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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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ARRANGED UNDER THEIR RESPECTIVE CIRCUITS AND DISTRICTS.

SIXTH CIRCUIT.

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EIGHTH CIRCUIT.

NINTH CIRCUIT.

CASES CITED.

CASES

ARGUED AND DETERMINED

IN THE

United States Circuit and District Courts.

HOLLAND and others *v.* RYAN and others.[1]

(*Circuit Court, D. Colorado.* June 14, 1883.)

1. JURISDICTION FEDERAL COURT—CITIZEN.
   To give jurisdiction to the federal courts on the ground of citizenship, all the plaintiffs who have an interest in the subject-matter must have a different citizenship from the defendants.
2. SAME—FEDERAL LAWS.
   An averment that the action involves the "construction and consideration of the laws of the United States on the subject of mines and mining, and the validity and title to mining claims occurring and arising thereunder," *held* insufficient to show a cause of action arising under the laws of the United States. The complaint must state there is a controversy between the parties as to the meaning and effect of those laws. It is not sufficient that the right to recover is based upon an act of congress.

Motion to Dismiss.

A. Danford, for plaintiffs.

D. T. Sapp, for defendants.

HALLETT, J., (*orally.*) An action of ejectment was brought by six persons against four to recover two mining claims. The title, as stated in the complaint, appears to be in four of the plaintiffs. F. E. Holland and B. M. Hypes, two of the plaintiffs, own a considerable interest in the claims, and they are citizens of the state of Missouri. Two of the plaintiffs, J. W. West and W. M. B. Worthington, own one-twelfth interest each. Charles A. Jones and Charles A. Daily are lessees of the plaintiffs. West and Worthington, Jones

[1] From the Colorado Law Reporter.

and Daily, the two plaintiffs who own a twelfth interest of the claims, and the lessees, are citizens of this state; the defendants also are citzens of this state; and the question is whether the action can be maintained here by these plaintiffs against these defendants. On that the rule is that all of the plaintiffs who have any interest in the property must have a different citizenship from the defendants. Assuming that Jones and Daily, as lessees, have no substantial interest in the property, or, at least, that they need not be joined in this action, West and Worthington remain, having a twelfth interest each. They have no standing in this court, and cannot prosecute an action here against other citizens of the same state.

The averment in the complaint that this is an action that involves the "construction and consideration of the laws of the United States upon the subject of mines and mining, and the validity and title to mining claims occurring and arising thereunder," is not sufficient to show a cause of action arising under the laws of the United States. The question which arises under those laws, and the difference of opinion between parties as to the meaning and effect of those laws, is to be stated in the complaint to show such cause of action.

The authority which we follow on that subject is *Gold Washing & Water Co.* v. *Keyes*, 96 U. S. 199. In that case it was decided that there must be a controversy between parties as to the meaning and effect of a law of the United States. It is not sufficient that they base their right to recover upon the acts of congress relating to mining claims, but there must be some dispute between the parties as to the construction of those laws.

The action is one which cannot be maintained in this court, and will be dismissed, pursuant to the motion of the defendants.

See *Kerling* v. *Cotzhausen*, 16 FED. REP. 705; *State of Illinois* v. *Chicago, B. & Q. R. Co.* Id. 706; *Adams Exp. Co.* v. *Denver & R. G. Ry. Co.* Id. 712; *Myers* v. *Union Pac. Ry. Co.* Id. 292; *Cruikshank* v. *Fourth Nat. Bank*, Id. 888; *Bates* v. *New Orleans, B. R. & V. R. Co.* Id. 294; *Ellis* v. *Norton*, Id. 4. [ED.

GOODYEAR and others *v.* SAWYER. (No. 126.)

(*Circuit Court, W. D. Tennessee.* June 29, 1883.)

1. COSTS—EQUITY PRACTICE—BILL DISMISSED BY PLAINTIFF—DOCKET FEE—WHEN TAXABLE—REV. ST. §§ 823, 824, AND 983, CONSTRUED.

When a bill in equity is, after answer filed, dismissed by the plaintiff, on his own application, either generally or "without prejudice," the granting of such an order is a "final hearing" in the sense of Rev. St. §§ 823 and 824, and the solicitor's docket fee of $20 is then taxable as part of the costs of the case, "recoverable by law in favor of the prevailing party," in the sense of Rev. St. § 983. This results from the general law of costs in courts of equity which is adopted by this act of congress, so far as relates to the principles governing the court in the taxation of costs, as between party and party.

2. SAME SUBJECT—DISMISSAL AFTER DECREE FOR ACCOUNT AND COSTS.
Where there has been a decree for an account and costs against the defendant, but subsequently the plaintiff dismisses the bill, the docket fee is taxable in favor of the defendant, notwithstanding the former decree.

In Equity. Motion to retax costs.

This is a motion to retax the costs on execution in six cases of the plaintiffs against the several defendants, the objection in all being the charge of $20 for a docket fee to defendant's solicitor. They were bills in equity for an account of profits, injunction, etc., for the infringement of a patent. The objection urged on this motion was that there was no "final hearing," as required by the statute, to entitle the solicitor to the fee. The cases were not all disposed of alike. This case, No. 126, had been set for hearing according to the practice of the court, and was, with a number of others not involved in this motion, by the court, on application of plaintiffs' solicitor, "dismissed without prejudice, at the cost of complainant, for which costs to be herein taxed let execution issue." This was done on the regular call of the docket. In No. 146 there was a decree at the hearing on March 30, 1872, for an injunction and an account, and against the defendant for costs; but on December 30, 1872, on the plaintiffs' application, the case was, among others, dismissed by the court, by an order which recites that they "had been dismissed at the October, 1872, rules, the plaintiffs assuming all costs not previously decreed against the defendants, and that the clerk, having omitted to enter the order at the rules, it is now made *nunc pro tunc*, and is in all things confirmed." No. 145 was dismissed by the above order of December 30, 1872, but there was never in fact any other hearing on the merits, nor any account ordered, nor any decree for costs against the defendant in the case. No. 132 is said by counsel for the plaintiff to have been dismissed in the clerk's office; but the only entry of any dismissal is a docket entry, thus: "August 5, 1873. Costs paid;" and No. 158, said to have been dismissed in the clerk's office, is like the last-mentioned case, with no entry except on the docket, thus: "July 6, 1875. Clerk's and commissioner's costs paid." No. 181 is said, like the last two cases, to have been dismissed in the clerk's office; but there is not even a docket entry or anything to show the dismissal. There were answers filed in all the cases, replications in two of them, but no replications in the others. They were all set on the hearing docket, and repeatedly called and continued until disposed of as above indicated. Executions issued for costs, and this motion to retax and strike out the docket fees for the solicitor was made in all the cases.

D. M. Scales, for the motion.

George Gillham, contra.

HAMMOND, J. Until the practice of this court conforms more closely to the equity rules, and the analogies to which equity rule 90 directs us for our government, and is less influenced by the more modern

system erected by legislation for the state courts of equity, to be found in our Tennessee Code, there must be a good deal of forbearance for irregularities like those found in the conduct of these cases. There can be no doubt that a too close adherence to the technicalities of our equity practice, when they are relied on by a kind of *ex post facto* application of them, as in this case, to defeat some unforeseen result, would frequently work injustice because of the fact that there has been, under the influence mentioned, so little regard for them in the progress of these particular cases, and generally by the bar in all cases. The contention here that there can be taxed no solicitor's fee because there has been no replication filed in some of the cases, does not admit of much consideration at the hands of the court when the default is that of the party making the objection. The truth is our state Code has abolished replications in equity, and until recently, when the necessity for them in our federal practice has been emphasized, there has been a general neglect to file them, as by the plaintiffs in these cases. It does not lie with them, therefore, to say that without a replication there can be no "final hearing," and consequently no taxed docket fee.

There are other irregularities of practice relied on to defeat the docket fees in these cases that can be accounted for only by this disregard of our own, and the mistaken application of the state practice. For example, these cases have never, in fact, been set for hearing at all. Our state practice requires the clerk, as soon as answer is filed, to set all cases for hearing on the hearing docket. It has always been so done by the clerk of this court; and it may be doubted if any equity case in the court has ever been properly set for hearing according to the practice that should govern us. 2 Daniell, Ch. Pr. (5th Ed.) 964–971. The cases go to the trial docket, under the practice grown up in the clerk's office, even before answer filed, and are called term after term, and whatever is to be done is accomplished without the least regard to the technical practice.

Again, our state practice, by statutory regulation, permits a plaintiff until final decree to dismiss his bill at will, and before the clerk. Not so here. The right of the plaintiff to dismiss is not an unqualified one, and it can never be properly done in the clerk's office, except, perhaps, by force of equity rules 2 and 5 in the special case provided for in equity rule 66; and it is only, perhaps, by the court, in term-time, that any dismissal can be made, it not being one of those interlocutory steps authorized to be done in vacation or at rule-days for the preparation of a cause, but essentially a final disposition of it. Equity Rules, Nos. 1–6; 1 Daniell, Ch. Pr. 790–812; *Stevens* v. *The Railroads*, 4 FED. REP. 97.

Yet the state practice was attempted to be followed in these cases, and we have in one of them the anomaly of an attempted dismissal at rules before the clerk, even after an account had been ordered. With this constant tendency to mix state with federal practice, which

prevails in other states as well as this, and which, no doubt, influences legislators, as well as the bar and bench, it is misleading to overlook the tendency in construing statutes or adjudicating matters of practice like this now before us. I shall, therefore, treat these cases as if that were done which the parties intended to be done, namely, as having been dismissed upon the application of the plaintiffs. If proper orders have not been entered by the court to effectuate that result, it may now be done. The case of dismissal after a decree for an account is somewhat peculiar; but there is no doubt that the plaintiff may, either by consent, or without it if the defendant has no special interest to protect, procure an order to dismiss after a decree ordering an account. 1 Daniell, Ch. Pr. 793, 810, 811.

But the mistake the plaintiff makes here is to claim that because on the hearing he procured a decree for an account and for costs he is the prevailing party, and no docket fee can be taxed. That was an interlocutory decree in the sense of the practice in matters of costs, and, whatever may be its effect as to other costs, had nothing to do with the docket fee, which is to be decreed only on a "final hearing." I think, moreover, if the plaintiff dismisses after a decree for account and inquiries, the order of dismissal necessarily revokes the former decree for account and costs, and the defendant is entitled to his full costs, as when the bill is dismissed on application of the plaintiff in other cases; but it is not necessary to decide that in this case, it being clear that the judgment given for costs against the defendant by the decree for the account did not apply to the docket fee. That fee is left to the "final hearing" for allowance and taxation.

We have, then, the simple question presented whether the defendant is entitled to recover a docket fee for his solicitor, to be taxed when the plaintiff takes an order to dismiss his bill in the ordinary way, or "without prejudice." It is a question between party and party, and one arising under the law of costs as applicable to a court of equity, and not one between the attorney and his client, or the attorney and the losing party. Like the fees of the clerk or marshal, those of an attorney or solicitor are payable to him by the party for whom the services are rendered, (his client, in the case of an attorney,) but are taxable, under certain circumstances, as costs against the losing party in favor of the prevailing party at law, and as the court may direct in equity. Rev. St. § 823; *Caldwell* v. *Jackson*, 7 Cranch, 276; *Anon.* 2 Gall. 101; *In re Stover*, 1 Curt. 201; *Lessee* v. *Arbuncle*, Pet. C. C. 233; *In re U. S.* v. *Cigars*, 2 FED. REP. 494.

Of course, not all the charges of the attorney against his client were taxable as costs, but certain special items were, under the general law. In some states, notably Tennessee, this allowance of costs to attorneys never prevailed, mostly for the reason that under the practice the services usually performed by the attorney, for which the charges were taxable, were relegated to the clerk or sheriff. But in other states, as in New York, it was customary to tax attorney's

and solicitor's fees somewhat in the manner which has always prevailed in England. There certain items were taxable as attorney's fees, quite as a matter of course, and others were or were not taxable according to the peculiarities of the case; the whole subject being largely regulated by statute, or the rules and practice of the court.

The rule at law was to tax them in favor of the prevailing party as a matter of right; but in equity, while this was the general rule, the court, in its discretion, governed by well-settled principles of judgment, may refuse costs, tax them against the prevailing party, divide them, enlarge the items of taxation, or otherwise regulate the allowance as it may deem just. *Trustees* v. *Greenough*, 105 U. S. 535; *Lottery Co.* v. *Clark*, 16 FED. REP. 20; *U. S.* v. *Treadwell*, 15 FED. REP. 532; *Wiegand* v. *Copeland*, 14 FED. REP. 118. And it is important to remember that, both at law and in equity, there were *interlocutory* costs and *final* costs. Those that were interlocutory were such as were allowed, taxable, and payable during the progress of the cause from time to time, as different stages were reached; and those that were final were such as were not allowable, taxable, or payable until the case had been finally determined. But in all cases the items were well ascertained, and usually were the subject of specific regulations fixing small sums for particular services of the clerk, attorney, or other officer of the court. Those that were *final* were not necessarily for services performed in and about the ceremony of trial or "final hearing," but were for services performed from the very commencement, all along through the case, and included all costs not strictly taxable as *interlocutory* which were comparatively less, and were limited to those that strictly belonged to the interlocutory proceeding itself.

It is not necessary to go into any more particular explanation of this distinction between interlocutory and final costs, nor those often obscure distinctions pertinent to the general subject, but not kept up under our new system, which grow out of regulations for taxing costs as between party and party simply, or between party and party *as if* between solicitor and client, or the summary taxation statutes designed to control the relation and the fees chargeable between the solicitor and the client, but having no necessary connection between the parties to the suit.

But the practice on the subject of costs as it existed when our judicial system was organized cannot be overlooked in construing our legislation affecting the practice any more than we can ignore it in other matters of more importance, particularly since the equity rules specially refer us for analogies to the old practice in all its departments. 2 Daniell, Ch. Pr. (5th Ed.) 1376, 1378, note 1, 1379, 1395, note 6, 1398, note 4, 1410, note 4, 1434–1452; 2 Mad. Ch. 413–436; 1 Newl. Ch. 393–427; 2 Newl. Ch. 390; Beames, Eq. Costs, (20 Law Library,) 4, 85, 159, 160, 184, 214–230, 256; 2 Bac. Abr. tit. "Costs," (Bouv. Ed.) 183; 2 Tidd, Pr. (3d Amer. Ed.) 945, 976;

2 Jacob's Fisher's Dig. tit. "Costs"; Weeks, Attys. 532; 20 Amer. Law Reg. (N. S.) 263.

The fallacy of the argument made here against taxing the docket fee for the solicitor consists in assuming that it is a kind of *honorarium* for the work gone through with in the ceremony of a trial at the "final hearing," and there is an unnecessary conflict of suggestion as to what amount of ceremony must be had to entitle the solicitor to this fee. It is treated as a sum allowed for a specific thing done, like, for example, the dollar allowed the clerk for issuing a writ. It is not such an allowance at all. The system of allowing small sums for specific work done is kept up as to the clerk, marshal, and commissioners, but that system as to the attorneys is abrogated, and they are allowed a lump sum for all their fees in a case, except, alone, the deposition fee, which, again, is a lump sum for each deposition, irrespective of the work done on it. It is called a "*docket*" fee, and the use of that word indicates that it is not allowed for the work of going through a "final hearing," but for all the service in a case. Too much stress has been put upon the use of the words "final hearing," as a discrimination in the character of the cases in which this docket fee is taxable and those in which it is not; and there has been a misleading adherence to a supposed analogy of construction found in the allowances prescribed for "cases at law" by the same statute.

Again, a too-isolated attention is paid to this section 824 of the Revised Statutes, in considering this docket fee, and too little attention to other parts of the same statute found at sections 823 and 983 of the Revision. Reading the whole statute together, as originally passed, and as it is found in the Revision, in the light of previous legislation and the practice under that legislation, and the law of costs at law, in equity, and in admiralty, as shown by the above-cited authorities, (as it must be read to understand it,) and it is plain that these "docket fees" in civil cases, as well as the deposition fees, are a lump sum substituted for the small "fees" allowed attorneys and solicitors under the old system, chargeable to and collectible from *their clients*, in addition to "such reasonable compensation for their services" as they may charge and receive, (Rev. St. § 823;) and that this lump sum is only taxable as costs against the losing party "*in cases where by law costs are recoverable in favor of the prevailing party.*" Rev. St. § 983. In other words, the whole general law establishing the principles upon which costs are or are not taxable as between party and party is adopted, and this statute only prescribes the items that may be taxed in the bill. And here, now, and in every equity case when the court comes to adjudge costs, it will determine what costs and to which party they are taxable; and this not alone upon two words in one section, but upon the whole statute and the general law which it adopts.

But, upon an implication based upon the use of two indefinite

words that are erroneously supposed to mean, technically, that ceremony of trial in equity which takes place when the issues are made, the proof taken, and the case is heard by the chancellor "upon its merits," we are asked to overthrow a principle in the law of costs, established, as I shall presently show, by a series of statutes, the oldest of which was enacted nearly 500 years ago, namely, that when a plaintiff makes a false clamor in court, or files a bill in chancery, and dismisses it without trial, he shall pay to the defendants *full* costs, including the fees due his attorney. And we are besought to do this when the act of congress itself requires that the costs shall be taxed "in cases where, by law, costs are recoverable in favor of the prevailing party," and only in such cases, and especially mentions the fees due the *attorney* in the same connection with those due the clerk and marshal, and requires them to be taxed by the same words it requires the fees of those officers to be taxed in cases like these. Rev. St. § 983.

Now, no book of practice or accurate writer ever describes the trial of a cause on its merits as the "final hearing." There was "a subpœna to hear judgment" and a "hearing," but it is called "*the hearing*," not a "*final* hearing." 1 Bouv. Dict. tit. "Hearing;" 2 Daniell, Ch. Pr. 967–986. Demurrers are "heard," and pleas are set down for "hearing" or argument, and exceptions to reports are set for "hearing," etc.; but the trial on the merits is "*the* hearing." It may or may not be the *final* hearing, for after it there often come other hearings, such as exceptions to the master's report, often more important and formidable than the other hearings, or on further applications for instructions, etc.; so that, strictly speaking, the "final hearing" is the *last* hearing. At least, it cannot be accurately applied to the trial on bill and answer, or on bill, answer, replication, and proof, and confined to that. But the distinction between *final* costs and *interlocutory* costs was well established, and may well be supposed to have been in the minds of the legislature when dealing with the subject of costs. The former are awarded, not necessarily, nor always properly, though possibly they are generally, by the decree made at the hearing, "upon the bill, answer, replication, proofs, and former proceedings had," as the formula goes, for a decree "on the merits," as it is called at the bar, and in common parlance. The "final" costs may be, and should be, reserved until the very end of the case, which often comes after "the hearing," when the matter of costs is "finally" disposed of by the court. As an illustration of this distinction, the familiar test of a final decree may be referred to, for it is often said that a decree is final which adjudges costs.

It is to be observed that the statute uses the words "*on* final hearing," not "*for* final hearing;" "*on* a trial by jury," not "*for* a trial by jury;" "*when* judgment is rendered without a jury," not *for* a judgment so rendered; and "*when* a cause is discontinued," not *for* the discontinuance. But subsequently the phraseology is changed, and

we have *for* scire facias, *for* each deposition, *for* services rendered in appeal cases, etc. This shows that the docket fee is general, *and the time when it may be taxable* is designed to be expressed as "*on* the final hearing," and not a charge for services then and there rendered. Rev. St. § 824.

Indeed, this act of congress intends only, by such phraseology, to prohibit *interlocutory* costs to be taxed for fees paid to attorneys, solicitors, and proctors, as, but for the statute, they might be. It does not prohibit interlocutory costs to be taxed and paid for services of clerks, marshals, and commissioners, and it is the constant practice to allow them, on continuances, the overruling of demurrers, hearings on the sufficiency of pleas, etc. But as to his attorneys, solicitors, and proctors, the prevailing party must await the *final decree as to costs*—and this is not necessarily that decree made at the hearing on the merits, for often the decree for costs comes long after that—and then take a lump sum for all the services. If his case be at law, and there has been a jury trial, $20; if a judgment without a jury, $10; and if a discontinuance, $5. If his case be in admiralty (except in a special case mentioned in the proviso) or equity, always $20, whenever the case is "finally heard" *as to costs*. There is, by this construction, no distinction between cases at law or in equity as to the rule that only *final* and no *interlocutory* costs shall be allowed for the attorney. They are all alike in respect of this, but for obvious reasons there are graded fees allowed by the statute in law cases, and one sum in equity or admiralty cases, and this because of the comparative differences in the labor of preparation. There could be no reason for allowing a fee of $5 to be taxed when a lawsuit is discontinued, and none when a bill in equity is dismissed; but good reason for allowing $5 in the one case and $20 in the other, if we take into view the mere worth of the service. But when we consider the rules of law which regulate both courts, as old as the law itself, and that section 983 of the Revision adopts those rules in the plainest terms, and construe the whole statute together in the light of the law of costs applicable to the two cases, and remember the excess of professional labor in equity over law cases, the reason of the distinction in amount and the necessity of no distinction in the principle of taxation at once appear. The whole statute then becomes consistent in all things, and aligns itself completely with well-established principles, which are found in the law of costs as the product of a most wise and intelligent system of legislation, as venerable and binding as any known to our jurisprudence.

At common law—that is, the most ancient common law—costs were not known, but the plaintiff who made a false clamor, and either failed to try his case, or, trying it, failed to sustain it, was amerced heavily, and the fine went to the king as a penalty for his invasion of a court of justice. It was the same if he took a nonsuit. 17 Amer. Law Reg. (N. S.) 693, and authorities above cited.

I shall not take space to trace the legislation for courts of law which, from the earliest statutes of Marlbridge (A. D. 1267) and Gloucester, (A. D. 1278,) will be found a complete parallel to the legislation I am about to cite in respect to costs in equity, and which, by constantly increasing severity, sought to discourage false suits by giving *a defendant* full costs against a plaintiff who failed in his action, and was especially severe on one who discontinued his suit, or was nonsuited for his own default without a trial; these costs *to the defendant* taking the place of the former fine to the king. 2 Tidd, Prac. 976 *et seq.;* 2 Bl. Comm. 439; 3 Bl. Comm. 188, 357, 399, 451; 17 Amer. Law Reg. 693.

Mr. Beames, who wrote a little before our equity rules were promulgated of the practice as it was then understood, gives an intelligible account of the general principles on which a court of equity acts in giving or withholding costs; and according to these principles, as I have endeavored to show, we are bound to determine the questions on this motion, for it is now for the court to decide whether these defendants are entitled to have costs, and if so, what costs, taxed as "recoverable by law" in favor of the prevailing party, for sums presumably already paid by them to the clerk, marshal, and solicitor, or for which they are liable to these persons. Rev. St. § 983.

It is within the discretion of the court to give or withhold them on either side, or to give some and withhold others, or to divide them, not arbitrarily, but according to the practice known to courts of equity and found in the authorities on the subject. This author tells us that the statute of 17 Richard II. *c.* 6, (A. D. 1394,) was the very foundation of costs in equity, and it enacts:

"Forasmuch as people be compelled to come before the king's council, or in the chancery, by writs grounded upon untrue suggestions that the chancellor for the time being, presently after that such suggestions *be duly found and proven untrue*, shall have power to ordain and award damages according to his discretion to him which is so troubled unduly, as before is said." Beames, Eq. Costs, 4.

It is noticeable that the very question we have in this case arose on this statute, and Lord COKE gave it as his opinion, citing some decisions in the Year Books, that, on the strength of the words italicized in the above extract, costs were not taxable unless the case *was tried*, and therefore were not recoverable upon dismissal or demurrer. Beames, Ch. Costs, 6, and note; 2 Comyn, Dig. 426, "Costs." Subsequently Lord HARDWICKE refused to recognize the force of this construction, or that the powers of the court were limited by this statute, and claimed that always and without its authority the court, "from conscience and *arbitrio boni viri*, as to satisfaction on one side or other, on account of *vexation*," decreed costs. Id. 8; *Burford* v. *Lenthall*, 2 Atk. 551.

The statute of 15 Henry VI. *c.* 4, recited that "divers persons were

greatly vexed and grieved by writs of *subpœna*," and enacted that "surety be found to satisfy the party so grieved and vexed, for his damages and expenses, if so be that the matter cannot be made good which is contained in the bill." Beames, Ch. Costs, 7. Owing to the construction of the earlier statutes above mentioned, costs were not taxable on dismissal except at 40 shillings, unless by special order for further allowances in particular cases, until the statute of 4 Anne, *c.* 16, § 23, (A. D. 1706,) "for preventing vexatious suits in courts of equity," which enacted "that upon the plaintiff's dismissing his own bill, or the defendant's dismissing the same for want of prosecution, the plaintiff in such suit shall pay to the defendant or defendants his or their *full* costs, to be taxed by a master." Beames, Ch. Costs, 85. This act not applying in terms to a dismissal at the hearing, the plaintiffs, in order to evade the effect of this legislative provision, adopted the plan of setting the case down for hearing on bill and answer, and then having the bill dismissed with 40 shillings costs; whereupon, on April 27, 1748, Lord HARDWICKE made a rule of court which declares "that when any cause shall be brought to a hearing on bill and answer, and such bill be dismissed, this court may and is at liberty to direct and order such dismission to be either with 40 shillings costs, or with costs to be taxed by a master, or without costs, as the court, upon the nature and merits of the case, shall think fit." Beames, Ch. Costs, 86.

This author, in other places above referred to, shows conclusively that everything was done, by legislation and by the practice of the court, to give a defendant *full* costs when the plaintiff dismissed his bill; and this legislation was continued to the latest statutes long after he wrote, as will be seen by reference to the other writers above cited.

Now I cannot think that upon an implication based on what I have endeavored to show was a somewhat loose and untechnical use of two words—"final hearing"—in fixing the *amounts* to be taxed as costs, we are to repeal all this legislation which is a part of that law to which section 983 of the Revised Statutes and equity rule 90 refer us for the principles upon which we are to proceed "where by law costs are recoverable in favor of the prevailing party." It is contrary to all the canons of construction to do this, and is merely sticking in the bark of one phrase used in the statute to the neglect of the rest of it.

A plaintiff, as will appear by the authorities cited, cannot dismiss his bill without a hearing by the court, nor without its order. This is especially so when he asks to dismiss "without prejudice," as was done in some of these cases. And, while it is quite a matter of course to grant the order, it is not absolutely so, and it will not be done where the defendant has acquired the right to object. *Stevens* v. *The Railroads*, 4 FED. REP. 97; *Booth* v. *Leycester*, 1 Keene, 247; S. C. 15 Eng. Ch. 247; 1 Daniell, Ch. Pr. 790. The passing of this order is done on a "hearing," to all intents and purposes, and it is a "final"

hearing in any proper use of that term. The great controversy has been whether such a dismissal, where there is no reservation of a right to sue again by taking the order "without prejudice," is a bar to a second suit. Under the old law it probably was not, but this is not certain; and by a comparatively recent order of court (promulgated A. D. 1852, since our equity rules) it is declared that whenever a party voluntarily dismisses his bill it shall have, without an order to the contrary, all the force and effect of a determination on the merits. This settled the controversy on the subject in a way that is wise and just, whether binding on us or not. *Stevens* v. *The Railroads, supra.* I refer to this to show that, in the state of the law on this point, it is by no means certain that congress, when it used the words "final hearing," did not intend to provide as much for cases dismissed like these as for cases dismissed *in invito* at the hearing.

Until this act of 1853 our own legislation was quite barren on the subject of costs. It is not necessary to go into it at length for that reason. Its general effect is stated in the cases of *The Baltimore*, 8 Wall. 377, 391; *Costs in Civil Cases*, 1 Blatchf. 652; *District Attorney's Fees*, Id. 647; *The Liverpool Packet*, 2 Spr. 37; *Hathaway* v. *Roach*, 2 Wood. & M. 63; *Jerman* v. *Stewart*, 12 FED. REP. 271, and other cases there cited.

The general result was that, except during a short time of temporary statutes making partial regulations, and some statutes applying to special cases, the federal courts were left to follow the state practice in cases at law, and the general equity practice in cases in that court until this act of 1853 was passed. One of these temporary statutes is, however, of great value in support of the views here expressed. Mr. Justice NELSON says that long after it expired it continued, without objection, to govern the taxation of costs, until the act of 1853 was passed. It was, no doubt, the model used in constructing the act of 1853. Its first sections were confined to regulating costs in admiralty cases. The "counselor or attorney" was allowed "the stated fee *for* drawing and exhibiting libel, etc., *in* each cause three dollars; drawing interrogatories three dollars; and all other services *in* any one cause three dollars."

It then proceeded to enact:

"Sec. 4. That there be allowed and taxed in the supreme, circuit, and district courts of the United States, *in favor of the parties obtaining judgments therein*, such compensation for their travel and attendance *and for attorney's and counselor's fees*, except in the district courts of admiralty and maritime jurisdiction, as are allowed in the supreme or superior courts of the respective states." Act 1793, *c.* 20, § 4, (1 St. at Large, 333;) Act 1796, *c.* 11, (Id. 451.)

The act of 1853 was intended, in my judgment, to express precisely what this section of the act of 1793 enacted as to attorney's and counselor's fees, but to fix the amounts in all cases of law, equity, and admiralty, to confine its operation to *final* costs, and exclude any

allowance for attorney's fees on *interlocutory* judgments; and left the principles of taxation to be governed by the law of costs as understood in courts of law, equity, and admiralty, respectively. Act 1853, c. 80, (10 St. 161.)

It must be conceded that the act is, in respect of the fees for attorneys, somewhat obscure, and the decisions have not been uniform. In *Peterson's Ex'rs* v. *Ball*, 1 Cranch, C. C. 571, (A. D. 1809,) when, however, the act of 1796, above referred to, had expired, it was held that where a bill was dismissed after answer filed, a lawyer's fee should be taxed. The court cites a Virginia statute, the effect of which I cannot ascertain. In *Dedekam* v. *Vose*, 3 Blatchf. 77, (S. C. Id. 153,) it was held that the attorney's fee could not be allowed upon *interlocutory* or collateral proceedings, and only upon an actual contestation of the case upon the merits, and that it could not be taxed twice in the same case,—first on final decree against the principal, and afterwards on another decree against the sureties. Nor can it be taxed more than once when a case has been twice heard, as before and after appeal. *Troy Factory* v. *Corning*, 7 Blatchf. 16.

In *Hayford* v. *Griffiths*, 3 Blatchf. 79, an appeal in admiralty was dismissed before the hearing, but on motion of the adverse party, and it was held the docket fee was taxable "on a final disposition of a cause on the calendar," which is precisely the ruling I make in these cases. There was no "hearing" in any sense in which these cases were not heard; certainly not any "final hearing" except in the same sense these cases were finally heard.

In *Goodyear* v. *Osgood*, 13 O. G. 325, it was held that "wherever a final decree is entered by the court in an equity cause, *after replication filed*, for the purposes of taxation of the docket fee this is to be considered as the 'final hearing' referred to in the Revised Statutes, § 824." The cases were dismissed on motion of the complainants after an interlocutory decree in another case settling the rights of the parties. As I understand the case, it supports the ruling made here, since the replications in these cases are, for reasons already stated, considered as filed; and the disposition made of that ruling of Judge SHEPLEY's by the adverse case of *Coy* v. *Perkins*, 13 FED. REP. 111, is not quite satisfactory. It certainly cannot be material what motive influenced the plaintiff to dismiss,—whether because of an interlocutory decree in another case, or for other reasons. If he dismissed voluntarily, as he certainly did in the two cases mentioned in the report of the facts, which were not included in the stipulation as to the case against Davis in which the interlocutory decree was rendered, there was no "final hearing" as those words are interpreted in *Coy* v. *Perkins, supra.*

The construction placed on the opinion in *Goodyear* v. *Osgood, supra*, by *Coy* v. *Perkins, supra*, seems to be that if the plaintiff dismisses because he concludes for himself he cannot succeed, the docket fee is not taxable; but if the court has convinced him by an *interlocutory*

decree in another case—to abide which he is not bound by any stipulation—that he cannot succeed, the docket fee is taxable. But Judge SHEPLEY does not, I think, place his judgment on that ground. In addition to what has been already quoted he says: "In the taxation of costs final hearing is to be considered as the submission of a cause in equity for the determination of the court, so that the case may be finally disposed of upon bill and answer, or bill, answer, and replication, or upon pleadings and proofs, *or otherwise after the case is at issue.*" He evidently regards any dismissal on the plaintiff's application *after issue* as a "final hearing." It illustrates the confusion in which we are involved when we undertake to interpret "final hearing" by the factitious circumstances attending the disposition of the particular case, and when we must inquire into the motives with which a plaintiff is actuated when he makes his motion to dismiss his own case.

The opinion by Mr. Justice CLIFFORD mentioned in the report of *Goodyear* v. *Osgood*, *supra*, and in *Coy* v. *Perkins*, *supra*, was oral, and has never been, the clerk at Boston informs me, reported. We cannot say on what reasoning he ruled, nor precisely the state of the case. It only appears that the bill was dismissed "by agreement of parties, with costs," and he held the docket fee not taxable.

In *The Bay City*, 3 FED. REP. 47, the fee was held taxable on a dismissal in admiralty after proof commenced, but without any judgment by the court. There the accidental circumstance that proof had been heard constituted "a final hearing," but the court cited *Hayford* v. *Griffiths*, *supra*, somewhat approvingly. In *Strafer* v. *Carr*, 6 FED. REP. 466, and in *Huntress* v. *Epsom*, 15 FED. REP. 732, it was held that when there was more than one "trial before a jury" only one docket fee is taxable, because, as was said by Judge SWING, until there is a verdict and judgment the case is not finally disposed of, and it is only on such a disposition that the right to tax this item of costs accrues. In other words, *interlocutory* costs for the attorney's docket fee are not allowed; yet, on the strict letter of the statute, there was "a trial before the jury," even where there was no verdict; but it was held upon the whole statute that one fee only is to be taxed, and this on the final disposition of the case. The learned judge says the fee is not given "in proportion to the labor performed," and it seems to be introducing a very uncertain element of construction into the statute to cast about and see what was done in each case, and the character of the performance, in order to determine whether there was a final hearing or not. It would impose on the taxing officer the necessity of taking proof *aliunde* the record to see how much of a hearing there was, what counsel did, and what the court did, and such other matters of fact as would enable him to determine whether there was a "final hearing;" and in the end, as the adjudicated cases show, there would be great disagreement as to what constituted a "final hearing," and the effect of varying circumstances on the question.

But in *Schmieder* v. *Barney*, 7 FED. REP. 451, *per contra*, it was held that where there was in the same case more than one "trial before a jury" a docket fee was taxable for each trial. In *Osborn* v. *Osborn*, 5 FED. REP. 389, there was no question of costs, but the words "final hearing," as used in the removal acts, were construed not to include an equity case where the evidence was heard and case submitted on questions of fact to a jury, but the jury disagreed. Yet in some of the cases on this statute as to costs this would be held conclusive evidence that there was a "final hearing," although the plaintiff voluntarily dismissed before the court could decree against him. In *The Alert*, 15 FED. REP. 620, on the same construction which I have placed on *Hayford* v. *Griffiths*, *supra*, it was held in a proceeding *in rem*, where the vessel was arrested and the case entered on the docket, but subsequently dismissed on application of the libelant on payment of costs, that this was a "final hearing." It was there said that the ground of the decision is that "granting an order which disposed of the cause was a final hearing," and that whenever an order of the court is necessary to dispose of the case, the hearing thereon is deemed to be a "final hearing." This seems to me to be the only just construction of the statute, and relieves us of that uncertainty before pointed out which arises when we depart from it.

The cases of *Coy* v. *Perkins*, *supra*, and *Yale Lock Co.* v. *Colvin*, 14 FED. REP. 269, are directly opposed to these views, and hold that where the plaintiff voluntarily dismisses his bill this docket fee is not taxable; but I am constrained, for the reasons given, to respectfully dissent from that ruling, and adopt that made in the other cases which have been cited holding the fee taxable.

This conflicting and indecisive attitude of the adjudged cases, and the fact that the question has often troubled the taxing officers of this court, induced me to take the first occasion when it has been presented here for judicial decision to give the subject a careful investigation, and this must be my apology for the undue length of this opinion.

