.

Henry J. Darby, for the assignee.

BENEDICT, J. This is an application for an order directing the present assignee of the above-named bankrupt to pay out of the funds in his hands the sum heretofore found due a former assignee, on being discharged from his trust. It is evident that there has been no violation of the order of February 28, 1882, and so the moving party concedes. The only question, therefore, is whether the petitioner is at this time entitled to be paid the sum heretofore determined to be his proper compensation.

If the claim of the petitioner were entitled to priority of payment over the claim of the present assignee for his compensation, inasmuch as there are funds in the hands of the present assignee sufficient to pay the petitioner, there would be no reason for deferring his payment. But it is not seen that any such right of priority exists. The account of the assignee shows that the funds in his hands are not sufficient to pay his own proper charges and also those of the former assignee. If there was no likelihood of any additions to the fund, it would seem proper now to divide the amount *pro rata* between the two assignees; but as the papers show a probability that sufficient money will shortly be realized by the present assignee to enable him to pay both claims in full, it is hardly worth while to make a division at the present time. The present motion is therefore denied, without prejudice to another motion, and without prejudice to the claim of the petitioner.

MARSH *v.* NICHOLS and others.

(*Circuit Court, E. D. Michigan.* March 5, 1883.)

1. PATENTS FOR INVENTIONS — VALIDITY — OMISSION OF SIGNATURE OF SECRETARY OF INTERIOR.

   A valid patent must be signed by the commissioner of patents and the secretary of the interior. If signed by the commissioner and not by the secretary, the patent is a nullity, though the omission be accidental.

2. SAME—RECORD OF PATENT-OFFICE.

   In such case the patent cannot be sustained by the production of the record of the patent-office showing a complete patent, since a perfect record of an imperfect patent cannot prove the grant.

3. SAME—ACCIDENTS—AMENDMENT.

A patent accidentally issued without the signature of the secretary of the interior cannot be amended in that particular by his successor in office. Nor does it make any difference that the same person was "acting" secretary of the interior under both administrations, and signed the patent in that capacity.

In Equity.

This was a bill in equity to recover damages for the infringement of patent No. 236,052, issued to Elon A. Marsh, for an improvement in steam-engine valve gear. The only defense made upon the hearing was that there was no such patent in existence at the time the bill was filed.

Complainants produced at the hearing a patent marked Exhibit A, bearing date December 28, 1880, and purporting to be signed by "A. Bell, Acting Secretary of the Interior," and "E. M. Marble, Commissioner of Patents." The further evidence consisted of a stipulation to the following effect: "That the patent, Exhibit A, was received from the patent-office by complainants, on or about January 2, 1881, in all respects in the same condition as it now is, save the words "A. Bell" were not thereon where they now appear, and that the signature of E. M. Marble, commissioner of patents, and the seal of the patent-office are genuine; that neither complainants nor their counsel had knowledge of the omission of the signature of the secretary of the interior to said patent, and supposed it to be regular in all respects, having never had their attention called to the same until after the commencement of this suit, and on or about February 12, 1882; that said Exhibit A was, on or about the seventeenth of February, 1882, sent by their solicitor to the patent-office, accompanied by a request from complainants to have the mistake corrected; that said exhibit was, on or about the twenty-fourth day of February, 1882, returned to their solicitor, signed "A. Bell, Acting Secretary of the Interior," and with no other or further change thereof." There was also admitted in evidence a letter from the commissioner of patents, of date April 28, 1882, stating that the application for the patent was duly made and granted, and the fees paid; that the case was placed in the weekly issue of patents of December 25, 1880, and duly entered in the alphabetical list of patentees; that the specifications and drawings were duly printed and published, the patent regularly prepared and presented to the commissioner of patents and the acting secretary of the interior for signature; that the said letters patent, supposed to be complete in every respect, were mailed to the patentees; that the patent was returned to the office,

February 23, 1882, and attention called to the fact that the signature of Mr. Bell, who signed the patents issued December 28, 1880, as acting secretary of the interior, had been omitted. They were presented to Mr. Bell, who affixed his signature to the letters patent, which were returned to the patentee's solicitor, and that the omission of the signature was purely accidental, and probably resulted from their being inadvertently laid aside, or withdrawn from before the acting secretary while he was in the act of signing.

R. A. Parker, for plaintiff.

George Harding and *Alfred Russell*, for defendants.

BROWN, J. Section 4883 of the Revised Statutes requires all patents to be issued in the name of the United States, under the seal of the patent-office, and signed by the secretary of the interior, and countersigned by the commissioner of patents. The patent in this case was regularly issued the twenty-eighth of December, 1880, except that it was not signed by the secretary of the interior. Without this signature it was not merely a defective instrument; it was wholly void. The statute has required the patent to be attested by certain signatures, and the omission of one is as fatal as the omission of both. A similar omission was held fatal to a land patent in *McGarrahan* v. *Mining Co.* 96 U. S. 316, and to a mortgage in *Goodman* v. *Randall*, 44 Conn. 321. In the former case Mr. Chief Justice WAITE, in delivering the opinion of the court, said:

"Each and every one of the integral parts of the execution is essential to the perfection of the patent. They are of equal importance under the law, and one cannot be dispensed with more than another. Neither is directory, but all are mandatory. The question is not what, in the absence of statutory regulations, would constitute a valid grant, but what the statute requires; not what other statutes may prescribe, but what this does. Neither the signing nor the sealing nor the countersigning can be omitted, any more than the signing or the sealing or the acknowledgment by a grantor, or the attestation by witnesses, when by statute such forms are prescribed for the due execution of deeds by private parties for the conveyance of land. It has never been doubted that in such cases the omission of any statutory requirements invalidates the deed."

This case also disposes of the further point made by the complainants that the patent is but evidence of the grant, and that the complainant may resort to the records of the patent-office to prove his title. But if the instrument as it existed on the day it bears date was not entitled to record, (as it would not be if not signed,) the record is of no force. It is merely *prima facie* evidence, and liable

to be rebutted by proof that no patent was actually signed. Upon this point the chief justice observed:

"It is said that the record of the paper is evidence of the fact that the recorder recognized its completeness, and is equivalent to its counter-signature. The law is not satisfied with the simple recognition of the validity of a patent by an officer of the government. To be valid, a patent must be actually executed. * * *

"A perfect record of a perfect patent proves the grant; but a perfect record of an imperfect patent, or an imperfect record of a perfect patent, has no such effect. In such a case, if a perfect patent has in fact issued, it must be proved in some other way than by the record. It is undoubtedly true that when a right to a patent is complete, and the last formalities of the law in respect to its execution and issue have been complied with by the officers of the government charged with that duty, the record will be treated as presumptive evidence of its delivery to and acceptance by the grantee. But until the patent is complete it cannot be properly recorded, and, consequently, an incomplete record raises no such presumption."

The only remaining question is, what effect shall be given to the signature of Mr. Bell affixed to this patent in February, 1882, after the commencement of this suit? It appears that when the patent was put in evidence before the examiner the mistake was discovered, when the solicitor for complainant withdrew the paper, sent it to Washington, whence it was returned with the signature of Mr. Bell, as acting secretary of the interior, affixed. It was claimed that this might be treated as an amendment of the patent, and the opinion of Chief Justice MARSHALL in *Grant* v. *Raymond*, 6 Pet. 231, was cited to show that there existed an implied power in the various departments of government to correct errors and supply omissions occurring through inadvertence or mistake. It was held in that case that a patent might be surrendered when it contained a defect which arose from inadvertence or mistake, and without any fraud or misconduct on the part of the patentee; and that the secretary of state had authority to accept such surrender and cancel the record of the patent, and to issue a new patent for the unexpired part of the 14 years granted under the old patent. Provision was afterwards made by statute for such reissues. The decision, however, does not cover a case of a *void* patent, where the amendment is not simply the correction of an error, but the creation of a grant. If the patent had been valid when first issued, I should have little hesitation in holding that a mere mistake in the name of the patentee, or other similar error, might be corrected. This was done in *Bell* v. *Hearne*, 19 How. 252, in which a land patent issued in the name of James

Bell was surrendered, and a new patent issued to John Bell, upon evidence that he had paid the purchase money, and was in fact entitled to the patent, although in the mean time the land had been levied upon and sold under an execution against James Bell.

Again, the amendment, to be of any avail to the complainant here, must relate back to the date of the patent. As a general rule, it is true that an amendment relates back to the time the original pleading is filed; but there is an exception, almost equally well recognized, of cases where intervening rights have accrued, or the statute of limitations has become a bar. Thus, while a declaration may be amended, so far as it relates to the original cause of action, as of the date when it was filed, a new cause of action cannot be added where the time for bringing suit upon the same has expired since the filing of the original declaration. As against third persons, too, the amendment takes effect from the time when it is actually made. I know of no case holding that a grantor may sign a deed *nunc pro tunc* so as to make a third person a trespasser who was not actually so at the date of the deed. This is substantially what is attempted in this case. But there is another serious difficulty in the way of recognizing this signature as made in December, 1880. At this time Mr. Carl Schurz was secretary of the interior, but at the time the patent was actually signed he had been succeeded by Mr. Kirkwood. Now it is clear that Mr. Schurz could give no legal validity to his signature after he left the office, nor could Mr. Kirkwood affix his name to papers as of a date prior to his taking office. The date and the tenure of office must correspond. We are informed by the record that Mr. Bell was acting secretary of the interior during the administration of Mr. Schurz as well as of Mr. Kirkwood, but this fact does not relieve the complainants of their difficulty. The acting secretary of the interior stands simply in place of the permanent incumbent of the office, and has no greater powers than the latter. Now in 1880 Mr. Bell was acting for and in place of Mr. Schurz, while in 1882 he was performing the same functions for Mr. Kirkwood. As assistant secretary of the interior he fills a permanent though subordinate office recognized by law, but with no authority to sign patents. As acting secretary, he occupies temporarily the position of secretary, and can act only for a person then in office. His acts have no more force than those of any other agent in respect to his principal.

Whether this patent can be held valid from the time it was actually signed by Mr. Bell in February, 1882, we are not called upon to decide. Section 4885 declares that "every patent shall bear date as of a day not later than six months from the time at which it was

passed and allowed, and notice thereof was sent to the applicant or his agent; and if the final fee is not paid within that period the patent shall be withheld." It is possible that this provision was inserted simply for the purpose of securing payment of the final fee; but upon this point I express no opinion. This is undoubtedly a very hard case for the patentee. He has apparently invented a valuable improvement; he has satisfied the patent-office of his right to a monopoly for 17 years; he has complied with all the preliminary conditions, has paid his fees, and has received what he supposed to be a valid patent. By an oversight of the department, however, he has lost his exclusive right to manufacture and sell his invention. But the case seems to be beyond the reach of the judicial power. I find myself unable to hold that this patent was valid at the time the suit was commenced, without disregarding well-established principles of law.

A decree will be entered dismissing the bill.

SHARP *v.* RIESSNER and others.

(Circuit Court, S. D. New York. March 14, 1883.)

PATENTS FOR INVENTIONS—HYDROCARBON STOVES.

Where defendants' combination lacks essential elements of the plaintiff's invention, the bill for an infringement will be dismissed.

In Equity.

Arthur v. Briesen, for plaintiff.

Benj. F. Lee, for defendants.

SHIPMAN, J. This is a bill in equity to restrain the defendants from the alleged infringement of letters patent, now owned by the plaintiff, which were issued on May 16, 1876, to Abner B. Hutchins, for an improvement in hydrocarbon stoves. The invention is said in the specification to consist of the following devices: "The vessel or chamber containing the oil or hydrocarbon is submerged in water, so as to always keep the said oil vessel or chamber cool, and thereby free from explosion or other accident. The water vessel is covered with a perforated metal plate, which forms the base of the hot-air cylinder, on the top of which the culinary or other vessels to be heated are to be placed. Vertical tubes or flues are placed in the hot-air cylinder in such positions as to act as chimneys for the

burners. Mica windows are placed in the sides of these flues" so as to enable the operator to watch the flames. The method of construction of so much of the stove as is material to this case is described in the specification as follows:

"The base of the stove consists of a vessel, A, resting for convenience on short legs, *a*. This vessel is intended to contain water, and has a top plate, A', which is preferably made of cast metal, and strong enough to support all the parts of the stove which are above it. This plate, A', is annular in form if the stove is of general cylindrical construction, (which is preferable to other forms,) the central opening in the said plate being nearly equal in area to the sectional area of the hot-air cylinder, C, which rests upon it. Concentrically arranged around this central opening is a series of preforations, *a'*, through which atmospheric air passes down into the top part of the vessel, A, and thence up through the hot-air cylinder and its chimneys. * * * The hot-air cylinder, C, is preferably built of sheet-metal, and is hinged to its base-plate, A', by the hinge, *c*, at the back side of the stove, so as to permit the top parts of the stove to be tipped back out of the way of trimming the wick, or for other purposes."

The first claim, and the only one which is said to have been infringed, is as follows:

"The water vessel, A, with its perforated top plate, A', and hot-air cylinder, C, hinged at *c* to plate A', and top perforated plate, L, all arranged and connected together substantially as and for the purpose set forth."

The perforated plate, A', and the hinge at *c* to plate, A' are the important features of this combination.

In the defendants' stove the cylinder rests upon three struts, which extend from the base-ring of the cylinder to the wall of the water chamber, so that the weight of the cylinder and the utensils which may be placed upon it is thrown against the wall instead of upon the bottom of the water chamber. The cylinder is hinged to its base-ring. The contention of the defendants is that they make their stove in accordance with the construction shown or pointed out in the Canadian letters patent of May 15, 1873, to James Henry Thorp, as assignee of John A. Frey, for "The Summer Queen Improved Coal-oil Stove," and as such stoves were made in New York in 1873 by Mr. Frey, the inventor. Whatever may be said by the plaintiff in regard to Frey's hinging his cylinder upon the base-ring, I think that it will not be denied that he used the defendants' three struts before 1873. It is sufficient for the purpose of this case to say that the three struts are not the plaintiff's perforated base-plate, A'. The object of this perforated plate was to perform a peculiar and material function in addition to that of supporting the cylinder, and which was to admit air through the

perforations to the flame in a certain way, viz., by passing "down into the top part of the vessel, A, and thence up through the hot-air cylinder and its chimneys." The defendants' struts do not perform the office which required perforations and a plate.

It is not necessary to determine whether the location of the defendants' hinge was described in the Canadian patent with such accuracy as to show to the public how or where it was to be placed, or whether it was a mere vague suggestion of what might be done, or whether, as is claimed by the defendants, the hinging to the base-ring in the manner now used was in fact adopted and was in public use in the city of New York in 1873, because the defendants' structure does not contain the perforated plate, A', of the patented combination.

Let the bill be dismissed.

THE PEGASUS.

(District Court, D. Connecticut. March 31, 1883.)

COLLISION—DANGER SIGNALS—DUTY TO REPEAT.

Where a tug and her tow were meeting a steamer about head on, and the captain of the tug saw the approaching steamer and blew two whistles to indicate his intention to go to the left, but the signal was not answered by the steamer, it was his duty not to go forward upon his proposed course without either renewing his whistles or making an effort to get out of the way of the steamer, when he had good reason to know that it was a steam-boat which was upon her regular route, and was taking the ordinary way to make her usual landing.

In Admiralty.

Franklin A. Wilcox, for libelant.

William S. Macfarlane, for claimants.

SHIPMAN, J. This is a libel *in rem* to recover damages for a collision. About half past 10 o'clock on the evening of July 21, 1882, the steam-tug H. B. Whipple left the long dock at Jersey City, having in tow the barge Allendale, fastened to her starboard side, and bound for pier 8, East river. The tug and barge were owned by the libelant. The night was dark and lights were easily seen. The tide was running flood. The tug and tow had all their regulation lights properly set and brightly burning. The course of tug and tow, before and at the time of passing pier 1, on the North river, was about S., and their speed was about three knots an hour. As the vessels passed pier 1, and were about 100 yards out in the river from the

line of the outer ends of the piers on the New York side, the officers of the tug and tow saw an approaching steam-boat, which proved to be the Pegasus and owned by the claimants, about abreast of Castle William, and saw both her colored lights, and that she was approaching about head and head. This steam-boat was one of seven boats of about the same size which, during the summer of 1882, made regular daily trips from Twenty-third street, New York city, to pier 1, North river, thence to Coney island, and thence returning, stopping at pier 1. A boat left Coney island and also Twenty-third street every half hour during the day and evening, till about 10 o'clock, with the exception of two trips, which were three-quarters of an hour apart. These boats were well known by means of the electric lights which they carried and which were a distinctive feature, and their general route and method of approaching pier 1 were well known to the navigators about New York harbor. Three or four times a week one of these boats went off this regular route to take an excursion party to Coney island from some other point, and in two instances during that summer one of the boats had taken an excursion party from the East river. The captain of the Whipple had good reason to know that the approaching steam-boat was an "iron steam-boat," and to believe that she was going to pier 1.

As the Pegasus passed Castle William the Whipple lost her green light and saw only her red or port light. The Whipple and her tow commenced at this time to swing under her starboad wheel so as to enter the East river, and blew two whistles to tell the Pegasus that she was bound to the East river and was going to keep to port. These whistles were not heard and therefore were not answered by the Pegasus. The Whipple blew no more whistles. The Pegasus, as was the uniform custom of the iron steam-boats in making their landing at the south side of pier 1 upon a flood-tide, sheered after passing Castle William, so that her course was about N. E., and so continued till she was between an eighth and a fourth of a mile from pier 1. At this point the captain of the Pegasus blew one whistle for the landing, and slowed his boat to four or five miles an hour, put his helm to starboard, and swung to the westward. This was the usual and proper course of navigation in order to land on the south side of the pier. The Pegasus struck the barge on her starboard bow when she was about 300 yards S. W. of the upper or private bath-house on the battery. The barge was seriously damaged by the blow. The Pegasus did not see the lights of the tug or tow, although they were properly burning. There was a lookout on the steamer, and her offi-

cers in the pilot-house were also on the watch. I cannot tell why the two vertical white lights on the flag-staff of the tug, and the barge lights were not visible. The Pegasus saw the lights on the steamer Maryland, which was behind the Whipple. The Whipple's red and green lights were not seen, because they were hidden from the Pegasus by the barge, which was higher and longer than the tug, and whose bow was beyond the tug's bow. The distance from the water to the upper deck of the Allendale is 12 or 14 feet, according as she is loaded or light. It is 8 feet from the upper deck of the Allendale to the pilot-house. It is 19 feet and 8 inches from the top of the pilot-house of the Whipple, where the signal lights were, to the water. From some cause not attributable to the electric lights of the Pegasus, and without fault or negligence on the part of her officers, they did not see the Whipple or the Allendale until they saw a dark object about 100 yards away, bearing about one point on their port bow. The captain of the Pegasus ported in order to throw his bow clear, and then reversed to throw his stern out. The Whipple stopped and backed. The action of her captain is criticised, and it is said that if he had ported hard he would have avoided the collision. There was no negligence on the part of either captain at this time.