Nothing less than a conviction, founded on thorough consideration, would justify my judicial judgment when it dissents from any of my brethren who have adjudicated the question.

Overrule the motion.

GAINES *v.* CITY OF NEW ORLEANS.[1]

(Circuit Court, E. D. Louisiana. May 3, 1883.)

1. EQUITY JURISDICTION.
   A bill for a discovery lies, even when the action to be supported sounds in tort.
2. SAME—ACCOUNTING—RENTS AND PROFITS OF REAL ESTATE.
   In a suit for an accounting as to the rents and profits of real property for a period of 45 years, which must be taken according to the laws of Louisiana, and wherein the defendant must be charged with the rents and profits which have been, or ought to have been, annually received, and credited with the yearly expenditures for reclamations, improvements, and taxes; and when such an account has reference to hundreds of lots of ground,—it is of a most complex and involved character, which could not be dealt with upon a trial at law at *nisi prius*, and the complexity of the account is, therefore, a ground of equity jurisprudence.
3. SAME.
   In a case where the complainant has recovered judgment against several hundred actual tenants for rents and profits for varying portions of a long period, and those tenants are insolvent, and the defendant is the warrantor of all those tenants, and whatever they owe the complainant the defendant owes to them; and when the defendant is not only a warrantor, but a warrantor in bad faith, who has enriched herself by purchasing in bad faith the complainant's property and selling it at a large profit,—the complainant, having no remedy at law upon this warranty for want of privity, has a right of action in equity.
   Riddle v. *Mandeville*, 5 Cranch, 322.
4. SAME.
   Equity will not allow a party, ultimately liable, to keep, for his own advantage, an intermediate and insolvent party in possession, who is, in return, responsible to the lawful owner, and thereby enrich himself out of the property of that owner thus dispossessed, and escape liability to him for want of a mode of action.
5. RENTS AND PROFITS.
   According to all the authorities, both under the common law and the law of Louisiana, a suit for rents and profits could not have been brought until the complainant had recovered possession.
   Gaines v. *New Orleans*, 15 Wall. 633.
6. EJECTMENT—TRUST.
   In an ejectment bill against a party holding by an adverse title, there could be no trust raised up as to the price received by him in case of sale.
7. POSSESSOR IN BAD FAITH.
   The possessor in bad faith is bound to surrender the thing immediately; and the seller and warrantor, who took and conveyed in bad faith, is bound forthwith to restore the price to his vendee, and to acquit, *i. e.*, discharge, for him his liability to the owner for fruits, without suit or condemnation.
8. SAME.
   He who, with a motive to deprive another of that which he knows is justly that other's, employs the process and machinery of the courts, is under obligation to satisfy all damages which that other thereby suffers. The damages springing from the legitimate exercise of legal rights, even when there is an absence of malice, and there is good faith, must, according to the settled law of Louisiana, at least place the injured party in the situation in which he would have been if the disturbance had not taken place.
9. WARRANTY AND WARRANTOR.
   The warrantor is, by the settled jurisprudence of Louisiana, the real defendant. The judgment is binding upon the warrantor if he has been called in warranty, or he is apprised of suit having been brought.

[1] Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

10. SAME—BAD FAITH.

Where a party had, in bad faith, entered upon the property of another and for an enormous price ($500,000) sold and conveyed it with warranty, and to avoid his liability as vendor and warrantor, *i. e.*, to escape being compelled to return to his vendee the price, and repay the fruits which the evicted vendee would be required to pay to the owner, in bad faith, hinders the restitution of the land and its fruits to the owner, and keeps the owner from recovering possession for a period of 50 years, the owner can recover for the rents and profits from the party hindering as a constructive possessor.

11. RENTS AND PROFITS.

In ascertaining the rents and profits of real estate, where the disseizin and possession have been in bad faith, the account must include not only the rents, revenues, and values for use actually received, but also those which the evidence shows would have been received with ordinary good management. Since the law requires the court in such a case to decide from evidence extrinsic to the actual receipts, satisfactory evidence may be found in the rents for the very period in question actually derived from numerous other lots, adjacent, similarly situated, and no better capacitated, and from ground rents during and for the same period.

Pontchartrain R. R. v. *Carrollton R. R.* 11 La. Ann. 258, 259.

McGary v. *City of Lafayette*, 12 Rob. (La.) 668; 4 La. Ann. 440.

12. SAME.

The burden which bad faith places upon the defendant, according to the civil law and the jurisprudence of Louisiana, while it should lead to the assessment of no damages or compensation beyond those actually suffered, requires the court to adopt conclusions fully warranted by evidence, though, through the fault of the defendant, it be derived in part from the rents and profits of other property adjacent and similarly situated, and no better capacitated.

13. SAME.

An account for rents and profits should be taken and stated as follows: The rent or income should be ascertained for each year separately, and upon the amount so ascertained for each year interest should be computed down to the time when the account closes, so that there may be interest upon each yearly sum falling due, but no interest upon interest.

Gaines v. *New Orleans*, 15 Wall. 634.

Wm. Reed Mills and *Alfred Goldthwaite*, for complainant.

J. R. Beckwith and *E. H. Farrar*, for defendant.

BILLINGS, J. This cause is before me on a submission for a final decree upon bill, answer, replication, exhibits, and depositions, and upon exceptions to the report of the master. There can be no doubt but that this cause is one over which a court of equity must take jurisdiction. It is an incident, and, in its nature, a supplemental proceeding, to a litigation as to the heirship and title of the complainant to certain real property, which has been conducted in this court between the parties hereto for upwards of 40 years, and always upon the equity side of the court. It is a suit for a discovery as to the means which have been employed by the defendant throughout this long period to prevent and hinder the complainant from recovering possession of this real property. See Comyn, Dig. "Chancery 3 B 1," where it is laid down that a bill for discovery lies even when the action to be supported sounds in tort. It is a suit for an accounting as to rents and profits of this real property for the period of 45 years, which must be taken according to the laws of Louisiana, and in which, therefore, the defendant must be charged with the

rents and profits which have been or ought to have been annually received and credited with the yearly expenditures for reclamation, improvements, and taxes, and that, too, with reference to hundreds of lots of ground. It is an account, the correct statement of which by the master occupies 300 pages, and upon which the record shows he has been occupied almost three years. It is, therefore, an account of a most complicated and ramified character, which could not be dealt with upon a trial at law at *nisi prius*.

The fact that the constitution of the United States guaranties to all suitors in common-law cases, where more than $20 is involved, a trial by jury, should insure precision on the part of courts in discriminating as to the proper character of causes, but cannot change the answer to the question as to whether a cause is of equitable cognizance. That must depend upon whether it be such a cause as the English court of chancery would have taken cognizance of at the time of the adoption of the constitution of the United States.

The case of *Root* v. *Ry. Co.* 105 U. S. 189, relied on by defendant, by no means excludes this case from the equity courts. On the contrary, while it holds that where there is no element of trust, and where there are no other special circumstances which would authorize jurisdiction in equity, an action for an account is an action at law; it adds the express reservation (page 216) that "an equity may arise out of, and inhere in, *the nature of the account itself*, if it render a remedy in a legal tribunal *difficult*, inadequate, and incomplete."

In *Hipp* v. *Babin*, 19 How. 271, there is the same exception made. That was a suit for a naked accounting as to rents and profits. There were no equity features. The court in declining jurisdiction (page 279) says: "To authorize jurisdiction it must appear that the courts of law could not give a plain, adequate, and complete remedy;" and that that case did not show that justice could be administered with less expense and vexation in a court of equity than in a court of law."

In *Ex parte Bax*, 2 Ves. Sr. 388, Lord HARDWICKE said:

"In an action at law an account is to be taken by auditors. Indeed, where the auditors have taken the account, and on charging and discharging the items issues may be joined, and so many issues then may be tried, actions at law, therefore, for accounts are so few because so long time is required."

In *O'Connor* v. *Spaight*, 1 Schoales & L. 309, Lord REDESDALE said, (this was an action for an account by a landlord against a tenant for rent:)

"The ground on which I think this is a proper case for equity is that the account has become so complicated that a court of law would be incompetent to examine it upon a trial at *nisi prius* with all neccessary accuracy. * * * This is a principle on which courts of equity constantly act by taking cognizance of matters which, though cognizable by courts of law, are yet so involved with a complex account that it cannot properly be taken at law."

In *Corporation of Carlisle* v. *Wilson*, 13 Ves. Jr. 278, the lord chancellor (ERSKINE) says:

"The principles upon which courts of equity originally entertained suits for an account when a party had a legal title, is that, though he might support a suit at law, a court of law either cannot give a remedy, or cannot give so complete a remedy as a court of equity."

In *Weymouth* v. *Boyer*, 1 Ves. Jr. 424, Mr. Justice BULLER, sitting for the chancellor, (Lord THURLOW,) says:

"We have the authority of Lord HARDWICKE that if a case was doubtful, *or the remedy at law difficult*, he would not pronounce against the equity jurisdiction. The same principle has been laid down by Lord BATHURST."

In *Fowle* v. *Lawrason's Ex'r*, 5 Pet. 495, the supreme court says:

"In all cases in which an action of account would be the proper remedy at law, the jurisdiction of a court of equity is undoubted. In transactions not of the peculiar character of those in this case, *great complexity* ought to exist to give jurisdiction."

In *Barber* v. *Barber*, 21 How. 591, the court says:

"It is not enough that a court of law also has jurisdiction; the remedy at law must be as practicable and efficacious to the ends of justice and its prompt administration to exclude."

In *Mitchell* v. *Great Works Manuf'g Co.* 2 Story, 653, Justice STORY, overruling a demurrer to a bill for an account, says: "Considering the complications and changes of interest, the claims cannot be adequately examined except in a court of equity."

In *Nelson* v. *Allen*, 1 Yerg. 372, the court say:

"It is contended by the defendants that, as the plaintiff's title is a pure legal title, he has a remedy at law for the mesne profits, and that, if his bill had been demurred to, it would have been dismissed. This position is wholly gratuitous, unsupported either upon principle or authority. It has been overlooked by them that courts of equity have concurrent jurisdiction with courts of law in cases of account."

See, also, Judge WHYTE's review of the English cases at page 373.

"So there shall be an account in equity for mesne profits." Comyn, Dig. "Chancery 2 A 1." "But not till possession has been recovered, as trespass will not lie at law for them till then." Comyn, Dig. "Chancery 2 A 2."

"Equity will decree an account of rents and profits whenever the account is intricate and complicated, and therefore not easily adjusted at law. And this holds not only where the matters grow out of a privity of contract as between landlord and tenant, but in many cases of adverse and conflicting claims." Holc. Eq. 85. See, also, 1 Mad. Ch. 868; Cooper, Eq. Pl. 134; *Ludlow* v. *Simond*, 2 Caines' Cas. 40, per THOMPSON, J.; *Knotts* v. *Tarver*, 8 Ala. 743; and *Printup* v. *Mitchell*, 17 Ga. 558.

From an early date equity decreed an account of mesne profits when there were particular circumstances which involve an equity.

By the lord keeper, in *Tilly* v. *Bridges*, Prec. Ch. 252. This exception includes all cases which involve an equity which cannot be made available at law. 1 Fonbl. Eq. marg. pp. 14 and 15, and note, (4th Am. Ed. by Laussat.) If the recovery of the demand had been unconscientiously obstructed, that of itself constituted an equity. *Curtis* v. *Curtis*, 2 Brown, Ch. 633, per Sir LLOYD KENYON, afterwards Chief Justice and Lord KENYON.

The *gravamen* of the bill of complaint is that the defendant, by her direct efforts, persisted in *mala fide*, has kept the complainant out of possession for 47 years, and until any remedy by an account at law is practically impossible. This allegation alone, according to the principle laid down in *Pulteney* v. *Warren*, 6 Ves. 73, would give jurisdiction.

But there is another distinct ground of equity jurisdiction here. The complainant has recovered judgment against several hundred actual tenants for rents and profits for varying portions of this long period. These tenants are insolvent. The defendant in this action is the warrantor of all those tenants, and whatever they owe the complainant the defendant owes to them. The defendant is not only a warrantor, but she is a warrantor who has enriched herself by purchasing in bad faith the complainant's property and selling it at a profit of $500,000. This sum she has retained, and has had the use of since the year 1837. The complainant has no remedy at law upon this warranty from want of privity. Equity, therefore, gives her a right of action. This case is, in principle, the case of *Riddle* v. *Mandeville*, 5 Cranch, 322, where "an indorser of a promissory note, who had been adjudged to have no remedy at law against a remote indorser, was held to be entitled to maintain a suit in equity against him, on the ground that the defendant, as the original indorser of the note, was ultimately responsible for it, and that equity would decree the payment to be made immediately, by the person ultimately responsible, to the person actually entitled to receive the money." Page 329.

It is but another application of the principle laid down by Mr. Story in his Equity Jurisprudence, § 687, that where an owner and lessor would have no action at law against an under-tenant upon his covenant for rent, still, if the original tenant was insolvent, equity would give the owner a direct action against the under-tenant. The reason assigned by Mr. Story is that the under-tenant should not be permitted to enjoy the profits of possession without accounting to the original lessor, because, if the original lessee had paid, he would have had a remedy over against the under-tenant.

It is but another application of the well-settled principle recognized in the familiar case put by Chief Justice MARSHALL, Id. 5 Cranch, 330, of a right of action by a creditor of an estate against the legatees of his debtor. "If," says Chief Justice MARSHALL, "doubts of his right to sue in chancery could be entertained while the executor was solv-

ent, none can exist after he has become insolvent. Yet the creditor would have no legal claim on the legatees, and could maintain no action at law against them. The right of the executor, however, may in a court of equity be asserted by the creditor, and as the legatees would be ultimately responsible for his debt, equity will make them immediately responsible.

The principle here to be invoked, and which is controlling, is that equity will not allow a party ultimately liable, for his own advantage, to keep the owner out of possession, and an intermediate and insolvent party in possession, who is, in turn, responsible to the lawful owner, and thereby to enrich himself out of the property of that owner, thus possessed, and escape liability to him for want of a mode of action.

This principle is laid down in broader terms by Lord Justice TURNER in the case of the *Emperor of Austria* v. *Day & Kossuth*, 3 De G., F. & J. (64 Eng. Ch.) 217, thus:

"The highest authority upon the jurisdiction of this court, in enumerating the cases to which the jurisdiction of this court extends, mentions cases of this class where the principles of law by which the ordinary courts are guided give no right, but upon principles of universal justice the judicial power is necessary and the positive law is silent."

The conclusion, therefore, is unavoidable that this suit is properly brought as a suit in equity:

(1) Because, as a bill for discovery of the participation of the defendant in, and her advantage from, the provoking and maintaining a litigation which, commenced in bad faith, has, upon various pretexts, been made to keep the complainant out of the enjoyment of a large inheritance for 47 years; and,

(2) Because, whether the bill of complaint be viewed as an incident to a litigation which has lasted in a court of equity for half a century, calling for an account for rents and profits for that whole period, as to a vast number of separate lots, and calling for a distinct and detailed statement of account for each lot, under a system of law by which, on the one hand, the annual profits or value for use, and on the other hand the yearly disbursements for ameliorations and taxes, must be ascertained and stated, and where it is made to appear that this exhaustive complexity is altogether due to the hindrances which have been interposed by the defendant; or whether the bill of complaint be viewed as leveled at a defendant who, under an obligation to indemnify a possessor in case of eviction, and for the purpose of retaining an enormous price unjustly obtained, and avoiding a liability for fruits which must be rendered to the real owner upon her recovery of possession, has, directly as well as through that possessor, by all manner of legal artifices, in bad faith, kept that owner out of possession of her own, that possessor having no means wherewith to respond to the owner when evicted and adjudged to deliver up the property with its fruits,—whether the bill of

complaint is viewed with reference to either of the distinct grounds which it presents for equitable jurisdiction,—*a fortiori*, if it be viewed with reference to all,—it states a case over which a court of equity has undoubted cognizance.

As to the cause upon the bill, amended bill, answer, pleas, and proofs. The averments of the bill which it is necessary to consider are as follows: That the complainant was the legitimate daughter of Daniel Clark, and by his last will and testament (will of 1813) became his universal legatee and inherited the property known as the Blanc tract, which is set out in the bill by metes and bounds; that in the year 1834 the First Municipality, a corporation whose property and liabilities were, by the amended charters, transmitted to the present city of New Orleans, fraudulently obtained possession under a pretended title of the said Blanc tract, and in the year 1837 divided it into squares and lots, and for a price exceeding $400,000 conveyed it to a multiplicity of grantees, who, by mesne conveyances, granted in parcels and subdivisions said tract to tenants, who, as well as the original and intermediate grantees, took in bad faith. The bill further avers an eviction and recovery by the complainant against these tenants for the entire tract, and for fruits for portions of the time of disseizin; their insolvency; that the defendant is a warrantor of all said tenants; was notified, and, in fact, made the defenses in the suits terminating in the judgments for eviction and for fruits; that a separate suit for a portion of this tract was commenced and maintained against the defendant, in which all of the facts and propositions of law relating to complainant's title and the liability and wrong-doing of the defendant were judicially determined; that, in spite of the requests of the tenants to surrender to the complainant, the defendant compelled them by threats to allow her to continue the defenses; that, as a final resort, when the rights of the complainant had been, after 35 years of litigation, fully established by the probate of the spoliated will of Daniel Clark, by the supreme court of this state, and by the complete establishment of the rights of the complainant to this property, as against the defendant, by decrees between these parties by the supreme court of the United States, the defendant, in the year 1867, caused a suit to be instituted for the pretended purpose of revoking the probate of the will of Daniel Clark, and thereby delayed and hindered the complainant's recovery for a further period of 10 years; that all this delay and hindrance has been caused by the defendant alone for the purpose of enriching herself by thereby saving herself from her ultimate liability upon her warranty for the return of the price and for fruits and revenues; and upon these averments the complainant demands judgment against the defendant for the rents which were received, and which ought to have been received, and which the complainant would have received but for the alleged long-continued and enormous wrong of the defendant.

The defenses contained in the answer of the defendant are, in substance, a denial of the bill, as well as (1) plea of prescription of one, two, and three years; (2) good faith of the defendant; (3) reduction of amount alleged by the bill to have been received for the property at public auction; (4) collusion in the case of *Gaines* v. *Hennen;* (5) denial of insolvency of the tenants; (6) plea that the judgment in the case of *Gaines* v. *City of New Orleans* is such an adjudication as precludes complainant from bringing this suit; and (7) irregular and fraudulent character of some of the judgments in the Agnelly and Monsseaux, *i. e.* the possessory, suits.

I will consider these defenses *seriatim:*

(1) Prescription. This is a suit which, according to all authorities, both under the common law and the law of Louisiana, could not have been brought until the complainant had recovered possession. *Gaines* v. *City of New Orleans,* 15 Wall. 633. Her judgments in the Agnelly and Monsseaux cases, wherein she recovered judgment for possession and for partial fruits, were rendered May 7, 1877, and therefore did not become final until May 3, 1879. This present suit was filed August 7, 1879. All ground, even for discussion as to prescription, is wanting.

(2) Good faith of the defendant. This issue has been absolutely and finally settled adversely to the city of New Orleans, in *Gaines* v. *City of New Orleans,* 6 Wall. 642, and 15 Wall. 633.

(3) As to the amount of price received from the sale of the Blanc tract at the public auction in 1837. The report of the master and the adjudication shows the aggregate amount derived from this sale to have been $482,525, besides $86,405, the amount of price of adjudication of certain lots for which no evidence of deeds of sale appears. Master's Report, p. 24.

(4) As to any alleged collusion between the parties in the case of *Gaines* v. *Hennen,* there is not a scintilla of evidence in the record in support of this averment; and it becomes of little moment except as bearing upon the question of good faith of the defendant. This has, as has been observed before, been settled, and is no longer an open question.

(5) The matter of the insolvency of the tenants appears by the testimony of Florville Foy and Jules Vienne.

(6) Plea that the judgment in the case of *Gaines* v. *City of New Orleans* is such an adjudication as precludes the complainant from bringing this suit. The suit here referred to is known in this record as suit No. 2,695. It was an ejectment suit, conducted on the equity side of this court as a suit in part for discovery. It was filed originally with reference to the whole Blanc tract. The defendant's answer contained a disclaimer as to any title or possession of the tract except that square upon which was situated the draining machine and some other small pieces. The answer disclosed the names of the occupants who were alleged to be in possession of the rest of the tract.

Upon the coming in of defendant's disclaimer the complainant took no further proceedings as to the portion of the tract covered by it, and the cause proceeded and the judgment was with reference to the portion as to which possession was not disclaimed. There was no judgment upon the disclaimer. In fact no issue was joined upon it. The judgment has precisely the same scope and effect as if the bill, as originally filed, had sought a discovery and recovery of property and fruits as to the square occupied by the drainage machine alone, and the other squares not included in the disclaimer. Indeed, after the disclaimer it became necessary that the possessory actions against the occupants should be commenced and terminated before this present action would lie. An exception was made after the cause had come back from the supreme court and was before the court upon the master's report, which presented the question whether the complainant could treat the city as a trustee for the price received by her for the Blanc tract. The question was solved by the court declaring that in an ejectment bill against a party holding by an adverse title there could be no trust raised up as to the price received, in case of sale of a portion; *i. e.*, that the whole aim of the bill was inconsistent with the claim thus urged by the exception. This ruling and decree can by no construction be made to be adverse to, or even relate to, the claim presented here. This claim is not only not inconsistent with the ejectment suit, but follows and could only follow as a consequence from that suit and the recovery in the possessory suits. The revenues upon which the master has reported are those derived or derivable from lands not included in the suit No. 2,695, after the disclaimer and not embraced in the judgment.

(7) That some of the judgments against the tenants (in the Agnelly and Monsseaux suits) were irregular and fraudulent. The evidence which seems to be relied upon is that in some of the instances, in which judgments *pro confesso* were entered, the subpœnas are not in the records. This by no means overcomes the *prima facie* case made by the judgment itself, as it cannot be presumed the court would have rendered it without proof of service of process. I do not find that the special defenses are in any respect sustained.

The exceptions to the report of the master are for the most part treated and disposed of in the subsequent portions of the opinion. As to those not there discussed which have been filed by the defendant:

(1) As to the order of reference. I take it, it is not to be disputed that the court may order a reference of any part of an equity cause, whenever, in its opinion, the ends of justice require it, and the matter referred can be considered by the master consistently with the rules of pleading and evidence. This order was made by the court in anticipation of the long time necessary to take and state this intricate and prolonged account, and with the purpose of putting into force the condition and stipulation upon which the judgment

against the defendant, taken *pro confesso*, had been vacated, viz.: To speed a cause which sought to enforce a right to an inheritance, the contest as to which had been prolonged far beyond two average human lives, and with respect to which the controlling principles had been settled never to be shaken. The thing as to which the account was directed to be taken was specifically defined, and the rules upon which it was to be taken were clearly set out in the order of reference. The only question worthy of any consideration, with reference to such an order, would be whether it was made at a point in the litigation, when a reference of the matter committed to the master could be had without prejudice to the rights of the litigants. The demurrer to the whole bill had been overruled, after a very full argument, and the court had announced its opinion to the effect that that portion of the bill, and that alone, was good by which the complainant sought to recover from the defendant the rents which she might and would have derived from that part of the Blanc tract from which she had been kept out of possession by the devices of the defendant, through her warrantees who occupied. Leave, accordingly, was given to the defendant to still demur to the rest of the bill, and a reference was directed to ascertain the rents and profits which the complainant would have derived had she been allowed to remain in undisturbed possession. See Decree, March 27, 1880. This inquiry was just as capable of being conducted at that point in the progress of the cause as after a decree upon the evidence. The complainant, in acting upon the order, incurred the risk of the costs of the reference, in case she should obtain no decree upon the evidence when the cause should have been finally submitted. The defendant was in no respect prejudiced, and was deprived of nothing but the opportunity for causing still further delay.

(2) As to the exception that the master has not reported upon certain questions. Nothing was referred to him except to take and state the account of rents and profits as to the tract of land known as the Blanc tract,—both those realized and those which might have been acquired with ordinary good management.

(3) As to the exception that, in some respects, the master has not correctly located the tract. The court finds that the location adopted by the master is confirmed by the contemporaneous maps offered as exhibits in this cause.

(4) As to the exception that the master has carried on the charges for rent after the judgments of eviction. This exception is founded on a misapprehension. The master's report shows that he charges the defendant with rents only up to the date of eviction, under the Agnelly and Monsseaux judgments, although he has properly continued the allowance of interest upon the rent dues, or amounts of rents, till judgment. The other exceptions to the master's report on the part of defendant have been considered in the opinion and are overruled. As to the exception to the master's report on the part of the

complainant, it is allowed to the extent and for the reasons set forth in the opinion. The additional exception as to the property conveyed to McDonogh, and by him bequeathed to the city of Baltimore, is also founded on a misapprehension. The account is brought down only to 1848, the date of the conveyance from the defendant to McDonogh.

The question remains whether the complainant has substantiated her bill, and, by the proofs, made such a case as to entitle her to a recovery. The complainant's title—that is, her capacity to take; her heirship; her legitimacy; the will, and her right to inherit under it; the entry into possession of this Blanc tract by the defendant; that the defendant in bad faith took her title and sold the property and received the price, and in all her relations to said property is to be deemed a person dealing in bad faith; that complainant has not renounced her title; and the legal identity of the First Municipality and the city of New Orleans, the defendant,—all these facts and issues have been settled beyond question by the supreme court of the United States by a solemn judgment between these parties. See record in suit, *Gaines* v. *City of New Orleans*, No. 2695 of docket of this court, and the case as reported, 6 Wall. 716 and 15 Wall. 624.

Under the civil law and the textual provisions of our Code, the seller, even in good faith, in case of eviction, is bound (1) for a restitution of the price; (2) for a restitution of all fruits and revenues, which the vendee is obliged to restore to the owner; (3) for the costs; and (4) for all damages which the vendor has suffered, besides the price paid. Civil Code, arts. 2506, 2507, 2510; *Morris* v. *Abat*, 9 La. 557; and *Downes* v. *Scott*, 3 La. Ann. 278.

The possessor in bad faith is bound to surrender the thing immediately, and the seller and warrantor, who took and conveyed in bad faith, is bound forthwith to restore the price to his vendee and to acquit, *i. e.*, discharge, for him his liability to the owner without suit or condemnation. He is in law a usurper, and liable for his successors. Pothier, Cont. of Sale, No. 127.

The complainant's title being incontrovertibly established, as well as the *mala fides* of the defendant, the simple inquiry is, in what manner and to what extent did the defendent delay or hinder restitution? for any delay, much more, any hindrance, was a fault.

The testimony shows:

That in 1836 this complainant first commenced her judicial demands against the First Municipality, in whose place the defendant stands, for this property; that six times she has been compelled to go before the supreme court of the United States, upon an appeal or writ of error, in the prosecution of her efforts to obtain restitution, mediately or immediately, from the defendant; that, prior to the year 1855, that tribunal could give no relief, though intimating that they were impressed with the equity of her cause, because she claimed property situated in the state of Louisiana, under a will not probated in that state, and from a testator whose will was declared by the probate courts of that state to be a different instrument, and one which excluded the

complainant; that thereupon, in 1855, complainant succeeded in obtaining the recognition of the genuine last will and testament of her father from the proper tribunal of this state, and in 1860 her right to inherit and recover under that will was authoritatively admitted and decreed by the supreme court of the United States, in the case of *Gaines* v. *Hennen*, 24 How. 615; that, in that case, not only was every point established which was material or requisite to entitle the complainant to vindicate her title to this entire tract of land, and to recover against this defendant, but the court emphasized its decision by the expression of the hope that opposition to rights so clear and, even then, so unduly resisted, would thereafter cease; that this defendant, nevertheless, continued her opposition by a defense to the suit of the complainant against the defendant, in which cause, in 1866, the propositions of law, and the conclusions as to the facts upon which the *Case of Hennen* had been decided, were reiterated by the United States supreme court with this severe rebuke to the defendant: "It was supposed after the decision in *Gaines* v. *Hennen* that the litigation, which had been conducted in one form or another for over 30 years by the complainant to vindicate her rights in the estate of her father, was ended; but this reasonable expectation has not been realized, for other causes, involving the same issues and pleadings, and upon the same evidence, are now pending before this court." See *Gaines* v. *City of New Orleans*, 6 Wall. 716. That the defendant, in the year 1867, joined in the institution and prosecution of a suit known as the Fuentes suit, in which it was attempted to revoke the decree by which the will of 1813, upon which the complainant's rights rested, had been probated; that upon the suggestion by the defendant of the pendency of this Fuentes suit, the circuit court of the United States for this district ordered a stay of proceedings in the causes known as the "Agnelly and Monsseaux cases," which had been brought in that court by the complainant against several hundred of actual tenants of this Blanc tract, who were intermediate warrantees of the defendant, to recover possession and fruits; that these possessory suits were thus made to pause till the final decree in the Fuentes case, whereby, in May, 1877, the prayer to revoke the probate of the will of 1813 was rejected; that the Fuentes suit, of itself, hindered the complainant in obtaining restitution 8 or 10 years; that, shortly after the decision of the supreme court of the United States in *Gaines* v. *City of New Orleans*, numerous parties, tenants upon this Blanc tract, under titles emanating from the defendant, united in a petition addressed to her, in substance, asking that the defendant should acquiesce in the demand of the complainant as the rightful owner, make restitution, and end a useless and already decided contest; but that the defendant refused to comply with this petition, and, through her counsel and attorney, entered upon and virtually conducted the defense against the demand of the complainant for possession and for the fruits of this tract, pending in the Agnelly and Monsseaux cases; that complainant, in May, 1877, recovered judgments for possession and for partial rents for portions of the time of her dispossession, which judgments, there being no appeal, became final in May, 1879; that the insolvency of the tenants in the Agnelly and Monsseaux case is established, and that the former holders of titles derived from the defendant, former occupiers of this tract, are either insolvent or dead, without representation, or cannot be found; that in August, 1879, this suit was commenced; that the answer of the defendant herein, among other defenses, denies all title on the part of the complainant to the Blanc tract; denies that the will of Daniel Clark, of 1813, is valid or operative, and the capacity of the complainant to take under it, and her heirship; avers the complete good faith of the defendant; in short, with a temerity amounting to hardihood, presents and urges, as if new and undecided, all the issues which had been for so many years controverted between the complainant and defendant, and which were decided adversely to the defendant by the supreme

court of the United States in 1860, emphatically reaffirmed adversely to the defendant in her own case in 1867, and decided and practically enforced against the numerous defendants by final judgments in the Agnelly and Monsseaux cases, who were all warranties of the defendant, who had notice and defended, which, by operation of law, rendered these last decrees also judgments against the defendant herself.

This recital, which is but a summarization of the proceedings and adjudications disclosed by the records in the various causes which constitute the litigation between these parties,—this unabating and defiant resistance to rights decreed from the beginning to have been known, and thus solemnly and frequently declared,—abundantly establishes that from the year 1837 to the year 1879 the defendant, with her large resources and power, by unconscionable proceedings, has kept the complainant from the possession of this property, with no conceivable object save the exhaustion of complainant and the consequent retention, as against the defendant's vendees, of the $500,000 which the defendant had in the year 1837 received for this property, and the evasion of her just liability for fruits. That this is a fault of an aggravated character, the perpetration of which has been persisted in beyond all precedent, cannot be doubted. Civil Code, arts. 2315, 2324; *Irish* v. *Wright*, 8 Rob. 428, 432; *Smith* v. *Berwick*, 12 Rob. 20, 25. That this wrong has been committed under the guise of judicial proceedings cannot exempt from liability. He who, with a motive to deprive another of that which he knows is justly that other's, employs the process and machinery of the courts, is under obligation to satisfy all damages which that other thereby suffers. The damages springing from the legitimate exercise of legal rights, even when there is an absence of malice, and there is good faith, must at least consist in placing the injured party in the situation in which he would have been if the disturbance had not taken place. *Gray* v. *Lowe*, 11 La. Ann. 392, 393; *Sellick* v. *Kelly*, 11 Rob. 150; *Horn* v. *Bayard*, 11 Rob. 263, 264; *Moore* v. *Withenburg*, 13 La. Ann. 22.

The case of *Dyke* v. *Walker*, 5 La. Ann. 519, illustrates the extent to which damages are allowed for injury effected by litigation, for there plaintiffs were allowed compensation for being compelled to go to protest and for loss of credit. When a party makes use of judicial procedure in bad faith, he is subjected to a peculiar and severer rule in the assessment of damages.

The liability of a corporation, municipal or other, for the wrongful and injurious acts of its officers and agents when acting within the scope of their authority, or when the corporation has ratified their acts, is, under the law of Louisiana, settled. *McGary* v. *City of Lafayette*, 12 Rob. 668; S. C. 4 La. Ann. 440; *Rabassa* v. *Navigation Co.* 5 La. 463, 464; *Wilde* v. *City of New Orleans*, 12 La. Ann. 15; and *Gaines* v. *City of New Orleans*, 6 Wall. 716.

Nor does it diminish the liability of the defendant that she has, in

some instances, conducted and urged these defenses in the capacity of warrantor. The warrantor is, by the settled jurisprudence of this state, the real defendant. *Millaudon* v. *McDonough*, 18 La. 108, and cases there cited. The defendant had the right, which the evidence shows she exercised with a guilty knowledge, to assume the conduct of the Fuentes case and the defense of the Agnelly and Monsseaux cases, as well as with the same knowledge to procrastinate the accession of the complainant to her estate by the defense of causes where she was the sole party defendant; but, by so doing, she incurred the liability which rests upon all parties who employ legal process and effect legal hindrance in bad faith, and against what are ultimately declared to be rights of others, and to their damage; she must make full reparation.

The case of *Chirac* v. *Reinicker*, 11 Wheat. 280, is in point, and illustrates the ground of the defendant's liability. In that case, in an ejectment suit, there had been a recovery of possession against a tenant, and a party, other than the defendant in the reported case, had, with the consent of the plaintiff, been admitted to defend as landlord. The court held that, notwithstanding this, if the defendant had derived profit, and had aided in resisting the title of the plaintiff and his recovery of possession by employing counsel and defending the suit, he also was liable for mesne profits.

"An actual occupation of the premises by the defendants, during the period for which damages are claimed, is unnecessary; it is sufficient if he was interested in and derived profits from the premises during that period." Adams, Eject. marg. p. 383.

The question as to the amount of damages is twofold, resulting from the double character in which the defendant is liable.

If we view the complainant as simply substituted in equity to the rights which the vendees, warrantees, would have had, the amount to be recovered would be determined by what had been recovered in the Agnelly and Monsseaux cases.

The evidence shows the defendant was called in warranty in some of those cases, and was notified in all; that she took upon herself the defense, and through her attorney conducted it. The judgment is binding upon the warrantor if he has been called in warranty, or he is apprised of suit having been brought. Civil Code, arts. 2517, 2518, 2519; Code of Practice, arts. 388, 714. The cases of *Vienne* v. *Harris*, 14 La. Ann. 382, and *Late* v. *Armorer*, Id. 826, establish that judgment against the vendee is, *prima facie*, sufficient to authorize judgment against vendor and warrantor, and that when the latter has had notice, though he did not appear, the judgment is conclusive against him. See, also, *Johnson* v. *Weld*, 8 La. Ann. 129, and *Williams* v. *Leblanc*, 14 La. Ann. 757.

The records in the Agnelly and Monsseaux cases were not only properly introduced as evidence in this case, even without the verification afresh by the witnesses of their testimony, which was also had,

but the defendant, having had notice, and having appeared, is concluded by the judgments therein rendered both as to the eviction and as to the fruits.