There seems to have been a mutual inability on the part of each boat to hear the whistles of the other. The Pegasus did not hear the two whistles of the Whipple, neither did the latter hear the one whistle of the former. The Maryland heard the Pegasus' whistle and answered it. The theory of the Whipple is that as she was turning to go into the East river she had good reason to suppose that the Pegasus was turning also for the same purpose; that the Whipple gave two whistles to indicate that she was going to keep to the left, and she rightfully supposed, especially as no answer was given to the whistles, that the Pegasus was also going up the East river on a parallel course, when, suddenly, she sheered to the westward, and, without warning, struck the barge.

It is manifest that if the Pegasus had seen, or ought to have seen, the lights of the tug and barge, her management was negligent and she was in fault. I have already said that I do not find her blameworthy in not seeing these lights. On the other hand, I think that the captain of the Whipple, who was on the deck of the barge and was watching the Pegasus all the way from Castle William, had good reason to know that she was probably trying to land at pier 1, and that, having good reason to know this, although she seemed to him to be willful in not answering his whistles, it was his

duty not to go forward upon his course without either renewing his whistles or making an effort to get out of her way. There was willfulness on the part of the Whipple's captain in neglecting to whistle again or to avoid the steamer, when he had good reason to know that she was an "iron steam-boat," and was probably going to pier 1, and was taking the ordinary way to make her landing.

I do not find that the collision was the result of negligence on the part of the Pegasus, and therefore the libel is dismissed.

THE E. LUCKENBACK.*

(*District Court, E. D. New York.* February 1, 1883.)

TUG WITH DREDGE IN TOW—NEGLIGENCE IN STARTING SUDDENLY.

A tug was conducting a tow from New London to Fall River at night. The tow consisted of a dredge with square ends, attached to the tug by a single hawser with a bridle, and nine substantially-empty scows towed by two hawsers attached to corner posts at the rear end of the dredge. As the tow approached Point Judith the hawser from the tug parted and was replaced by two hawsers, the tug stopping for the purpose. When they were out the tug started again; shortly after, the dredge's port rear corner post pulled out and the dredge sank. Her owner filed a libel against the tug to recover her loss. *Held*, upon all the evidence, that the tearing out of the corner post of the dredge was not to be attributed to a defective construction of the dredge, but that the tearing out of the post and the sinking of the dredge were the result of want of due care, on the part of the tug, in starting up again with a sudden jerk, after the hawsers were got out, and there must therefore be a decree for libelant, and order of reference.

In Admiralty.

Goodrich, Deady & Platt, for libelant.

Butler, Stillman & Hubbard, for claimant.

BENEDICT, J. This is an action to recover for the sinking of a dredge called the Brooklyn while on a voyage from New London to Fall River in tow of the tug E. Luckenback. The accident occurred in the night-time, when the tug with her tow was approaching Point Judith from the westward. The sea at the time, according to the assertion of the libelant, was heavy and dangerous; according to the assertion of the claimant, smooth. The tow consisted of this dredge attached to the tug by a single hawser with a bridle. Behind the dredge were nine scows substantially empty, towed by two hawsers attached to the dredge. The dredge had square ends. The rear

*Reported by R. D. & Wyllys Benedict.

end, as she was being towed, was constructed with a corner post at each corner, strengthened by knees, and to which the side and end planking was spiked. The top of each of these posts constituted a timber head, constructed for the purpose of being used to make lines fast thereto. On this occasion the two hawsers by which the empty scows were being towed were made fast, one to each of these corner posts of the dredge. "The scows," to quote the words of the captain of the Luckenback, (p. 345,) "were very light, and it was a small digger, and it didn't take a great deal to pull them along." The dredge and scows had been towed from New York to New London by the tug Cyclops. She breaking down, the E. Luckenback went to New London and took her place. The Luckenback started with the tow from New London in the morning, passed through Fisher's Island sound and out into the Atlantic by Watch hill, on her way around Point Judith. As she approached Point Judith, the hawser running from the tug to the dredge parted. It was replaced by two hawsers, the tug stopping for that purpose. Until the two lines were out the tug was worked under one bell; when the two lines were out and taut she was started again. Shortly after there came an alarm from the dredge, and in a very few moments the dredge went to the bottom and was totally lost. The immediate cause of the sinking of the dredge was that the port-corner post, to which one of the hawsers from the scows was attached, pulled out. The question therefore arises as to the cause of the pulling out of this corner post, for if negligence in the management of the tug was the cause, the liability of the tug follows, of course. On the part of the libelant it is contended that the corner post of the dredge was pulled out by negligent management of the tug, in that a savage jerk was given the dredge by the tug when she started up after the two hawsers were made fast. On the part of the claimant it is contended that no jerk was given to the dredge, and that inherent weakness in the dredge was the cause of the pulling out of the corner post. Upon this issue my opinion is with the libelant. Some of the reasons for this conclusion will be briefly stated.

In the first place, attention is called to the fact that the time when the corner post was started from its fastenings is indicated by the crash proved to have been heard by several on the dredge, and not by the cries of alarm made and whistles blown at the time when the corner post was discovered to have gone out entirely. These cries and whistles—being the first notice to those on board the tug of any difficulty—were subsequent to the crash which, before that,

had so alarmed those on the dredge as to cause an examination of the hold to be made with a light. Whether the crashing was caused by the giving way of the bolts and knees of the corner post itself, or by the giving way of some adjacent parts, is not disclosed by the testimony; but there is no room for a reasonable doubt that the breaking of what broke when the first crash was heard was the beginning of the fracture which ended in the going out of the corner post. The inquiry, therefore, is limited to ascertaining the cause of the breaking of the dredge, which was announced to those on the dredge by the loud crash. Proof of the cause of this breaking is found in the testimony as to the time when it occurred, and the behavior of the dredge at that time. Two witnesses from the dredge, who are uncontradicted, testify that the crash on the dredge and the starting up of the tug were simultaneous; and it is also proved by witnesses, likewise uncontradicted, that at the same time a savage jerk was felt on the dredge. This is direct evidence from witnesses who have no interest in this controversy, and are not defending themselves against a charge of negligence on their part, and who speak as to what occurred on their own vessel. The facts so proved by these persons afford satisfactory ground for the inference that the cause of the breaking of the dredge was the action of the tug in starting up after the two hawsers were put out. Indeed, if the statement of the answer that the sea was smooth be taken as true, no other conclusion is possible, inasmuch as the testimony fails to show any other cause than the action of the tug for the breaking of the dredge at that time. But the master, pilot, engineer, and second engineer of the tug say that no jerk was given the dredge, and that the tug was started up easily and with great care. The weight to be given to this testimony from the tug is seriously impaired by the consideration that the pecuniary interest of the master is involved in the inquiry, and also by some other facts stated by the same witnesses to which attention will now be called.

The master of the tug was on her upper-deck aft, at the bell-pull, while the two hawsers were being got out, after the parting of the single line. The tug was stopped, and then worked under one bell until the hawsers were out and taut, then the master, as he says, rang from aft the bell to hook her up. When this signal was given the engineer was leaning out the door of the engine-room, by the throttle. The natural thing for the engineer to do when he heard the bell was to obey the order, and, if he did obey, the testimony from the dredge as to the jerk then felt is confirmed. But the engineer says he did

not obey the bell. The reason he assigns for not obeying is that before he had time to obey the bell the order was modified by a verbal order from the master, who came over the engine-room to give it. The master says that immediately upon pulling the bell he went forward, stamped three times on the deck and called to the engineer, "Don't open her too fast." If this verbal order was given as soon after the ringing of the bell as the master would have us understand, still I doubt its sufficiency as a reason for the engineer's not having obeyed the bell. It seems to me that the bell would have been obeyed before the order could be given at the engine-room; and if it was so obeyed, not only is the evidence from the dredge as to the jerk confirmed, but the action of the master in going to the engineer and calling, "Don't open her too fast," is explained. The testimony affords no other explanation of the master's action.

Again, the second engineer of the tug was tending one of the hawsers as they were put out, and heard the bell when rung by the master. He says that he then ran to the engine-room door to tell the engineer to open her easy; that he started to run while the captain was calling to the engineer, and that the reason he ran was to make it doubly sure. From this testimony it is apparent that after the captain rang the bell something occurred that caused the second engineer to think it all-important that the engine should go easy, and made him run with speed to the engine-room to see that the engine was so handled. If the engineer, standing near the throttle, had opened the engine wide as soon as he got the bell to that effect, the action of the second engineer in running to the engine-room is accounted for, and the testimony of those on the dredge as to the jerk is again confirmed. No other reason for the action of the second engineer is disclosed by the testimony. Some significance may also be attached to the circumstance that the pilot of the tug, who says that he was within hearing of the bell, is very positive that the bell was not rung. But the bell was rung in his hearing; and his testimony to the contrary is suggestive of a belief on his part that the ringing of the bell and an easy opening of the engine are not consistent. In this testimony from the tug I find, therefore, important confirmation of the testimony from the dredge, that a jerk was given the dredge by the tug at the time the dredge was broken.