As to the rule to be followed in ascertaining the rents and profits, the court, in the order of reference, directed the master to take account, not only of the rents, revenues, and values for use actually received, but also of those which the evidence showed would have been received with ordinary good management. In the Agnelly and Monsseaux causes, in response to a request of the masters for instructions upon this point, the court ruled as follows:

"The defendants therefore must, in accordance with the very textual provisions of the law, restore all products of the property which they have possessed. They are also liable for the products which they ought to have realized with ordinary good management. The possessor in bad faith is not held to the highest possible degree of skill and care, but he must have administered as a prudent master of a family. *Winter* v. *Zacharie*, 6 Robinson, 467. This was a cause in which the defendant had wrongfully possessed a plantation, and he was adjudged not only liable for the fruits which he received, but those which he could have received with ordinary husbandry; and the doctrine is laid down in express terms that the possessor in bad faith must not only restore the fruits received, but also those fruits which, with ordinary good management, he ought to have received. That case was determined in the first instance after a thorough argument, and an elaborate opinion was written. Upon a rehearing the court reiterated their view, and it is the settled law of Louisiana down to the present time.

"This question has been raised in the reports of both masters, whether the principles already enunciated apply to all lands, improved and unimproved. They apply to all lands unimproved as well as improved. The complainant is not entitled to a recovery for the revenues which might, by the remotest possibility, have been received by the possessor; on the other hand, she is entitled to all income, revenues, profits, and value for use or occupation which the evidence establishes she, as owner, would have received or derived whether the possessor has realized them or not, and whether the failure on his part to realize them resulted from his not managing the estate with ordinary prudence, or from the estate remaining unproductive by reason of the title thereto being in dispute on account of a claim of title on the part of the possessor, now adjudged to have been unfounded."

This is the doctrine distinctly laid down by Mr. Justice BRADLEY in *Gaines* v. *Lizardi* and *Gaines* v. *New Orleans*, 1 Woods, 105. This is the settled rule of the civil law—The Partidas, (Moreau & Carlton's Ed.) vol. 2, p. 1109, tit. 14, law 4: "If the possessor held in bad faith and was evicted, he would have been obliged to deliver up the estate, together with all the fruits he had gathered from it, those which he had consumed, and even the rents and fruits which he might have gathered from the estate had he cultivated it, inasmuch as he had no right to possess it and has acted in bad faith."

Precisely this principle was laid down by the circuit court of the United States for the district of Arkansas in *Beebe* v. *Russell*, 19 How. 285, which was an action for fraudulently withholding real estate, and for rents and profits. According to the statement of the supreme court in their opinion, wherein they assign their reasons for

dismissing the appeal as premature, the circuit court ordered "that the master take an account of rents and profits received, or which could and ought to have been received." See this principle expounded in Duranton, vol. 16, p. 307, No. 288; Demolombe, vol. 9, p. 96; and MacEldey's Compendium, No. 154. Says Papinian, lib. 62, §§ 1, 6, ff. de rei vindi: "Generally, when the amount of fruits is being inquired into, we must not consider whether or not the possessor in bad faith has reaped fruits, but whether the complainant (owner) might have reaped fruits if he had been allowed to remain in possession. And this decision is also approved by Julian." (Generaliter autem, quum de fructibus æstimandis quæritur, constat adverti debere, non aumalæ fidei possessor fruitus sit, sed an petitor frui potuerit, si ei possidere licuisset—quan sententian Juliaun quoque probat.) See, also, same author, lib. 64, ff. de rei vind. And Paulus, lib. 33, eodem titulo, says: "Not only the fruits that have been gathered, but also those that might have been gathered, must be accounted for." (Fructus non modo percepti, sed ed qui percepi honeste potuerunt, æstimandi sunt.)

1 Du Caurroy, 285, 289, 298, Instit. de Justinien, (Ed. 1826,) says, at page 298, "that the possessor in bad faith must account for all the fruits received, and even for the fruits which, though not received by him, could have been obtained by the owner." (Papin, fr. 62, § 1, Paul, fr. 33, eod. v. sec. de off. Ind.; 1 Moreau de Montalin, p. 596, (Ed. 1824,) and Analyse des Pandretes de Pothier.)

The common law, as stated in Bracton's Laws and Customs of England, gives the same rule: "The jurors will diligently inquire what profits the disseizor had received in fruits, rents, and other commodities. They were also to estimate the advantages the disseizen might have derived from the estate if he had not been disseized." Stearns, Real Actions, 393.

The amounts already in judgments would establish the limit of recovery if there was nothing but the naked liability flowing from the law of warranty. But there is here another ground of liability on the part of the defendant which is to be considered in connection with, but which exists independent of, the warranty. The warranty gave the defendant her moneyed interest in defeating and delaying the complainant in the enforcement of her rights. But it is the unjust hindrance which was the cause and is the measure of the damage; for it cannot be that a wrong-doer can so frame the execution of his wrong as to limit his liability short of complete indemnity. The evidence shows that for 47 years the city of New Orleans has in bad faith kept the complainant out of the possession of her property; that she has done this by using her vast resources and even her power of annually taxing complainant's property for keeping in prosecution a gigantic system of litigation, having for its object to prevent the complainant from possessing and enjoying property which the defendant

knew, and had been judicially decreed to have known, belonged to complainant.

It is not now as warrantor that we are considering the defendant's conduct, but as a person who, from motives springing from her own advantage, has caused to the complainant pecuniary loss, and that, too, when aware of her own wrong doing. From this fact a liability springs up which is not necessarily satisfied by the redress given indirectly through the machinery of warranty; *i. e.*, the complainant may recover from the defendant all the loss which she suffered for the entire period during which she has been kept out of possession by the defendant.

Of all the writers on the subject of the obligation to redress wrongs and injuries none are more discriminating, or consider the matter in broader relations, than Puffendorf in his Law of Nations. He states (book 3, *c.* 1, § 3) the division of damage by the civilians into *damnum emergens* (loss which one suffers by diminishing his present goods) and *lucrum cessans*, (damage which one receives by loss of gain which he might have made.)

"All hurt, spoil, or diminution of whatever is actually our own, and all interception of what we ought to receive," the same writer says, entitles us to reparation. At section 4 he enumerates those who are responsible for a wrong as comprising those who give any real assistance in the act of damage, or who, by any antecedent motion or default, caused it to be undertaken, or who came in for any part of the advantage; to those, he says, must be added all *who hinder the duty of restitution.* He cites the case of Probus, a prefect, who, under the Emperer Valentinian, did nothing but protect his clients in unlawful action, and he was held to be responsible therefor; "for here," says the author, "protection of a great patron, interposing, hindered them from making good the damage they had been guilty of."

At the common law, at a time when its maxims were but an utterance of the civil law in another tongue, the disseizor was liable for the possession of his grantees and feoffees, and until the statutes of Gloucester and Marlbridge he alone was liable, and after those statutes the tenants were liable to the extent of the insolvency of the disseizor. In construing the statute, it was held that the damages should still be recovered against the disseizor, if he was able to satisfy them. See a summary of the law on this point derived from Bracton, in Prof. Stearns' Treatise on Real Actions, 389, 390.

See Pothier, Contract of Sale, Cushing's translation, No. 127.

Now, in this case, the evidence establishes that the tenants have been kept from making restitution, and the complainant from receiving it, solely by the defendant, and it is a case where every day of hindrance added fresh loss to complainant.

It must be that a defendant, clothed with such semi-sovereign powers alike for repairing or committing injury, must render to this

complainant, who, after 47 years of resistance, calls it into a court of equity, and shows that it is the author of this deliberately unjust and long-continued dispossession, a compensation equal to her established pecuniary loss.

In the light of these twofold liabilities of the defendant, I will consider the master's report as to the revenues which were and could have been derived. His report enables the court to come to a conclusion on the subject from two distinct processes, sustained by two distinct resources of testimony.

As to the improved property, from an examination of 64 different squares and lots, upon the testimony derived largely from the tenants themselves, he shows, after allowing for all expenditures for ameliorations and taxes, and interest upon the same, a net income, averaging 13 per cent. upon 70 per cent. of the price of adjudication at the public auction at which the defendant sold the same in 1837. This, of course, would be a net annual income of over 9 per cent. upon the entire price. As to the unimproved property, he finds as a fact that it was capable of yielding a revenue from that which so many lots upon the same tract did yield, and states it as at least 5 per cent. upon 70 per cent. of the adjudicated price at said public sale. The evidence fully establishes a further fact that the sole reason which prevented the improvement of the unimproved lots was a fear on the part of pretended owners and of the public that the title of the complainant was well founded. Now, if the improved yielded an annual income of upwards of 9 per cent. net, taking the value as the full price of adjudication, and the unimproved would have been improved but for the doubt which the defendant's wrong inspired as to the title, it follows that 5 per cent. net, at the very lowest, would have been realized, not upon 70 per cent., but upon 100 per cent. of the price of public adjudication.

The second source of evidence upon this point is the sale upon ground rents of property within the city limits and its suburbs. In 49 instances of ground rent reserved by the city, and 46 other cases of ground rent reserved by Daniel Clark, in most cases, for the period of 29 years, some of which still continue, the yearly rent was 6 per cent. upon the fixed value. The rate at which these ground rents were contemporaneously established and continued, by which the income was fixed for long periods, furnishes a sound, independent standard, and corroborates the inference drawn from the 64 cases into which inquiry was made by the master, that the fructual value was considerably above 5 per cent. upon the ascertained value of the land. The case shows a great fact, which fortifies the conclusion drawn from these facts found by the master.

What the value of this Blanc tract should be held to be when it is regarded as a capital from which an income is to be held to have been derivable, is additionally and independently established by the

auction sale of 1837. The adjudication and other evidence show that at the public sale at which the defendant sold these lots there were upwards of 60 purchasers who had the money to pay the adjudicated price. The city had laid out the Blanc tract, with adjoining property, into squares and lots, and 60 different persons estimated the value of, and purchased, the same at auction.

The concurrence of so many minds as to the value of these lots, thus expressed and recorded, furnishes a criterion as to its productive value, founded upon so many practical judgments, that a court, after a lapse of 46 years, should not lightly disregard it, certainly not upon the evidence in the record; for the case shows that the complainant commenced her assertion to title to this property by suit against the First Municipality in 1836, and from most of the witnesses, even from those who were defendants themselves, come such statements as to authorize the inference that the value fixed by the public sale of 1837 was prevented from continuing to be the productive value by the doubts which the defendant's unjust pretensions threw upon the title. From this fact alone, then, it might safely be considered as established, and the defendant is estopped from denying, that the use of each lot or parcel of this land was yearly worth 5 per cent. upon this auction price.

The rate of 6 per cent. was virtually allowed for the use of such property by the supreme court of this state in the year 1843. See *Erwin* v. *Greene*, 7 Rob. 175. Vacant lots to the value of several hundred thousand dollars had been sold subject to a mortgage, which the vendor agreed to remove. Notes for the price were given, dated at the time of the sale, which was contemporaneous with the period of the public sale here, in 1837, bearing 6 per cent. interest, which were deposited to be delivered when the mortgage should be canceled. The mortgage was not canceled till 1843. The question was whether the vendor should recover 6 per cent interest for the time previous to cancellation of the mortgage. The court answer "yes," for two reasons; one of which was that the purchaser could have had possession, and that by the Civil Code of Louisiana he must pay interest if the property did, in the eye of the law, yield a revenue. The case showed that it was vacant city lots; from which the court inferred it was susceptible of yielding a revenue, "for," says the court, "they could have been rented."

The court ought not to overlook a principle always recognized by the civil authorities, and which is laid down in *Pontchartrain R. Co.* v. *Carrollton R. R.* 11 La. Ann. 258, 259, that even if the evidence as to the value of the rents had been much less satisfactory than it is, and if an accurate estimate of loss had not been attainable upon such clear and full proofs as are here afforded, the defendant having invaded the rights of complainant, and failing itself to furnish more satisfactory proof, would have had to be content with the conclusions to which the court would have been able to arrive from the evidence

which had been produced. See, also, *McGary* v. *City of Lafayette*, *supra*, where the court, in the assessment of compensation, lay great weight upon *vexatious and incidental wrongs* which have been established.

In short, the burden which bad faith places on the defendant, according to the civil law and the jurisprudence of Louisiana, while it should lead to the assessment of no damages or compensation beyond those actually suffered, requires the court to adopt conclusions fully warranted by evidence, though through the fault of the defendant it must be derived from facts outside of the receipt of actual rents; for, since the law requires the court, in such a case, to go further and decide from evidence extrinsic to actual receipts, it must be admitted that a safe guide may be obtained, and in this case has been furnished, from the rents and profits, for the very period in question, shown to have been actually derived from so many other lots, adjacent, similarly situated, and no better capacitated, from numerous ground rents, and from the opinion of such a multitude of purchasers.

This is a peculiar case. It calls a defendant to a reckoning for 50 years of flagrant and already adjudged wrong. The complainant has already recovered possession. The restitution to which the complainant was and is entitled is founded upon decrees between the parties which establish it conclusively. The hindrance on the part of the defendant and the amount of compensation due are fully proven. The bad faith of the defendant has been previously determined, and is a thing adjudged. The court must not be deterred, by the magnitude of the amount involved, from the application of settled principles of law, and the deduction of conclusions which follow from established facts. The conclusion which must be deduced, after giving all the evidence in this cause its full weight, is that the productive value of the Blanc tract was, in the year 1837, fixed at the public sale, and has not been maintained, but has receded, and has been kept from advancing only by the insecurity as to the title created by the pretensions of the defendant, asserted in bad faith at the outset, and continuously, and persisted in years and years after they had been rejected and even rebuked by the highest tribunal under our government; and that the actual yearly value, which could and would have been derived from the lots constituting the same by the complainant, had she been allowed to occupy them without unjust molestation from the defendant, is established to have been at least 5 per cent. upon the price which they brought when sold by the defendant at public auction in 1837.

The master's account is stated in the precise manner determined to be correct in the case of *Gaines* v. *City of New Orleans*, 15 Wall. 634; *i. e.*, he has stated the account with reference to each lot separately, and has ascertained the rent or income which should have been derived each year, and has computed interest at 5 per cent. upon the same down to January 10, 1881, which point of time he

selected for convenience. The master's account shows that the total amount of judgments rendered against the warranties of the defendant in the Agnelly and Monsseaux suits is 576,707.72. This amount, though less than the evidence shows is requisite to indemnify the complainant, cannot be disturbed. It is, to the extent of the periods covered thereby, binding alike upon the complainant and the defendant. A study of his report, and the records of the causes introduced in evidence, shows that, when the complainant recovered the land, she recovered rents for only a portion of the period of her dispossession, often a small one, as the tenants had been in occupation only varying fractions of time since 1837. The proof shows that the earlier intermediate grantees who occupied it are either insolvent, dead, without representatives, or, after search, cannot be found. The balance of the amount, viz., $1,045,363.78, which is the aggregate of the rents and profits which would, with ordinary good management, have been received from the unimproved lots,—*i. e.*, for those periods not covered by the possessory judgments,—is derived from a detailed statement of the rents from each lot, the yearly rental being 5 per cent. upon 70 per cent. of the price of adjudication in 1837. This rate, according to the conclusion of the court, as stated above, is short of what the evidence shows is the true measure of the rent by 30 per cent.; *i. e.*, that the yearly rent, as established by the evidence, is 5 per cent. upon 100 per cent. of the full price of adjudication and sale. The correction required is made by adding 30 per cent. of this sum, where, as has been said, the computation has been made upon a basis of 70 per cent. The amount to be recovered, therefore, would be as follows:

For improved and unimproved land already in judgments,	$ 576,707 92
For balance of rents, unimproved land, - - -	1,348,959 91
Total, - - - - - - -	$1,925,667 83

For which last amount, and the costs which have been taxed in the Agnelly and Monsseaux suits, with interest upon that portion which arises from the yearly sums for rent from January 10, 1881, the complainant must have a decree.

UNITED STATES *v.* BEEBEE and others.[1]

(*Circuit Court, E. D. Arkansas.* June, 1883.)

1. EQUITY—LAPSE OF TIME AS A DEFENSE.
It is a general principle of equity that lapse of time may constitute a sufficient defense, even in the absence of any statute of limitations, and without necessary reference to any question of laches.

[1] From the Colorado Law Reporter.

2. SAME—PRESUMPTION AS TO DEATH OF WITNESSES.
When the lapse of time has been so great as to afford a reasonable presumption that the witnesses are dead, and the proofs lost or destroyed, a court of equity will refuse to undertake the task of ascertaining the facts and affording a remedy; and this, not because of any statutory limitation, or because of laches merely, but upon grounds of public policy and for the peace of society.

3. THE UNITED STATES BOUND BY THESE RULES.
Lapse of time may be a sufficient defense to a suit instituted in the name of the United States. When the government becomes a party to a suit in its courts, it is bound by the same principles that govern individuals. When the United States voluntarily appears in a court of justice, it at the same time voluntarily submits to the law, and places itself upon an equality with other litigants.

The facts are sufficiently stated in the opinion.

Cummings & Baker and *Liberty Bartlett*, for complainant.

U. M. & G. B. Rose, Clark & Williams, and *J. M. Moore*, for respondents.

MCCRARY, J. The demurrer raises, for the first time in a federal court, the important question whether any lapse of time will constitute a bar, or a sufficient defense, to a suit in equity, brought in the name of the United States.

This suit is brought to cancel and set aside certain land patents executed by the United States, on the ground that the same were obtained by fraud. The patents attacked as fraudulent were issued about 43 years before the filing of the bill, and many of the alleged matters of fact, concerning which it would be necessary to take proofs, in order to determine the question of fraud, transpired more than 60 years before the filing of the bill, as appears from its allegations. The claims of the Philbrook heirs, which it is alleged were unlawfully and fraudulently set aside by the action of the land department, had their inception in November, 1815. The frauds alleged to have been perpetrated by C. W. Beebee and Chester Ashley consisted, as alleged, in inducing the register of the land-office to believe that the settlers on the land had consented to the issuance of the patents; and it appears that whatever they did to this end was done prior to October, 1838. Both the parties charged to have actually participated in the fraud are long since dead, and we may assume that most, if not all, the witnesses who could testify from personal knowledge concerning it are likewise dead. The city of Little Rock, now the capital of Arkansas, has been built upon the land, and hundreds of innocent purchasers have bought and paid for portions of it upon the faith of the patent of the United States. The land is covered with the homesteads of many hundreds of families. It has been thus occupied in many instances by the present holders and their predecessors for more than a generation. A court of equity cannot contemplate with any degree of favor the proposition that this land shall, at this late day, be declared a part of the public domain, or granted to claimants who have so long slept upon their rights. It must, however, be conceded that, as a general rule, the

United States is not bound by any statute of limitations not imposed by congress, or chargeable with laches.

The following cases, cited by counsel for plaintiff, abundantly support this general doctrine: *U. S.* v. *Kirkpatrick*, 9 Wheat. 720; *Gibson* v. *Chouteau*, 13 Wall. 92; *Gaussen* v. *U. S.* 97 U. S. 584; *U. S.* v. *Thompson*, 98 U. S. 486.

These are all, it is true, actions at common law, but the same doctrine must, no doubt, prevail in equity, where the statute of limitation is sought to be interposed, in analogy to a like limitation at law. Unless, therefore, this defense can be supported upon some principle of equity jurisprudence, separate and distinct from any state statute of limitations, and from any considerations based alone upon the laches of the public agents of the government, it must fail, however disastrous to the rights of innocent parties, and however inequitable the consequences may be.

We are thus brought to the consideration of the question whether a lapse of time so great as to afford a clear presumption that all the witnesses to the transaction in controversy are dead, and all proof lost or destroyed, will of itself constitute a bar to a suit in equity, independently of any statute of limitations, and without regard to any question of laches; or, in other words, should a court of equity refuse to entertain a bill in equity upon the sole ground that the lapse of time has been so great as to make it impossible to ascertain the facts and apply the remedy, by reason of the death of the witnesses and the loss or destruction of proofs? In my judgment, the doctrine that a court of equity will not entertain a claim so stale as to be not capable of satisfactory proof, must stand as one applicable alike to all suitors; it rests not upon any statute of limitations, nor upon any doctrine of laches alone, although the fact of laches may always appear; it rests rather upon the sound rule that no court should ever entertain a controversy after the ravages of time have destroyed the evidence concerning it. A party called upon to answer to a charge of fraud committed by his ancestors, or those through or under whom he claims, more than 40 years before the commencement of the suit, need not plead the technical bar of the statute of limitations or the laches of the complainant; it is enough if he alleges that the claim is stale, and insists that by reason of the long delay in bringing suit the witnesses by whom he might have explained the transaction are dead. To compel him to submit his rights to adjudication under such circumstances would be abhorrent to the principles of equity, not because of any statutory bar or any laches merely, but because the great lapse of time is evidence against the complainant and in favor of the defendant, and because it is contrary to equity and good conscience that any person should be brought into court to answer for a fraud alleged to have been committed by others before he was born, and so long ago as to make it impossible for him to find living witnesses who have personal knowledge of the facts. Under such

circumstances a court of equity ought to presume that the persons who were cognizant of the facts could, if living, explain them so as to disprove the charge of fraud.

It is well settled that possession of land for a long period of time will raise a presumption of a grant which will be enforced as against the government, (*Major* v. *Horner*, Cowp. 102; *Jackson* v. *McCall*, 10 Johns. 380; *Lewis* v. *San Antonio*, 7 Tex. 304; 3 Starkie, 1221; 2 Whart. Ev. § 1348; *Roe* v. *Ireland*, 11 East, 280;) and if a grant is to be presumed by reason of the lapse of time, when there is no other evidence of a grant except that afforded by long possession, it would seem that, upon similar grounds, the validity of a grant which is shown to have been actually executed, and under which possession has been held for an equally long period of time, should be presumed. The authorities support the proposition that lapse of time may be a good defense in equity, independently of any statute of limitations, and they show that the doctrine rests not alone upon laches; it is often put upon one or all of the following grounds, namely: *First*, that courts of equity must, for the peace of society and upon grounds of public policy, discourage stale demands by refusing to entertain them; *second*, that lapse of time will, if long enough, be regarded as evidence against the stale claim equal to that of credible witnesses, and which, being disregarded, would in a majority of cases lead to unjust judgments; *third*, that, after the witnesses who had personal knowledge of the facts have all passed away, it is impossible to ascertain the facts, and courts of equity will, on this ground, refuse to undertake such a task.

Thus Mr. Justice STORY says:

"A defense peculiar to courts of equity is founded on the mere lapse of time and the staleness of the claim, in cases where no statute of limitations directly covers the case. In such cases courts of equity act sometimes by analogy to the law, and sometimes act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere when there has been gross laches in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse rights." 2 Story, Eq. 1520.

And in *Maxwell* v. *Kennedy*, 8 How. 221, the supreme court of the United States, in answer to the argument that there was no statute of limitations applicable to the case at bar, said:

"We think the lapse of time, upon the facts stated in the bill and exhibits, is, upon principles of equity, a bar to the relief prayed, without reference to the direct bar of a statute of limitations."

Again, in *Clarke* v. *Boorman's Ex'rs*, 18 Wall. 509, the same court said:

"Every principle of justice and fair dealing, of the security of rights long recognized, of repose of society, and the intelligent administration of justice, forbids us to enter upon an inquiry into that transaction 40 years after it occurred, when all the parties interested had lived and died without complain-

ing of it, upon the suggestion of a construction of a will different from that held by the parties concerned, and acquiesced in by them throughout all this time."

In *Brown* v. *Co. of Buena Vista*, 95 U. S. 161, the same doctrine is expressed in these words:

"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."

In *Harwood* v. *Railroad Co.* 17 Wall. 78, the doctrine is concisely and clearly stated thus:

"Without referring to any statute of limitations, the courts have adopted the principle that the delay which will defeat a recovery must depend upon the particular circumstances of each case."

In *Badger* v. *Badger*, 2 Wall. 94, the court said:

"But there is a defense peculiar to courts of equity, founded on lapse of time and the staleness of the claim, where no statute of limitations covers the case. In such cases courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, and refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights."

In *Boone* v. *Chiles*, 10 Pet. 248, the rule is thus laid down:

"A court of chancery is said to act on its own rules in regard to stale demands, and independent of the statute; it will refuse to give relief where a party has long slept on his rights, and where the possession of the property claimed has been held in good faith, without disturbance, and has greatly increased in value."

In *Wilson* v. *Anthony*, 19 Ark. 16, cited with approval by the supreme court of the United States in *Sullivan* v. *Railroad Co.* 94 U. S. 811, the doctrine is well stated thus:

"The chancellor refuses to interfere, after an unreasonable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice when the original transactions have become obscured by time, and the evidence may be lost."

And see *Elmendorf* v. *Taylor*, 10 Wheat. 173; *Hume* v. *Beale's Ex'r*, 17 Wall. 343; *Hall* v. *Law*, 102 U. S. 465; *Godden* v. *Kimmell*, 99 U. S. 210.

Numerous other authorities might be cited to the same effect, but these are sufficient. In view of these authorities, and upon reason, I hold it to be a general principle of equity that lapse of time may constitute a sufficient defense, even in the absence of any statute of limitations, and without necessary reference to any question of laches. Such being the law, it is clear that lapse of time may be a sufficient defense to a suit instituted in the name of the government.

It is well settled that when the United States becomes a party to a suit in the courts, and voluntarily submits its rights to judicial de-

termination, it is bound by the same principles that govern individuals. When the United States voluntarily appears in a court of justice, it at the same time voluntarily submits to the law, and places itself upon an equality with other litigants. *U. S.* v. *Fossatt*, 21 How. 450; *The Floyd Acceptances*, 7 Wall. 675; *U. S.* v. *Barker*, 12 Wheat. 559.

In *Mitchel* v. *U. S.* 9 Pet. 711, the court said:

"By common law the king has no right of entry on land which is not given to his subjects; the king is put to his inquest of office or information of intrusion in all cases where a subject is put to his action. Their right is the same, though the king has more convenient remedies in enforcing his. If the king has no original right of possession to land, he cannot acquire it without office found, so as to annex it to his domain."

And see *U. S.* v. *State Bank*, 96 U. S. 36; *U. S.* v. *Bostwick*, 94 U. S. 66.

"The principles which govern inquiries as to the conduct of individuals in respect to their contracts are equally applicable where the United States are a party." *U. S.* v. *Smith*, 94 U. S. 217.

In the case of *The Siren*, 7 Wall. 159, the court said:

"But, although direct suits cannot be maintained against the United States or against their property, yet when the United States institute a suit they waive their exemption so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made or property claimed; and when they proceed *in rem*, they open to consideration all claims and equities in regard to the property libeled."

And in the same case it was said that the government, by its appearance in court, "waives its exemptions and submits to the application of the same principles by which justice is administered between private suitors."

See, also, *Burbank* v. *Fay*, 65 N. Y. 62; *Osborne* v. *Bank of U. S.* 9 Wheat. 870; *U. S.* v. *Macdaniel*, 7 Pet. 1; *Brent* v. *Bank of Washington*, 10 Pet. 615. In the latter case the court declares that there is no reason why the United States should be exempted from a fundamental rule of equity subject to which its courts administer their remedy, and it is said: "Thus compelled to come into equity for a remedy to enforce a legal right, the United States must come as other suitors, seeking, in the administration of the law of equity, relief," etc.

The same doctrine was laid down in strong language by Attorney General Black in *Reside's Case*, 9 Op. Atty. Gen. 204, and also in the case of *People* v. *Clarke*, 10 Barb. 120. In the latter case, which was a bill instituted by the attorney general of New York to cancel certain patents granted before the revolution, the court said:

"If the questions in this case may be deemed to belong to a court of equity, I cannot persuade myself that they are, therefore, never to be put at rest by lapse of time. It would be an alarming doctrine to hold that every man in the state who holds any land under a grant before the revolution may be turned out of possession by the plaintiffs, if a king was cheated who, one or two hundred years since, made the grant."

See, also, upon this point, *Mayor of Hull* v. *Horner*, Cowp. 110, decided by Lord MANSFIELD.

These considerations lead to the conclusions—*First*, that the lapse of time constitutes a good defense to this suit, upon the general principles of equity above stated, and which would be administered as between two citizens litigating in this tribunal; and, *second*, that the United States is bound by the same law.

These conclusions render it unnecessary to consider the other important questions discussed by counsel.

The court, however, deems it proper to say, in view of some remarks of the counsel for respondents, that, in its opinion, the official action of the attorney general in directing that the bill be filed, cannot properly be made the subject of adverse criticism. The bill was filed upon the recommendation of the secretary of the interior, for the declared purpose of having the questions which were being pressed upon the attention of the land department in connection with the claims of the Philbrook heirs, determined by the judicial department of the government. Those questions are important and unsettled. An appeal to the courts was, therefore, entirely proper.

The demurrer to the bill is sustained; and, unless the complainant asks leave to amend, there will be a decree for respondents, dismissing the bill.

CALDWELL, J., being interested, took no part in this case.

See *Speidell* v. *Henrici*, 15 FED. REP. 753, and note, 758.

ADAMS, Trustee, and another, Assignee, *v.* CRITTENDEN and others.[1]

(*Circuit Court, N. D. Alabama.* 1881.)

1. INJUNCTION.

It is neither regular nor proper to issue a perpetual injunction, at the first hearing of a cause, where no evidence was taken or considered, and an injunction so issued will be considered as temporary only.

2. JURISDICTION IN BANKRUPTCY.

After the property of a bankrupt has been sold and the proceeds received, and neither the court, nor the assignee, nor the creditors have any further interest in it, the court will not interfere, at the instance of the purchaser, to prevent, by injunction, parties from asserting any claims they may have, or pretend to have, against the property in any of the courts of the several states; and this, notwithstanding no final distribution has been made in the bankruptcy. The bankrupt court will not interfere where no advantage can result to the bankrupt's estate.

Hewitt v. *Norton*, 1 Woods, 71, *distinguished.*

In Equity.

[1] Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

O'Neal & O'Neal, for complainants.

D. P. Lewis and *J. B. Moore*, for defendants.

PARDEE, J. The petition in this case was filed in the district court to enjoin the defendants Crittenden and Weaver from further prosecuting or enforcing their suits or claims against certain lands in the state chancery court for the second district of the northern chancery division of Alabama, and to enjoin the defendant Andrews, register of aforesaid chancery court, from advertising and selling said lands under order of said chancery court. The petition, which is lengthy, sets out in substance that the lands described formed part of the assets belonging to one Weaver, who had been compelled by the judgment of the district court to make a surrender in bankruptcy, and so, after certain litigation, passed into the hands of Harris, assignee of said Weaver, with certain real and fictitious liens upon them, who, under a proper order and decree of the district court, sold and conveyed them to Adams, plaintiff; that after the sale made in bankruptcy the defendants Crittenden and Weaver, claiming to have vendors' liens upon the land in question, are seeking to enforce them against the property in the state chancery court, and have prosecuted their claims to judgment, and are about to cause the lands to be sold under the decree obtained. The state court is alleged to be wholly without jurisdiction, by reason of the provisions of the bankrupt law of the United States; and the defendants are alleged to be violating the jurisdiction of the district court of the United States; and that the proceedings will damage plaintiffs by throwing a cloud on their title. The record shows that the sale made by the assignee in bankruptcy has been completed and ratified by the court, and the proceeds thereof received by the assignee; that a final discharge has been granted the bankrupt, but no final distribution has been made, and to that extent the bankruptcy proceedings may be considered as still pending.

It further appears that the prayer of the petition was for an injunction to issue, and that, upon the hearing, the injunction should be made perpetual. The petition was filed on the twelfth day of April, 1879. On the fourth day of May following, defendant Crittenden filed demurrer and answer. On the fifth day of May, defendant Weaver filed demurrer and answer; and on the same day the district judge made this order:

"This cause having come on to be heard, and after argument by counsel and consideration by the court, it is ordered, adjudged, and decreed that the clerk of this court issue the writ of injunction in accordance with the prayer of the petition aforesaid."

Thereupon, May 7, 1879, the clerk issued an injunction containing an order for the defendants to show cause at the next term of the court why the same should not be made absolute, which was served. November 4, 1879, the defendants filed, on many grounds, a motion to dismiss the petition and dissolve the injunction. Afterwards, on

the sixteenth of December, the motion to dissolve was heard and denied by the judge. Finally, on February 24, 1881, the district court rendered a judgment, finding for the defendants, and decreeing "that the petition for injunction or restraining order be denied and the same is dismissed, and the temporary injunction heretofore granted by the court upon the petition is hereby dissolved;" and from this judgment the plaintiffs have appealed to this court.

The first question in proper order presented in this court, necessary to pass upon, is whether the injunction granted May 5, 1879, was or not a temporary injunction, or whether the order or judgment rendered that day was not final on its merits, ordering and perpetuating the injunction in the same decree. In the record there is no notice to defendants for application for injunction, though, as they appeared and filed demurrers and answers, they must have had notice. Nor in the record, until the day of the final decree, is there anything to show but the plaintiffs had always taken and treated the injunction as temporary.

So that it may be considered that up to the final decree all the parties, and the judge himself, held and treated the first injunction as temporary only. The terms of the injunction are to that purport. At the first hearing it does not appear that any evidence was taken or considered. It was neither regular nor proper to have issued a perpetual injunction at that stage of the case. That no bond was required proves nothing, as that was, considering the injunction as a restraining order merely, within the discretion of the court.

Under these circumstances, I do not well see how this court can declare that a perpetual injunction which was neither so in terms nor in intention.

The only remaining question of the many raised and ably argued, necessary to decide, is whether the district court of the United States sitting in bankruptcy, and undoubtedly having exclusive jurisdiction against the state courts over all questions relating to the ascertainment and liquidation of the liens and specific claims bearing on the bankrupt's assets, and extending to all acts, matters, and things to be done under and in virtue of the bankruptcy until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy, will, after property of the court bankrupt has been sold and the proceeds received, and neither the court nor the assignee nor creditors have any further interest in it, interfere at the instance of the purchaser to prevent, by injunction, parties, strangers to the bankruptcy, from asserting any claims they may have, or pretend to have, against the property, in any of the courts of the several states, and this, notwithstanding no final distribution has been made in the bankruptcy.

It would seem that this question as stated would suggest its own answer. Because one court has exclusive jurisdiction of a matter, it

does not follow that it will enjoin parties from proceeding or attempting to proceed in some other form. There can be no question that the United States district courts have exclusive original jurisdiction in admiralty; but those courts do not issue injunctions to hinder the state courts from infringing on their jurisdiction. There is a remedy in another direction, and the same remedy, it seems to me, can be, unless lost by delay, resorted to by the parties in this case.

The reasoning of Judge HILL, in the case of *Penny* v. *Taylor*, 10 N. E. R. 200, is applicable in full force to this case. The rights of the parties, under the laws of the United States and the decrees of the district court of this district, are well ascertained and determined, and every court in the country is bound to, and, it is presumed, will, maintain them. If not maintaining them to the satisfaction of the parties, the remedy would lie, not by an injunction from another court, but by appeal to the proper superior court, and, finally, to the supreme court of the United States, if justice were not sooner done in the premises.

If the property in controversy were in anywise under control of the bankrupt court, or in anywise affected the bankrupt estate, it would be decidedly different. But the bankrupt court is not for all time, or any time, a warranty of title to property sold, disposed of, and paid for under its orders.

The case of *Hewitt* v. *Norton*, 1 Woods, 71, was a case where the property was in the hands of the assignee. No other conclusion can be arrived at from an examination of the whole case.

The authorities quoted in Bump, Bankr. (9th Ed.) 177, note 4, to the effect that the bankrupt court will not interfere where no advantage can result to the bankrupt's estate, gives, in my judgment, the proper rule to follow in cases like the one under consideration.

The argument that unless the bankrupt court protects property after it has passed out of the bankruptcy the power of the court and the efficiency of the law will be impaired, if not brought into contempt, is not very forcible. The jurisdiction of the courts of the United States, under the laws of the United States, is well grounded, and, wherever necessary, will be vindicated; and for that very reason it behooves the said courts and the judges thereof to exercise care and comity when called upon to interfere with the proceedings in state courts, which courts are presumed to know and apply all the laws of the country with learning and justice.

There is another view of this case which is equally against the plaintiff in this suit. The district court has no jurisdiction, exclusive or otherwise, to interfere, under the bankrupt law, except with such matters and things, liens and otherwise, as pertain to the assets of the bankrupt's estate. Now, when property of the bankrupt has been brought into the bankrupt court, sold under the decree of the court, the proceeds received by the assignee, and the sale ratified by the court, that property has ceased to be assets of the bank-

rupt, ceased to pertain to his estate, and ceased to be under control of the bankrupt court, just as much as it would have passed out of the jurisdiction of any other court that might have had judicial possession of it, and ordered and completed its sale.

Can it be pretended that an admiralty court, after having possession and control of a ship, and after selling it free and clear of all liens, as against all the world, can prevent parties with alleged liens pursuing the ship in the hands of the purchaser in any other courts; or that a probate court, having the exclusive control and jurisdiction of a minor's property, can protect it, after sale, from alleged mortgages and liens? It would seem immaterial whether the debts, which are the basis of the alleged liens claimed by defendants, were the debts of the bankrupt Weaver or not; but, in fact, they are not his debts, but the debts of strangers to the bankruptcy, and were not provable in said bankruptcy, although the liens might have been allowed therein. The views of this case as herein expressed, or others leading to the same conclusions, were undoubtedly entertained by the learned judge presiding in the district court who decided the case adversely to the pretensions of the plaintiff.

Let a decree be entered affirming the decree of the district court.

FOOTE and others *v.* CUNARD MINING CO. and others.

(*Circuit Court, D. Colorado.* June 28, 1883.)

1. SUIT BY STOCKHOLDERS—PREREQUISITES.
   Before a stockholder can sue in his own name he must show to the satisfaction of the court that he has exhausted all the means within his reach to obtain within the corporation itself the redress of his grievances, or action in conformity to his wishes.
2. SAME—BILL MUST SHOW, WHAT.
   In such a case the bill must set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.
3. SAME—PROBABLE REFUSAL OF CORPORATION TO ACT.
   It is not enough that it appears from the bill that the corporation would probably refuse relief. The rule is imperative that efforts should be made to obtain relief in that direction before suit can be instituted by a stockholder.

In Equity. Demurrer to the bill.

Bentley & Vaile, for plaintiffs.

Decker & Youley, for defendants.

MCCRARY, J., after stating the facts, delivered the opinion of the court, *orally*, as follows:

The demurrer to the bill will have to be sustained. It is apparent that this is a suit brought in the interest of the Amulet Mining Company, a corporation. It is brought by the stockholders of that cor-

poration. The substance of the allegation is that certain property, which in equity belonged to the Amulet Mining Company, was fraudulently conveyed to the Cunard Mining Company, and the relief sought is that the title be transferred from the one corporation to the other. It is, therefore, a suit which ought to be brought by the Amulet Mining Company, unless there is some reason set forth in the bill why it should be brought by the complainants as stockholders in that company. There are no sufficient allegations in the bill upon this subject. The rule which obtains now in such cases is laid down in the case of *Hawes* v. *Oakland*, 104 U. S. 450, in which, after having stated the circumstances under which a bill may be brought by a stockholder against the corporation of which he is a member, the court adds:

"But in addition to the existence of grievances which call for this kind of relief, it is equally important that, before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show, to the satisfaction of the court, that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated, effort with the managing body of the corporation to induce remedial action on their part; and this must be made apparent to the court. If time permits, or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body in the matter of which he complains; and he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it.

"The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders, when that is necessary, and the cause of failure in these efforts, should be stated with particularity, and an allegation that complainant was a shareholder at the time of the transactions of which he complains, or that his shares have devolved upon him since by operation of law, and that the suit was not a collusive one to confer on a court of the United States jurisdiction in a case of which it could otherwise have no cognizance, should be in the bill, which should be verified by affidavit."

Upon the announcement of that opinion the supreme court adopted an additional rule in equity, to which I think, perhaps, the attention of counsel in this case has not been called. It is rule 94, and will be found in the 104th volume of the United States Reports, and is as follows:

"Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law; and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action."

This bill does not set forth that the complainants were shareholders at the time of the transactions of which they complain; it does not set forth any efforts which have been made by complainants to obtain redress from the corporation; it is, therefore, in these particulars insufficient. It is not enough to say that it appears from the bill that the corporation would probably refuse relief. The rule is imperative that efforts shall be made to obtain relief in that direction before such a suit as this shall be commenced in the courts.

On this ground the demurrer to the bill will be sustained.

MEEKER and others *v.* WINTHROP IRON CO. and others.[1]

(Circuit Court, W. D. Michigan, N. D. June, 1883.)

1. OFFICERS OF A CORPORATION DEALING WITH THEMSELVES—CONTRACT VOIDABLE.

   Officers of a corporation are but agents, and cannot, as such officers, while acting for the corporation, deal with themselves, to the detriment of the corporation for whom they are acting. All such contracts, if not void, are voidable at the option of the corporation.

2. SAME—EFFECT OF STOCKHOLDERS' MEETING.

   Nor can the holders of a majority of the capital stock of a corporation, by *their votes* in a stockholders' meeting, lawfully authorize its officers to lease its property to themselves, or to another corporation formed for the purpose and exclusively owned by them, unless such lease is made in good faith, and is supported by an adequate consideration; and in a suit, properly prosecuted, to set aside such a contract, the burden of proof, showing fairness and adequacy, is upon the party or parties claiming thereunder. All doubts will be solved in favor of the corporation for whom such stockholders assumed to act.

3. SAME—POWER OF MAJORITY.

   The holders of a majority of the stock of a corporation may legally control the company's business, prescribe its general policy, make themselves its agents, and take reasonable compensation for their services. But, in thus assuming the control, they also take upon themselves the correlative duty of diligence and good faith. They cannot lawfully manipulate the company's business in their own interests, to the injury of other stockholders.

4. COSTS—COUNSEL FEES.

   An owner of capital stock in a corporation, who sues for himself and all other shareholders, and successfully prosecutes the action, for a wrong done to the corporation, is entitled to be reimbursed his actual and necessary expenditures, including attorney's fees, out of the corporate funds.

5. SAME—CASE STATED—RELIEF GRANTED.

   The four brothers S. leased the mine of the W. Iron Co. for five years, at a royalty of 50 cents per ton of ore mined, they to furnish the requisite machinery, which was to be purchased by the lessor upon the expiration of the lease. They incorporated the W. Hematite Co. to operate the mine, they being the sole owners of its stock. Shortly before the expiration of their lease, being unable to obtain a renewal of it, they purchased a majority of the stock of the W. Iron Co., and called a meeting of its stockholders, but at which no other stockholder attended. That meeting ordered an expenditure of $50,000 of the company's capital in sinking a shaft in the mine to facilitate its operation; directed a lease for 18 years of the mine, machinery, and all of the company's other property to the W. Hematite Co. at a royalty of 25 cents per ton of ore mined, with certain

[1] Reported by J. C. Harper, Esq., of the Cincinnati bar.

other advantages to the lessee; voted one of the brothers a salary of $3,000 a year as president; and in pursuance of said action such a lease was executed by two of the brothers, acting as president and secretary of the W. Iron Co., and by the other two acting as secretary and superintendent of the W. Hematite Co. Upon a bill filed by stockholders in behalf of themselves and all other stockholders, *held*, that such a lease was inequitable, and a fraud upon the rights of stockholders not concurring therein.

In Equity.

Morris & Uhl, for complainants.

C. T. Walker and *Mr. Crocker*, for defendants.

BAXTER, J. The defendants, the Winthrop Iron Company and the Winthrop Hematite Company, are corporations organized under the laws of Michigan. The capital stock of the former consists of an iron ore mine rated at $500,000. In August, 1877, it made a lease thereof to the St. Clair Brothers, a partnership composed of the four defendants by that name sued herein. Soon after securing said lease they organized the Winthrop Hematite Company, for the purpose of working the mine thereunder. They continued thus to operate until the summer of 1881, when they made an effort to obtain a renewal thereof to the Winthrop Hematite Company. But failing to secure it, they proceeded to purchase a majority of the capital stock of the Winthrop Iron Company, and assume control of its business. At their instance a stockholders' meeting was called for October, 1881. The meeting was accordingly held by one of the St. Clairs, (who acted for himself and brothers,) assisted by W. S. Hollert, their attorney, and one G. B. Breese. Neither Hollert nor Breese owned any stock in the company. Hollert was made president, and Breese secretary, of the meeting. Being thus organized they adopted certain resolutions, in which, among other things, they removed two directors of the company, and appointed three of the St. Clairs in their stead; authorized the sinking of a shaft at the mine, and appropriated $50,000 of the company's money to complete and equip it; authorized and directed a lease of the company's mine for 18 years from and after December 1, 1882,—the time at which the former lease was to expire,—to the Winthrop Hematite Company; and soon thereafter Eugene G. St. Clair as president, and J. N. St. Clair as secretary, of the Winthrop Iron Company; and Eugene G. St. Clair as secretary, and George A. St. Clair as superintendent, of the Winthrop Hematite Company, professing to act for and in behalf of their respective companies, entered into a contract wherein and whereby it was agreed that said first company should lease its mine, with all the improvements, machinery, etc., thereon, for 18 years to the Winthrop Hematite Company at a royalty of 25 cents per ton.

The relief sought by complainants, who sue as well for all other stockholders in the Winthrop Iron Company as for themselves, is a rescission of said lease and an account of rents and profits; and to

this end they have, through their solicitors, invoked that well-established principle so uniformly enforced by courts of equity, which forbids agents from dealing with themselves or with other persons for their private benefit, to the detriment of their principals. Is the principle applicable to the facts of this case?

The lease sought to be rescinded is not to the St. Clairs, but to the Winthrop Hematite Company. But who is the Winthrop Hematite Company? A mere entity created by law, without body or soul, endowed with capacity to acquire, hold, and dispose of property, in trust for the use and benefit of the natural persons of whom it is composed, in proportion to their several interests therein. But its property belongs in equity to the corporators, and every contract that wrongfully deprives the corporation of any part thereof, or diminishes its value, is an injury to its beneficial owners. Hence, courts of equity look beyond the artificial creature in whom the legal title is vested, to the real persons which it represents.

The defendants St. Clair were, at the time the lease was executed, and are yet, the owners of all the capital stock of the Winthrop Hematite Company. If any profits or other advantage resulted therefrom, it inured to them, to the same extent as if the lease had been made directly to them. Hence, in executing said lease for the Winthrop Iron Company to the Winthrop Hematite Company, they were, in a beneficial sense, dealing with themselves; and we can see no reason for withholding the application of the principle invoked and hereinbefore stated, unless its application is averted by the stockholders' resolution hitherto mentioned, and under and by authority of which, as it is alleged, the lease was executed.

Does this resolution validate and make effectual a contract that would otherwise be declared void?

The ownership of a majority of the capital stock of a corporation invests the holders thereof with many and valuable incidental rights. They may legally control the company's business, prescribe its general policy, make themselves its agents, and take reasonable compensation for their services. But, in thus assuming the control, they also take upon themselves the correlative duty of diligence and good faith. They cannot lawfully manipulate the company's business in their own interests to the injury of other corporators. Any contract made by them in behalf of their principal with themselves or with another for their personal gain would be voidable at the option of the company. We may, therefore, admit that the stockholders' meeting of October, 1881, was legally called and regularly convened, (facts, however, denied by the complainants;) that it possessed the power to displace two of the existing directors and of electing three of defendants in their stead; to direct a lease of the company's mine, and dictate the company's general policy within the scope of its chartered priviliges; and yet defendants would be without the legal right to appro-

priate the corporate property to themselves or to make any other disposition of it for their private benefit. If they could, they would be, in effect, the beneficial owners of the entire corporate property. If they can make such a lease, they can, as selfishness or caprice shall dictate, modify its terms, expend the company's entire income in improvements to facilitate their individual interests, or do anything else their selfishness or cupidity may suggest. The law does not thus vest majority stockholders with any such dangerous power, invite such peculations, or open the door to such abuses. If a majority of stockholders can, in any event and under any circumstances, thus vote away the corporate property to their individual uses,—a question that need not be decided in this case,—they could only do so upon the clearest and most satisfactory evidence of good faith, and for an adequate consideration; and the burden of proof is upon the parties thus acting and claiming the enforcement of such a contract. All doubts in relation to adequacy of consideration and good faith ought to be resolved in favor of the principal. Was the lease in question, therefore, fairly obtained, and is it supported by a just and adequate consideration?

On these points the testimony is not susceptible of easy reconciliation. It consists mainly of the opinions of professed experts and interested witnesses; the witnesses for complainants generally concurring in the opinion that the royalty contracted for in the second lease is grossly inadequate; while those for defendants unite in the opinion that the rent agreed on is a sufficient consideration for the leased premises. Each witness endeavors to fortify his opinion with such extraneous facts as seemed to him to be material and pertinent to the issue. But fortunately the court is not entirely without other evidence bearing on these questions. It appears that the defendants St. Clair are experienced and successful business men. In 1877, with a full knowledge of its condition, resources, and capabilities, they applied for and obtained a five years' lease of said mine, and therein agreed to pay a royalty of 50 cents per ton. By it they obtained nothing but a lease of the mine. The lessor was under no obligation to make any improvements or furnish machinery. These facilities were to be provided by the lessees, the lessor covenanting to purchase the same upon the expiration of the lease, at such price as might, in case of a disagreement between the parties, be fixed by arbitration. This contract sufficiently evinces the defendant's estimate of the mine at that time. Nothing has since been developed in connection therewith calling for any radical change of opinion in this regard; and yet, after more than three years of actual experience in working the mine under that lease, the defendants, for the purpose of securing another lease of the same property, resorted to the means hereinbefore detailed to obtain it; and, after having thus secured absolute control of the corporation to which it

belonged, by their votes as stockholders, authorized and directed themselves, as the officers and agents of the company, to make and execute a lease of said premises to another and distinct corporation, wholly owned by them and for their exclusive benefit, at one-half the royalty contracted for in the first lease, provided a sufficient quantity of ore could be found accessible without an unreasonable outlay of money.

It seems that a reduction of one-half the royalty agreed to be paid under the first lease ought to have been accepted as a sufficient concession. But it did not satisfy the defendants. They demanded more, and being, as they supposed, in full possession of the requisite power, they dealt in a most generous spirit with themselves. The second lease, conforming to the requirements of the resolution passed by their votes, included, in addition to the mine, from $30,000 to $40,000 worth of machinery, (which the lessor company was, under the terms of the first lease, bound to purchase,) and the $50,000 of money appropriated for the purpose of sinking and equipping a shaft to put the mine in a more workable condition to facilitate their operations. Interest on these two sums, ordinary deterioration of the machinery, the $3,000 salary allowed to one of the defendants for acting as president of a corporation stripped of its property and left without any active business or responsibility, will about absorb all the rent payable under said second lease. Its effect, therefore, is to transfer the beneficial interest of all the company's property to defendants for 18 years. But if, perchance, it does not do this, another stockholders' meeting, to be called and controlled by defendants, can easily find some pretext for appropriating any surplus that may remain. A lease thus attained, and capable of being perverted to such injustice, ought not to be sustained. It is inequitable, and a fraud upon the rights of the other stockholders. A decree will, therefore, be entered declaring it fraudulent, and ordering its rescission, and appointing a receiver to take charge of and superintend the company's business, until the accounts hereinafter ordered and the rights of the parties involved herein are ascertained and finally adjusted. The defendants St. Clair will also be required to account with the Winthrop Iron Company, pursuant to the terms of the first lease, until December 1, 1882, the date of its expiration, and from and after that time for the actual profits realized by them from said mine, or for a reasonable royalty, at complainants' election. Said defendants will also be decreed to pay the costs heretofore accrued. And as the complainants have prosecuted this case for the common benefit of all the parties interested, to protect and preserve a trust fund, they are entitled to be reimbursed therefrom for all proper expenditures made or liabilities necessarily incurred in and about the prosecution of the same. A master will, therefore, be appointed to hear proof, and take and report in reference to the accounts hereinbefore ordered, and to ascertain what will be a proper allowance to complainants for their

counsel fees and other necessary expenditures made or to be made by them in and about the prosecution of this suit.

All other questions will be reserved until the coming in of the master's report.

The main position in the case above given rests on the rule that a principal may, at his election, avoid a contract made by his agent when such contract reserves emoluments or benefits to the agent which should have been given to the principal. The profit that an agent is permitted to make out of his agency is limited to salary and commissions fixed by law or by agreement of the parties. Hence, any contracts by an agent for the purchase of the principal's property, or the investment of the principal's assets, inures to the principal's benefit; or, if it be the result of a speculation by the agent for his private gain, it may be repudiated by the principal, so far as concerns the agent and parties with notice, unless it should appear that the speculation was made with the principal's approval, on a full knowledge of the facts.(*a*) The reasons for vacating such contracts increase in strength when the agent, from his peculiar position, is enabled to exercise peculiar influence over the principal, as is the case when a director or officer of a company makes a contract on behalf of the company for his own emolument;(*b*) or a trustee, relied on implicitly by the *cestui que trust*, makes an unfair profit out of the latter's estate.(*c*) Nor is this all. An agreement by an officer of a railroad company to use his influence to have the road take a particular course, is not only voidable as against the company, but void generally, as against public policy.(*d*) "All arrangements by directors of a railroad company to secure an undue advantage to themselves, at its expense, * * * are so many unlawful devices to secure an undue advantage to enrich themselves to the detriment of the stockholders and creditors of the company, and will be condemned whenever properly brought before the courts for consideration."(*e*) And in a later case, still unreported, (*f*) it was held that an agreement, for a consideration, of a stockholder in a business corporation to vote for a particular person as manager, and to vote to increase the salaries of the officers, including that of the manager, is void, as against public policy, if not cured by the assent of all the stockholders.(*g*)

FRANCIS WHARTON.

(*a*) Lees v. Nuttall, 2 Myl. & K. 819; Lowther v. Lowther, 13 Ves. 95; Dunne v. English, L. R. 18 Eq. 524; Marsh v. Whitmore, 21 Wall. 178; Baker v. Humphreys, 101 U. S. 494; Mott v. Harrington, 12 Vt. 199; Smith v. Townsend, 109 Mass. 500; Fulton v. Whitney, 66 N. Y. 548; Lorillard v. Clyde, 86 N. Y. 384; Everhart v. Searle, 71 Pa. St. 256.

(*b*) Imperial Merc. Co. v. Coleman, L. R. 6 H. L. 189; Flanagan v. Railroad, L. R. 7 Eq. 116; New Sombrero Phosphate Co. v. Erlanger, L. R. 5 C. D. 73.

(*c*) Coles v. Trecothick, 9 Ves. 234; Ellis v. Barker, L. R. 7 Ch. 104; Thompson v. Eastwood, L. R. 2 App. Cas. 236; Parker v. Nickerson, 112 Mass. 495; Hunt v. Moore, 2 Barb. 105; Diller v. Brubaker, 52 Pa. St. 498; Spencer's Appeal, 80 Pa. St. 332.

(*d*) Berryman v. Railroad, 14 Bush, 755.

(*e*) FIELD, J., Wardell v. Railroad, 103 U. S. 658; citing Great Luxembourg R. R. v. Magney, 25 Beav. 586; Benson v. Hathaway, 17 S. C. 326; Flint R. R. v. Dewey, 14 Mich. 477.

(*f*) Woodruff v. Wentworth, Sup. Ct. U. S. 1883.

(*g*) See Guernsey v. Cook, 120 Mass. 501.

HUTHSING *v.* BOSQUET and others.

(*Circuit Court, D. Iowa.* February, 1882.)

PUBLIC OFFICER—CONTRACT WITH NON-RESIDENT—KNOWLEDGE OF LAW PRESUMED.

Where a party in one state makes a contract with direct reference to the law of another state, he must be held to know the law of that state.

Huthsing v. *Bousquet*, 7 FED. REP. 833, reaffirmed.

This case was submitted on the following agreed statement of facts, after the filing of the opinion, reported in 7 FED. REP. 833:

"It is hereby stipulated and agreed, by and between the parties to the above-entitled action, that said cause be submitted for determination and judgment to the court, and that in the determination of said cause the following agreed statement of facts shall be taken and considered as true, without further proof thereof, but subject to any legal objection that may be urged in argument by either party on the ground of incompetency, irrelevancy, or immateriality.

"1. That the plaintiff and said Lawler are now, and have continuously been, citizens and residents of the state of Missouri, since prior to the year A. D. 1876, and that the defendants are, and for many years have been, residents and citizens of the state of Iowa.

"2. That in the year A. D. 1876 the board of supervisors of Marion county, in the state of Iowa, was composed of three members only, and that the defendants, Herman F. Bosquet, A. A. Welsher, and one H. D. Lucas, being the chairman of said board. That the term of office of said Lucas expired on the thirty-first day of December, 1876, and he was succeeded by the defendant, John B. Ely, who served as such supervisor for three years next succeeding thereafter.

"3. That on the tenth day of October, 1876, the office of the treasurer of said Marion county was robbed of about ten thousand and five hundred dollars ($10,500) of money, belonging to said county, by two men, who entered the said office and by threats compelled the treasurer of said county to open the safe and deliver said money to them, and that John R. Barcus and Harry Williams are the persons who committed said robbery.

"4. That on the morning of the eleventh day of October, 1876, said Bosquet, Welsher, and Lucas met at Knoxville, the county seat of said county, without notice or request therefor having been given, and without any of the steps having been taken as provided in section 301 of the Code of Iowa for the holding of special meetings of boards of supervisors, but having convened, with other citizens, solely on account of said robbery, for the purpose of taking such action in relation thereto as might be deemed best, they, the said Bosquet, Welsher, and Lucas, then and there, while thus convened, issued and caused to be published and circulated the offer of reward referred to and set out in the original and substituted petition herein, and sent a copy thereof to the chief of police of the city of St. Louis, Missouri, which was seen and read by the plaintiff and by said Patrick Lawler on or before the sixteenth day of November, 1876. It is agreed that the said Bosquet, Welsher, and Lucas, at the time they issued the said circular, did not meet or organize as a board, nor pass any resolution in any formal or informal manner adopting said offer of reward, nor make any record of their proceedings, but were individually present in the treasurer's office, and merely consulted together as to the propriety of making said offer, and agreed thereto, whereupon the said offer was written out and signed by said H. D. Lucas, chairman, in the presence of the

defendants Bosquet and Welsher, and the said offer was, by the direction of the said Bosquet, Welsher, and Lucas, printed and circulated.

"5. That in making and circulating said offer of reward said Bosquet, Welsher, and Lucas acted in good faith, believing they had the right and power to make the same on behalf of said county in the manner as herein stated, and that if the terms of said offer were complied with it would entitle the party who might perform such service to the reward therein offered from said county, but did not intend to make such offer as a personal offer by said board or its individual members in their individual capacity. Nor did said supervisors intend that said circular should be understood to be a personal offer by them, but intended to make the same in their official capacity only, as the board of supervisors of said Marion county.

"6. That after the plaintiff and the said Lawler had seen and read said circular, and with a view to obtain said reward,—to-wit, on or about the sixteenth day of November, 1876,—they recovered about the sum of ($3,071) three thousand and seventy-one dollars of the said stolen funds of said county in the city of St. Louis, Missouri, and placed the same in the hands of the chief of police of said city, subject to the order of said county; and also, on or about the twentieth day of November, 1876, arrested the said John R. Barcus at Atchison, in the state of Kansas, and in a few days thereafter delivered him over into the hands of the sheriff of said Marion county. That said Barcus was duly convicted of said robbery in January, 1877, and is now serving out his sentence in the penitentiary.

"7. That when said printed circular came to the notice of plaintiff and said Lawler, and when they performed the services herein mentioned and referred to, they and each of them understood and relied on such circular and the offer of reward therein contained as being made solely on behalf of said Marion county, and not on behalf of the supervisors who issued and published the same. That they and each of them expected the compensation promised in said circular to be paid by said county, and not by said supervisors personally, nor by any of them. That neither plaintiff nor said Lawler knew the name of any member of the board of supervisors of said county, except said H. D. Lucas, until after they had performed all the services for which compensation is claimed in this action, and had, at the time of said services, no actual knowledge, information, or belief that under the laws of Iowa supervisors were not legally authorized to issue said offer of reward, but had only such knowledge as imputed by law.

"8. That about the month of January or February, 1877, plaintiff and said Lawler filed, with the auditor of said Marion county, an account (a copy of which is hereto annexed and marked A) against said county, duly verified, claiming of said county the reward sued for in this action, and also for expenses; and that afterwards said plaintiff and said Lawler sued said Marion county for the reward sued for herein, and also for the reward on the money recovered by them, and for their said expenses; and that, upon issues joined in said action in a court of competent jurisdiction, said plaintiff and said Lawler were adjudged to be entitled to recover of said Marion county about the sum of $1,000 as reward for the recovery of said $3,071, and about the sum of ($675) six hundred and seventy-five dollars for expenses in and about the recovery of the same, and in the apprehension and delivery of said Barcus. But the question of the liability of said county to pay the reward sued for herein, for the arrest of said Barcus, was not adjudicated in said action, and the claim herein is not barred by reason of any former adjudication thereon, but the same was withdrawn before judgment in said case.

"9. That the acts of the supervisors, in issuing and publishing said offer of reward, were duly ratified by the said board in full and regular session, in 1877, and by repeated acts thereafter, as shown by the annexed resolutions,

marked B and C and D and E, which are made a part hereof, and which, it is agreed, were regularly and duly adopted by said board and spread upon its record.

"10. The court may take notice and give force to any statutes of the state of Missouri or decisions of the law court of said state, cited in argument by either party herein, the same as though offered in evidence, and subject to the same objections as are provided for in section 1 hereof.

"11. That in case the plaintiff is entitled to recover herein for the arrest and conviction of said Lucas, it is agreed that he is to have judgment in the sum of $2,500, and interest from May 1, 1877, being one-half the reward offered, if the court shall hold that said reward is apportionable, and if that is material.

"12. That so far as said petition herein relates to the claim for the apprehension and conviction of said Williams the same is to stand for trial separately, and subsequently hereto.

"13. That said offer of reward was issued for circulation and information of the public, and to induce parties to act thereon, and that said Huthsing and Lawler performed the work and services set forth in the petition, resulting in the arrest of John R. Barcus, as further set forth in section 6 hereof."

Whiting S. Clark, for plaintiff.

Anderson & Kinkead, for defendants.

McCRARY, J. The plaintiff now seeks, by his new averments and the agreed statement, to put his case upon the ground of fraud. It is not pretended that there was any fraudulent intent on the part of the defendants. That they, in fact, acted in perfect good faith, intending to bind the county, and believing they had power to do so, is not questioned. How, then, does the plaintiff attempt to make a case of fraud? They say the defendants are conclusively presumed to have known the law of Iowa, and therefore must be held to have offered the reward knowing that the county would not be bound. They must, therefore, have intended to mislead and deceive the plaintiff. Now it is manifest that this reasoning is purely technical. It aims to charge the defendants upon a case of fraud in law when there was no fraud in fact. It would be a strange result in an action at law to make a defendant responsible upon a charge of fraud while admitting that he, in fact, acted in perfect good faith.

It is, of course, necessary to this argument for the plaintiff to assume that he did not know the law of Iowa, because if he did know the law he was not deceived. But in my opinion this is untenable. When a party in one state makes a contract with direct reference to the law of another state, I think he must be held to know the law of that state. In all the county bond cases it was held by the supreme court that the non-resident holder for value without notice, of county bonds, must take notice of the law of the state conferring the power to execute them, and that if the law of the state conferred no power the innocent purchaser and holder could not recover. He was bound to know the law of the state under which the contract was made. He could not be innocent by reason of his ignorance in that regard. It never entered the mind of any one to say that, being a citizen of

another state, he was not presumed to know the law of the state giving the authority to issue the bonds; and no one ever dreamed that the county officers, if they acted *ultra vires*, bound themselves personally. Why, then, was not the plaintiff in the present case bound to take notice of the law of Iowa conferring power upon the board of supervisors to offer the reward? The plaintiff saw, by the very terms of the offer, that the board intended to bind the county and not to make themselves personally liable. Why was he not bound to take notice of the law of Iowa, and see whether or not it gave the board power to make the contract upon which he sues?

If the defendants in this case can be made responsible for fraud, upon the theory that they knew the law while the plaintiff was ignorant of it, I can see no reason why the county officers who may issue bonds in perfect good faith under a mistake of the law may not be made personally responsible upon them by any non-resident purchaser for value.

The plaintiff made a contract with the county of Marion, not with the defendants as individuals. He did service to the county, not to the defendants individually. And now, finding he cannot recover from the county, seeks to change the whole nature of the transaction. He seeks to make parties liable with whom he had no contract, and for whom he performed no service.

Upon a careful reconsideration of the whole case by both judges we are prepared to reaffirm what was said in the original opinion, and to hold that there is nothing in the amended petition upon which to base a claim for damages in favor of the plaintiff and against the defendants.

The demurrer to the amended petition is therefore sustained, both judges concurring.

LITTLE PITTSBURGH CONSOLIDATED MINING CO. *v.* AMIE MINING CO.

(*Circuit Court, D. Colorado.* July 2, 1883.)

1. MINING CLAIM—LOCATOR DISPOSING OF PART.
   After a mining claim has been properly located, the owner of it may sell any part without prejudice to his right to hold the remainder. He may dispose of it by gift or grant in any way that seems proper to him, and the mere fact that a part of it is transferred to another will not defeat the right of the locator to other portions which were not so sold, disposed of, or surrendered.
2. SAME—PREVIOUS LOCATION.
   A location of a mining claim cannot be made by a discovery shaft upon another claim which has been previously located, and which is a valid location.

At Law.

Rockwell & Bissell, for plaintiffs.

Markham, Patterson & Thomas, for defendants.

HALLETT, J., (*orally.*) The Little Pittsburgh Consolidated Mining Company brought an action of ejectment against the Amie Mining Company to recover the Winnemucca mining lode. The defendant answered, among other things, that the plaintiff at one time, without stating what time, set up a claim to the Winnemucca lode, and also to the Little Pittsburgh lode. At that time the Winnemucca lode was owned by other parties, claiming adversely to the plaintiff, and the Little Pittsburgh lode embraced or covered all of the Winnemucca claim except the ground in controversy in this suit, which is a small strip upon one side or the other—I don't remember the exact location. The ground then claimed by the plaintiff as a part of the Little Pittsburgh claim included the discovery shaft of the Winnemucca claim. The owners of the Little Pittsburgh claim applied for a patent to that claim, and were met by an adverse proceeding on the part of the owners of the Winnemucca claim, which was settled in some way, by which the claimants of the Little Pittsburgh property became entitled to their entire claim, including the discovery shaft of the Winnemucca claim. The adverse claim was withdrawn from the land-office, and the Little Pittsburgh people were allowed to make the entry of their lode. There is some confusion in the statements of the answer as to who were the parties owning these claims, respectively, at that time. In some parts of the answer it appears that the present corporation, the Little Pittsburgh Consolidated Company, then claimed and owned the Little Pittsburgh claim, and conducted the proceedings for patent; and from other parts of the answer it would seem that it was not this company, but some one from whom it has derived title. But the substance of the answer is that by the withdrawal of the adverse claim to the application of the Little Pittsburgh claim for a patent the Winnemucca parties abandoned their claim entirely, and no right or title can be now set up under that location. This position appears to be to the effect that one who owns a mining claim must at all events hold on to his discovery shaft until he has obtained a patent for his claim. If he yields it to another in any way, by conveyance or otherwise, he thereby abandons the rest of his claim.

I do not see upon what principle such a conclusion can rest. After a claim has been properly located, the owner of it may sell any part without prejudice to his right to hold the remainder. He may dispose of it by gift or grant in any way that seems proper to him. What was done in this instance by the Winnemucca parties and the Little Pittsburgh parties is not stated. Whether the Winnemucca parties yielded voluntarily to the Little Pittsburgh people, or made sale to them, or in what way they disposed of their interest, if they had any, in this claim, is not stated. But I do not think that can be material. Any concession that they may have made to the Little Pittsburgh people is to them only, and is not available to any other person.

It has been decided, it is true, in the supreme court of this state,

and in this court also, that a location may not be made by a discovery shaft upon another claim which has been previously located, and which is a valid location, but that doctrine has nothing to do with the point in controversy here. For all that appears, the Winnemucca may have been the better location, and it may have been sold by the Little Pittsburgh parties, or disposed of in some way. The mere fact that a part of it was transferred to the Little Pittsburgh parties is not enough to defeat the right of the locators to other portions which were not sold, disposed of, or surrendered.

The demurrer to the answer will be sustained.

TILTON *v.* BARRELL and another.

(*Circuit Court, D. Oregon.* June 26, 1883.)

1. RES JUDICATA.
   The decree of a competent court in a suit to enforce the right of the grantee against the grantors in an instrument admitted by both the plaintiff and defendants to have been intended to operate as a mortgage, determines the rights of the parties thereto and thereunder, so that either they or their privies, as against each other, are estopped to say or allege aught to the contrary.
2. FINAL DECREE—MODIFICATION OF.
   During the term the court may modify, supplement, or supersede a final decree in any case; and while it is more orderly and convenient to state in the second decree how far or in what respect it is intended to affect the first one, still this is not actually necessary; and it will be presumed that in giving the second decree the court intended to modify the first one, in so far as they differ, unless the circumstances plainly indicate the contrary.
3. DECREE AND EXECUTION THEREON.
   An execution directing the sale of mortgaged premises to satisfy the debt of the mortgagee must be based upon a decree which is sufficiently indicated therein; but, although there is a variance between the latter and the former as to the date of the decree, the execution and sale thereon is valid, in favor of any person claiming thereunder, if it plainly appears to the court, upon a view of all the facts, that the execution was in fact issued upon the decree in question, and for its enforcement.
4. TWO SIMILAR DECREES IN A CASE.
   Two decrees, purporting to be final, were given in *L.* v. *B.*, within three days of each other, directing the sale of mortgaged premises, and differing only in the mode of describing the same,—the first one describing them by parcels, and the second one by the same parcels, and as a whole. *Held*, that said decrees were, in legal effect and operation, identical, and an execution might properly issue upon either of them.

Action to Recover Possession of Real Property. Motion for a new trial.

M. W. Fechheimer, for plaintiff.

W. W. Chapman, for defendants.

Before FIELD and DEADY, JJ.

DEADY, J. On November 29, 1882, Charles E. Tilton, a citizen of New York, brought this action against Colburn Barrell and his wife,

Aurelia Jane, citizens of Oregon, to recover the possession of a tract of land situated in Multnomah county, containing 13¼ acres, and alleged to be worth $13,000. Aurelia Jane demurred to the complaint, and on December 27, 1882, the demurrer was overruled. 14 FED. REP. 609. The defendants afterwards answered separately, and to the new matter contained in these answers the plaintiff replied.

From the pleadings it appears that the plaintiff purchased the premises from William S. Ladd, a citizen of Oregon, who purchased them at a sheriff's sale upon a decree against the defendants foreclosing a mortgage thereon, executed by them to said Ladd, and upon them the following issues arise:

(1) As to the ownership and right to the possession of the premises,—the plaintiff alleging that he is the owner of the same, and entitled to the possession thereof, while the defendants deny such ownership, and allege respectively that Aurelia Jane is the owner of 11 acres of the premises, and Colburn is the owner of the remaining 2⅜ acres, and entitled to the possession thereof. (2) As to legal effect of the conveyance of the premises to William S. Ladd by the defendants on January 17, 1877,—the defendants alleging that the same was intended as a mortgage to secure the payment of $3,850 then due from said Colburn to Ladd in two years, with interest at 1 per cent. per month, and that Ladd agreed to give the defendants a writing to that effect, which promise, so far as Aurelia Jane is concerned, he did not keep, but on March 22, 1877, executed a writing to said Colburn whereby he agreed to sell the whole of said premises to him; while the plaintiff alleges that he gave said Colburn, for himself and as agent of his wife, on said date, a writing by which he agreed that if the sum due him was paid on or before March 7, 1878, but not afterwards, he would release and quitclaim the premises to said Colburn or his assigns. (3) As to whether the defendants are not estopped to allege any act concerning the execution of the conveyance of January 17, 1877, and the understanding or conduct of the parties about or concerning it,—the plaintiff alleging that on December 4, 1879, said Ladd brought a suit in the proper state circuit court, against the defendants, for the purpose of having said conveyance of January 17, 1877, declared a mortgage, and foreclosed accordingly; that the defendants were summoned, appeared and answered the complaint in said suit, and that on March 22, 1880, said court made a final decree therein, declaring said conveyance to be a mortgage; that the defendants had broken the condition thereof, and that the premises be sold as therein directed; that on March 23d an order of sale issued out of said court to the sheriff, requiring him to sell the premises as upon an execution, upon which the same were duly sold to William S. Ladd on April 24, 1880, who afterwards, on August 25, 1880, and after the confirmation of said sale by said court, duly conveyed the premises to the plaintiff. And (4) as to whether the conveyance by Ladd to the plaintiff was collusive or not,—the defendants alleging that it was made without consideration, and for the purpose of enabling said Ladd to maintain an action in this court for the possession of the property in the name of the plaintiff, and upon the understanding that the same, or the proceeds thereof, should be returned to him;—all of which the plaintiff denies.