The conclusion that the breaking of the dredge was caused by a jerk given by the tug is fortified by the testimony respecting the strength of the corner post of the dredge, and the method of its construction. The testimony on this point shows the corner post to have

been sufficiently strong for the purpose to which it was applied on this occasion. It was undoubtedly a strong construction. Up to the time of the tug's starting up it gave no signs of weakness, and caused no uneasiness to those on board the dredge whose lives depended upon its sufficiency to withstand the strain of the scows attached thereto. The weight of the evidence respecting the construction of the dredge, as I find it to be, is therefore adverse to the contention of the claimant—that the tearing out of the corner post should be attributed to a defective construction of the dredge, and confirmatory of the contention of the libelant, that it was caused by a want of due care on the part of the tug in starting up after the hawsers were got out. If further evidence of the sufficiency of the corner post be required, it is found in the fact that it endured the strain of very heavy seas for hours prior to the accident without showing signs of giving way; for, although the answer asserts that the sea was smooth, the testimony proves beyond controversy that after the tow passed Watch Hill a very heavy sea was encountered. There is much testimony to show that this sea was dangerous and unfit for the towing of such craft, and there is also much testimony to show that it was not dangerous, but safe. Whether a way could be found to reconcile the testimony upon this point I do not take time to ascertain. It is sufficient for the view I take of the case to find that the sea was sufficiently heavy to put the strength of the dredge to the proof, and demonstrate its ability to endure any strain to which it could be properly subjected on the occasion in question.

I rest my decision of this case, then, upon the conclusion that the sinking of the dredge was the result of the want of due care on the part of those in charge of the tug in starting her up after the two hawsers had been put out. So viewing the case, it is unnecessary to express my opinion in regard to the other points so ably discussed by the respective advocates. The decree must be for the libelant, with an order of reference to ascertain the amount.

END OF VOLUME 15.

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ACTIONS.

ADMIRALTY.

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6. NEGLIGENCE IN STARTING SUDDENLY.—A tug was conducting a tow from New London to Fall River at night. The tow consisted of a dredge with square ends, attached to the tug by a single hawser with a bridle, and nine substantially-empty scows towed by two hawsers attached to corner posts at the rear end of the dredge. As the tow approached Point Judith the hawser from the tug parted and was replaced by two hawsers, the tug stopping for the purpose. When they were out the tug started again; shortly after, the dredge's port rear corner post pulled out and the dredge sank. Her owner filed a libel against the tug to recover her loss. *Held*, upon all the evidence, that the tearing out of the corner post of the dredge was not to be attributed to a defective construction of the dredge, but that the tearing out of the post and the sinking of the dredge were the result of want of due care, on the part of the tug, in starting up again with a sudden jerk, after the hawsers were got out, and there must therefore be a decree for libelant, and order of reference. *The E. Luckenback*, 924.

7. CHARTERERS' POWER TO BIND VESSEL FOR COAL.—In this case the charterers of a vessel had no authority to bind her owners or the vessel, for a supply of coal in a foreign port, and the vendor was put upon inquiry to ascertain the fact of authority. *The Secret*, 480.

Practice and Procedure.

8. SUPPLEMENTAL LIBEL—EXCEPTIONS.—A libel having been filed claiming freight and demurrage under a charter-party, the libelant thereafter filed a supplemental libel, setting up the same and additional facts, and claiming the same freight and demurrage and additional demurrage, to which supplemental libel the claimant excepted on the ground that it set forth facts occurring after the suit was commenced. *Held*, that as it did not appear upon the face of the supplemental libel that any of the facts therein stated occurred subsequent to the commencement of the suit, the exceptions must be overruled. *Eight Hundred and Forty-one Tons of Iron Ore*, 615.

9. MOTION TO STRIKE OUT SUPPLEMENTAL LIBEL.—Where it appeared that the original libel was filed and process issued and served on September 22d, and the supplemental libel, claiming an additional amount, was filed October 4th, before the return of process, no claimant having appeared, and on October 6th the claimant appeared and procured a discharge of the property by depositing in court money to the amount claimed in the supplemental libel, *semble*, that a motion to strike out the supplemental libel on the ground that it set forth facts occurring after the suit was commenced, would be denied, on the ground that the claimant would be deprived of no right by allowing it to stand, while to strike it out would increase expense without benefit, and would also deprive the libelant of the security which the claimant had given for the demand made in the supplemental libel. *Id.*

As to when a proceeding in admiralty is deemed to be commenced, *quære*. *Id.*

10. APPORTIONMENT OF COSTS WHERE DAMAGES ARE DIVIDED.—Full costs in admiralty proceedings do not always follow a judgment for partial damages. *The Pennsylvania*, 814.

11. COSTS—LIBEL FOR COLLISION—JOINT NEGLIGENCE.—Where a collision resulted from joint negligence and the libelant recovered a judgment for half damages, there being no cross-libel, or allegation of damage in respondent's answer, the costs may also be divided. *Id.*

12. COSTS.—As no tender of any sum had been made for salvage, costs were allowed in all three cases. *The Rialto*, 124.

13. SECURITY FOR COSTS.—By the long-standing practice in courts of admiralty, parties prosecuting or defending or intervening are required to give a stipulation for costs. In actions *in personam*, such security was formerly obtainable under the express rule, when the process was by warrant, which was at the option of the libelant. Now that the process by warrant is abolished in ordinary cases, the requirement of security for costs should still be maintained under the supreme court rule 25, and an amendment of the old rule 44 of this court should be made, in order that no doubt may exist as to the proper practice. *Rawson* v. *Lyon*, 831.

BANKRUPTCY.

1. PREFERENCE—DISCHARGE, WHEN BARRED—SECTIONS 5021, 5110.—Where debtors in insolvent circumstances make transfers of their property for the security of a portion of their creditors only, without making equal provision for other creditors known to them, such transfers constitute a preference which will bar the debtor's discharge in bankruptcy under subdivision 9 of section 5110, without regard to the lapse of time, and although proceedings in bankruptcy were not commenced until eight months afterwards. In such a case the provisions of the act of July 26, 1876, (19 St. at Large, 102,) amending section 5021, do not apply. *In re Diehl*, 234.

2. PREFERENCE.—An assignee in bankruptcy, though representing only creditors at large, can maintain an action to set aside as fraudulent and void a sale upon execution issued upon a judgment on a *cognovit* note of the bankrupt given with the intent to secure a preference. *Balfour* v. *Wheeler*, 229.

3. COGNOVIT NOTE—REV. ST. § 5128.—Where such *cognovit* note was taken 10 months before proceedings in bankruptcy, but at a time when the debtor was insolvent and known to be so by the creditor, and the *cognovit* note was given pending an extension to the debtor by his creditors, and for the purpose of securing a preference to the defendant in any contingency, and thereafter within two months of filing a petition in bankruptcy, judgment was entered on the *cognovit* note, and a levy made upon the debtor's stock of goods, and the debtor thereupon gave consent in writing to a private sale thereof by the sheriff on execution pursuant to the law of Ohio, under which the property was sold to the defendants at such private sale, and the bankrupt remained in charge as before, *held*, that the seizure and sale on execution were "procured or suffered by the bankrupt" within two months of the bankruptcy proceedings, with the intent to give a preference, and that the sale was void under section 5128 as against the assignee in bankruptcy, both as a seizure procured by the bankrupt as well as an "indirect transfer or conveyance." The cases of *Clarke* v. *Iselin* and *Watson* v. *Taylor*, 21 Wall. 360, 368, distinguished. *Held*, also, that the defendants should account to the assignee for the price of the property, on the sale to them. *Id.*

4. FRAUDULENT TRANSFER—PRIMA FACIE EVIDENCE OF.—Where a transfer of property is made outside of the usual course of one's business, by one who is insolvent and who is known to be so by the parties to whom he transfers, and with whom he has confidential business relations, it will be considered as *prima facie* evidence against the parties to the transfer that a fraud upon the bankrupt act was intended, and the facts and circumstances surrounding such transfer impose upon the party to whom the transfer is made, the active duty of inquiring into the debtor's financial situation, and the number of his creditors. *Judson* v. *The Courier Co.*, 541.

5. NON-JOINDER.—All the parties to a transfer, such as the above, are necessary parties to an action brought to invalidate the transfer, without whose presence the court could not proceed to a decree. *Id.*

6. ASSETS—MEMBERSHIP IN PRODUCE EXCHANGE.—Membership in a produce exchange is property which passes to the assignee in bankruptcy as assets of the debtor's estate. *In re Werder*, 789.

7. CLAIM OF THE UNITED STATES—RIGHT OF PRIORITY IN PAYMENT—PERSONAL LIABILITY OF TRUSTEE.—By the Revised Statutes the right of priority in payment of debts due the United States is established, *inter alia*, in cases where an act of bankruptcy has been committed, and every assignee and other person, who pays debts due by the person or estate from whom or for which he acts before he has discharged all that may be owing the United States by such person or estate, is made personally answerable for whatever may be needed to satisfy the unpaid claims of the government. *United States* v. *Murphy*, 590.

8. ACQUIESCENCE IN PROCEEDINGS AND OMISSION TO ASSERT CLAIMS—WAIVER OF RIGHT OF PRIORITY—ASSIGNEE NOT RESPONSIBLE.—The government is not bound to go into a bankruptcy court, nor is its debt barred by a certificate of discharge; but to secure priority in payment out of funds upon which such court is administering under the act, the right must be asserted in that court and worked out through that act. Failure of the government, with full knowl-

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COLLISION.

Sailing Rules.

1. ENTERING NARROW CHANNEL—PILOT RULE 3.—The question of negligence, where a vessel enters a narrow channel while another is aground on its banks, depends on the apparent situation and circumstances of the vessel aground, making proper allowances for a change in the relative situation of the vessel aground; but unexpected changes, not brought about by the vessel attempting to pass, should not be considered in determining whether there has been any blame. Where, *therefore*, pilot rule No. 3 requires an ascending vessel, about to enter a narrow channel at the same time with a descending vessel, to lie below the channel until the descending vessel has passed through, she may, without negligence, enter the channel, if the descending vessel, being a tow-boat with barges in tow, has grounded one of the barges, and is not coming on, and there be room to pass without collision; and the unexpected drifting of one of the barges, by which a collision occurs, is an inevitable accident, for which the ascending vessel is not liable. *The Cherokee*, 119.

2. RULES OF NAVIGATION—FAULT BY NON-OBSERVANCE.—The non-observance of the statutory rules of navigation is itself a fault which charges the vessel with damages, where it appears that but for this fault the collision would have been avoided. *The City of New York*, 624.

3. STEAMER IN FOG—MODERATE SPEED—RULE 17.—Where a steamer in a fog does not go at "moderate" speed nor "slacken," as soon as there is perceptible danger of collision, as required by rule 17, and a collision ensues, which would have been avoided had the rule been observed, *held*, that the steamer is chargeable with fault, and responsible, notwithstanding the fault of the other vessel also, without which the collision would not have happened. *Id.*

4. TUG AND TOW.—A tow-boat working at one of its barges aground should, if possible, make way by temporarily suspending work to permit another vessel to pass, where that is necessary to prevent delay. *The Cherokee*, 119.

5. BARGE ADRIFT.—Where a barge, constituting part of a tow, is adrift in a narrow channel, a passing steam-boat owes the duty of doing all that is possible to prevent collision with it; but if she reverses her engines as speedily as possible, and otherwise does all she can, there can be no blame, because she is in a narrow channel, where the tug and tow would have had the right of way if it had not been partially aground. *Id.*

Fault.

6. DANGER SIGNALS—DUTY TO REPEAT.—Where a tug and her tow were meeting a steamer about head on, and the captain of the tug saw the approaching steamer and blew two whistles to indicate his intention to go to the left, but the signal was not answered by the steamer, it was his duty not to go forward upon his proposed course without either renewing his whistles or making an effort to get out of the way of the steamer, when he had good reason to know that it was a steam-boat which was upon her regular route, and was taking the ordinary way to make her usual landing. *The Pegasus*, 921.

7. CANAL-BOAT AT END OF PIER—PROPELLER.—Where a canal-boat, sound and strong, was lying at the end of a pier, and a propeller, in attempting to get into the adjoining slip, brought up against the canal-boat and injured her, *held*, that if it was necessary for the propeller to come up along-side and against the canal-boat, it was her duty to do so in an easy manner, and the propeller must be held liable for the damage resulting from the blow. *The Harry*, 161.

8. PROPELLER ENTERING HARBOR.—Where a propeller was entering a harbor on a dark night at a high rate of speed, she was held liable for a collision with a schooner leaving such harbor, notwithstanding the evidence was conflicting as to the position of the lights of the schooner, or the period at which a torch-light had been flashed on the schooner, and although the propeller may have had a proper lookout. *The Badger State*, 346.

9. HIGH RATE OF SPEED—WANT OF VIGILANCE.—In such a case it is fault in a propeller, when entering a harbor on a dark night, not to slacken her speed and take the necessary precautions to avoid a collision. *Id.*

See LIMITATION OF ACTION, 610; PRACTICE, 162; RULES OF NAVIGATION, 474.

COMMON CARRIERS.

Carriers of Passengers.

1. LIMITED TICKET—EJECTION—MEASURE OF DAMAGES.—A passenger holding a ticket, the limitation of which has expired, cannot insist that the conductor shall take it, in violation of a regulation of the company requiring the conductor to demand train fare of persons without tickets, although he may have an understanding or contract with the station agent of whom the ticket was purchased that it would be received after the time limited on the face of it; and on the refusal to pay the fare ejection from the train was not wrongful. And the measure of damages in a suit for a breach of the alleged contract is, in the absence of proof of any special damage by delay, only the price of the extra fare demanded and paid for transportation to the place of destination. *Hall* v. *Memphis & Charleston R. Co.*, 57.

2. WRONGFUL EJECTION—RESISTANCE BY PASSENGER.—While resistance to the authority of a conductor does not preclude a passenger from recovering reasonable damages for a wrongful ejection from the train, it is his duty, certainly where he is in the wrong, to submit without resistance, except in defense against impending bodily injury; and, right or wrong, unnecessary resistance will excuse the use of force and mitigate the damages for any injury received. *Id.*

3. CONTRACT OF CARRIAGE—MISTAKES ABOUT TICKETS.—A contract of carriage is made with reference to the reasonable regulations of the carrier for the intercommunication between the agents of the carrier in the transaction of its business; and mistakes should be treated, as in other business transactions, as matters for adjustment between the passenger and the proper agents of the carrier. *Held*, therefore, that where there is a dispute arising on the train about the ticket it is the duty of the passenger, if able to do so, to pay the extra fare and rely on his remedy to recover it back, rather than to force the conductor to expel him, with a view to suing for damages for a wrongful ejection. And, if he insists on expulsion, he can recover no other damages than he could have recovered if he had paid the extra fare or quietly left the train and sued for a breach of the contract. *Id.*

4. PLACE OF EXPULSION—REGULAR STATION.—A regular station is not an improper place to eject a passenger, although there may not be a hotel for public accommodation at that place. *Id.*

Carriers of Live-Stock.

5. CONSTRUCTION OF STATUTES.—By the provisions of the Revised Statutes of the United States, §§ 4386, 4390, no common carrier of cattle, sheep, swine, or other animals, conveying the same from one state to another, shall confine the same in cars, boats, or vessels for a longer time than 28 consecutive hours, without unloading the same for rest, water, and feeding for a period of at least five consecutive hours. Section 4387 gives to those who give such care a lien on the animals for the expenses incurred, and relieves them from liability for the detention. Section 4388 fixes the penalty for violating such statute at not less than $100 nor more than $500. Sections 4389 and 4390 provide that the penalty may be recovered by civil action in the name of the United States in the circuit and district courts, and that the lien given by section 4387 may be enforced by petition in the district court. *United States* v. *Boston & A. R. Co.*, 209; *Same* v. *Fitchburg R. Co.*, 209.

6. CONSTITUTIONALITY OF STATUTE.—Authority for this legislation is found in that clause of the constitution which confers upon congress the power to regulate commerce among the several states. *Id.*

7. PENALTY FOR VIOLATION.—The penalty imposed by section 4388 is not less than $100 nor more than $500, where more than one animal is carried and confined in violation of the statute. The statute cannot be so construed as to make the unlawful confinement of each animal constitute a separate offense, and thus multiply the penalty by the whole number of animals. *Id.*

CONSTITUTIONS CONSTRUED.

Of United States.

Of Arkansas.

CONTEMPT.

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COSTS.

DEBTOR AND CREDITOR.

DECISIONS OF UNITED STATES CIRCUIT COURTS, 561.

DECLARATION OF TRUST, 35.

DEED.

DISTRICT COURT.

PRACTICE AND PROCEDURE.—In cases not provided for by the supreme court rules in admiralty, it is competent for the district court to regulate its own practice, and to allow remedies according to the analogies of admiralty procedure, as new exigencies arise, as the court may deem necessary for the due administration of justice. *The Hudson*, 162.

DONATION ACT.

1. SECTION 4 — DIVISION OF DONATION BETWEEN SETTLER AND WIFE. — The division of a donation to a married man, under section 4 of the donation act of September 27, 1850, (9 St. 497,) between the settler and his wife, is committed by the act to the discretion of the surveyor general and in contemplation of law is made when the settler proves to the satisfaction of said officer that he has complied with the provisions of the act, and the latter issues the certificate containing the facts constituting such compliance, and specifying the portion of the donation set apart to the husband and that to the wife, as provided in section 7 of said act; and no valid objection thereto is found by the commissioner of the general land-office, which is shown by the subsequent issue of a patent thereon. *Traver* v. *Tribou*, 25; *Same* v. *Brooks*, 25.
2. SUIT FOR PARTITION—STATUTE OF LIMITATIONS.—The wife of a married settler, under section 4 of the donation act, died after final proof by the settler of compliance with the act, and before the issue of the patent. *Held*, (1) that the half of the donation to which she was or would have been entitled, was thereupon granted, by the act, to her surviving husband and children in equal parts as the direct donees of the United States: and (2) the statute of limitations did not commence to run against the right of the heirs of said husband to maintain a suit against his vendees of certain distinct portions thereof, for a partition of their interests in said half of said donation, until the same was formally and finally divided by the surveyor general as aforesaid. *Id.*
3. DONATION TO MARRIED PERSONS UNDER SECTION 5 OF THE DONATION ACT.—Upon the death of a married donee, intestate, under section 5 of the donation act, (9 St. 497,) after compliance with the act, and before the issue of a patent, the share of the deceased in the donation descends to his or her heirs, under the local law of descents, (Or. Laws, 547,) and is not affected by the provision in section 4 of said act, giving the share of a married donee, dying under like circumstances, to the survivor and children, or heirs of the deceased, in equal parts. *Proebstel* v. *Hogue*, 581.

EQUITY.

1. CONCURRENT REMEDIES—AT LAW AND IN EQUITY.—The plaintiffs, in a suit at law, may file a bill against the defendant therein, on the equity side of the

neither sue nor defend *in forma pauperis*, such is not the rule of the federal courts of equity, in which they may so sue or defend. *Id.*

See ESTATES OF DECEASED, 307; PUBLIC LAND, 401; RAILROAD, 691; VENDOR'S LIEN, 763.