The cause was tried by the district judge, with a jury, and the defendants admitting that the issue as to the collusive character of the conveyance to Ladd ought, upon the evidence, to be found against them, under the direction of the judge a verdict was found for the plaintiff. The defendants moved for a new trial, and the motion was

heard on June 26th. The grounds of the motion for a new trial are error of the court in the admission of the evidence and instruction to the jury.

In the course of the trial the plaintiff offered in evidence a transcript of the proceedings in the state court in the case of *Ladd* v. *Barrell et ux.*, to which the defendants objected for various reasons, only one of which is pressed on the motion for new trial. In this transcript there are two final decrees—the one given on March 19th and the other the 22d; and while the latter is pleaded in the replications as an estoppel, the execution appears to refer by date to the former. And, first, the rights of the parties to this conveyance or mortgage of January 17, 1877, and the writing of March 22, 1877, were directly involved and determined in the suit of *Ladd* v. *Barrell et ux.*, in the state court, and are now *res judicata*. The defendants had their day in that court, and by their answer substantially admitted the claim of the plaintiff therein, and cannot now be heard to allege aught to the contrary of the determination based thereon.

But counsel for the defendants contend that as there is nothing in the transcript from which it expressly appears that the state court intended to vacate or modify the first decree, the second one is a nullity, and does not support the estoppel set up in the replications; while, if such decree is valid, then the sale and conveyance to Ladd in pursuance of the first decree is void and of no effect.

But if the order of this argument is reversed, as it well may be, the conclusion reached supports the allegation of title or ownership in the plaintiff, and disproves the plea of title in the defendants, whatever may be the effect on the estoppel. Admit, if you please, that the second decree is void, as being made after the court had exhausted its power and jurisdiction over the subject, then the first decree is valid, and the sale and conveyance to Ladd in pursuance of it is valid. But we do not see any reason to think this second decree invalid. It was given at the same term as the first, and while the proceeding was still in the breast of the court, and subject, in this respect, to its control and power. True, it would have been more orderly and convenient, in making the second decree, to have referred to the first one, and stated in what particular the latter was intended to modify, supplement, or supersede the former. But such a statement was not absolutely necessary. On the contrary, it is to be presumed that a second decree made within the term is intended to modify a former one just so far as it differs from it, either in breadth or length. Any other conclusion, unless under circumstances plainly indicating mistake or misapprehension, would be contrary to reason and common sense. Nor is the objection that the sale appears to have been made on an execution issued on a decree of March 19th, instead of the 22d, valid in this action. The process upon which this sale was made consists of a copy of the decree, followed by a writ in the nature of a *venditione exponas*, issued and signed by the clerk,

and may be considered an execution, within the purview of section 403, Code Civil Proc., providing for the enforcement of a decree in a suit in equity.

It is necessary, of course, that this execution should have a decree to support it, and that it should appear from the former what decree is intended to be enforced by it. But where sufficient appears on the face of the execution to connect it with the decree,—to indicate with reasonable certainty that the one is intended to enforce the other,—courts usually disregard mere variances in the names of the parties, the date, or the amount of the judgment or the decree. *Bissell* v. *Kip*, 5 Johns. 100; *Jackson* v. *Walker*, 4 Wend. 462; *Jackson* v. *Anderson*, Id. 478; *Brown* v. *Betts*, 13 Wend. 33; Freeman, Ex. § 43.

The material question in this case is, did the execution issue on this decree? and if, upon all the facts, it appears evident to the court that it did, the sale upon it ought to be regarded, so far, as valid.

Now, there is no doubt that this execution was issued upon and to enforce the final decree in the court in *Ladd* v. *Barrell et ux.* The marks of identity are the names of the court and the parties, the origin and amount of the indebtedness to satisfy which the property was directed to be sold, the subject-matter of the sale,—in short, every material circumstance contained in such decree except the date, and that all the authorities agree is amendable, and should be disregarded in this action. But, in legal effect, there is no difference in these two decrees of March 19th and 22d, and the execution may have been well issued on either of them. The actual difference between them consists simply in the fact that in the first decree the premises are described by parcels, seven in number, and in the second decree by said parcels and as a whole,—the one being as exactly the equivalent of the other as 2 and 2 are of 4.

The entry of two final decrees in the case, and the difference between them, evidently arose in this way: At the request of counsel for the Barrells, the court sent the case to a referee to examine and report upon the propriety of a scheme of offering the property for sale in parcels, so as to enhance the proceeds thereof. The referee reported a scheme, dividing the property into seven parcels, and the court directed it to be sold accordingly, upon the condition that, after it had been offered in parcels, if any would bid more for it as a whole, it should be knocked down to him, and the result was that it was sold to Mr. Ladd as a whole. But in the first decree the property was only described and bounded by the metes and bounds of these seven parcels, and the second decree was evidently entered out of an abundance of caution, so as to describe the premises by metes and bounds as a whole, as well as in parcels, and as a convenience for future use and direction, in case it should be so offered and sold.

The motion for a new trial is denied.

WILLIAMS *v.* BUFFALO GERMAN INS. CO.

(*Circuit Court, D. Kentucky.* February 19, 1883.)

1. FIRE INSURANCE—SOLE OWNERSHIP OF PROPERTY—OUTSTANDING INTEREST —BOND FOR CONVEYANCE.
   A policy of fire insurance described the property insured as "his two-story dwelling-house," etc., and it appeared that he had purchased the fee and taken a bond for a conveyance, but that the vendor had only a life estate in the property, with a remainder in six-sevenths thereof; that a suit had been instituted to perfect the title, to which the insured was a party; and that there was an outstanding purchase note, which he owned at the time of the insurance and the loss. *Held*, that the outstanding note, and the fact that the insured only held under a title bond, was not material to the risk, and that the fact of the outstanding seventh interest or remainder did not prevent him from being "the sole and unconditional owner," within the meaning of the policy.
2. SAME—MATERIALITY OF DEFECT IN TITLE—QUESTION FOR JURY.
   In such a case the question whether the defect in the title or interest of the insured was material to the risk should have been submitted to the jury, and the peremptory instruction to the jury to find for him was error.

At Law. Motion for new trial.

Yeiser & Moss, for plaintiff.

Gilbert & Reed, for defendant.

BARR, J. I gave the instructions for plaintiff on the trial of this case, and I am glad a motion for a new trial has been entered, as it gives an opportunity for the examination of the authorities, and a more mature consideration of the questions upon which the case turned. The material facts are not in controversy, and, if I remember them, they are briefly these: No previous written application for insurance was made by plaintiff, and at the time he insured he was in the possession of the property insured, claiming the absolute ownership thereof. He had purchased a fee-simple title, and held a title bond for a conveyance with covenant of warranty. There was an outstanding purchase note, which he owed at the time of the insurance and at the time of the loss. At this time there was a defect in the title of the vendor, Mrs. Perkins. She had a life estate in the property, and had obtained from her children their interest, except one of them, who held an undivided one-seventh in the remainder after the death of Mrs. Perkins. There was pending in the McCracken circuit court a chancery suit at the time this insurance was obtained. Williams was a party to this litigation, and its object was to perfect Mrs. Perkins' title so that he (Williams) might obtain from her a perfect title. The policy describes the property insured as plaintiff's: "His two-story frame dwelling-house and ell." There was no other statement as to title and ownership; and as the policy provides that the assured, by the acceptance of this policy, warrants that he, among other things, has not "omitted to state to the company any information material to the risk," the learned counsel insists that the omission to state to the company the outstanding vendor's note, and that he only held

under a title bond, was and is fatal to his contract of insurance. The outstanding note, and the fact that plaintiff's title was evidenced by a title bond instead of a deed, were not material to the risk, since the loss to the assured would have been equally as great as if his title had been a legal instead of an equitable one, and the note had been paid instead of being unpaid. It will be observed that the assured was not asked as to the evidence of his title, nor did he warrant against incumbrances. The defect of title, the outstanding one-seventh interest in the remainder, which the assured had notice of, I will consider under the next defense. There is a provision of the policy which provides that it shall become void unless consent in writing is indorsed by the company in each of the following instances, viz.:

"If the assured is not the sole and unconditional owner of the property; * * * or if any change takes place in the title, interest, location, or possession of the property, * * * whether by sale, transfer, or conveyance, in whole or in part, or by legal process, or by judicial decree; or if the title or possession be now, or shall hereafter become, involved in litigation."

This is rather awkwardly expressed, but I presume the meaning is that if the assured is not sole and unconditional owner of the property insured, or if the title or possession of it is involved, or shall thereafter become involved, in litigation, it must be consented to, and consent indorsed in writing by the company. I am inclined to the opinion that this does not require the assured to guaranty his title, but only requires that he hold, *claiming* a sole and unconditional ownership. If this is not the correct construction, then every one accepting such a policy thereby warrants his title to be *perfect*.

Those who insure against fire and other losses are interested in knowing who is in possession of the property insured, and upon whom the loss would primarily fall if there were no insurance, and hence are interested in knowing whether the assured is holding as a sole and unconditional owner. The *character* of his possession and holding is the matter of interest to the insurer, and not his paper title.

We should give a reasonable construction to the language of this contract, and, in ascertaining what is a reasonable construction, the purpose and object of the contract should be considered.

The plaintiff had purchased a sole and unconditional ownership, and was in possession under that purchase. The fact that his vendor, although claiming a fee-simple title, had in law only a life estate and six-sevenths of the remainder, does not, I think, prevent plaintiff from being the sole and unconditional owner of the property, within the meaning of this provision of the policy. If the assured are expected not only to state the extent of their interest in the property sought to be insured, but to guaranty a *perfect* title, under penalty of losing the benefit of their insurance, the language should be clear and explicit, so that the assured may understand it.

The authorities are in some conflict upon this subject.

The supreme court, in *Ins. Co.* v. *Haven*, 95 U. S. 245, held that an outstanding lease for 10 years was not a violation of an agreement that the assured had the "entire, unconditional, and sole ownership of the property."

In *Hough* v. *City Fire Co.* 29 Conn. 10, the court held that the word "absolute" in such a provision in the policy was synonymous with "vested." In that case the policy provided that "if the interest in the property to be insured be a leasehold interest, or other interest not *absolute*, it must be so represented to the company, and expressed in the policy in writing, otherwise the insurance shall be void;" and the facts were that the assured was in possession under a parol agreement to purchase. The assured recovered for his loss. In *Wineland* v. *Security Ins. Co.* 53 Md. 276, the policy provided that if the assured was not "the sole and absolute owner of the land on which the building should stand by a title in fee-simple," the same should be stated and indorsed in writing, else the policy would be void. The assured had entered under a parol gift from his uncle, who was the fee-simple owner, and had made improvements on the land, and the court held he could not recover. Much stress was laid upon the words "by a title in fee-simple."

In *American Basket Co.* v. *Farmville Ins. Co.* 3 Hughes, 251, the assured had only an equitable fee, and it had been stated in the application that the title was in the assured; still a recovery was had, although the policy, like the one at bar, required the assured to be the "entire, unqualified, and sole owner."

In *Washington Mills M. Co.* v. *Commercial Fire Ins. Co.* 13 FED. REP. 646, the policy provided that "if the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, or if the buildings insured stand on leased ground, it must be so represented to the company, or so expressed in the written part of the policy, otherwise the policy shall be void."

The land had been sold by the assured before obtaining the policy, but in the conveyance the assured had reserved the right to remove the buildings within a certain time, and if not removed within that time they were to be the purchaser's. Those buildings were insured and destroyed during the time within which assured could remove them. Held, he could recover for the loss of the buildings.

In *Waller* v. *Northern Assurance Co.* 10 FED. REP. 233, the policy provided as in *Washington Mills, etc.*, v. *Ins. Co., supra*, and the finding of the jury was that the assured was simply a mortgagee with a debt of $5,000, and that the property assured was worth $8,000 or $9,000. The assured held by an absolute, unconditional title, although in fact he was only a mortgagee. The court held that there could be no recovery, because the assured's true interest was material to the risk, and should have been communicated to the insurer.

In *Rumsey* v. *Phœnix Ins. Co.* 1 FED. REP. 396, the provisions of the policy were like those in the policy sued on, and the court uses this very pertinent language to the case at bar:

"A party in possession of insured premises under a valid subsisting contract of purchase is equitable owner, and has an insurable interest, although he has not paid the whole consideration money. He is not guilty of a misrepresentation if he represents the house as *his* when he applies for insurance, and there is no breach of warranty if the house is described as his dwelling-house in the policy. The statement and the state of facts are consistent with each other; there is no misrepresentation, because an intent to deceive cannot be inferred; there is no breach of warranty, because *the representation is true in substance.*"

It is insisted that the plaintiff's title was, at the time of the insurance, "involved in litigation," and therefore he should not recover.

There was a litigation in which plaintiff was endeavoring to perfect his title, but the outstanding one-seventh interest could not have been recovered from him, as that interest did not accrue until the death of the mother, who was plaintiff's vendor. The chief purpose of the chancery suit was to have the property which plaintiff exchanged for the property insured take the place of that property. "Involved in litigation" means, in this connection, a litigation in which there could be a recovery of the assured's title in part or in whole. I do not mean that the litigation should show that there *would* be a recovery against the assured, but only that the litigation should be of such a *character* that there might be some recovery against him. Thus, to illustrate, suppose a party held by title bond, and was entitled to a deed, and was suing to get the legal title out of heirs or others, and the suit was of such a character that in *no* event could there be a recovery against such a party, this would not be a litigation *involving* the title of such party within the meaning of this policy. In this case the daughter of Mrs. Perkins could in *no* event have recovered of Williams anything, because her interest was that of a remainder-man, subject to a prior life estate, which was owned by Williams.

The views indicated on the trial, after a careful consideration, are still adhered to; but I am inclined to think error was committed by a peremptory instruction to the jury to find for plaintiff.

It may be that the jury would have found that this defect in the title and interest of plaintiff was a fact material to the risk, and as plaintiff knew of it, he should have communicated it to the defendant. This question should have been left to the jury.

I shall, therefore, grant defendant a new trial, and it is so ordered. The costs will follow the final result.

MILLER v. UNION PACIFIC RY. CO.[1]

(Circuit Court, D. Colorado. June, 1883.)

1. RAILROAD COMPANY—NEGLIGENCE.
   Negligence is the failure to use ordinary care,—that is to say, such care as a person of common prudence would exercise under the circumstances; and where the complaint is that the plaintiff has been injured by the negligence of a railroad company, the question for the jury is, did the railroad company fail to discharge any duty it owed to the plaintiff?
2. NEGLIGENCE—PUSH CARS.
   Where push cars are furnished by a railroad company to be used in transporting materials, and to be propelled by pushing, it is not negligence in the company to fail to supply them with brakes or other means of controlling their movement.
3. MASTER AND SERVANT—RESPONSIBILITY OF MASTER FOR ACTS OF VICE-PRINCIPAL.
   If the master, or another servant standing towards the servant injured in the relation of superior or vice-principal, orders the latter into a situation of greater danger than in the ordinary course of his duty he would have incurred, and he obeys and is thereby injured, the master is liable, unless the danger is so apparent that to obey would be an act of recklessness.
4. SAME—WHO IS A VICE-PRINCIPAL.
   Where a master employs one servant and requires him to work under the orders of another, and gives the latter power to dismiss the former at his pleasure, the latter is a superior servant or vice-principal, and stands in the place of the master when acting in the scope of his powers.
5. RAILROAD COMPANY—USAGE OR CUSTOM—USE OF PUSH CARS TO CARRY EMPLOYES.
   Although push cars are originally furnished to be used only to carry materials, yet if the company permits their use to transport workmen from place to place for such a time and so generally as to become a custom of the road, it may be held to have authorized such use.

MCCRARY, J., (*charging jury.*) The plaintiff in his complaint avers that he has suffered personal injury by reason of the negligence of the Kansas Pacific Railroad Company, and that the defendant is liable therefor. That the plaintiff was injured while in the employ of said Kansas Pacific Railroad Company, substantially as alleged, is not disputed; but the defendant interposes three separate defenses, which it is your duty to consider. These are—*First*, that the Kansas Pacific Railroad Company was not guilty of negligence as charged; *second*, that the plaintiff was guilty of negligence which contributed to his injury; *third*, that if there was any negligence other than that of the plaintiff, it was the negligence of his fellow-servants engaged in the same common service with him, for which the company is not liable.

If you find from the evidence that either of these defenses has been sustained, you will find for the defendant. If you find that neither of them has been sustained, and that plaintiff has suffered injury without negligence on his part, and by reason of the negligence of

[1] From the Colorado Law Reporter.

said Kansas Pacific Railroad Company, then you will find for the plaintiff.

You may give your attention in the first place to the question whether the company was guilty of negligence. Negligence is the failure to use ordinary care; that is to say, such care as a person of common prudence would exercise under the circumstances. In the present case the question may be stated thus: Did the Kansas Pacific Railroad Company fail to discharge any duty it owed to the plaintiff?

It is contended on behalf of the plaintiff that the company failed to discharge its duty towards the plaintiff in two particulars, to-wit: *First*, that it failed to furnish him a safe means of transportation from the coal mine to the station, when he was required by its order to go from the former to the latter place; and, *second*, that by its agent, McGrath, who was placed in a position of authority over him, it ordered him into a position of unusual peril, by reason of which he was injured.

As to the first of these particulars, it is to be observed that, to sustain it, the plaintiff is required to prove to the satisfaction of the jury that the push car, upon which the plaintiff was riding at the time of the accident, was furnished by the company to be used for the transportation of employes from place to place upon the line. There is no evidence tending to show that the push car was originally furnished for this purpose. It is clear that if the plaintiff can recover at all, it is not upon the ground that the push car was constructed and placed upon the road for the purpose of being used to transport employes, and was not furnished with brakes, so as to be safely used for that purpose. As the cars were not originally intended to be used for this purpose, but to carry material only, and to be propelled by pushing, it was not negligent in the company to omit to provide brakes or other means of retarding their movement. Whether the company, by permitting the employes to use push cars for the purpose in question, and by its order to McGrath, to be hereafter referred to, has so far consented to such use as to be bound, is a question for you to consider, under the evidence and instructions of the court, which will be presently given you.

Between a railway company and its employes there exists the relation known in law as that of master and servant. When the servant enters into this relation he assumes all the risks ordinarily incident to the duty he undertakes to perform, and on the other hand the master (the railroad company) binds itself not to expose him to any extraordinary risks, or such as do not ordinarily belong to the employment. In accordance with this rule the law is that if the master, or another servant standing towards the servant injured in the relation of a superior or vice-principal, orders the latter into a situation of greater danger than in the ordinary course of his duty he would have incurred, and he obeys, and is thereby injured, the master

is liable, unless the danger is so apparent that to obey would be an act of recklessness. A servant may obey orders coming from one having authority over him, with power to discharge him for disobedience, unless to obey would expose him to danger so glaring that a prudent man would refuse to enter into it even under such orders. In order to make out the allegation that the company was negligent in ordering the plaintiff into a position of unusual danger, the plaintiff must show to your satisfaction—*First*, that McGrath, the foreman, was invested by the company with power to order him to get upon the push car, to be carried to the station, and to enforce such order by a dismissal of the plaintiff from the service, or, what is equivalent, by a request or recommendation which plaintiff knew would result in his dismissal; *second*, that by obeying said order the plaintiff subjected himself to extra danger; and, *third*, that the danger was not so apparent and glaring as to make it an act of recklessness on his part to obey.

Had McGrath authority from the company to use the push car for the transportation of the carpenters from the coal mine to the station? This is a very material question in the case, and one which you must determine from the proof. It is clear that McGrath had authority to order plaintiff from the coal mine to the station for the purpose of taking the train to Cheyenne Wells. Probably he would have possessed this authority as foreman merely; but, however this may be, it is in evidence that he had express orders from the proper officer of the company to take the carpenters, including plaintiff, by the next train to Cheyenne Wells, in order that they might perform certain duties there.

He was authorized by this order to employ such means as were usual and proper to transport the men to the station; and what means would be proper might depend to some extent upon whether great haste was necessary or not. If, in order to carry out his instructions, it was necessary to proceed to the station in a very short time, or if he supposed in good faith that haste was necessary, then he was justified in choosing, among several modes of conveyance authorized by the rules or usages of the company, that one which would enable him to reach the station in the shortest time. But he was not authorized, even for the sake of speed, to adopt a mode of transportation not permitted or sanctioned either by the rules or the customs of the company. If it was customary or usual upon the lines of the Kansas Pacific Company to use push cars for such a purpose, then, under the circumstances, McGrath was authorized by the order under which he was acting, and by such custom, to use the push car in question for that purpose. The company cannot, however, be held to have authorized this use of the push car by McGrath, unless the previous similar use of such cars on the same road had been so common as to be known to the officers having charge of the management of the branch road, or so that, if not in fact known to

them, it might have been known by the exercise on their part of ordinary diligence. It is not necessary that such usage or custom should have existed for a very long period, but it is necessary that it should have existed long enough, and been sufficiently general and notorious, to enable the jury to say that it was an established custom or usage of the road. If the company permitted its employes to use the push cars in this way, and made no objection and took no steps to stop or prevent such use until it became habitual, the employes of the company had a right to assume that it was authorized, and McGrath had the right to resort to it in executing the orders above mentioned; but if, on the other hand, such use of push cars had only been occasional, and was not general or common, then the company was not bound by it.

It is for the jury to say upon the evidence whether McGrath was authorized by the usage of the company, and in view of the law as I have stated it, to use the push car to carry plaintiff and the other carpenters to the station. If he was so authorized, then the jury will proceed to inquire whether he ordered plaintiff to get upon said car to be so transported, and if so, whether, by reason of the character of the grade, the load upon the car, the absence of brakes or other means of retarding the motion of the car, it was extra hazardous for plaintiff to obey the order. If you find that it was, then you will come to the question whether plaintiff was guilty of negligence in obeying the order; or, in other words, the question of contributory negligence. What I have already said will in part apply here. Plaintiff cannot be charged with negligence in obeying an order of his superior, unless he acted recklessly in so obeying. He was not bound to examine the push car, nor to make inquiry concerning the grade, but was at liberty to rely upon the implied promise of the company not to subject him to unusual dangers, unless, from what was patent to him, he must have known that to obey the order would be an act of recklessness. If you find that McGrath was plaintiff's superior, with power to order him to get on the push car to be carried to the station, then the rule I have just stated must guide you in deciding the question of contributory negligence.

Defendant insists that the plaintiff and McGrath were fellow-servants, engaged in the same common employment, and that, therefore, the company cannot be held liable in this case. The rule upon this subject is this: If the company employed plaintiff and required him to work under the orders of McGrath, and gave McGrath power to cause his dismissal at his pleasure, and also directed McGrath to take plaintiff from the coal mine to Cheyenne Wells on the day of the accident, then I hold as a matter of law that in respect to the removal from the one place to the other, and with respect to the time and manner of such removal, McGrath was the superior, and stood towards plaintiff in the relation of vice-principal, or in place of the company.

You are, then, to consider, in the light of the evidence and of these instructions: *First*, whether the company authorized McGrath to use the push car for the purpose named, and his authority may be shown by proof that such use was in accordance with an established custom of the company, as above explained, but is not shown in this case unless you find such custom has been proved; *second*, if you find that such authority is proved, you will proceed to inquire whether the order given by McGrath to plaintiff in pursuance of such authority required the latter to incur unusual danger, resulting in his injury; and, *third*, whether plaintiff was guilty of contributory negligence, or was injured by reason of the negligence of a fellow-servant, within the rule I have laid down.

If you find for the plaintiff upon these questions, you will then come to the question of his damages, in considering which you will take into account the nature and extent of his injuries, whether they are permanent or not, to what extent he is deprived of earning a living by the pursuit of his usual occupation or otherwise, as well as his pain and suffering, loss of time, and expenses of medical treatment and nursing. From all the facts and circumstances as developed before you in the evidence, you will, if your verdict is for plaintiff, assess his damages at such reasonable sum as in your judgment will compensate him for his injuries.

If you find for the defendant, you will simply say so by your verdict.

In re JOHNSTON.

(*District Court, D. New Jersey.* June 30, 1883.)

BANKRUPT'S DISCHARGE—PARTNERSHIP—CREDITORS.

Where, deducting from the list of creditors assenting to the discharge of a bankrupt partner those whose claims are against the partnership alone, it appears that one-third in value have not assented to the discharge, it must be refused.

In Bankruptcy. On application for discharge.

John Linn, for bankrupt.

Charles T. Glen, for creditors opposing discharge.

NIXON, J. Various specifications are filed against the bankrupt's discharge. In my view of the case it is only necessary to consider the one charging that not one-fourth of the creditors in number and one-third in value have assented to the discharge. It appears by the schedules of the bankrupt, by the proofs of claim, and by the evidence taken on the reference, that the said bankrupt, at the time he filed his individual petition for the benefit of the act, was also liable for the debts of a partnership of which he had been a member, and which had been dissolved a few years before. The partnership has not been

brought into bankruptcy, but a number of the claims put in against the individual estate are these partnership debts, and two or three of the creditors assenting to the discharge are only creditors of the partnership, and have no individual claim against the bankrupt. In the schedules the bankrupt estimates his interest in the real and personal estate of the late firm of W. L. & G. W. Johnston, after the settlement of the debts of the partnership, at about $8,000. We cannot, therefore, assume that there were no assets of the firm to be administered, and that the case will fall within that class of cases where, in the absence of all partnership assets, the discharge of the bankrupt on his personal petition operates upon his partnership as well as his individual debts. It only discharges his individual obligations. See *In re Little*, 1 N. B. R. 341; *In re Bidwell*, 2 N. B. R. 229; *Hudgins* v. *Lane*, 11 N. B. R. 462; *Crompton* v. *Conkling*, 15 N. B. R. 417; *In re Noonan*, 10 N. B. R. 331.

It was, doubtless, lawful for the partnership creditors to prove their claims against the individual estate of one of the partners, for they would be entitled to come in and participate in any dividend of the assets, if any should happen to remain after the payment of the individual debts in full. But consenting to the discharge is quite a different matter. The law clearly contemplates that only those creditors should be allowed to assent whose claims will be discharged by the discharge of the bankrupt.

Eliminating from the proofs the claim of Elias A. Wilkinson, trustee, for $47,999.26, on which the bankrupt is not liable as principal debtor, and allowing the other proofs to stand, their aggregate amount is $22,116.18—one-third of which is $7,372.06. Deducting from the list of creditors assenting to the discharge those whose claims are against the partnership alone, it is clear that one-third in value have not assented to the discharge, and the same is therefore refused.

UNITED STATES *v.* OWENS.[1]

(*District Court, E. D. Missouri.* July 3, 1883.)

INDICTMENT—SENDING LETTER THROUGH THE MAIL TO CREDITOR WITH INTENT TO DEFRAUD—REV. ST. § 5480.

An attempt to defraud a creditor by inclosing with a letter to him worthless slips of paper in place of money, stated by such letter to be inclosed therewith, and sending such letter and inclosed slips to such creditor through the mail, is not an indictable offense under section 5480 of the Revised Statutes.

Motion to Quash Indictment on the ground that it does not set out any offense under the statute.

[1] Reported by B. F. Rex, Esq., of the St. Louis bar.

The indictment charges that the defendant, being indebted to the Bowman Distilling Company,—

"Devised a certain scheme and artifice to defraud by means of certain slips of paper, to be inclosed in a certain letter with a certain coin known as a half-dollar, which said slips of paper were then and there to be inclosed as aforesaid in the place of a certain sum of money, to-wit, the sum of $162; and which said scheme and artifice was then and there intended by the said Owens to be effected by opening correspondence and communication with the said corporation by means of the post-office department of the United States,—did, in and for executing and attempting to execute the said scheme and artifice, then and there place in a certain post-office of the United States, to-wit, the post-office at Alton, * * * a certain letter, then and there having inclosed therein the said slips of paper and the said coin, and then and there addressed to the said Bowman Distilling Company."

The letter is set forth in the opinion.

The section of the statute alleged to have been violated is as follows:

"Sec. 5480. If any person, having devised or intending to devise any scheme or artifice to defraud or be effected by either opening or intending to open correspondence or communication with any other person * * * by means of the post-office establishment of the United States, * * * shall, in and for executing such scheme or artifice, or attempting so to do, place any letter * * * in any post-office of the United States, * * * such person so misusing the post-office establishment shall be published by a fine * * *."

William H. Bliss, for the United States.

Franklin Ferriss, for defendant.

TREAT, J. An indictment was found against defendant under section 5480, Rev. St. A motion to quash has been interposed. The questions presented call for an interpretation of said section, and the sufficiency of the averments made. Substantially, the indictment charges that the defendant, being a debtor of the Bowman Distilling Company for $162.50, remitted to the latter, through the mail, a 50-cent coin, with certain slips of paper, (their character and value not stated,) the letter inclosing the same being as follows:

"ALTON, MO., February 21, 1883.

"*Bowman Distilling Company*—GENTS: Please inclosed find $162.50, being the whole amount due you from us, for which you will please place to our credit and forward the receipt for the same, and oblige yours, truly,

"A. B. OWENS & CO."

It is averred that defendant, within the meaning of said section, opened a correspondence with said creditor to defraud him by the means aforesaid. It is obvious, so far as the indictment discloses, that the fraudulent scheme could not be effective. The debt would not be discharged by the receipt of worthless slips of paper, nor even by the giving of a receipt obtained by fraud. If the design was to obtain credit for $162.50 and a receipt through the carelessness of the creditor, does the transaction fall within said section? No one was defrauded, and no one could possibly be. There may have been

an attempt to cheat, cognizable, possibly, by some state statutes or a common law. Were the postal laws designed to draw within federal jurisdiction each and every individual transaction between debtor and creditor, when postal correspondence ensues, with respect thereto, irrespective of the possibilities of effecting a fraud, if any were designed? Remittances may be made which may or may not be received in discharge of a debt, and may or may not be of the value stated. If the creditor chooses to receive such remittances—may be drafts, etc.—in payment of his demand, and it should turn out, after litigation, that such remittances were valueless, and forwarded with the knowledge of the debtor that they were of no value, is resort to be had to the postal laws for the ascertainment of such facts and the punishment of the offender? If such is the scope of the section named, it may draw within federal cognizance nearly all the commercial correspondence of the country as to disputed demands and the value of remittances.

It appears to the court that the act was designed to strike at common schemes of fraud, whereby, through the post-office, circulars, etc., are distributed, generally to entrap and defraud the unwary, and not the supervision of commercial correspondence solely between a debtor and creditor. This seems to be the true interpretation from the language in the last clause in the section, viz.:

"The indictment, information, or complaint may severally charge offenses to the number of three, when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall apportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device."

The court, on this motion, looks solely to the charge as made in the indictment, without holding that no case of private correspondence between debtor and creditor can, under any circumstances, fall within the statute. It was hinted in argument that certain devices were resorted to, in connection with a registered letter, for the purpose of inducing the creditor to believe that the remittance had been tampered with and abstracted while in the post-office, and that at the trial facts to that effect would appear. If such are the facts the indictment does not disclose them. It must suffice that averments made do not bring the defendant within the statute. Whether the fact *dehors* the record may justify a new indictment, it is for the pleader to determine. The motion is sustained.

UNITED STATES v. EARL.

(Circuit Court, D. Oregon. June 26, 1883.)

1. INDIAN—WHEN UNDER CHARGE OF AN AGENT.
When a tribe of Indians is placed under the charge of an Indian agent by treaty or otherwise, each member of such tribe is under the charge of such agent, within the purview of section 3129 of the Revised Statutes, and no member thereof can dissolve his tribal relation or escape from such charge by absenting himself from such reservation, or otherwise, without the consent of the United States.

2. SAME.
An Indian boy in Oregon, who left the locality of his tribe and lived with a white family until his tribe had entered into treaty relations with the United States and gone upon a reservation in pursuance of such treaty, and until he was 23 years of age, and then went to live upon such reservation as a member of his tribe, could not thereafter, by simply absenting himself from the reservation, dissolve his tribal relation or cease to be under the charge of the agent of such reservation.

3. INTERCOURSE WITH INDIANS.
It is the duty of congress to regulate the intercourse with the Indians, and to that end they may provide for punishing the giving of spirituous liquors to them on or off a reservation within or without a state.

Motion for New Trial. Information for disposing of spirituous liquor to an Indian.

On April 28, 1883, the district attorney, by the leave of the court, filed an information in the district court, charging the defendant with the disposing of spirituous liquor in this district to Jake Thomas, an Indian under charge of an Indian agent of the United States, on March 1, 1883, contrary to section 2139 of the Revised Statutes, which provides that every person who disposes of spirituous liquor to any Indian "under the charge of any Indian superintendent or agent" shall be punished as therein provided. The defendant pleaded not guilty to the information, and the cause was thereupon removed to the circuit court and there tried before the district judge with a jury. On May 17th the jury, under the instruction of the court, found the defendant guilty as charged in the information. The defendant moved for a new trial on the ground of error in the instruction to the jury, and the motion was heard on June 26th before Mr. Justice FIELD and the district judge.

James F. Watson, for the United States.

Charles B. Bellinger, for defendant.

DEADY, J. On June 25, 1855, a treaty was negotiated with "the confederated tribes and bands of Indians residing in middle Oregon," at Wasco, Oregon, and ratified by the senate, March 8, 1869. 12 St. 963. Among these tribes were the Wascoes, belonging to the country about the Dalles of the Columbia. The treaty provided for the cession to the United States of the country belonging to these tribes, and the establishment of a reservation therein for their "exclusive use," commonly called "the Warm Spring reservation," to which they were to remove within a year from the ratification of the treaty.

On the trial it was admitted that the defendant kept a saloon at the Dalles, about 30 miles from the agency, and there disposed of whisky to the Indian, Jake Thomas, as alleged in the information. It also appeared from the testimony of said Indian that his parents belonged to the Wasco tribe of Indians, and that he was born near the Dalles about the year 1845, and that about 1855 he came down to the Wallamet valley with his parents, where he lived with them near Oregon City, at the residence of Col. Jennings, a well-known citizen. Thomas' father carried an express for the "government" in the Cayuse war of 1847. Gen. Palmer, when superintendent of Indian affairs, transferred the father to the "Grand Round reservation," as Thomas says, in 1861; but as Palmer was not superintendent after the early part of 1857, and the Indian is more likely to remember the name of the superintendent than the date of the transaction, such transfer must have taken place during Palmer's superintendency, and probably in 1856 or 1857, as the Grand Round reservation was not formally established until the latter year. 11 St. 183; Ex. Order, June 30, 1857. In about a year he returned to Col. Jennings' place and died; but Thomas remained with the latter, except a a short interval spent in running on a steam-boat to the Dalles in 1862, until 1868, when he went to live upon the Warm Spring reservation, where he remained about four years—part of the time engaged in teaching. In the winter of 1872–3 he served three months with a company of Indian scouts from the reservation in the Modoc war. Then he was in the Wallamet valley, knocking about on steam-boats and in tavern kitchens for two years, and the two following years he spent upon the reservation. Since then he has lived about the Dalles until last fall, when he went upon the reservation, where he has a sister, but no house, and remained there until this spring. During the latter period he bought and sold a piece of land. He has a family, that now reside about five miles from the Dalles. He also has a band of horses upon the reservation, and is allowed the privileges of the same as a Wasco Indian. When on the reservation he does not appear to have drawn any annuity or supplies, but says he could have done so if he wanted to; and that the reason he did not draw any supplies the last time he was there, was, "the treaty had run out." The court instructed the jury that the disposition of the spirituous liquor to the Indian being admitted, the only other question in the case is, "Was he an Indian under the charge of an agent?" and upon this point he said:

"If you believe the testimony of Thomas himself, then you ought to find the defendant guilty, because upon that testimony he is, and was at the date of the disposition to him of the liquor in question, an Indian under the charge of the Indian agent at the Warm Spring reservation."

To this instruction there was an exception, and counsel for the defendant now contend that it was erroneous, and therefore the motion for a new trial ought to be allowed.

The Wasco tribe of Indians were bound by the treaty of June 25, 1855, made with their "chiefs and head men," to go upon this reservation, and be subject to, under the charge and care of, an agent appointed by the United States for them. This convention included and applied to every member of the tribe in the same sense that a treaty duly concluded between the English and American governments does to the subjects and citizens of such powers. More than this, the United States claims and has rightfully exercised the power to place Indians upon reservations, or within circumscribed localities, and appoint agents to take charge of them there, as its wards, without any treaty to that effect, but simply upon its own volition, manifested by an act of congress or other proper department of the government. This treaty and appointment of an agent to take charge of the Indians upon the reservation thereby established, included Thomas, a member of the Wasco tribe of Indians, and thereafter we do not think it was in his power to relieve himself from the operation of the one or the authority of the other without the consent of the United States. The government of the latter is charged with the duty of regulating the intercourse between the Indian tribes and the other inhabitants of the country, and to this end it may inaugurate and pursue that policy in regard to such intercourse as may be for the best interest of all concerned.

But it may be said that, for the purpose of this case, the Indian should not only be under the charge of an agent potentially, but also as a matter of fact, and that whenever an Indian is allowed to be much or most of his time away from the reservation, doing for himself, he is not to be considered as under the charge of an agent. The fact that the Indian was off the reservation when he obtained the liquor from the defendant is rather suggested than asserted as some kind of an excuse for the act. But the defendant was not obliged or induced to sell this Indian liquor because he was not upon the reservation. It is a well-known fact that the Indians of Oregon, as a rule, belong to some reservation by virtue of treaty stipulations, and are actually or potentially under the charge of an agent; and whoever disposes of spirituous liquor to any one of them does so *prima facie* in violation of law. As was said by Mr. Justice MILLER, in *U. S.* v. *Holliday*, 3 Wall. 415:

> "The policy of the act is the protection of those Indians who are, by treaty or otherwise, under the pupilage of the government, from the debasing influence of the use of spirits; and it is not easy to perceive why that policy should not require their preservation from this, to them, destructive poison, when they are outside of a reservation, as well as within it. The evil effects are the same in both cases."

If it is admitted that this Indian was a member of the Wasco tribe at the date of the treaty of 1855, he was within its operation, and subject in law to the charge of the agents residing at the Warm Spring reservation since its ratification, unless his tribal relation has

since been dissolved. The recognition or dissolution of the tribal relation is a matter in which the courts usually follow the action of the political departments of the government. *U. S.* v. *Holliday*, *supra*, 419.

It does not appear that the tribal relation of Thomas has been dissolved by any act of the government, or that it has in any way consented to or acquiesced in any such purpose on his part. And, without such consent, we do not think the relation can be dissolved, as against the United States, after being recognized by it. But in the absence of any law or regulation made or authorized by congress to that effect, mere absence from the reservation, however prolonged, is not proof of such consent, because it may occur without the approval of the government, and it may take place with the consent of the agent for some lawful purpose, and with intent to return.

It may be admitted that an Indian who had separated from his tribe before the government took cognizance of it, as such, by treaty or otherwise, and did not return thereto, or claim or enjoy, at the hands of the government, any right or privilege as a member of such tribe, is not under the charge of an agent, within the meaning of section 2139 of the Revised Statutes. But in the case at bar, although the Indian was apparently separated from his tribe at the date and ratification of the treaty of 1855, by the act of his father, yet soon after coming to man's estate he voluntarily went upon the reservation therein provided for, and claimed and was allowed the privileges of such a reservation, as a member of the Wasco tribe of Indians, where he has since remained quite half the time, including a period so late as the last winter, and still keeps his stock there. Indeed, the absence of this Indian from this reservation since 1868 is probably owing to the fact that he is thereby enabled to get whisky from the defendant and others engaged in that business.

Under the circumstances, we are clearly of the opinion that Thomas is under the charge of the Indian agent at Warm Spring; since 1868, at least, when he went to live upon that reservation. The motion for a new trial is therefore overruled, and the defendant ordered to appear for sentence.

See *Forty-three Gallons of Cognac Brandy*, 11 FED. REP. 47, and note, 51; S. C. 14 FED. REP. 531, and note, 540.

CLARK POMACE-HOLDER CO. *v.* FERGUSON.

(*Circuit Court, N. D. New York.* 1883.)

1. PATENTS—COMBINATION OF OLD ELEMENTS.
   To constitute a valid combination, where the elements are old, all the component parts thereof must so enter into the combination that each qualifies the other, and a new result is produced by the combined action of all the component parts.
2. SAME—INVENTION OF NEW PLACE FOR OLD THING NOT PATENTABLE.
   To authorize a patent the law requires the invention of a new thing. It is not satisfied by inventing a new place for an old thing without change of result.
3. SAME—PUBLIC USE.
   Proof of but one instance of public use more than two years prior to the application for a patent is sufficient to defeat it.
4. SAME—LETTERS PATENT INVALID.
   Letters patent issued to John Clark on the sixth day of February, 1877, for an alleged improvement in cheese-formers for cider-presses are invalid, as the combination, if a valid combination, was not patentable, and was in public use more than two years before the application.

In Equity.

Walter E. Ward and *J. Van Santvoord*, for complainant.

William H. King, for defendant.

COXE, J. This is an equity action for infringement of letters patent issued to John Clark on the sixth day of February, 1877, for an alleged improvement in cheese-formers for cider-presses. The patent was subsequently assigned to the complainant. The patentee in the specification declares:

"The object I have in view is in laying up a 'cheese' for the cider-press, where each layer is folded up in a cloth, to secure uniformity of thickness of all the layers in the mass or cheese, and thus secure uniform pressure on its entire area, and to avoid all tendency to break the pomace frames or racks. To this end it consists in the employment of a guide-frame, in combination with extended pomace-racks, as more fully hereinafter set forth."

The claim is in the following words:

"The guide-frame, D, in combination with an extended pomace-rack, and a cloth to inclose a layer of pomace therein, substantially as described."

In the *Cider-makers' Manual*, published in 1869 by J. S. Buell, the author, after stating the advantages to be derived from the substitution of cloths for straw, as used in the old method of cider-making, proceeds to describe, at page 47, a plan which suggested itself to him in the fall of 1868, and which, in its essential particulars, is similar to the process described in the patent. After explaining how the frames are made, by placing lath or thin boards near together and nailing to them similar boards placed at right angles, he proceeds in these words:

"These frames are designated and known as pomace-frames, and are used in laying up a cheese as follows: First place upon the platform of the press one of these frames, seeing that it covers the entire inner surface of the curb.

Place upon the top of this frame the cloth or cloths, at the same time covering the inside of the rack with one thickness of cloth, laying the lower ends over the frame, and then fill in with pomace to the uniform depth of from three to five inches. Then lay on cloths, and upon the cloths place another frame, upon which lay other cloths, and add thereto five inches of pomace, thus building up successive layers of frames, cloths, pomace; cloths, frames; cloths, pomace,—alternating in like manner until the curb is filled, and then proceed as before described. The frames separate the cloths and allow the free passage of the cider from all parts of the cheese through and between them, while the openings between the slats of the frames act as conduits for the liquid to the outside receptacle."

It also appears by other evidence that two years and more before the application for this patent, cloths had been used in a precisely similar manner to the one therein described. Racks or frames had been used; so had guide-frames. This is not seriously disputed by the complainant's counsel, but they contend that the combination is new; that a guide-frame, in combination with an extended pomace-rack and a cloth to inclose the layer of pomace, was not used or known before.

Without pausing to consider the defenses of a purely technical character, relating to defects in the drawings, omissions in the affidavit, and the like, it will be more satisfactory to examine, in the light of the recent adjudications, the three questions which seem to be of paramount importance. *First*, does the use of the various elements claimed in the patent constitute a valid combination? *second*, has the patentee discovered anything that rises to the dignity of invention? and, *third*, was the precise process described in the patent known and used two years and more prior to the application?

The law, as applicable to patents of this character, would seem to be as follows: All the component parts must so enter into a combination of old elements that each qualifies every other. The result must be the product of the combination, which is patentable provided something new and useful is produced. If the elements of the combination act independently of each other, or if one element acts independently of the others, it is an aggregation of parts, and not entitled to protection as a combination. It is indispensable that a new and useful result should be produced, either by the invention of a new thing or a new combination of old things. Unless this is the case, even though the elements act reciprocally and in combination, the requirements of the law are not satisfied. The combination must be new; so must the result. *Hailes* v. *Van Wormer*, 20 Wall. 353; *Pickering* v. *McCullough*, 104 U. S. 310; *Reckendorfer* v. *Faber*, 92 U. S. 347; *Packing Co. Cases*, 105 U. S. 566; *Perry* v. *Co-operative Co.* 12 FED. REP. 436; *Welling* v. *Crane*, 14 FED. REP. 571; *Slawson* v. *Railroad Co.* 4 FED. REP. 531; *Stephenson* v. *Railroad Co.* 14 FED. REP. 457; *Manuf'g Co.* v. *Myers*, 23 O. G. 1443; [S. C. 15 FED. REP. 237;] *Doubleday* v. *Roess*, 11 FED. REP. 737.

Turning now to the patent in controversy, it may be said at the outset that the presumption of law, where a patent is claimed for a combination simply, is, that all the separate elements are old. But in addition to the presumption it is, as above stated, practically conceded that all the elements entering into this alleged combination are old.

The proof sufficiently establishes the fact that cloths and racks had been used before; that they had been used both separately and in combination; and further, that they had been used in combination with some device which, if not technically a "guide-frame," enabled the manufacturer to produce a layer of pomace "of a uniform depth of from three to five inches." So it would seem that the only distinction that can be suggested between the old method and the method described in the patent is in the extended racks,—in the use of a guide-frame a few inches smaller instead of a few inches larger than the racks. The result sought and obtained in both cases was the expression of the juice from the pomace. Whether the new method possesses advantages over the old is left somewhat to conjecture by the proof; perhaps the presumption that it does possess such advantages is a legitimate one arising from the patent itself.

1. It is sometimes extremely difficult to distinguish between a meritorious combination and a mere aggregation of distinct parts, and the case at bar furnishes a new illustration of this fact.

How the use of the guide-frame causes any co-action or combination between it and the racks and cloths, it is not quite easy to perceive. No new result is produced by its use. The press operates in the old way: the cheese is pressed down, and the juice forced out as before. To what that is new or useful does the guide-frame contribute in connection with the other devices? In other words, suppose this patentee to be the first inventor of racks and cloths, could he be deprived of the benefits of his discovery in its simplest and most practical form, by another person who should obtain a patent for such a combination as is described in the specification? Would it not be immediately insisted that the latter was simply using the old invention, with the addition of a very simple and well-known mechanical contrivance, which added to the old combination no new co-operative element? It would seem, at least, doubtful whether the guide-frame—to any greater extent than the shovel with which the pomace is placed upon the racks, or the instrument with which it is "'struck' level with the girts of the frame"—acts in combination with the racks and cloths. The guide-frame has been removed, and has ceased to perform any function before the racks and cloths begin to act reciprocally; it does not act on them or they on it. If straw or a solid platform were under the guide-frame instead of the racks, it would perform the same office.

To constitute a valid combination there must be a new result pro-

duced by the combined action of all the component parts. What is that result in this case? It may, perhaps, be admitted that the guide-frame operates more conveniently than the old devices; but something more than this is necessary to sustain a patent for a combination.

2. Assuming for the moment that there is here what the law recognizes as a combination—viz., such a union of separate and distinct parts that each operates upon and with the others, producing a new and useful result by their united action—the next question to be considered is, has the patentee invented anything worthy of protection? Before this patent, cider-makers had an undoubted right to use racks and cloths in combination or alone; and they had also a right to use some device by which the pomace could be placed on the rack in layers of uniform thickness. Any man of ordinary mechanical ingenuity, who wished to confine a yielding substance within prescribed limits, would almost certainly make a frame of the desired size. Clark did this and only this. He nailed four boards of equal length together at the corners, in the form of a hollow square, and laid it on the rack. Why is there any more of invention in this than the placing of the window, in the stove case, or the mirror, in the car case? What instrumentality does the patentee here use that was not known, and free to every cider-maker, long before the patent? Take away the guide-frame and nothing remains of his invention. Its use, though in a new position, would seem to be a simple mechanical device, requiring only ordinary skill and judgment, and not amounting to invention. Furnish any practical cider-maker with cloths and racks, direct him to place the pomace on the racks in a uniform and symmetrical manner, and it would immediately occur to him to do just what the patentee here did.

To adopt the sententious language of the court in *Stephenson* v. *Railroad Co.*, *supra*, it may be said: "To authorize a patent the law requires the invention of a new thing. It is not satisfied by inventing a new place for an old thing without change of result."

3. But it is insisted that the precise combination described in the patent was in use more than two years before the application. The complainant does not seriously dispute that it was used in the fall of 1874, but argues that its use was subsequent to September 11th, the application being filed September 11, 1876.

The undisputed evidence shows that it was used for a long time prior to the application, and in some instances the complainant is forced to admit that the delay in applying for a patent brought the patentee very close to the two-years' limitation. A number of witnesses, who are unimpeached, swear to the use of the combination in 1873, and even before that year. It is true that several persons were called by the complainant who testify that they heard nothing of its use, though living in the immediate neighborhood. It is also true that some of defendant's witnesses are contradicted and other-

wise discredited. Bearing in mind, however, the rule that proof of but one instance of public use more than two years prior to the application for the patent is sufficient to defeat it, the court would hardly be justified in disregarding the testimony of the numerous witnesses who positively affirm that they used the rack, cloths, and frame in 1871-2-3-4. *Egbert* v. *Lippmann*, 104 U. S. 333; *Manning* v. *Cape Ann, etc., Co.* 23 O. G. 2413; [S. C. 2 Sup. Ct. Rep. 860.]

As indicative of the patentee's own views upon the novelty and patentability of the alleged invention, it appears that he visited Syracuse in the summer of 1874 and explained his system to a member of the Boomer & Boschert Press Company—Mr. Boomer.

In September following, in a periodical issued by that company and widely circulated, there appeared a full and complete description of the system described in the patent. Under the heading, "The best system yet devised," is the following statement:

"It is to last year's experience that we are indebted for the most sensible plans for laying up a cheese,—a plan which we predict will be speedily adopted by all wide-awake cider-makers, although, perhaps, it has not yet been sufficiently tried to establish its merits; yet, *as is has been successfully put into use by several parties*, there seems to be no question as to its feasibility."

Then follows the description. This certainly is a very significant piece of evidence, in view of the fact that Mr. Boomer, who admits that he probably wrote the article, is now vice-president of the Clark Pomace-holder Company, the complainant in this action, his relations with the patentee being of an intimate and confidential character.

Upon the whole evidence it is thought that the patent cannot be sustained. The bill is, therefore, dismissed.

CORNELY *v.* MARCKWALD.

(*Circuit Court, S. D. New York.* June 26, 1883.)

1. PATENTS FOR INVENTIONS—PRIOR FOREIGN PATENT AS EVIDENCE—FOREIGN USE.

An inventor can obtain a patent in this country by proving that he is the original and first inventor in this country, and complying with the laws of this country in making his application for it; and foreign use would have no effect upon it at all, and a prior foreign patent would have no effect but to limit the term from the date.

2. SAME—ACTS OF 1836, 1839, AND 1861.

Under section 8 of the act of 1836, the inventor was not entitled to a patent here if the invention had been patented in a foreign county more than six months next preceding the filing of the application; but this restriction was removed by section 6 of the act of 1839, provided the invention should not have been introduced into public and common use in the United States prior to the application, and that the patent should be limited to 14 years from the date or publication of the foreign patent; and by section 7 the public use to defeat a

patent was required to extend to two years before the application; and finally, by section 16 of the act of 1861, the term was extended to 17 years, and extensions prohibited.

In Equity.

Benjamin F. Lee, for plaintiff.

William A. Coursen, for defendant.

WHEELER, J. This cause has now, after a decree for the orator establishing the validity of letters patent No. 83,910, dated November 10, 1868, issued to Antoine Bonnaz for an improvement in sewing-machines for embroidery, and pending the accounting, been heard on a motion of the defendant to reopen the case for further proofs. The grounds of the motion are that the invention was previously patented in France; that in litigation there between the orator, who now owns this patent, and the inventor, the patent there was adjudged invalid on allegations and evidence of the orator; and that the defendant desires an opportunity to put that judgment and the evidence of the orator there on which it was obtained in evidence here. This patent was granted under the acts of 1836, (5 St. at Large, 117;) 1839, (Id. 353;) and 1861, (12 St. at Large, 246.) The validity of the patent in this country does not at all depend upon the validity of the patent in France, although its duration may, which is not in question yet. Under section 8 of the act of 1836, the inventor was not entitled to a patent here if the invention had been patented in a foreign country more than six months next preceding the filing of the application. This restriction was removed by section 6 of the act of 1839, provided the invention should not have been introduced into public and common use in the United States prior to the application; and that the patent should be limited to 14 years from the date or publication of the foreign patent; and by section 7 of that act the public use to defeat a patent was required to extend two years before the application.

By section 16 of the act of 1861, the term 14 years was extended to 17 years, and extensions were prohibited. Under this provision patents for inventions patented abroad before were limited to 17 years from the date or publication of the foreign patent. *De Florez* v. *Raynolds*, 17 Blatchf. C. C. 436; [S. C. 8 FED. REP. 434.] The public use in France which might defeat the patent there would have no effect upon the validity of the patent here. The law here did not make the invention patentable here because it had been patented there, nor in any way found the patent here upon the patent there. The inventor could obtain a patent here by proving that he was the original and first inventor in this country, and complying with the laws of this country in making his application for it, and foreign use would have no effect upon it at all, and a prior foreign patent would have no effect but to limit the term from its date.

The evidence sought would be irrelevant to any issue in the case, and wholly unavailing. Motion denied.

CROSBY STEAM GAGE & VALVE CO. *v.* ASHCROFT MANUF'G CO.

(*Circuit Court, D. Massachusetts.* June 30, 1883.)

PATENTS FOR INVENTIONS—ANTICIPATION—INFRINGEMENT—PATENT NO. 145,726 VALID.

Patent No. 145,726, for an improvement in pressure-gages, granted to George H. Crosby, December 23, 1873, was not anticipated by patent 23,032, known as the Lane patent, granted in 1859, and is infringed by defendant's gage, which unites the ends of a Bourdon tube by a piece of metal, which, as to its operative parts, is the solid V-link of patent No. 145,726.

In Equity.

Before GRAY and LOWELL, JJ.

W. A. Herrick and *J. H. Millett*, for complainants.

T. W. Clarke, for defendants.

LOWELL, J. The plaintiffs are owners of patent No. 145,726, granted to George H. Crosby, December 23, 1873, for an improvement in pressure-gages. In his specification, the patentee declares the invention to consist of a new mechanism for connecting and transmitting the motion of the arm, or arms, of a Bourdon tube to the rack, or equivalent device, that carries the pointer, or index, in order to utilize, as far as possible, the upward, or vertical, as well as the horizontal movement of said tube, or tubes, which enables him to use a stouter tube for the same pressure.

"To accomplish this result," he says, "I employ two links, connected or jointed together at one end and separately pivoted at their opposite ends, which are spread apart in such manner that the two links constitute the sides of a triangle, of which the point where they are joined or connected together is the apex, and the line drawn between their separately pivoted ends is the base. In case two Bourdon tube arms or branches are employed, then one of said links is pivoted to the end of one of the branches, and the other link is pivoted to the other branch. In case but one branch or arm is used, then one of the links is pivoted to the end of this branch, and the end of the other link is pivoted to the case of the gage."

He then describes, with the assistance of drawings, several forms of gage in which his improvement may be used, and concludes:

"In all the modifications represented, it will be seen that there is one feature common to all, of two links jointed together at one end, with their other ends spread apart and pivoted separately, one, at least, of said ends being pivoted to the Bourdon tube, and connected, through their common pivotal point, with mechanism to operate the index-shaft of the gage, said mechanism deriving its movements from the changes of position of said common pivotal point; and, in all the modifications, the vertical movement of tube, or tubes, is fully utilized. In lieu of jointing together the two links at the apex, these ends of the links may be solidly united, the two thus forming, in effect, a solid V-link, the legs of which are separately pivoted, as before described."

The defendants make a gage which unites the ends of a Bourdon tube by a piece of metal which, as to its operative parts, is the solid V-link of the plaintiff's patent; and the points taken in defense are

two: that the patent, though it mentions this solid link, does not claim it; and that there was no patentable novelty in the improvement itself.

Taking the latter point first, it seems to us to be proved that a connecting device of the sort described in the patent, that is, a triangular link, is new in form. The instrument described in the Lane patent, No. 23,032, granted in 1859, approaches very nearly to the Crosby gage, and without the test of actual experiment we might not be able to detect any difference; but the experiments tend to show that the plaintiff's link, in some forms of gage, at least, saves some motion which Lane's rack and pinion loses. That the gage possesses this advantage to as great a degree as the patentee supposes, or that he has made a discovery of great importance, or even that the instrument works precisely as he supposes it to work, it is not necessary to say; but the plaintiff's experimental tests are not met by similar experiments on the other side, but with mathematical reasoning not sufficient to convince us of the fallacious character of those tests.

There is no doubt that Crosby's claim includes the solid V-link. It is in these words:

"In a pressure or vacuum gage, the means herein described for operating the index-shaft by both the upward, or vertical, as well as the horizontal movement of the Bourdon tube or tubes, the same consisting of two links joined or connected together at one end, with their other ends spread apart and pivoted separately, as specified, in combination with intermediate mechanism, transmitting the movement of said links to the index-shaft; the whole constructed and operating substantially in the manner shown and set forth."

The claim follows presently after the statement that the solid V-link may be used instead of the jointed link, and it carefully uses the words "joined or connected," instead of "jointed," to include both modes of joining the ends which made the apex of the triangle.

Connected with this question, there is some evidence which appears to be intended to prove that the operation of the solid link is not, in all respects, and under all pressures, precisely like that of the jointed link; but this is of no consequence, since both are sufficiently described and claimed, and one is infringed. We have not sufficient confidence in the actual superiority of the Crosby gage over that of Lane to order a peremptory injunction, but shall refer the case to a master to ascertain the real value of the improvement, and reserve all other orders until the coming of his report.

Decree for the complainants.

The Fannie Tuthill and others.

(District Court, N. D. Ohio, E. D. 1883.)

1. Collision of Vessels—Damages.
   Where a vessel has been damaged by a collision the owner is entitled to recover as damages whatever sum is found necessary to restore his vessel to the same degree of efficiency and usefulness as existed before the collision took place, notwithstanding that in such restoration new and more valuable material is used; nor is the sum actually contracted to be paid in the making of such repairs, though *prima facie* the measure of the sum, necessarily conclusive. Yet no sum greater than that actually expended should be allowed, in the absence of any claim by the shipwright for more compensation.
2. Same—Demurrage.
   The injured party may recover for the loss of the use and services of his vessel during the period required for her repairs; but it should only include the minimum time required for that purpose, and this should fall within the season of navigation, or within a time in which, but for the injury, his vessel could have been properly used.
3. Same—Towage and Dockage.
   Expenditures for towage or dockage made necessary wholly by the collision, also constitute a rightful claim for damages.

In Admiralty.

This was a suit to recover damages arising from a collision of the barge Harvest with libelants' vessel, the schooner Minnie Davis, while the barge was being towed by the tug Tuthill. On trial the tug and barge were found to be equally in fault, and a decree rendered accordingly. The cause was referred to Earl Bill, a circuit court commissioner, to take testimony and report to the court the damages of libelants arising from the collision.

Omitting the formal parts, the commissioner reported as follows:

In arriving at the conclusions of this report, from the facts shown in the testimony, the undersigned assumes as a legal principle that, as the collision is in the nature of a tort, the wrong-doer is bound by law to pay to the injured party, as damages, whatever sum is found necessary to restore his vessel to the same degree of efficiency and usefulness as existed before the collision took place, notwithstanding that in such restoration new and therefore more valuable material is used, and that for such difference in value no allowance should be made; and further, that while the sum actually contracted to be paid in the making of such repairs is, *prima facie*, the measure of the sum so necessary, it is not conclusive, for either the work may be contracted to be done for much less than the actual value, on the one hand, or, by collusion, an inordinately large sum may be contracted for. In the one case the contractor, and in the other the wrong-doer, would suffer injustice by the rigid enforcement of such a rule of damages. But any departure from it should only be taken with much care, and evidence of inadequacy should be severely scrutinized.

The right of the injured party to be indemnified for the loss of the use and service of his vessel during the period required for making his repairs is also recognized; but it should only include the minimum time required for that purpose, and this should fall wholly within the season of navigation, or within which, but for the injury, his vessel could have been profitably used. The value of such use and service is, in general, best proven by showing from the vessel's books what her earnings had been prior to the collision, and her current expenses, thus affording the means of estimating her net revenue.

Expenditures for towage, made necessary wholly by the collision, will also constitute a rightful claim for damages on the part of the libelants.

Guided by these principles the undersigned finds from the testimony—

That libelants contracted with one Lant, a ship-carpenter, for the repair of so much of the injury to their vessel by said collision as was inflicted upon her stern, for the sum of $400, not including the expense of dockage to the amount of 20 cents per ton of the vessel. It is somewhat difficult to determine, from a perusal of this contract, whether it was intended by the parties to it to include a complete restoration of the vessel, so far as the after-part of it was concerned, to its condition prior to the collision, or only the items of work and materials particularly specified in it. But, in the view taken of the matter by the undersigned, it is deemed unnecessary to pursue the inquiry. Lant proceeded with the work under it, and as he had, in the judgment of persons to whom the question was submitted, performed more than the contract required in the sum of $80, that sum was paid him by libelants' agent, in addition to the $400 stipulated in the contract.

Certain bills for materials, amounting to $31.02, were also paid by libelants, as to which it might be said that they were within the terms of the contract of Lant. It is also claimed that services were rendered by the master of the injured vessel while the repairs were going on, by way of superintendence of the work. There is also testimony showing payment by libelants on account of other materials used in the repairs, to the amount of $42.25. The items thus enumerated amount to the sum of $553.27. But it appears from the testimony, to the satisfaction of the undersigned, that the estimate of said Lant made prior to the execution of his contract, as to the outlay necessary for restoring said vessel to its condition of usefulness and efficiency, was erroneous and insufficient by reason of the decayed condition of the timbers, whereby it became necessary to extend the repairs to points beyond those to which they would of necessity have been carried had the unbroken parts been sound, in order to a secure fastening of the parts added by way of repair; such decayed and rotten condition being unknown to said Lant. If the fact of the rottenness was known to libelants and not disclosed or

apparent on inspection, there is at least a moral, if not a legal, obligation on the part of libelants to compensate Lant for his losses in the performance of his contract.

In the light of these facts the contract price ceases to be a true measure of libelants' damages, and we are to look to other means for their ascertainment, to-wit, the testimony of the experts as to the actual expense necessary to restore the vessel, as to her injuries at her stern, to its condition of usefulness and efficiency; and also to take into consideration the facts and circumstances developed in the actual making of the repairs aforesaid. As the estimates of witnesses who testified on this point have a range of from $130 to $800, the undersigned is compelled to rely greatly upon the opinion of the witness Lant, who did the work, and had, therefore, the most complete means of knowing the true value. His estimate is from $600 to $800, and is most nearly in accord with that of those witnesses (other than himself) whose skill, means of knowledge, and disinterestedness invite the confidence of the commissioner. Such true value is, therefore, found to be $700.

It is claimed that in making the repairs aforesaid the new work was extended beyond any necessity caused by the collision, by the insertion of new materials in place of old not injured or broken, thereby wrongfully enhancing the expense, and that the estimates of Lant, and the other witnesses last referred to, are tainted with the same infirmity. In repairing injuries to an old vessel whose timbers are decayed, it is difficult to fix, by testimony, at least, the true line where the insertion of new material should cease; and unless bad faith on the part of the injured party be shown, strict proof is required of the measure and value of the superfluous labor and materials. No evidence of bad faith appears in this case, and the undersigned is unable from the proofs to find any such excess that is susceptible of estimation.

Besides the injuries to the stern or after-part of the schooner Minnie Davis, to which the foregoing finding relates, it is found that the forward part of the vessel was injured by said collision, which libelants did not undertake to repair. The sum found necessary to make this repair is found to be $175.

It is also found that there was paid by libelants, for the use of the dock at which said schooner lay while undergoing repairs, the sum of $35, and that the same is justly chargeable as a part of their damages in this cause. Also, that they paid for towage in the Cuyahoga river, made necessary by said collision, the sum of $20 being allowed on that account. When the collision occurred the Minnie Davis was loaded with limestone, and she was cut down so nearly to the waterline that she was in danger of sinking, and the dock to which her cargo was destined by consignment being occupied, and inaccessible for the purpose of discharge of cargo, her master was compelled to proceed to another place, where he could and did discharge so much

of it as would enable him to avoid the peril of sinking. For this service, and for towage from the dock of her original destination to the place where the repairs were made, the above allowance is made.

It only remains to consider the question of demurrage, or the sum required to indemnify libelants for the loss of the use and services of their vessel during the period necessary to make the required repairs, and while the lake was still open for navigation. It is found that, although a longer time was in fact consumed, yet that 18 days were sufficient for the repair of the vessel had it been done with ordinary vigor and speed; and from the date of the collision to the close of navigation more than that number of days intervened, and in estimating the loss of service that number is adopted. Testimony as to the value of such service per day is conflicting, the range being from $8 to $30. As the books of the vessel, showing what, in fact, she had been earning, were not produced in evidence by the libelants, the commissioner is forced to rely upon the estimates of experts, or those engaged in like trade, and this kind of testimony is deemed quite unsatisfactory. As the vessel's books are esteemed to be evidence of a higher nature, this secondary proof is of necessity subject to a rigid scrutiny. On consideration of all the testimony on this point, the undersigned finds the value of said use and service at $20 per day, amounting to the sum of $360.

The sums so found on account of said repairs, towage, dockage, and demurrage, are exclusive of all other claims on said several accounts, the same being disallowed, and the aggregate of the sum so found is intended as a full indemnification for the damages done by said collision, which sums are hereby recapitulated, as follows:

For repairs of stern,	$700 00
For repairs of bow,	175 00
For towage,	20 00
For dockage,	35 00
For demurrage,	360 00
Total,	$1,290 00

It is, therefore, found that the true amount of the damages sustained by said libelants, by reason of the collision in their libel set forth, is the aforesaid sum of $1,290, with interest thereon from the date of said collision, viz., October 25, 1880.

Respectfully submitted,

EARL BILL, Commissioner.

To which report counsel for the respondent, Patrick Smith, owner and claimant of the tug Fannie Tuthill, filed 13 exceptions; and the same having been fully argued, a decision was rendered by the court at the April term, 1883.

Goulder & Weh, for libelants.
Charles L. Fish, for owner of the Tuthill.

WELKER, J. There are 13 exceptions filed by the respondent, owner of the Tuthill, covering all the findings of the commissioner. After full argument on behalf of both parties the exceptions are overruled and the report confirmed, except as to the item of repairs made to the libelants' vessel as allowed by the commissioner, to-wit, $700, found by him to have been the reasonable value of the repairs; and as to that item the court reduce the amount to the sum of $553.27, the actual expense of the repairs as found by the commissioner. The court holds that, although the rule adopted by the commissioner constitutes the usual measure of damages, yet when it appears that the repairs were actually done for less, and no claim made for more compensation by the shipwrights who did the work, in equity such should be the measure of recovery.

Decree accordingly.

THE JEANIE LANDLES.

(*District Court, D. Oregon.* July 3, 1883.)

1. SUPPLIES.
   The master of a vessel is not authorized to purchase supplies or incur indebtedness on the credit of the ship, or owner, in a foreign port, where the owner is represented by a known agent, unless under circumstances where the conduct of the owner or agent may fairly be construed as giving such authority.
2. STIPULATION BY CLAIMANT FOR THE DISCHARGE OF A VESSEL.
   The clerk is not authorized to take a stipulation for the discharge of a vessel, but the same must be done in court or at chambers, or before a commissioner; and in the former case notice thereof is given to the marshal by a writ of *supersedeas* issued by the clerk, and in the latter case by an order to the same effect issued by the commissioner; and in neither case is the marshal entitled to any fee or mileage for "serving" such writ or order, but he may charge any necessary expense incurred by him in consequence of such writ or order, as a part of the expense incurred under the process for the arrest and custody of the vessel.

In Admiralty.

David Goodsell, for libelant.

Erasmus D. Shattuck and *Robert McKee*, for claimant.

DEADY, J. On March 1, 1883, G. T. Reed, of the Caledonia saloon, in this city, brought suit in this court against the British ship Jeanie Landles for $159.50, of which sum $89.50 was alleged to be for vinous and spirituous liquors furnished the master as ship-stores, and on her credit; and $70 money loaned to him, as was alleged, on the credit of the vessel, for the payment of seamen's wages. The claimants, Meyer, Wilson & Co., of this city, as the agents of the owner, Mr. David Law, of Glasgow, answered the libel, alleging that they were the agents in this port for the owner of the vessel during her stay here, to the knowledge of the libelant, and denying that said liquors or money were necessary under the circumstances for said

vessel, or that she ever, in fact, had the benefit of them, or that they were furnished to the master of the Jeanie Landles on her credit, or otherwise than on the credit of the master and for his own use.

On the trial, it appeared from the testimony of the master, and otherwise, that the answer was true, and the court dismissed the libel; holding that by the maritime law the master is not authorized to purchase supplies or incur indebtedness on the credit of the ship in a foreign port where the owner is represented by a known agent, unless under circumstances where the conduct of such owner or agent may fairly be construed as giving such authority. 1 Pars. Shipp. & Adm. 8, 9, 15, 20, 332; Abb. Treat. 126. The claimant also had a decree for costs, and filed a cost bill, which includes these two items paid the marshal:

Service of warrant of delivery, - - - - -	$ 4 00
Mileage to Astoria, 110 miles, - - - - -	17 00

To these the libelant excepted, and the clerk sustained the exception, and the claimant appeals.

Upon the arrest or seizure of a vessel in a suit *in rem*, the claimant is entitled to have her returned to him upon giving a stipulation, with sureties, in such sum as the court may direct, to abide by and pay the money awarded by the final decree of the court in which it is taken, or the appellate court. Adm. Rule 10.

By the admiralty rules 5 and 35 this or any other stipulation may be taken in court or at chambers, or before a United States commissioner. Or the claimant may, under the act of March 3, 1847, (section 941, Rev. St.,) procure a stay of the execution of the process, or a discharge of the vessel therefrom, if already arrested, by giving a bond or stipulation to the marshal in double the amount claimed by the libelant, with sureties, approved by the judge or collector of the port.

In this case it appears that the stipulation was taken by the clerk in the form of a bond in double the amount claimed by the libelant, conditioned to "abide and answer" the decree, and upon so doing the clerk issued a writ, entitled a "Warrant of Delivery," directed to the marshal, reciting that the district judge—naming him—had ordered the ship to be delivered to the claimant, and directing him to make such delivery. When this warrant was received by the marshal, it appears that the vessel was lying in the river at Astoria, bound out, in the custody of a deputy or keeper, and that the marshal undertook to "serve" it, by sending it by mail to his deputy at Astoria, who removed the keeper, and surrendered or delivered the vessel to the master or agent of the owner.

Before proceeding further, attention is called to the fact that the clerk was not authorized to take this stipulation, and that, the district judge not having taken it, he made no order for the delivery of the vessel as recited in the so-called "Warrant of Delivery." But sup-

posing the stipulation to be taken before the proper officer, there must be some method of giving formal notice of the fact to the marshal, and advising him that the process for the arrest of the vessel has been superseded, and therefore he must surrender or deliver the vessel to the claimant upon demand.