ESCHEAT FUND.

DUTY OF SECRETARY OF STATE.—The secretary of state, as such, is not authorized under the laws of Oregon (chapter 16, p. 582) to collect escheat funds from the treasurer of state; and if he does so without authority from the party entitled thereto, or fails to account to him for the same, his sureties are not holden therefor. *Dowell* v. *Applegate*, 419.

ESTATES OF DECEASED.

1. LIABILITY OF THE LANDS OF A DECEDENT TO PAY HIS DEBTS.—The liability of the lands of a decedent to pay his debts depends upon the statutory provisions in relation thereto. *Springfield* v. *Hurt*, 307.
2. SAME—JURISDICTION IN EQUITY.—The statute of Mississippi, which renders lands so liable, provides the mode by which they shall be so applied, and that mode must be pursued, when it can be done, and only in event that it cannot be done, can it be reached by a bill in equity. *Partee* v. *Kortrecht*, 54 Miss. 66. *Id.*
3. DEMURRER TO BILL SUSTAINED.—A demurrer to a bill in equity, praying for the sale of lands of a decedent, and that the proceeds of the sale be applied to the payment of complainant's claims, will be sustained when the averments of the bill fail to show that the complainant has pursued the mode which the statute lays down to be followed before relief can be sought in a court of equity. *Id.*

ESTOPPEL.

FIRE INSURANCE, 707; MUNICIPAL CORPORATIONS, 783.

EVIDENCE.

PRODUCTION OF BOOKS AND PAPERS—RIGHTS OF LITIGANTS.—A corporation may be compelled to produce its books and papers in evidence, which may be necessary and vital to the rights of litigants, and considerations of inconvenience must give way to the paramount rights of parties to the litigation. *Wertheim* v. *Continental Ry. & Trust Co.*, 716.

See FORMER CONVICTION, 799; SUBPŒNA DUCES TECUM, 712.

EXECUTION.

1. LEVY—WHAT ARTICLES EMBRACED.—A sheriff's levy described the premises as "having erected thereon a large two-story brick building, known as the Corry Wooden-ware Works, with machinery for manufacturing tubs, pails, etc., large boilers and engine, pulleys, shafting, belting," etc. *Held*, that the levy embraced two patented machines, although loose and portable, used in the works in the ordinary course of the manufacture of tubs and pails, to paint or grain designs thereon and thus finish them for the market. *Wilder* v. *Kent*, 217.
2. WHAT PASSES WITH PATENTED MACHINE.—Whatever right to use a patented machine the defendant in an execution may have, passes with the machine to the purchaser upon a sale thereof by the sheriff. *Id.*

EXECUTION AGAINST RAILROAD.

SHERIFF, 778.

EXEMPTION LAWS.

PERSONAL PRIVILEGES.—The general doctrine is recognized that exemption laws are grants of personal privileges to debtors, which may be waived by contract or surrender, or by neglect to claim before sale. *Spitley* v. *Frost*, 299.

EXPRESS COMPANY.

EXTRADITION.

FEES.

FIRE INSURANCE.

FORMER CONVICTION.

CONFESSION.—The fact that the accused on a former occasion was accused of a similar offense, pleaded guilty to the charge, and was convicted thereof, although such conviction would be a bar to any subsequent prosecution for that offense, may be considered by the jury as a confession on his part at that time, tending, with other circumstances in his conduct, to show the character of the business he had at that time been establishing and carrying on, and has since carried on; and in this connection the jury should also consider his explanation of his reasons for pleading guilty. *United States* v. *Stickle*, 799.

FRAUDULENT CONVEYANCE BY PARENT TO CHILD, 419.

FRAUDULENT TRANSFER. BANKRUPTCY, 541.

FREIGHT ON BONDED MERCHANDISE. COLLECTOR OF CUSTOMS, 905.

GARNISHMENT.

JUDGMENT. — A judgment of one court is not attachable under process issued out of another court. *Henry* v. *Gold Park Mining Co.*, 649.

GOOD-WILL. SALE AND DELIVERY, 312.

HOMESTEAD.

1. HOMESTEAD LAWS—WIFE'S INTEREST.—Under the homestead laws of Nebraska enacted in 1866, the wife had no vested interest in the homestead, and was, therefore, not a necessary party to any judicial proceedings relating to it. The supreme court of Nebraska has held that the homestead laws in force when a contract is made, is the one that shall govern in subsequent proceedings in reference thereto. *Spitley* v. *Frost*, 299.
2. POWER OF THE COURT IN CASES AFFECTING HOMESTEADS.—The court in which a case affecting the homestead is pending may exercise such power only as the parties before it might, in the absence of judicial proceedings, exercise over the subject-matter. *Id.*

IMPRISONED DEBTOR.

DISCHARGE UNDER SECTION 2202, NEW YORK CODE—ESCAPE.—The defendant, an imprisoned debtor, petitioned for a discharge. The plaintiff opposed on the ground that the application was premature, the defendant not having been imprisoned on the execution issued from this court for a period of three months, as is required by section 2202 of the New York Code of Civil Procedure. *Held*, that such objection was well taken. The statute in such cases must be strictly followed to give the court jurisdiction, and a discharge granted before a strict compliance with the statute in this respect would render the marshal liable in an action for an escape. *Moran* v. *Secord*, 509.

INDICTMENT. STATUTORY OFFENSE, 138.

INFANT. CONVEYANCE TO, 35, 419; DEFENDANTS IN FORMA PAUPERIS, 771.

INJUNCTION. MOTION TO DISSOLVE, 847; RESTRAINING MISLEADING ADVERTISEMENTS, 439; PATENTS, 242; RAILROAD, 650; WHARF, 405.

INSANITY. AFTER EXECUTION OF DEED, 860.

INSOLVENCY.

INSPECTORS OF ELECTIONS.

INSURANCE.

INTENT TO DEFRAUD.

INTEREST.

INTEREST OF JUDGMENT CREDITOR.

INTERNAL-REVENUE LAWS.

2. SALE OF MANUFACTURED TOBACCO—RETAIL TRADE.—Section 3363, Rev. St., provides, *inter alia*, that "no manufactured tobacco shall be sold or offered for sale unless put up in packages and stamped, as prescribed in this chapter, *except at retail, by retail dealers, from wooden packages stamped* as provided in this chapter." *Held*, that a sale by a retail dealer, in the course of his business, from a wooden package properly stamped, of part of the tobacco to another retail dealer, who proposed to sell it again, is a retailing within the excepting clause. The vendor is not answerable for the acts of the purchaser, and need not concern himself as to his intentions. *United States* v. *Jenkinson*, 903.

JOINT DEBTOR.

1. ENTRY OF SATISFACTION AS TO ONE JOINT JUDGMENT DEBTOR, SAVING THE RIGHT TO SUE THE OTHERS.—An actual release of one joint obligor discharges all; but it is otherwise where the right to sue the others is reserved. An entry of satisfaction of a judgment as to one joint debtor, expressly stipulating that it should not prejudice the creditor's rights as to the others, where it is the intention that it should prevent maintaining an action or issuing an execution on the judgment against such debtor, does not operate as a contract not to sue, but as a technical release. *United States* v. *Murphy*, 590.
2. SAME—FACTS.—After an execution had been issued by the proper officers of the government on certain real estate of one of several joint judgment debtors of the United States, another of the judgment debtors was adjudicated bankrupt and defendant appointed his trustee. During the entire course of the administration of the latter's estate, the real estate exceeded in value the amount of the whole debt, the execution on it continued in force, and the officers of the government, with full knowledge of the facts, never even intimated the right of priority for the claim, nor demanded its payment. Acting on a belief, induced by these circumstances, that the government relied for satisfaction exclusively on the property so levied on, the assignee withheld only his bankrupt's full contributive portion of the judgment, on proper demand paid this to the United States, and distributed all the assets according to law. *Held*, that the officers of the government, having received its quota of the debt, and having executed a release to the debtor whose property had been taken in execution, the trustee of the debtor was not personally liable. *Id.*

JUDGMENT.

1. POWER OF COURT OVER, AFTER TERM.—Suit was brought in Colorado on a judgment rendered by the superior court of Cook county, Illinois, and judgment was rendered here. Subsequently the Illinois judgment, the case being removed by writ of error to the appellate court of that state, was reversed. Defendant sets up these facts in a petition, and moves that the judgment be vacated. *Held*, that such proceeding is allowable. *Heckling* v. *Allen*, 196.
2. CIRCUMSTANCES ARISING AFTER JUDGMENT.—While it is the general rule that, as to all matters that were in issue, or which might have been contested at the time judgment was rendered, the court has no power to vacate judgment after the expiration of the term at which it was rendered, yet as to matters arising after the judgment, or before the judgment but too late to be presented as a defense, the rule is different. Relief in such case may be had by motion to vacate or otherwise, as the circumstances may require. *Id.*
3. THE ISSUE GROWING OUT OF THE SUBSEQUENT FACT MUST BE TRIED.—In this case the judgment of the superior court having been reversed and the case remanded for retrial there, proceedings in this court will be stayed until final action by the courts of Illinois, when proper steps can be taken to afford relief, either by a renewal of this motion, or by proceeding in equity, or otherwise, as the circumstances may require. *Id.*

See CORPORATIONS—COLLUSIVE JUDGMENT, 353.

JURISDICTION.