In 2 Conkl. Adm. 98, it is said that "if the stipulation is taken and acknowledged before a commissioner of a distant port, he at once orders the vessel to be discharged; and if it is given in court, a *supersedeas* is immediately issued to the marshal. This is the only suggestion on the subject that I find in the works on admiralty within my reach, and, comparing it with the mode of proceeding in analogous cases, I think it furnishes a proper and convenient rule in the premises. The stipulation is intended to operate as a *supersedeas*, and whoever takes it ought to give or cause to be given notice to the marshal accordingly.

If this stipulation had been taken in court, notice would have been given to the marshal by a writ issued by the clerk, and called a *supersedeas*, because of its effect upon the former process. And if it had been taken before a commissioner, he should have given similar notice to the marshal by an order to the same effect. But in either case the writ or order would be served *upon* the marshal, and not *by* him; and by the claimant, his attorney or agent, delivering the same to him. The writ or order should contain a recital of the issue of the process, the allowance of the stipulation, and require the marshal to forbear the further execution of the process, and to surrender or deliver the property taken thereon to the claimant on demand. Of course he can make no charge for serving this writ or order, for, as I have said, he does not serve, but it is served upon him, so far as it is served at all. If, in consequence of it, he is put to any expense, as in transmitting it, or giving direction in pursuance of it to his deputy or keeper in a distant port, he may, I suppose, charge the same as a part of the expense incurred under the process for the arrest and custody of the vessel. See section 829, Rev. St; Rule 59, of the Civil Code.

The taxation of the clerk is affirmed and the appeal dismissed.

THE OSCAR TOWNSEND.

(District Court, N. D. Ohio. 1883.)

1. COLLISION—ANCHORING VESSEL IN RIVER—PRECAUTIONS.
   Although anchoring in a river in the night-time or day is not necessarily improper or dangerous, and although it may be customary to do so during stress of weather, yet, when so doing in the night, great care must be used to make ample room and space in the channel for passing vessels, and to so locate the anchorage as to avoid possible danger.

2. SAME—EVIDENCE OF FAULT.

In the absence of a proper watch and proper lights on board the anchored vessel, in this case, she must be held in fault and negligent.

In Admiralty.

William H. Condon and *E. A. Angell*, for libelant.

Goulder & Weh and *Willey, Sherman & Hoyt*, for respondents and cross-libelants.

WELKER, J. The steam-barge Oscar Townsend, with the barge Edward Kelley in tow, came down the St. Clair river at 2 o'clock on the morning of October 19, 1881, and ran the Kelley into the schooner Sunrise, which was lying at anchor in the river near Sarnia Bay, and was the cause of great damage to the schooner, for which this libel suit is filed. The barge Kelley claims to be somewhat damaged, for which a cross-libel is filed by her owners against the Sunrise. The libelant alleges that the Sunrise was anchored at a suitable and proper place, and that its officers were guilty of no fault or carelessness, and that the collision occurred through the fault and carelessness of the Townsend and Kelley. This is denied by the answer, and it is alleged in the answer that the collision was occasioned by the fault of the Sunrise.

The court finds that the Sunrise was in the night-time anchored in the St. Clair river, and within the channel or roadstead usually taken at that point by vessels coming down the river at night; that, although anchoring in the river in the night-time or day-time is not necessarily improper or dangerous, and although it may be customary to do so during stress of weather, yet, when so doing in the night, great care must be used to make ample room and space in the channel for passing vessels, and to so locate the anchorage as to avoid possible danger; that the Sunrise was anchored at a dangerous place in the river, at a point where there was a strong current, and where her lights might have easily been confounded with those on the Canada shore beyond her by persons on vessels coming down the river, and difficult to distinguish from them; that the Sunrise did not have at the time a suitable and proper anchor watch to guard her from danger from passing vessels coming down the river; that she did not put up and keep up in good order to the time of collision suitable and proper anchor lights, to notify passing vessels of her locality, so as to avoid collision with her; that she did not comply with rule 10, Rev. St. § 4233, which requires that all vessels, when at anchor in roadsteads or fair-ways, shall exhibit, where it can best be seen, a white light, so constructed as to show a clear, uniform, and unbroken light, visible all around the horizon; that she did not display, as it was her duty, a torch-light, when the lights of the Townsend and Kelley were first made, as they approached her, to enable them to see her and avoid a collision; that immediately before the collision she failed to change her position, as she might have done by putting her wheel to starboard instead of to port, and thereby cause her to

swing out of the way of the Townsend and Kelley,—in all of which respects the Sunrise was at fault and negligent; that the Townsend, in coming down the river, occupied the usual channel or roadstead at the point where the Sunrise was anchored and located; that it had proper lights and a proper watch at the proper places; that the lights of the Sunrise, being so dim at the time, were not seen by the Townsend far enough away to have avoided the collision, although proper diligence was used for that purpose; that when the lights were seen, being close upon the Sunrise, the master of the Townsend used proper seamanship in trying to avoid the collision; and that, therefore, the Townsend was not guilty of negligence or carelessness in causing the injury; that the Kelley, being the tow, was guilty of no negligence, and therefore not liable for the injury to the Sunrise.

The claim of the Kelley in the cross-libel not being pressed by counsel, the cross-libel is dismissed. Decree dismissing libel at libelant's costs. Appeal allowed.

THE ARCTURUS.

(*District Court, N. D. Ohio, E. D.* April Term, 1883.)

LIBEL FOR WAGES OF MASTER.

The master of a vessel has no lien on the cargo of the vessel for his wages beyond the amount of the freight thereof, and where, for any reason, he does not unload the cargo, he is only entitled to a lien upon such of the freight as the vessel has actually earned, that being the freight less what it costs to unload.

In Admiralty.

Mix, Noble & White, for libelant.

Goulder & Weh, for the Arcturus.

WELKER, J. The libelant was the master of the Arcturus, and had wages due him as such master from the owners of the vessel about the month of November, 1882. At that time he had on board the vessel a quantity of telegraph poles, owned by A. A. Colby, which had been carried on board the Arcturus, and were to be delivered at the port of Sandusky, upon which the said Colby was to pay freight in the usual way. Before the telegraph poles were unloaded at Sandusky the vessel was seized by the United States marshal under a libel filed by W. H. Wolf *et al.* against the Arcturus, so that the master could not, and did not, unload the poles at Sandusky, and Colby, the owner, was compelled to pay $70 to procure the poles to be unloaded, and before he was allowed to do so he paid the whole freight money into the registry of the court which would have been earned by the Arcturus if the contract of affreightment had been ful-

filled by the delivery of the poles. The libelant, Jones, the master, claims the whole freight should be applied on his unpaid wages, and also a lien on the poles, the cargo, for the amount due him for services as master.

The court finds that the libelant had no lien on the cargo for the wages beyond the amount of the freight thereof; that in this proceeding he is only entitled to the freight actually earned by the vessel, that being the freight less what it costs to unload it at Sandusky; that the libelant is entitled to a decree for that part of the freight so actually earned, to be applied on his wages as such master; that Colby is entitled to repayment out of the registry of the amount he paid for the unloading of the cargo, being the sum of $70.

Decree accordingly.

See *The De Smet*, 10 FED. REP. 483, and note, 496.

THE MONTAUK.

(*District Court, N. D. Ohio, E. D.* April Term, 1883.)

PERSONAL INJURIES TO SEAMAN.

A seaman cannot recover for injuries resulting from his own carelessness in executing a proper order of the master.

In Admiralty. Libel for damages for personal injury.

Willey, Sherman & Hoyt, for libelant.

Goulder & Weh, for respondent.

WELKER, J. The libelant was the wheelsman on the Montauk, and while in the Sault Ste. Marie river the schooner, on the fourth of August, 1881, in tow of a tug, ran aground, and the libelant, then at the wheel executing an order of the master, was injured by the wheel spinning around and striking him. The libelant claims that the master gave him an improper order, and that, while executing it, he was injured without his fault. This is denied, and it is alleged the libelant was injured through his own carelessness. The court finds that the order given the wheelsman, from the weight of the evidence, was a proper one; that the libelant, in executing the order, was himself guilty of carelessness, which produced the injury, and therefore not entitled to recover. The libel is dismissed, with costs, and the appeal allowed.

MILLER v. CHICAGO, B. & Q. R. CO.

(Circuit Court, D. Iowa. October, 1881.)

REMOVAL OF CAUSE—LOCAL PREJUDICE ACT—CITIZENSHIP.

Under subdivision 3 of section 639 of the Revised Statutes it is not necessary, in order to the removal of a cause, that it should appear from the record that the parties were citizens of different states at the time the suit was commenced.

Motion to Set Aside Order Remanding Cause.

McCRARY, J. This suit was removed to this court from the state court under what is known as the "local prejudice act" of 1867, now embodied in the third subdivision of section 639 of the Revised Statutes of the United States. At the last term there was an order remanding the case to the state court. After said order was entered, the counsel for the defendant moved that it be set aside, and thereupon the court suspended its execution until that motion could be heard before the full bench. The question is whether, under the said third subdivision of section 639 of the Revised Statutes, it is necessary, in order to the removal of a cause, that it should appear from the record that the parties were citizens of different states at the time the suit was commenced. It was held in the case of *Ins. Co.* v. *Pechner*, 95 U. S. 183, that, under the twelfth section of the judiciary act of 1789, this was necessary. In the case of *Kaeiser* v. *Railroad Co.*, recently decided in this court, and reported in 6 FED. REP. 1, it was held that the same rule prevails under the act of March 3, 1875. In *Johnson* v. *Monell*, 1 Woolw. 390, it was held by Mr. Justice MILLER, while holding the circuit court, that under the local prejudice act, now embodied in the third subdivision of section 639, it was sufficient to show the citizenship of the parties at the time of the filing of the petition for removal. If, therefore, the last-named decision is not to be regarded as overruled by the two more recent decisions above cited, in both of which Mr. Justice MILLER concurred, the present motion must be sustained, and this court must retain jurisdiction of the case.

In view of these facts, and considering the importance of the question of practice involved, I have thought proper, with the concurrence of Judge LOVE, to submit the question to Mr. Justice MILLER for his opinion and advice, which he has very kindly furnished to us, as follows:

"I think it may be taken for granted now that the act of March 3, 1875, did not repeal the third clause of section 639 of the Revised Statutes. That clause, in describing the class of cases in which it authorizes a removal from a state to a federal court, begins by saying: 'When a suit *is* between a citizen of the state in which it is brought and a citizen of another state,' etc., it may be removed on account of prejudice or local influence. If the language here used is to be construed literally, undoubtedly such a suit *is* pending when

the application for removal is made. But apart from this restrictive view of the language of the Revised Statutes, which constituted the law when the act of 1875 was passed, it is to be observed that the *main ground* of removal under the act of 1867, embodied in this clause of the Revision, is the existence of 'prejudice or local influence.' Removal, where citizenship alone was the cause, has been provided for by other statutes, and is found in other sections of the Revision. But since removal for prejudice could not constitutionally be made without the required citizenship, it was necessary to incorporate into this statute so much on that point as to make the statute constitutional. It is not necessary, in that view, that the citizenship should have existed when the suit was brought. It is fair to presume that congress meant to say that whenever the requisite citizenship co-exists with such prejudice or local influence as will prevent a fair trial in the state court, the party liable to be injured by that prejudice—namely, the one who is a citizen of another state—may have the cause removed. As regards the case of *Ins. Co.* v. *Pechner*, I think I am not mistaken in saying that the ground of that decision was that congress *had not intended*—and the language used showed this—to allow a case to be removed on the ground of *citizenship alone*, except where that cause of removal existed when the suit was commenced. In the case before you citizenship is a necessary incident to removal, but is not the principal ground on which the right is founded, and there exists no language in the statute which implies a limitation of the right to citizenship in different states existing when the suit was brought. Nor does the reason apply; for surely it is right that, when prejudice or local influence will prevent a fair trial, a change of venue should be had; and if *then* the parties have the requisite citizenship, no reason is perceived why the change should not be to a federal court. No provision of the statute, nor any sound policy of law, forbids such a transfer of the case."

The motion to set aside the order remanding the case is sustained.

LOVE, J., concurs.

Section 639 of the Revised Statutes is not repealed by the act of March 3, 1875, except by merger; and a case which could have been removed under the former provision, but could not be under the latter act, may still be removed. *State of Texas* v. *Lewis*, 14 FED. REP. 65.

A suit cannot be removed from a state court, under the act of 1875, unless the requisite citizenship of the parties exists both when the suit was begun and when the petition for removal is filed. *Gibson* v. *Bruce*, 2 Sup. Ct. Rep. 873.—[ED.

WHITE, Agent, *v.* CROW and others.

(Circuit Court, D. Colorado. June 25, 1883.)

1. CORPORATION—CONFESSION OF JUDGMENT—COLLATERAL ATTACK.

Upon a confession of judgment by a corporation, the court in which the action is pending must, of necessity, judge of the authority of any natural person who may appear for the company in that behalf, whether it be an attorney at law or an agent of the company, and its judgment as to the right and authority of the person so appearing to bind the corporation, must be conclusive in all other proceedings where the same judgment is drawn in question and not open to collateral attack.

2. JURISDICTION OF CIRCUIT COURT—RESTRAINING PROCEEDING IN STATE COURT.
A bill to restrain the sheriff of a county in the execution of process of a county court of co-ordinate jurisdiction with the circuit court of the United States, or to restrain the execution of a deed in pursuance of a sale under such execution, cannot be maintained in the circuit court; but when the parties to whom such deed would go are before the court, the court may deal with them and dismiss the bill as to the sheriff.

3. SAME—SETTING ASIDE SALE.
The circuit court has not jurisdiction to set aside a sale made in the court of the state, with a view of ordering another sale, because the sale was not made pursuant to the statute, and the party claiming such sale to be void must proceed in the state court.

4. SAME—RIGHT TO REDEEM—PAYMENT OF PART OF CLAIM—REFUNDING MONEY PAID.
Where a party owning an interest in the property of a corporation that has been sold under execution and purchased by several parties constituting a pool, has, with a view to redeeming such property, paid to such parties a portion of the claims against the company, they cannot, while retaining the amounts so paid, deny the right of such party to redeem, on the ground that the time allowed by the statute for redemption has expired; and unless within a reasonable time they refund the money so paid, a decree allowing redemption or payment of the balance of the claims will be passed.

HALLETT, J., (*orally.*) In the year 1881 the Brittenstein Mining Company owned six or eight mining claims in the county of Chaffee. In the course of its operations it had incurred debts which it was unable to pay, amounting in all to $5,000 or $6,000; and early in the following year, 1882, these claims were put into judgments by the parties who held them. There were five of these judgments, and upon three of them sales were made of the property of the company during the month of June, 1882. The delay in execution of the judgments was procured by the officers of the company, through some negotiations carried on with a view to the settlement of the demands. One of these judgments was obtained by Joseph R. Crow, upon a claim assigned to him by John B. Henslee, who was a stockholder in the Brittenstein Company, and the agent of the company in this state to receive service, appointed by the company pursuant to the statute of the state. He at one time had something to do with the management of the company, but at the time that he assigned his demand to Crow, and at the time judgment was entered on that demand, he had no official connection with the company, but was in correspondence with its officers, residing in New York, in respect to the settlement of these claims. He assigned his demand against the company on the first day of January, 1880, or about that time, and on the ninth day of that month Crow brought suit, and served his process upon Henslee, as the agent of the company in the state. Four days later, on the thirteenth of January, Henslee appeared in the county court of Lake county, in which the suit was brought, and confessed judgment in favor of Crow against the company for the demand, amounting to $1,794.33. No execution was issued upon this judgment, or upon the other judgments, until some time in the month of June following, or if executions were issued no sale was made until that time. I have not inquired as to the date of execu-

tions. The time for the redemption of the property expired in December of the same year. Proceedings were had in a court of the state of New York, upon which the property of the company was sold by a receiver to Mr. John D. White, plaintiff in the bill in equity, on which a decree is now to be entered. Mr. White was also a stockholder in the Brittenstein Company; he was at one time its president. At the time of these transactions he was a director of the company, and at the time of these proceedings in the court of New York, also; and if the company was still in existence—of which I am not advised—after the sale of the property, he was still a director. In December following, as a purchaser of the property, he telegraphed to Mr. Smith, an attorney residing at Denver,—I think, on the sixth of December,—to proceed to Leadville and Buena Vista, to confer with parties there—among others, Mr. Henslee—in respect to claims and demands against this property, with a view to redeem from the sales which had been made on judgments obtained against the Brittenstein Company, as I have stated. An interview took place between Mr. Henslee and Mr. Smith on the seventh of December, in reference to these matters, in which something was stated as to these several demands against the company, and some things, which were not stated, it was agreed might be ascertained from the records of Chaffee county at Buena Vista, to which Mr. Smith proposed to proceed for the purpose of getting full particulars in respect to matters in which he was acting for Mr. White. Among other matters discussed at that time was a demand on the part of Henslee against the Brittenstein Company, and Mr. White, as the successor of that company, for annual work done on the claims of the company during the years 1881 and 1882. Henslee represented that some of this work had been done, and some of it was still in progress; he expected to have evidence of its completion in a day or two to present to Mr. Smith, and if the property was to be redeemed he desired to have the money so expended refunded to him.

At this point it may be proper to state, also, that while Mr. Henslee had been corresponding with the officers of the Brittenstein Company, in New York, and with Mr. White, plaintiff in this suit, to some extent as to the settlement of these claims, he had also been acting for certain parties in St. Louis and Leadville—five or six of them—called in the evidence the Western Pool. These parties, some of them,—all, I believe, but one,—had been stockholders in the company, and had agreed together to unite in the purchase of the several claims against the company with a view to secure the property; to protect the interest which they had in the company; to protect themselves in respect to moneys which they had expended in behalf of the company, and so on. It seems to have been thought desirable on the part of all persons who were connected with these affairs to get this property; the property was much more valuable than the demand against it, and any one who should secure it would be able to realize some-

thing in addition to the claims which were made against it. With that view these parties—Noel, of St. Louis, and Loker and Simmons—I don't know who all—had appointed Mr. Henslee to communicate with the owners of these claims and purchase them, and he had done so. He assumed to act and did act for them in the settlement of these claims, so far as they could be settled. He did not deny Mr. Smith's right, or Mr. White's right, to redeem the property at the time, and in the manner provided by law, nor conceal his connection with the parties for whom he was acting. It seems to have been contended by counsel for plaintiff that his position in attempting to act for parties in New York, and at the same time for these other parties, was of doubtful character; but I do not discover anything in the evidence to impute wrong to him, or any effort on his part to conceal his relations with this Western Pool, or the circumstance that he was endeavoring to secure the property for them. Thus matters stood about the seventh of December. The time for redeeming under one of the judgments would expire on the tenth, under another on the seventeenth, and under another, I believe, on the twenty-fourth, of December. Mr. Smith, as the agent of White, redeemed from all the judgments but one. He went further and paid off some judgments upon which no sales had been made. He went still further and paid the money which was due for annual work,—some of it due to Mr. Henslee, having been advanced by him, other portions to parties who had done the work. From the judgment in favor of Crow he declined to redeem, from some notion that that judgment was void in itself, or so far irregular that Mr. White was not bound to recognize it, upon the ground, I suppose, that Mr. Henslee, having owned this claim at one time, his assignment to Crow was collusive, without consideration, done with intent to put the matter in judgment under process served upon him as agent of the company, and without the knowledge of the officers of the company; and upon the ground, also, that this judgment was entered within four days after the service of process upon Henslee, and by his confession, he not having authority to act for the company in that behalf. That, I believe, is in substance the position assumed by counsel here, and this bill was filed to redeem from this judgment upon some such theory as that.

We are unable to recognize the force of these suggestions. While it may be true that Henslee was without authority, and as agent of the company, appointed to receive service of process, he would not have power under the statute to confess judgment in favor of any one and bind the company in that way, the judgment, therefore, was irregular, perhaps subject to reversal, on that account; yet we do not think it is open to collateral attack. Upon a confession of judgment by a corporation the court in which the action is pending must of necessity judge of the authority of any natural person who may appear for the company in that behalf, whether it be an attorney at law or an agent of the company, and its judgment as to the right and

authority of the person so appearing to bind the corporation must be conclusive in all other proceedings where the same judgment is drawn in question. What the force and effect of such a confession shall be in any regular proceeding to vacate it, and in any court of review to which it may be carried, is not for us to say. We think that the judgment of the county court, entered upon Mr. Henslee's confession, must be taken to be valid and binding upon the company. It is in evidence that the claim was a valid one; the amount for which judgment was given was due from the company to Henslee; he assigned upon good consideration to Crow. His right to assign cannot be denied; and if there be any infirmity in the matter in respect to his right and authority to appear for the company and confess judgment in its behalf, that is a matter which can only be inquired of upon some proceeding to vacate and set aside the judgment.

In respect to the particular circumstances of this case, it is in evidence that some of the officers—certainly the vice-president, in particular—knew of the entry of this judgment very soon after it was entered, and long before any sale was made under it. Mr. White, the purchaser of the property, and the plaintiff in this suit, knew something of it long before he became a purchaser of the property, and no step was taken by the company itself to attack the judgment and set it aside in the court in which it was rendered, or to remove the record into the supreme court of the state, with a view to make inquiry there concerning it. So that we are prepared to say that in this proceeding, and so far as the right of Mr. White to redeem from it is concerned, that no question can be raised in respect to its validity. And the failure of Mr. White to redeem from it within the time prescribed by statute was one which probably may affect his interest very materially in respect to this property. We do not see that he offers any valid excuse for failure to do so. Mr. Smith was informed of the existence of this judgment, and of the time the sale was made, 10 days before the expiration of the time for redemption. Of course, it was in his discretion to act, or decline to act, as he thought best. It is to be said further, relative to this matter, that this bill was filed against the judgment creditors and the sheriff of the county to enjoin further proceedings under that judgment.

In so far as it is proposed by the bill to restrain the sheriff of the county in the execution of process of a court of Lake county, it cannot be maintained in this court. In that respect, it is a bill to restrain proceedings in a court of co-ordinate jurisdiction, and as such we have no greater authority in respect to the execution of a deed in pursuance of the sale than we have in respect to the sale under the execution in the first instance; and so, by the express language of the statute of the United States,—I do not recall the number of the section,—we are forbidden to interfere with the conduct of the sheriff in respect to that matter. But having the parties before us to whom the deed would go, we conceive we have a right to deal with them and to

dismiss the bill as to the sheriff. The parties, whose ultimate right it is to have this property, are before the court. It appears that these purchasers of the various judgment claims from the execution creditors, Crow and Evans, and more of them, are before the court. They came in voluntarily. The members of the Western Pool made defense in their own name, becoming parties to this bill. Having them before the court, we have a right to deal with them directly in respect to this matter, and without reference to the sheriff, and to proceed against them as we would proceed against the sheriff, if it were competent for us to entertain jurisdiction as to him. This, I suppose, determines everything that can be said in reference to this matter except one. As already stated, these parties, constituting the Western Pool, bought up all these claims against the company. The amount in all is something over $5,000—between five and six thousand. They had also a claim for annual work done in the year 1882, and they allowed Mr. White, plaintiff in this suit, upon the theory and proposal to redeem from all these demands, and acquire the property for himself, to pay a good part of these demands,—something over $3,000,—four of the judgments, and for the annual work.

In our view, and we think it should so be regarded in any court of equity, these demands, held by one party and for one purpose, should be regarded substantially as one thing, and one accepting payment of any part of them cannot deny Mr. White's right to pay the remainder without refunding what he had received from him. It is not competent for them to say, we will take part of the money in payment of these demands and keep it, because you have failed in respect to one, under some mistake of fact or law. We will hold on to this and deny your right to redeem, and keep the property also. We think that would be most inequitable and unjust, and therefore we propose to say to these defendants that they must refund the money, or admit the plaintiff's right to redeem this property. The decree will be that, within 30 days from the date of entering the decree, the defendants refund the money received in partial payment of the several demands against this property, with interest; or, failing in that, that the plaintiff be allowed to pay the remainder, and to have a deed from these parties of such interest as they may have acquired or may acquire under these several sales. As to the sheriff the bill will be dismissed.

There is a point which I intended to advert to in the course of discussion, to which I may allude now. In respect to the sale of the property *en masse*, it is alleged in this bill, and not very well denied, that this property was sold in bulk—six or eight claims, whatever their number may be—as one claim, and upon that the plaintiff contended, as it is decided in some states, the sale was void, or, as held in others, it was voidable, and he would have the right to redeem. We do not think it can be regarded as a void sale, and if it be voidable the right can only be asserted in a court of the state. We have

not jurisdiction in this court to set aside a sale made in a court of the state, with a view of ordering another sale, the sale not having been made pursuant to the statute. That portion of the bill, therefore, should be dismissed, without prejudice to the right of the plaintiff to maintain another bill for the same cause in any court of competent jurisdiction.

I believe that covers the whole ground.

It is pretty clear to us that plaintiff has no other right than to have this money back, with interest. We are not disposed to maintain his possession by injunction.

If the defendants here get legal title from the sheriff they can assert that title in an action at law; we are not disposed to interfere in a suit of that kind.

McConville *v.* Howell and others.[1]

(*Circuit Court, D. Colorado.* June 27, 1883.)

1. Non-Resident Aliens.
   Under the statute of Colorado non-resident aliens may own, inherit, and convey property, real or personal, the same as citizens and residents.
2. Contract of Sale—Specific Performance.
   A contract for the purchase and sale of an interest in mining property, at a price named therein, in which contract is the following clause: "Provided, always, in the event of such failure to complete such purchase, he, (the purchaser,) his heirs and assigns, upon the delivery of possession of said lands and mining premises as aforesaid to the parties of the first part, their heirs and assigns, shall in nowise be held responsible for the payment of said purchase money." *Held*, that upon refusal to redeliver the property to the sellers on demand, the latter had the right to treat the contract as a sale, and proceed to enforce its specific performance in equity.

In Equity.

N. F. Cleary and *G. G. Symes*, for plaintiffs.

George, Maxwell & Phelps and *Markham, Patterson & Thomas*, for defendants.

McCrary, J., (*orally.*) In the case of *Edward McConville* v. *C. C. Howell et al.* I have reached certain conclusions, which I am prepared now to state. It is a bill in equity, brought for the purpose of obtaining a decree for the specific performance of a written contract whereby these complainants agreed to sell to the defendant Howell, and the defendant Howell agreed to purchase, certain interests in mining property situated in Lake county, in this state. It is alleged that the complainants are the heirs at law of one John McConville, who died at Leadville some time in November, 1880. Some discussion has been had as to whether the proof in this case is sufficient to establish the heirship. Some of the statements given by the principal witness, Mr. Burne, are in the nature of family history, and, to some extent,

[1] From the Colorado Law Reporter.

hearsay; but they probably fall within the very liberal rule which prevails upon that subject. Whether they do or not, I am prepared to say that, in this particular case, the court is satisfied with the proof. We should not apply a very strict rule in a case of this character, for it must be borne in mind that Howell, the defendant, who was the purchaser of this property, was the administrator of the estate of John McConville, deceased, and he dealt with these plaintiffs as the heirs of John McConville, and bought the property from them as such heirs. He must be presumed to know who the heirs were. It was his duty to ascertain that fact. He was the trustee for them, and if they had chosen to repudiate the contract upon the ground that he acted as their trustee, they could in all probability have done so, upon the doctrine that the executor has no right to purchase the property of the heir while he is acting in that capacity. They have not seen fit to do that, and I mention it merely to show that the court ought not to adopt a very strict rule in reference to proof of heirship. I hold, therefore, that the proof is sufficient to show the heirship of these complainants.

In the second place, it is established that the said John McConville was, at the time of his death, the owner of an undivided interest in the several mining claims mentioned in the bill. Precisely what his interest was, it is not material here to consider, but that he had an undivided interest is well established.

In the third place, the complainants, though non-resident aliens, were capable of inheriting property in this state by virtue of the statute of the state upon this subject. The complainants, it appears, are non-resident aliens, and it is insisted that for that reason they were incapable of inheriting any interest in this property from John McConville, and, consequently, had nothing which they could sell. It is said that the result is that there is no consideration for this contract. But the statute of this state upon that subject is very explicit. Chapter 4, p. 90, Gen. Laws Colo. § 15, provides:

"All aliens may take, by deed, will, or otherwise, lands and tenements, and any interest therein, and alienate, sell, and transmit the same to their heirs, or any other persons, whether such heirs or other persons be citizens of the United States or not; and upon the decease of any alien having title to or interest in any lands or tenements, such lands and tenements shall pass and descend in the same manner as if such alien were a citizen of the United States; and it shall be no objection to any person having an interest in such estate that they are not citizens of the United States; but all such persons shall have the same rights and remedies, and in all things be placed upon the same footing, as natural-born citizens of the United States. The personal estate of an alien, dying intestate, who, at the time of his death, shall reside in this state, shall be distributed in the same manner as the estate of natural-born citizens; and all persons shall be entitled to their proper distributive shares of such estate under the laws of this state, whether they are aliens or not."

It is conceded, as of course it could not be questioned, that the statute is broad enough to include this case; but it is suggested that

it is not constitutional. The provision of the constitution referred to is section 27 of article 2, which reads as follows:

"Aliens, who are or who may hereafter become *bona fide* residents of this state, may acquire, inherit, possess, enjoy, and dispose of property, real and personal, as native-born citizens."

And the argument is that the necessary purport of this provision of the constitution is to limit the right to possess, inherit, or enjoy property to aliens who are or may hereafter become citizens; in other words, that it prohibits the legislature from extending the right to non-resident aliens. I do not agree to that construction of the constitution. The very same question was decided by the supreme court of California, and I think upon very sound reasoning, in the case of *State* v. *Rogers*, 13 Cal. 159. The constitutional provision, and also the statutory provision, in California, were substantially like those in Colorado, and the points decided in this case were these:

"The constitution is not a grant of power, or an enabling act, to the legislature. It is a limitation on the general powers of a legislative character, and restrains only so far as the restriction appears, either by express terms or by necessary inference.

"The act of April 19, 1856, permitting non-resident aliens to inherit real and personal estate, is constitutional. The constitution (article 1, § 17) [which corresponds to the section of the Colorado constitution I have just read] gives the *bona fide* resident alien certain rights, which may be enlarged, but cannot be abridged, by the legislature."

That I understand to be a sound rule; the rights guarantied by the constitution cannot be taken away, but other rights may be given to the same or to other persons. The legislature may go further in the conferring of these rights upon aliens, but they cannot do less than that which the constitution requires.

It appears that the complainants, through their lawfully authorized agent, and the defendant C. C. Howell entered into the contract set out in the bill, whereby the defendant agreed to buy the interest in the said mining claims. In my opinion the said contract was not a mere option to buy on the part of Howell, from which he could withdraw at pleasure, without restoring to complainants the possession of the property and of all rights as they existed before the execution of the contract. Here arises a question of a good deal of importance in the case. It depends upon the construction of the contract between the parties; it is a very voluminous contract; I shall not undertake to read it. It is in substance a contract whereby these heirs agreed to sell this mining property to Howell. Howell agreed to spend $25,000 within a year in developing the mines, and agreed to pay $33,000 as a consideration for the conveyance at the end of the year. There were other provisions, which need not be referred to. The one relied upon by the defendant, as constituting this contract a mere option, is as follows:

"Provided always, in the event of such failure to complete such purchase, he, [that is, Howell,] his heirs and assigns, upon the delivery of possession of said lands and mining premises as aforesaid to the parties of the first part, their heirs and assigns, shall in nowise be held responsible for the payment of said purchase money."

There is an unequivocal promise in this agreement on the part of Howell to pay the $33,000 within the year, but this clause is added, whereby, as it appears to me, he was given an election to discharge the obligation by a redelivery of the property to the heirs before the end of the year. I suppose that, like many of these transactions, the value of the property was somewhat problematical, and would depend upon development and investigation, and so Mr. Howell desired to reserve the right or privilege of an option, in case it turned out to be of less value than supposed, to redeliver the property, and thereby discharge himself from liability for the purchase money. But he failed and refused to redeliver the possession to these complainants. They demanded possession and were refused. In my judgment the option was at an end; the right of Mr. Howell, which he had reserved by this clause of the agreement, was no longer available to him after his refusal to avail himself of it when the demand was made, and thereupon the grantors in the contract had a right to treat it as a sale, and proceed in equity for the purpose of obtaining a specific performance.

I do not overlook the question, which has been discussed a good deal by counsel, as to whether this is a case within the equity jurisdiction of the court; in other words, as to whether there is a plain, speedy, and adequate remedy at law. That depends, perhaps, upon the question whether the vendor here is entitled to a lien upon the property for the purchase money. Undoubtedly he would not have been if Mr. Howell had redelivered the property to him in accordance with the terms of the contract; but since Mr. Howell declined to do that, and chose to retain the possession, and still retains it, and appears to be in the enjoyment of the property, and engaged in its development and use, I have no doubt that the contract becomes, in substance, a bond for a deed, or contract for the purchase of real estate, which gives the vendor a lien for his purchase money, which he may proceed in equity to enforce. It is true, there is a conflict of authority upon the question whether a party, under such circumstances, may come into a court of equity, or whether he is obliged simply to proceed at law. This question, however, is set at rest, so far as this court is concerned, by the decision of the supreme court of the United States in *Lewis* v. *Hawkins*, 23 Wall. 119. That was a case of a vendor who gave a simple contract to convey. There was no conveyance. He went into a court of equity to enforce the specific performance of the contract, and to claim a lien upon the property. The argument for defendants in that case, by very distinguished counsel, was precisely the same that has been made here. They said:

"The estate in fee being in Lewis, [that is, the vendor,] how can he have a lien? The man cannot have a lien on that which is his own." But the court answered it: "The seller, under such circumstances, has a vendor's lien, which is certainly not impaired by withholding the conveyance. The equitable interest of the vendee is alienable, descendible, and divisible, in like manner as real estate held by legal title." And so they maintained the jurisdiction in equity to enforce the performance of the contract, and to enforce a lien upon the property, on the ground that, although there was no formal conveyance by the vendor to the vendee, by the contract to convey there was an equitable estate vested in the vendee, which he could sell and dispose of, and the other party had a right to treat it as a sale, and proceed to enforce his vendor's lien upon the property.

I think in this case that the complainants are entitled to a decree requiring the payment of the purchase money upon their tendering a deed to Mr. Howell, and for the enforcement of the decree, if necessary, by the sale of the premises.

UNITED STATES *v.* MARSHALL SILVER MINING CO.[1]

(*Circuit Court, D. Colorado.* June 28, 1883.)

PATENT FOR LANDS—CONSPIRACY AND FRAUD IN PROCURING.

A bill which charges a conspiracy between defendants and officers of the land department of the government, with a view to perpetrate a fraud upon the government and other persons, *held* good on demurrer. *Quære:* To what extent must injury to the government be shown as a basis of relief? Is it enough to show that the patent was obtained in violation of law?

On Demurrer to Bill.

Andrew W. Brazee, Dist. Atty., for the United States.

Morrison & Fillius, for defendants.

MCCRARY, J., (*orally.*) In the case of the United States against the Marshall Silver Mining Company and others I have considered the demurrer to the bill. The bill charges, at very considerable length, a conspiracy between defendants and certain land-officers to change the boundaries of a claim for a patent, and to do this fraudulently, for the purpose of extending one claim over the lines of another, and thus secure a patent to the defendant here, the Marshall Silver Mining Company, for certain mining property which was in equity the property of McClellan, Webster, and Rist, who also had their application pending. Numerous acts and several rulings of the land-officers are charged specifically in the bill as having been wrongful and fraudulent; as having been done and made in pursuance of the gen-

[1] From the Colorado Law Reporter.

eral conspiracy to perpetrate a fraud upon the United States, and also upon McClellan, Webster, and Rist. I will not take the time to repeat the allegations of the bill, or to go into any discussion upon them. It is sufficient for the present to say that, in my judgment, it charges conspiracy and fraud with sufficient certainty to require an answer. Whether the facts, when fully developed, will show a fraud upon the United States, or only upon McClellan and Webster, or whether it will show a fraud upon both, are questions we can better determine upon the proofs and on final hearing. They are questions of some importance, perhaps of some difficulty. It is probably not entirely settled as to how far, or to what extent, an injury to the government must be shown, as the basis of relief in a case of this character. It may be that it is enough to show that the patent was obtained in violation of the law; possibly it may be necessary to show some actual damage; but these questions may be better determined upon the final hearing of this case than they can be now upon this demurrer, and I do not propose to pass upon them any further than I have already indicated.