See ADMIRALTY, 555; ASSIGNMENT OF CAUSES OF ACTION ARISING ON TORT, 840; NATIONAL BANKS, 703.

JURY.

MASTER AND SERVANT.

NATIONAL BANKS.

the verdict all over the amount which the jury would have found had they followed the instructions of the court. *Knapp* v. *Williamsport Nat. Bank*, 333.

See TAXATION, 222, 483.

NEGLIGENCE.

1. DEFINITION.—Negligence is the failure to do what a reasonably prudent person would ordinarily have done under the circumstances of the situation, or doing what a person under the existing circumstances would not have done. *Sunney* v. *Holt*, 880.
2. REASONABLE AND PROPER CARE.—Negligence is a failure to do what a reasonably prudent person would ordinarily have done under the circumstances of the situation, or doing what such person under existing circumstances would not have done. Reasonable and proper care must have reference to surrounding circumstanees. These may often demand a higher or lower degree of care and diligence of a party. *Fuller* v. *Citizens' Nat. Bank*, 875.
3. MATTER OF LAW AND FACT—PROVINCE OF COURT AND JURY.—Negligence is a question of law and fact. The duty of the party is matter of law, and to be settled by the court. What was done by the party is matter of fact, and to be determined by the jury. *Id.*
4. CONTRIBUTORY NEGLIGENCE.—The law does not impose upon the driver of a vehicle in a crowded city thoroughfare the duty of giving a signal to the vehicles behind him of his intention to turn: it is the duty of the driver in the rear of such venicle to be on the lookout for such a deviation from the course by the driver in the advance. Although both parties are bound to use ordinary prudence and care, yet ordinary care on the part of a driver of a team following another team in the streets of a city may mean, in the circumstances in which the parties are placed, a higher decree of care than would be exacted from the driver of the team in advance. *Bierbach* v. *Goodyear Rubber Co.*, 490.
5. RECOVERY—CONTRIBUTORY NEGLIGENCE.—Where a plaintiff so far contributes to an injury complained of by his own negligence, or want of ordinary care and caution, that but for that negligence or want of care and caution on his part the the injury would not have happened, he is not entitled to recover. *Sunney* v. *Holt*, 880.
6. OWNER OF VESSEL—DEGREE OF CARE.—The owner of a vessel is required to exercise the usual and customary mode and care adopted by reasonably prudent persons in control of vessels of like character, for safety to their employes from hatchways, usually adopted and used on board of vessels of the character of his, and under like circumstances, and if that was not done by the owner and his agents, such failure would be negligence, and if an employe was injured thereby without his own carelessness contributing thereto, the owner would be liable to damages therefor. *Id.*
7. NEGLECT OF PORTER TO LIGHT VESSEL—CO-LABORER.—Where it is the duty of a porter on a vessel to place lights upon a vessel and about the hatchways, if left open, and by reason of his failure to place such lights an employe falls down a hatchway and is injured, although such porter may have been a co-laborer in performing his duty in regard to the lighting of the vessel, he is the agent of the owner of the vessel, and his negligence would be the negligence of such owner. *Id.*
8. PERSONAL INJURIES—COLLISION ON HIGHWAY.—Where teams have a right in the ordinary course of business to follow each other, turn about, pass and repass, that decree of care and caution must be exercised by parties using such highways, when in proximity to each other, to avoid doing each other injury, as might be expected of a person of ordinary care and prudence; and it is not enough to exonerate one from a charge of negligence, that after a collision had become inevitable he did all that he could to avoid it, when it appears that if he had exercised the proper degree of care and prudence in keeping at a safe distance behind the plaintiff's vehicle the accident never would have happened. *Bierbach* v. *Goodyear Rubber Co.*, 490.
9. NEGLIGENCE—INJURY TO PASSENGERS—PLEADING.—The plaintiff in a suit against a railroad company to recover damages for injuries received while traveling as a passenger on the defendant's cars through the defendant's negli-

NEGOTIABLE PAPER.

NEW TRIAL.

NON-DELIVERY OF GOODS. BY COMMON CARRIER, 687.

NOTES RECEIVED FOR DISCOUNT BY BANK, 675.

OFFSET. BANK, 675.

OMISSION OF IMMATERIAL STATEMENTS.

OPTION CONTRACTS.

PARTITION.

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Infringement.

his property as was wrongfully converted will have passed by the sale and conversion, and no damages will accrue to him on account of further use of that property. *Id.*

Practice and Procedure.

62. WHEN EQUITY HAS JURISDICTION.—The proper forum in which to sue for damages arising from infringement of a patent is a court of law, but chancery courts may take cognizance of such cases if they involve some element of equitable jurisdiction; and when such courts have once rightfully obtained jurisdiction they may proceed and decree full relief. *Burdell* v. *Comstock*, 395.

63. SUIT BROUGHT JUST BEFORE EXPIRATION OF PATENT—FRAUD ON EQUITY JURISDICTION.—Where, *though* a bill in equity, alleging infringement of a patent and praying for an injunction and an account, was filed only five days before the expiration of the patent and no effort was made to obtain an injunction, *held*, that the prayer for an injunction was a mere pretext, and that the court never acquired jurisdiction of the case. *Gottfried* v. *Moerlein*, 14 FED. REP. 170, distinguished. *Id.*

64. RESTRAINING ISSUE OF PATENT.—The decision of the commissioner of patents is not final on a question of the priority of invention, but the successful applicant will not be enjoined from receiving his patent upon the mere suggestion that the commissioner was mistaken. *Whipple* v. *Miner*, 117.

65. IMPROVED SKATE—AMERICAN CLUB SKATE.—The operative locking mechanism is the lever, which operates as the ordinary toggle-joint does after the parts have passed centers and is automatically held in against the runner by the pressure of the clamps, and the hook-like action alone of one of the links would not keep the clamps closed or locked; but the efficient locking cause is the toggle-joint and lever, the use of which in defendant's device will be enjoined. *Spaeth* v. *Gibson*, 810.

66. PRELIMINARY INJUNCTION.—Where an infringement does not clearly appear to the court, it will not grant a preliminary injunction. *Allis* v. *Stowell*, 242.

67. INFRINGEMENT—CONTEMPT PROCEEDINGS.—Where there is doubt upon the question of infringement, the court will not determine that question in contempt proceedings, instituted after a decree in a pending suit, but will remit the party to his right to file a supplemental bill, or to institute a new and plenary action. *Id.*

68. VIOLATION OF INJUNCTION.—The plaintiff's motion for an attachment against the defendant for violation of an injunction restraining the defendant from the infringement of plaintiff's patent, and to compel obedience of the master's order to file an account of the articles which are the subject of the motion for an attachment, and which have been made since the service of the injunction order, denied, on the ground that the article complained of is not an infringement. *Yale Lock Manuf'g Co.* v. *Scovill Manuf'g Co.*, 342.

69. EFFECT OF DECISIONS AS TO VALIDITY—PRELIMINARY INJUNCTION.—Where a motion is made for a preliminary injunction for an alleged infringement of a patent, which has been held valid without collusion in a contested patent case, the validity of the patent will be considered settled for the purposes of the motion. *Coburn* v. *Clark*, 804.

70. SAME.—Where, however, the decision does not show what claims were held valid, nor what would be an infringement, the following questions are left open, viz.: (1) What are the contrivances covered by the patent? (2) Has the defendant infringed the same? *Id.*

71. DISMISSAL OF BILL.—Where the subject of the patent in controversy in this case has been decided by the circuit court for this district not to be patentable, such decision is conclusive on this court, and the bill will be dismissed. *McClosky* v. *Hamill*, 750.

72. PLEADINGS—DEMURRER.—Courts will refuse to decree unless the substantial groundwork of the case in which relief is sought is distinctly alleged in the complaint; but objections to the form of a pleading should be taken by demurrer, and after proof has been taken the bill will not be critically studied to find defects in the form of the pleading. *Pelham* v. *Edelmeyer*, 262.

73. EVIDENCE.—Where the proof shows that the complainant had no legal or equitable interest in the matter in controversy, the bill will be dismissed. *Id.*

Patents Enumerated.

Reissues Enumerated.

See EQUITY, 395; EXECUTION, 217; INJUNCTION NISI, 118.

PENALTY AND FORFEITURE.

1. VIOLATION OF REVENUE LAW.—Whenever a vessel, or the owner or master of a vessel, has become subject to a penalty for a violation of the revenue laws of the United States, such vessel shall be holden for the payment of such penalty, and may be seized and proceeded against summarily by libel to recover such penalty. Rev. St. § 3088. *The Saratoga*, 382.
2. WHEN VESSEL NOT SUBJECT TO SEIZURE.—The act of congress of February 8, 1881, provides that no vessel shall be subject to seizure or forfeiture as above by reason of the penalty incurred under section 2873, Rev. St., unless it shall appear that the master, at the time of the alleged illegal act, was a consenting party or privy thereto. *Id.*

See CARRIER OF LIVE-STOCK, 209.

PLEADING.

EXISTENCE OF CORPORATION.—In an action brought by a corporation it is not necessary to allege that it is a corporation; it is sufficient if the name be stated at the commencement of the narration, since the plaintiff need only prove the material allegations of his declaration. *Non constat* why there should be required proof of the existence of plaintiff corporation, not averred and not challenged by the defendant. *Union Cement Co.* v. *Noble*, 502.

2. DENIAL—RULE IN FEDERAL COURTS.—In federal courts the existence of foreign and domestic corporations alike can be denied only by a special plea in abatement or bar, or notice. *Id.*
3. GENERAL ISSUE.—The pleading of the general issue in an action of *assumpsit* by a foreign corporation admits the corporate existence, and evidence should be received to establish the cause of action without proof, but not to show want of corporate capacity to sue. *Id.*
4. REPLICATION—NEW CAUSE OF ACTION.—A replication cannot go behind the case made by the declaration and add another and different cause of action. *Burdell* v. *Denig*, 397.

See CITIZENSHIP, 328; PUBLIC TREATIES, 489.

POST-OFFICE.

1. POSTMASTERS—REMOVAL OF POST-OFFICES—POSTMASTER GENERAL.—A postmaster is a subordinate officer of the post-office department, and bound to obey the orders of the postmaster general. *Western Star Lodge, No.* 2, v. *Schminke*, 410.
2. SAME.—The power to remove the post-office in certain towns from one building to another is vested by law in the postmaster general, and can be exercised by him at his discretion. *Id.*
3. SAME.—A claim for rent of premises occupied, or leased to be occupied, by the government as a post-office, should be sued for in the court of claims. *Id.*

See USE OF, TO DEFRAUD, 798; UNLAWFUL IMPORTATION, 891.

PRACTICE.

1. BRINGING IN THIRD PARTIES.—Under the English judicature act of 1873 it is the constant practice, at the instance of the defendant, to bring in third persons as parties to be bound by the judgment, where they have a common interest in the subject-matter of the litigation, or in the question of liability to be determined. *The Hudson*, 162.

PRINCIPAL AND AGENT.

RAILROAD COMPANIES.

RAILROAD DISCRIMINATION.

SAVINGS BANK. TAXATION, 225.

SEAMEN'S WAGES.

SECURITY.

SECURITY FOR COSTS IN ADMIRALTY, 637, 831.

SERVICE OF PROCESS.

SHERIFF.

mined according to law. This agreement is not to prejudice any right he may, and which can be, legally established to the rolling stock." The sheriff was not a party to the equity suit or the agreement. *Held*, that the agreement must be construed as reserving to the plaintiff all his legal remedies, and did not operate as an estoppel to bar his action of trespass against the sheriff. *Id.*

SHIPPING.

1. USAGE OF PORT—LANDING CARGO.—In the absence of any different usage of the port, or other indication in the bill of lading, a vessel is bound to land her cargo at some suitable wharf. *Gronstadt* v. *Witthoff*, 265.
2. LAY DAYS—WHEN COMMENCE.—Where the bill of lading contains nothing to indicate a contrary intention, the stipulated lay days should be held not to begin to run as against the consignees of cargo on a general ship until the vessel has arrived at her berth, or is in actual readiness to discharge, according to her legal obligation. *Secus*, as against the charterer, or a consignee assuming all the obligations of the charter-party, or having the control of the ship. *Id.*
3. CUSTOM AND USAGE:—A custom or usage to dispense with this legal obligation must be so fixed, uniform, and well understood as to be presumed to form a part of the contract. Such a usage is not made out by evidence that in the majority of cases merely certain kinds of cargo are discharged on lighters for the mutual convenience of the consignee and the vessel, where it also appears that it is not unusual to discharge upon the dock, and that plenty of docks were available. *Id.*
4. MODE OF DISCHARGING VESSEL.—The words "to be taken free from on board," in a bill of lading, do not, necessarily, mean to be taken on lighters away from the wharf. *Id.*
5. CASE STATED.—The ship Petropolis having arrived with 2,090 empty petroleum barrels stowed above a cargo of iron, which by the charter-party and bill of lading were to be discharged at the same berth, was directed by the consignees of the latter to go to the Erie basin, where barrels would not then be received. The ship arrived there on May 26th, but could not reach the wharf, and moored along-side another vessel. She was unable to get a berth along-side the wharf until June 1st, and the barrels were discharged by the 4th. The bill of lading gave four lay days, and demurrage thereafter, not indicating when they commenced to run. On May 25th the vessel notified the consignee that she would be ready to discharge on the 26th, and the consignee, on the 27th, notified her to discharge the barrels on the dock if lighters were not along-side. *Held*, that the lay days, as against the respondents, did not commence to run until June 1st, and that no demurrage accrued. *Id.*
6. SHIPPING CONTRACTS.—A seaman is not bound by a clause in his shipping contract unfavorable to his interest if it was concealed from him, or its meaning misrepresented; and if, from any cause, he is unable to read the contract, he may show that it differs from his oral engagement, upon clear proof that the written contract was not read or explained to him. *The Samuel Ober*, 621.

See BILL OF LADING, 265, 618.

STATE CONSTITUTIONS CONSTRUED, 8, 11, 183, 651, 784.

STATE LOAN.

IN AID OF RAILROAD.—The act of the legislature of Arkansas, providing for a loan of the bonds of the state to railroad companies, construed, and *held* (1) to create a statutory mortgage on the roads, and their income and revenues, to secure the payment of the state bonds by the companies accepting the loan; (2) that such lien took effect from the date of the award of the loan, by the board of railroad commissioners, to the company applying for the same; (3) that the duty of the governor to issue the bonds, after the award of the loan, was ministerial; (4) that all persons were bound to take notice of the lien reserved by the act, and when it accrued; (5) that the lien reserved to secure the payment of the bonds is primarily a security for those holding the bonds; (6) that as between the state and the company receiving the bonds, the company was the

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STATUTORY CONSTRUCTION.

1. STATE STATUTES—PROVINCE OF STATE SUPREME COURT. It is the peculiar province of the supreme court of the state to determine the meaning of the statutes of such state, and with such determination courts of the United States will hesitate to place upon a state statute any construction which will bring such statute in conflict with a statute of the United States, and therefore render it void. *Davenport Nat. Bank* v. *Miltenbuscher*, 225.
2. REVENUE LAWS — CONSTRUCTION — RULE OF.—In the construction of revenue laws, if property, which by a previous general statute is declared liable to taxation, is to be exempted under a later act from bearing its proportion of the public burden, the exemption must rest upon some clear and unequivocal provision of the statute. *Id.*
3. AMENDATORY ACTS TO REVISED STATUTES.—*Held*, that amendatory acts of congress are to be construed as enacted with reference to the existing system of

TAXATION.

TELEGRAMS. SUBPŒNA DUCES TECUM, 712.

TELEGRAPH COMPANIES.

See BOARD OF TRADE—EXCLUDING REPORTERS, 847.

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TROVER.

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TRUST SALE.

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UNDUE INFLUENCE.

UNLAWFUL IMPORTATION THROUGH MAIL.

1. WOOLEN SHAWL DUTIABLE—SEIZURE BY COLLECTOR — ACTION FOR CONVERSION.—A knit woolen shawl sent as a present through the mail from Germany in a registered package on which was indorsed the contents of the package and the words "Suspected liable to customs duty," was opened by the party to whom it was addressed, at the post-office, in the presence of a deputy collector, who took it from her, had it appraised, and refused to deliver it until she had paid the appraised value or received permission from the secretary to pay the duty and to receive the package. In an action for wrongful conversion, *held*; that the article was dutiable; that its importation through the mails was unlawful, though the intent of the sender was innocent; that it was the duty of the proper officer, if he had reasonable cause to believe it was subject to duty, or had unlawfully been introduced into the United States, to seize it, and having done so, he was by law the custodian of the property; that the owner could only reclaim it by payment of the appraised value or appeal to the secretary of the treasury for relief; and that there was not a wrongful conversion of the property. *Von Cotzhausen* v. *Nazro*, 891.
2. OWNERSHIP AS ENTITLING TO POSSESSION.—Where property that is dutiable is imported contrary to law, it is liable to seizure, and it does not follow from the fact of ownership that the owner would be entitled to possession. *Id.*
3. SECTION 2082, REV. ST.—MERCHANDISE NOT FOR SALE.—Section 2082 of the Revised Statutes comprehends any merchandise imported contrary to law, and is not limited to merchandise sent or received for sale. *Id.*

USE OF POST-OFFICE TO DEFRAUD.

1. REV. ST. § 5480.—One who advertises under various titles for agents to sell goods and distribute circulars without any intention of employing such agents, but intending to incite persons who meet with such advertisements or circulars to send him 15 cents in postage-stamps and $2.50 in money for agent's outfits or sample cases, with the intention of cheating and defrauding the persons sending such postage-stamps or money, or a portion of it, by converting such stamps or money to his own use, without intending any equivalent for the same, and to carry out this fraudulent device takes a letter and packet from the post-office, and deposits a packet in the post-office, is guilty of the misdemeanor described in section 5480 of the Revised Statutes of the United States. *United States* v. *Stickle*, 798.
2. WHAT MUST BE SHOWN—REASONABLE DOUBT.—As the offense consists in the concocting of a scheme or artifice to defraud individuals of their property and money, and in the employment of the post-office department in carrying into execution such scheme or artifice, to warrant a conviction the jury must be satisfied, beyond a reasonable doubt, of the intention of the accused to defraud, and of the use of the post-office for that purpose. *Id.*
3. EVIDENCE OF INTENT TO DEFRAUD.—In determining the intention of the accused, it is proper for the jury to consider all the facts and circumstances in evidence, the nature and quality of his advertisements and circulars, and the statements and representations therein contained, their truth or falsity in different particulars, whether he filled orders for goods or not, and the equality of such orders, and his conduct in the premises generally. *Id.*

USURY.

1. REV. ST. § 5198.—Section 5198, Rev. St., makes the receiving or charging "a rate of interest greater than is allowed" "a forfeiture of the entire interest."

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