The demurrer to the bill is overruled.

HOLLINGSWORTH *v.* PARISH OF TENSAS.[1]

(Circuit Court, W. D. Louisiana. 1883.)

1. CONSTITUTIONAL LAW—TAKING PRIVATE PROPERTY FOR PUBLIC USE.
   The plaintiff, owner of riparian property, whose lands adjacent to the Mississippi river are alleged to have been taken and damaged for public-*levee* purposes by the defendant, a parochial corporation, *held* to have a *right of action* for the recovery of just and adequate compensation therefor.
2. SAME—INDEMNITY.
   Private property can only be *taken*, *appropriated*, or *damaged* for public use through the exercise of the single principle of eminent domain, which in all cases carries with it the right of just indemnity.
3. SAME—POLICE POWER OF STATE—LEVEE.
   Under the exercise of its general police power, which extends only to the *regulation* of the owner's use and dominion of private property, the state of Louisiana cannot, for *levee* or other public purposes, *take*, *appropriate*, or *damage* private property so as to *deprive* the owner of its dominion, use, control, and profits, and especially without due compensation first being paid,—Louisiana state jurisprudence, as contained in the case of *Bass* v. *State*, 34 La. Ann. 494, and other cases, to the contrary.
4. DECISION OF STATE COURTS—WHEN FOLLOWED BY FEDERAL COURTS.
   National courts are required to follow decisions of state courts when they engage in giving effect to, or the interpretation or construction of, state statutes or local laws, but not when employed in giving effect to general principles of law. So, when a decision of the supreme court of Louisiana declares the right in the legislature to authorize private property to be taken or damaged, or its use appropriated, without compensation, for public purposes, under the general police power, or other implied powers of government, it is a dealing with general principles of law, and places no restraint on the federal court.

[1] Reported by Talbot Stillman, Esq., of the Monroe, Louisiana, bar.

On Exception, no Cause of Action.

W. R. Young, for plaintiff.

W. W. Farmer and *T. P. Clinton*, for defendant.

BOARMAN, J. The petition shows that plaintiff is the owner of land adjacent to the Mississippi river, in the parish of Tensas. The defendant, a parochial corporation, caused a levee to be constructed on her land, a distance from the river front and behind her dwelling, store-house, and other houses. She alleges that she has been damaged substantially as follows: That in 1880 the police jury of Tensas parish, by an arbitrary and wanton abuse of the powers conferred on them by law, and upon the pretext of constructing a new levee, abandoned the old one, by which her plantation was protected from overflow, and constructed a line of levee on the back lands of her plantation, at a distance of a mile from the river front; that for the construction of this new levee about 50 acres of plaintiff's land, worth $4,000, was taken and damaged, against her protest and consent, without notice to her, and without the compensation provided for in article 159, state constitution; that between the new levee and the old one, on the river front, about 250 acres of valuable land, worth $25,000, was thrown or left out, and exposed to the aggressions and damages of the overflows; that the new levee cuts off and damages the natural drainage of her plantations, and renders much of the land valueless and unfit for cultivation; that she owns a public river landing, and has a store-house at or near it; that in consequence of the location and building of the new levee this landing and store are often inaccessible to the neighboring people who trade there; that by the action of the police jury herein complained of she has been deprived of all protection afforded her by the public-levee system of the state, to carry on which she is annually taxed, and a great portion of her plantation is exposed to yearly overflows; that the rain-water drainage having been damaged and destroyed by the new levee, her plantation is greatly damaged in value and for cultivation; that without such new levee her lands were exempt from overflow except at long intervals.

In the argument defendant claims that the law imposes a service for building levees on all lands adjacent to the Mississippi river; that in constructing the levee this service has been exercised only to the extent and in the manner provided by law, and the damage alleged is *damnum absque injuria*.

Defendant cites several articles of the Civil Code, and relies for relief particularly upon articles 660 and 661, and the subsequent levee laws:

Art. 660. "Services imposed by law are established either for public utility or for the utility of individuals."

Art. 661. "Services imposed for public or common utility relate to the space which is to be left for public use by the adjacent proprietors on the shores of navigable rivers, and for making and repairing levees, roads, and

other public or common works. All that relates to this kind of servitude is determined by laws and particular regulations."

Defendant claims that certain laws relating to "*this kind of servitude*" are now operative laws in this state. If so, it is not essential that they should now be quoted.

For convenience I shall quote several articles of the Code which relate to the subject-matter of this action:

Art. 2604, Civil Code. "The first law of society being that the general interest shall be preferred to that of individuals, every individual who possesses, under the protection of the laws, any particular property is tacitly subjected to the obligation of yielding it to the community, whenever it becomes necessary for the general use."

Art. 2605, Civil Code. "If the owner of a thing necessary for the general use refuses to yield it, or demands an exorbitant price, he may be divested of the property by the authority of law."

Art. 2606, Civil Code. "In all cases a fair price should be given to the owner for the thing of which he is dispossessed."

Art. 489, Civil Code. "No one can be divested of his property unless for some purpose of public utility, and on consideration of an equitable and previous indemnity, and in a manner previously prescribed by law."

Art. 2294, Civil Code. "Every act whatever of man that causes damage to another, obliges him by whose fault it happens to repair it."

Art. 156, Const. La. A. D. 1879. "Private property shall not *be taken nor damaged* for public purposes without just and adequate compensation being first paid."

Defendant insists that I should, on the trial of this exception or demurrer, follow the decisions of the state courts, and cites especially the decision in the case of *Bass* v. *State of Louisiana*, 34 La. Ann. 494. Strong analogies are apparent between this and that case; but my views of that case, as well as of the several others cited by counsel, or rather my opinion of the character of the law upon which these cases seem to have been decided, forbids me to adopt the persuasive suggestion. These decisions do not impress me with the belief that the issues decided by them are such as may be determined by interpreting and giving effect only to laws of a strictly local nature. To me it appears that the court in the *Bass Case*—and as this is presented as the strongest case I shall now refer only to it—was engaged in giving effect to general principles of law, and especially to the powers of a legislature to authorize private property to be taken or damaged, or its use appropriated, without compensation, for public purposes, under the police or other implied powers of government. In trials at law the national courts are required, substantially, to follow the decisions of the state courts in cases where the laws apply. These decisions do not make the laws; but they are considered the best evidence of what the law is in a state where the decisions cited "show a case of statutory construction."

The rule adhered to by the supreme court seems to be that section 34, judiciary act 1789, should be observed only where the decisions

cited were or are based on the statutes or laws of a state which "fix rights to things intraterritorial in their nature, or which fix rules of property." 18 Wall. 584; 16 Pet. 1; 18 How. 520; 14 Wall. 665; 92 U. S. 494. With this rule in view, I will further consider defendant's suggestion. Defendant claims that the state, in articles 660 and 661, Civil Code La., and subsequent levee laws, has imposed a service, in the interest of public utility, on all lands adjacent to navigable rivers, and that now such lands may be taken or damaged, or their use appropriated, for the construction of levees, without compensation. It may be that these articles of the Code, which can hardly be said of themselves to impose any service on such lands, have been supplemented by subsequent levee laws which impose the service claimed by the defendant. But if they do, in law, burden plaintiff's lands with such service, I think no court could give the effect claimed—that is, that land may be taken or damaged for public purposes, so as to divest the owner of its use, profits, and dominion, without compensation—without passing upon general principles of law and jurisprudence which define what sort of a use is a public use; without passing upon the effect, if it has any, of the article 156 of the constitution of 1879; upon what is a "taking" or *damaging* in the meaning of the law; upon whether or not to damage land by constructing artificial works which, *under parochial levee regulations, and in their physical nature*, must depose the owner from all use or profits of the land, is a *damaging* or "taking" which is prohibited without compensation; and without passing upon other questions akin to these, which can be judicially determined only by a resort, on the part of any court trying the case, to general reasoning and legal analogies common to the several states. In the *Bass Case* plaintiff put at issue, not the right of the legislature to pass articles 660, 661, Civil Code, and supplemental statutes; not the right to take or burden his land in such a way; not the right to dispossess or damage him for the general use,—but he put at issue, above every thing and question, the right to take or dispossess him of his land and its uses, *without compensation, under the lawful exercise of any power* in the state government.

This paramount issue was met and decided adversely to Bass. Could any court have decided this issue for or against him without passing upon the laws and analogies of jurisprudence which concern such public interests as cannot be determined by local laws?

Upon this point I must conclude that whatever may be the nature or extent of the powers or laws upon which the state court refused to allow Bass damages, or whatever may have been the method, compass, or basis of reasoning which lead the court to hold practically that Bass had no cause of action for an invasion of rights protected, as I think, by natural equity, the law of the land, and by the articles of the Code herein cited, I think it must be conceded that such a conclusion was not reached by the court's consideration only of a statutory

case, or giving effect to local laws. Feeling free from the restraint suggested, I shall now consider whether the petition shows a cause of action for this court to hear.

It is said that, under the lawful exercise of *the police powers* inherent in the state, the legislature may authorize the construction of levees, and land for their construction may be taken or appropriated, as in this case, without compensation therefor, and the complaining owner cannot be heard to dispute the authority of the officers building the levee, or dispute *the necessity for the levee, or the necessity for public use of the particular space of land*, nor can he be heard when he alleges wanton injury, and prays the court to control prudentially, for all interests, the officers in their right to take land, even though they should choose to run the levee a distance away from "*the space* which is to be left by adjacent proprietors on the shores of navigable rivers." It is said that this was substantially announced in the *Bass Case*, where the rules and maxims of law regulating society and property rights, and the principles of government from which the police powers are deduced, were discussed at length by the learned chief justice of the state court. In that case, many authorities are cited to show that the police powers afford "solid foundation" for articles 660 and 661, Civil Code. No one, I suppose, will deny the sufficiency or solidity of the foundation.

In this case now before the court the property alleged to be taken is a riparian right. The supreme court, discussing such property, say, in 10 Wall. 497:

> "This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessary that it be taken for the public good, upon due compensation."

Clearly, it is a property right in the civil as well as in the common law; and if there is an implied exception against its protection in the laws of Louisiana, such an exception should be made as manifest to this court as the protection to all property is expressed in the articles of the Code and Constitution herein cited.

In Louisiana, as well as in all the states, the implied powers are sufficient to warrant the imposition of this service on lands adjacent to the navigable rivers, and the imposition of such service may be the offspring of a wise public policy; but does it follow that there is, in the state or federal system, *any power outside of and apart from the eminent-domain right* to lawfully, by direct or implied legislation, take any private property, or take the use of it, or so damage it as to deprive the owner of its use or profits, with or without compensation?

The United States supreme court, in 6 How. 532, says:

"That in every political sovereign community there inheres, necessarily, the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. * * * This power, denominated the *eminemt domain* of the state, is, as its name imports, paramount to all private rights vested under the government, * * * and must yield, in every instance, to its proper exercise. * * * In fact, the whole policy of the country relative to roads, mills, bridges, and canals rests upon *this single power*, under which lands have been always condemned; and without the exertion of this power not one of the improvements just mentioned could be constructed."

The same court, discussing the same principles, (91 U. S. 367:)

"No one doubts the existence in the state governments of the right of eminent domain—a right distinct from and paramount to the right of ultimate ownership. * * * The right is the offspring of political necessity, and is inseparable from sovereignty unless denied to it by its fundamental law."

It is observable that the right of eminent domain and the police powers, though well-recognized attributes of political sovereignty, are distinctive in the purpose and extent for which the legislature may exercise them, and neither is ever free from the restraints or limitations of the fundamental laws. Laws passed under a proper exercise of these respective powers have often been considered by the federal courts, and their distinctive purposes and application recognized. To some extent these courts differ as to the basis of the eminent-domain right,—some of the decisions citing the power as resting on political necessity; some on the tenure of lands and implied compact; but I think no federal authority can be cited as a precedent for taking or appropriating the use and control of private property under any other power, expressed or implied, than "this single principle" of eminent domain, upon which it is well known that the policy of the country in relation to public works rests in one state as well as in another. 6 How. 532.

These courts have uniformly held that the police power is a different "prerogative power," and extends only to *regulating the owner's use* and dominion of private property, not to taking from him or dispossessing him of its use and control.

In a case where the city of Richmond prohibited, by ordinance, a railway company to use its locomotives in the streets to move and remove trains, the supreme court (96 U. S. 521) said: "The appropriate regulation of the use (by the owner) is not taking within the meaning of the constitutional prohibition."

The company in that case continued to use its railway track on the streets, but to run the locomotives in the city's streets was considered a noxious use on the part of the owner of its own property rights, and they were prohibited.

Dillon, Mun. Corp. § 93, discussing the same question, says:

"These police powers rest upon the maxim '*salus populi est suprema lex.*' This power to restrain a private injurious use of property is very different from the right of eminent domain. It is not taking private property from

the owner, but a salutary restraint on the noxious use by the owner contrary to the maxim '*sic utere ut alienum non lædas.*'"

Both of these powers are equally clear in the common law; but neither of them can be said to warrant the legislature in imposing, directly or impliedly, without compensation, such an easement or servitude as defendant herein claims. The supreme court having held in the case of *Pumpelly* v. *Green Bay Co.* 13 Wall. 166, that the taking of property in the meaning of the prohibition clause in the Wisconsin constitution, similar in language to article 156, was sufficiently established to warrant indemnity where it was shown that any "artificial structure was placed on the land, so as to effectually destroy or impair its usefulness to its owner," or when it was shown that plaintiff's land was covered with water in consequence of the back water from a mill-dam, which was built according to state statute, went on to say:

"We do not think it necessary to consume time in proving that when the United States * * * parts with the fee, by patent, without reservation, it retains no right to take that land for public use without just compensation; nor does it confer such a right on the state within which it lies; and that absolute ownership * * * is not varied by the fact that it borders on a navigable stream."

This is the common-law doctrine as to easements, and this decision and others, notably the 51 N. H. 504, establishes the law as to what amounts to a taking of private property under the common-law rule, which is emphasized in article 156, State Const. 1879.

In the New Hampshire case, cited with approval in 13 Wall. 166, a railway company, acting under legislative authority, caused the removal of a natural barrier which had previously completely protected plaintiff's land from freshets in the river close by. In consequence of the railway's removal of the barrier, the water sometimes overflowed the meadows, carrying stones, sand, and gravel upon plaintiff's land. Under this showing, the court held it was such a taking by the railway as the legislature could not authorize without providing for compensation.

The decisions of the several states, so far as I have had an opportunity to examine them, are uniform in the opinion that to constitute a taking there must be some direct, actual, physical interference with, or disturbance of, the lands or chattels. Now, if no such service is known to the common law, can such a servitude as is exacted by defendant be imposed by statute under any implied power peculiar to Louisiana and her system of laws?

The defendant, in *Pumpelly's Case*, claimed that the Green Bay Company had an implied easement on Pumpelly's land in favor of improving the Fox river, and Pumpelly could not complain if his land was overflowed by the company's dam, it having been built according to law, and no compensation was due him. The court refused to maintain the view that any such easement was implied in

violation of the constitutional prohibition, and clearly intimates that Pumpelly's land would have been protected from such an injury or damage by the common law, in the absence of any such constitutional prohibition.

The supreme court of New Jersey, in *Sinnickson* v. *Johnson*, 2 Har. 129, says, of the right to take private property,—

"That this power to take private property reaches back of the constitutional provisions; and it seems to have been a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is inseparably connected with the other; that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle."

This was said in vindication of the protection afforded in the common law at a time when New Jersey had no prohibitive clause like article 156 of our constitution. Chancellor KENT, in *Gardner* v. *Newburgh*, 2 Johns. Ch. 162, maintained the same view as to the common-law protection of private property in New York, in the absence of such a clause in the state constitution. In addition to English authority, he cites continental jurists to show that they all lay it down as a clear principle of natural equity that the individual whose property is sacrificed for public purposes must be indemnified. Mr. Justice MILLER cites these last two cases in his opinion in the Pumpelly suit, to show what amounts to a taking; but they are further instructive on the question as to whether an easement, for the enjoyment of which private property must be taken or damaged, may be imposed by statutory implication, in the face of the common-law rule, whether written or unwritten, in the laws or constitution of the state.

In the New Jersey case defendant had been authorized by statute to build a dam across a stream to improve navigation, and thereby the water was pushed back on plaintiff's land. Defendant claimed, in consequence of being authorized by law to build the dam in a certain way, he had an implied easement on the lower land, which received the overflow. This was denied by the court, and he had to pay damages. Chancellor KENT granted an injunction preventing the diversion of water from plaintiff's land, over which was the natural flow, because the legislature authorizing the public work made no provision for compensation.

These cases show that no provision for compensation having been made, no such easement was implied in the statutes authorizing the public work; that the injury in each case was considered as taking private property for public use, and cannot, under such circumstances, be treated only as a consequential injury, not warranting indemnity.

In law, strictly speaking, land is not property, and, though it may be damaged, it cannot be taken; but the right to possess it, its uses and profits, to control and dispose of it, and its beneficial uses at will, is property. These rights are created, defined, and protected by rules of law. A common-law regulation of conduct of trade or business

may be changed or annulled by legislative will, as well in Louisiana as elsewhere; but these rights of property in land cannot be changed or annulled, under any power of government, so as to destroy or impair them, or their beneficial uses, in violation of constitutional limitation.

In Louisiana the law is called the civil law. Its Code says, "Law is the solemn expression of legislative will;" but does it follow that the implied powers to be exercised by "legislative will" are different in their nature or extent from those under which legislation may be rightfully exercised in Wisconsin? The property which is known as the riparian right is the land lying next to the river front, designated in articles 660 and 661, Civil Code, as "the space which is to be left for public use." This space is to be left "on the shores of navigable rivers;" but it has no definite limits or dimensions fixed in the Code, and this fact of itself suggests strong reasons why *the court should discuss and fix limits to the undefined space*, when an unwilling owner invokes the protection of the law against the riparian use or right being taken, or its beneficial use damaged, in pursuance of any claim to an implied easement.

The articles of the Code cited herein for plaintiff's protection announce well-known rules for the protection of property at common law, and since they are a part of the system of laws in Louisiana, before denying plaintiff a cause of action it should be made clear that such property rights as we are now discussing are impliedly or directly excepted from the protection warranted in these articles and rules of law. To me it seems clear that if I should conclude that she cannot recover, admitting her allegations to be true, it will follow, as of course, that the court indorses one of two views: *First*, that her land, though it has been appropriated to the public use, so that physically and in law she has been excluded from its dominion and beneficial uses, has not been "taken nor damaged," in the meaning of the common-law rule, emphasized in article 156, Const. 1879; *second*, that such a taking as she alleges can be and has been provided for by the legislature, in enacting the levee laws of the state under a proper exercise of the police power, or some power other than the eminent domain. I am unwilling to assent to either view. To the first, because a taking, or what amounts to such a taking in law, can—at least in the absence of any statute defining a taking—be judicially determined only by a resort to the general reasoning and legal analogies which we find in the jurisprudence to which these common-law rules properly belong. References to such jurisprudence show that an actual physical disturbance of or interference with land, so as to damage its beneficial uses, is a taking which is prohibited. As to the second, aside from the reasonable doubt whether a public use, or the necessity for the use, or what amounts to a public use, can be conclusively determined by legislative will, so that judicial inquiry would be precluded, I do not think "private property may be taken for public use,

under the general police power of the state, without compensation therefor," as was held in the *Bass Case*, or that it may be taken for public use under the exercise of any other power than "*this single principle*" of *eminent domain, which in all cases carries with it just indemnity.*

Article 156 of the constitution of 1879, appearing for the first time in A. D. 1845 in this state's constitution, has been emphasized in all the subsequent constitutions, until now we find its meaning and prohibitive effect enlarged by the additional inhibition against *damaging* private property without compensation. The article from the beginning has meant something, and these additional words "nor damage" are too significant to be considered only as an idle and purposeless contribution to the organic law regulating and protecting property. It is not clear at all to me that the property right, for the protection of which it is now invoked, is, by any statutory implication, excepted from the pale of this protection, whatever the power may be under which articles 660 and 661, Civil Code, and subsequent laws, may have been enacted.

Plaintiff shows a cause of action which should be heard and passed upon by this court, and the exception is overruled.

Riparian owners on a navigable stream cannot recover damages for a diversion of the water by the state, or by a corporation acting by authority of the state, for the improvement of the navigation.[1] The state legislature cannot authorize a taking or damaging of property without compensation.[2] Depriving one of the right of user of his land is as much a taking as if the land itself were "physically taken away."[3] The term "property," in its legal signification, means only "the rights of the owner in relation to it,"—"the right of a person to possess, use, enjoy, and dispose of a thing."[4] Riparian rights are property, and can be taken for the public good only when due compensation is made.[5] Any physical interference with those rights "takes" *pro tanto* the owner's "property." The right of indefinite user is an essential quality or attribute of absolute property, without which absolute property can have no legal existence, and this right necessarily includes the right and power of excluding others from using the property.[6] Occasional inundations may produce the same effect in preventing an owner from making a beneficial use of his land, as would be caused by a manual asportation of the constituent materials of the soil. So, covering the land with water or with stones is a serious interruption of plaintiff's right to use it in the ordinary manner.[7] And from the very nature of these rights of user and of exclusion, it is evident that they cannot be materially abridged without, *ipso facto*, taking the owner's property.[8] The destruction of property is as much a divestiture of vested rights as a change or destruction of its title. A previous adequate compensation can alone justify an expropriation for purposes of public utility.[9] The law concerning the expropriation of private property for public use, does not

1 Black Riv. Improve. Co. v. La Crosse Booming, etc., Co. 54 Wis. 659.

2 Eaton v. Boston, C. & M. R. Co. 51 N. H. 511, and cases cited.

3 People v. Kerr, 37 Barb. 399.

4 Eaton v. Boston, C. & M. R. Co. 51 N. H. 511; Wynehamer v. People, 13 N. Y. 378.

5 Yates v. Milwaukee, 10 Wall. 497.

6 Wynehamer v. People, 13 N. Y. 378.

7 Eaton v. Boston, C. & M. R. Co. 51 N. H. 513; and see Reeves v. Wood Co. 8 Ohio St. 346.

8 Walker v. O., C., etc., R. Co. 103 Mass. 14.

9 Cash v. Whitworth, 13 La. Ann. 401.

apply to lands on the banks of navigable rivers necessary for levee purposes.[1] Where a city built a dike in the channel of the river so that the current was diverted and mud deposited on plaintiff's land, *held*, that he was entitled to damages.[2] So, where a lower riparian owner constructed a dam so that in times of ordinary freshet the water was thrown back upon plaintiff's land, he was entitled to damages.[3] The remedy for the violation of riparian rights is by action at law.[4]—[ED.

1 Dubose v. Levee Com'rs, 11 La. Ann. 165.
2 Meyers v. St. Louis, 8 Mo. App. 266.
3 Bristol Hydraulic Co. v. Boyer, 67 Ind. 236.
4 Mason v. Cotton, 2 McCrary, 82.

HAMM v. CITY OF SAN FRANCISCO.[1]

(Circuit Court, D. California. May 28, 1883.)

1. FALSA DEMONSTRATIO.
Where the description in a deed appears to be true in part and false in part, and it can be ascertained from references in the deed to other contemporary documents, and extrinsic attending facts, which part is false, so much of the description as is false must be rejected.

2. CONSTRUCTION BY ACTS OF PARTIES.
Where the parties to a deed, by their subsequent acts, have given a practical construction to a deed, having in some particulars a false or indefinite description, such practical construction by the parties themselves will be considered by the court in construing the doubtful clause.

3. CASE IN JUDGMENT.
A conveyance described the land conveyed by reference to a deed, bearing a particular date, recorded on a particular page of a public record. Upon reference to the page of the record, a deed between the parties was found, but bearing a *different date* from the one described; so that either the date, or the page of the record, was false. On the preceding page, facing the page mentioned in the description, was found the record of a deed between the same parties for the proper amount of land, bearing the proper date, and in all other particulars correct; and by reference to the deed bearing the proper date, and to other transactions surrounding the one in question, referred to in the deed to be construed, it appeared that the false particular in the deed was the *number of the page* of the record referred to. *Held*, that the page mentioned in the description should be rejected as false, and the premises conveyed ascertained from the remaining portions of the description.

At Law.

Wm. Irvin, W. S. Wood, and *R. H. Lloyd,* for plaintiff.

W. C. Burnett, for defendant.

SAWYER, J. The contest in this case arises out of a defect in a conveyance from Henry Gerke to the town of San Francisco, executed in 1850; but the day and month are left blank. It was acknowledged, however, April 8, 1850, and recorded on the following day. Gerke, before the land was surveyed into lots, had received a grant of two 50-vara lots in 1848; or rather an unsurveyed lot 50 by 100 varas, equal to two 50-vara lots. Upon extending the surveys, subsequently, by direction of the ayuntamiento, six 50-vara lots

1 From the Pacific Coast Law Journal.

were set apart as a public square, since known as Union square, which embraced the lot before granted to Gerke. Gerke then petitioned the town council either to set apart these two lots, so taken into the public square, to him, or else to grant him an equal amount of the adjoining land. The common council thereupon passed a resolution giving him two 50-vara lots, Nos. 930 and 935, fronting on the same square, on the south side of Geary street, in exchange for the lots before granted to him, which latter lots would be Nos. 918 and 919, and this exchange was accepted by Gerke. The deeds to Gerke of lots 930 and 935 were drawn up and executed by the alcalde, in pursuance of the resolution, on March 18, 1850; and the deed to the other lots, from Gerke to the town, was also drawn up, but the day of the month and the month left blank. Probably Gerke was not present at the time, and the blanks were left to be filled at the time of the execution of the deed, but were overlooked at that time. At all events, they were not filled, but the deed was acknowledged a few days afterwards, on April 8, and put on record. This was, manifestly, one transaction, the deed from Gerke to the town being a part of it. These were mutual conveyances to carry out the design of an exchange of lots. One deed from the town to Gerke recited that the lot 935, conveyed thereby, is conveyed "in lieu of lot 919," and that it is made "for and in consideration of the *reconveyance* by said Henry Gerke of the above lot, No. 919." And the other deed has a like recital and statement, with reference to the conveyance of lot 930, for a reconveyance of lot 918. No other transaction of a similar kind took place between the parties. The transaction is all plain enough upon the face of the grants from the town to Gerke, wherein the facts are all recited. There can be no mistake about it. But in the deed of reconveyance from Gerke to the town, instead of describing the property by the numbers of the lots, or by the description of the lands as given in the alcalde's grant to him, they undertook to describe it *in part*, by reference to the page of the record of the brief certificate of the alcalde that a grant had been made to him; and in this reference to the page of the record there is a mistake. The reference to the page, however, is not the whole description. There are other points of description, referring to extrinsic facts, which are readily shown by other documentary and record evidence, and the transactions alluded to in the deed, which enables us to apply the deed, without difficulty or embarrassment, to the proper subject-matter. One fact is that the conveyance is "in consideration of the reconveyance of an *equal quantity of land* with that herein conveyed." The quantity, then, "herein conveyed" must be 50 varas by 100 varas, or two 50-vara lots; for, by reference to the only conveyance to him that could relate to the transaction, there were two, and only two, 50-vara lots, and in those conveyances so referred to, both the lots conveyed, and those in consideration of which they are conveyed, are distinctly specified by their proper numbers, thus distinctly identifying the lots conveyed by both sides.

But the deed in dispute goes on to say that "I convey all my right, title, interest, and estate of, in, and to all that piece or parcel of land herein described, which said tract was conveyed to me, the said Gerke, by the authorities of the town of San Francisco, by *deed bearing date* September 8, 1846, and entered in Book B, District Records, archives of San Francisco, *page* 23." Had the description stopped at "San Francisco," omitting "page 23," there could not have been a possible question; for, by reference to the record, with the records of the other deeds, etc., the matter would have been perfectly certain. There would not have been the slightest difficulty in applying the description to the proper subject-matter. The description would have been good and certain without the "page 23." But, upon referring to page 23 of Book B, we find a grant from the authorities of the town of San Francisco to Gerke, but it is for 100 *varas square*, lying in another situation, and therefore of *double* the quantity, and not "an *equal* quantity of land." The deed, also, on that page is not a deed bearing date September 8, 1846, but a certificate of a deed stated as bearing date September 8, 1848. There is no record of a deed on that page bearing date in 1846. There is, then, upon the face of the deed, when compared with the record, a *falsa demonstratio*—a false description. Either the date of the grant referred to, or the number of the page of the record, is necessarily and manifestly false, and we must ascertain, if we can, from the other portions of the deed and the record, and the other facts surrounding the transaction, which is the false description, and reject it, if there is enough left to enable us to apply the remainder to the proper subject-matter. Says Greenleaf, sometimes "the description is true in part, but not true in every particular. The rule in such cases is derived from the maxim, *falsa demonstratio non nocet, cum de corpore constat.* Here, so much of the description as is false is rejected, and the instrument will take effect if a sufficient description remains to ascertain its application." 1 Greenl. Ev. § 301.

By referring to page *22* of this same Book B, the opposite page facing "page 23," we find the certificate of a grant of the premises in question, which states, as it was originally written, that they were granted to Gerke by the authorities of the town on September 8, 1846, the very date mentioned in the deed containing the false description; and the grant in that case is also of "an equal quantity of land." It is true that the figure 8, both in this grant and in the other grant certified on the same page, has, at some time since originally entered, been written over the figure 6, so that it now reads 1848 instead of 1846. But the original entry, as clearly appears, was 1846, and it is not known or satisfactorily shown when the change was in fact made. That it was made is clearly apparent, both from inspection and other testimony to the fact. Undoubtedly, the date should originally have been 1848, for Leavenworth was not alcalde in 1846, the date at which the grant was first certified

to have been made, and the grant could not have been made by Leavenworth at the time stated in the certificate as originally written. But the deed under consideration, containing the false description, does not describe the date of *the certificate in Book B*, which itself has no date, but by the date of the *deed itself*,—"*deed bearing date September 8, 1846*,"—not certificate of that date. The deed or grant itself is not recorded or entered in full in that book. There is simply a brief certificate of a past transaction—a brief certificate that on a prior day a grant had been made to Gerke, which was the form, at that time, of making a record of the transaction. And this certificate, evidently, was not made at the date of the grant, for the entries of grants of different dates are all mixed up in the record, there being certificates of a number of long-subsequent grants scattered along through prior pages of the book, and of grants of an earlier date on subsequent pages, thus showing that these brief certificates that grants had been made were not entered at the time of making the grants, but often some time after the grant was made. They do not purport to be, and are not, copies of the grants. The practice then seems to have been for the party desiring a grant to present a formal written petition to the alcalde, stating the facts and describing the lot wanted. Following the petition, the grant was written upon the same sheet of paper, or a sheet attached to it, and signed; and the petition and grant so appended thereto were delivered to the party as his evidence of title. The alcalde, at his leisure, seems to have afterwards entered in Book B the brief certificate that he had made the grant at the date stated, and this was his official record of the fact. Afterwards, under the early statutes of California, these original petitions and grants were brought in by the grantees, or those deriving title from them, and recorded, and by the statutes these records were made evidence of title. Looking to the records we find that the petition and grant, of which the entry on page 22 is a certificate, is duly recorded in pursuance of the statutes. And this petition describes fully and clearly the premises in question, and the grant appended grants the premises as described, being 50 by 100 varas, or two 50-vara lots; or, in the language of the grant itself, "adjoining the tier of lots next to the pink line of the town survey, comprising two lots, each 50 varas square." And the grant bears date in fact, as shown by the record, "September 8, 1846," precisely corresponding with the date of the certificate as first written on page 22 of the records; and this petition and grant constitute the deed bearing date September 8, 1846, and entered in Book B, District Records, referred to in the deed in question, containing the false description, so that the original grant is referred to as a part of the description, and the date referred to is the date written in the deed, and not the date that ought to have been written therein,—"deed *bearing* date,"—and as it is the original, it is the better authority as to what the date as originally written was. The certifi-

cate on page 22 must have been entered from the grant itself, otherwise the date, as originally written in the certificate, would not have corresponded with the date on the grant, and *especially so*, as both must have been erroneous in fact, as we have before seen; Leavenworth not being alcalde in 1846. Yet such is the date of the grant, and also of the certificate as originally written. The grant could not have been present when the correction in the certificate was made, from 1846 to 1848, or it would, doubtless, also have been corrected.

Whether the correction in the record was made before the execution of the deed in question containing the false description is not satisfactorily shown. If afterwards, then the description in the deed in question, at the time it was made, corresponded with the date then stated in the certificate, as well as with that of the "deed itself, bearing date September 8, 1846." It is quite probable that the deed in question was drawn with this certificate on page 22 before the draftsman at the time, and as the two pages face each other, in glancing at it to get the number his eye fell upon the wrong page, and hence the mistake in the page in his draft of the deed. But he would hardly have copied 1846 had the correction been then made, as the record now shows very distinctly 1848—the 8 in heavy lines appearing written over the 6. But, however this may be, by looking to the original petition and grant, a part of the record of the title, and to the deeds of the other lots conveyed in exchange, wherein the transaction of the exchange is fully stated, and the lots exchanged on both sides designated by their proper numbers, and considering the fact that the deed in question states the consideration to be a conveyance of "*an equal quantity* of land," thereby directing attention to the other conveyance and the other surrounding facts disclosed by the evidence, and it is perfectly clear which is the false description, and that the falsity consists in appending to the description, which was clearly sufficient without it, "page 23," instead of "page 22," as it should have been if the page was to be mentioned at all. Page 23 being manifestly the false description, it must be rejected; and, rejecting it altogether, the application of the remaining description to the proper subject-matter is easy and entirely clear, in view of the surrounding facts. That such rejection must be made, and effect given to the description left, is established by the decision of the United States supreme court in *White* v. *Luning*, 93 U. S. 524, in which the judgment of this court was affirmed, wherein several distinct calls of physical objects were rejected, and the last course reversed, on the ground that the calls rejected and the course reversed appeared to be *falsa demonstratio*. That case presents a remarkable instance of the extent to which courts are justified in going in the rejection of false descriptions in written instruments.

Rejecting the false description apparent on the record, the part which is false appearing from the contemporaneous records and documentary evidence, and from the undisputed facts surrounding the

transaction, and adopting the remaining description, explained and illustrated by the other documents and transactions referred to in the description, the title is clearly in the defendant, the city and county of San Francisco.

Again, the construction contemporaneously and subsequently put upon the deed in question, and for many years acted upon and acquiesced in by the parties to the deed, brings us to the same conclusion. The city, acting under the deed, took possession of the property intended and supposed to be conveyed, without objection from Gerke, who acquiesced in that possession for more than a quarter of a century after the transaction, before making, so far as appears, any adverse claim, or before he conveyed what he described as "all his right, title, and interest in the land" to his son-in-law, Cameron, while he had long before conveyed the lots received in exchange for the lots in question, as well as all other lots granted to him by the alcalde, or the town of San Francisco. This, itself, is a practical construction of the defective deed by the acts of both parties to it; and in such cases the acts of the parties showing their own construction may be considered by the court in construing a deed of doubtful import. *Mulford* v. *Le Franc*, 26 Cal. 108–110, and cases cited; *Reamer* v. *Nesmith*, 34 Cal. 627. *Mulford* v. *Le Franc* was cited approvingly as an authority on this point by the supreme court of the United States, in *Steinbach* v. *Stewart*, 11 Wall. 576.

I am satisfied from the attendant facts that Cameron had actual notice of the condition of the title, if such notice or want of notice could affect his right in the matter. It is scarcely possible, considering his relation to the grantor and the notoriety of the facts,—being, as it were, a part of the public history of the town and city of San Francisco,—that he should not have known all about it. But if he did not, the state of the record of the various documents connected with the transaction, with the cross-references from one record to another,—the falsity of the description in some particulars apparent on the record itself of the defective deed,—the long-continued and *then-present* notorious and open possession of defendant afforded him means of notice of the real character of the transaction, and of the title of the city, that he was bound to avail himself of; and, making the inquiry he was called upon to make, he could not have failed to discover the truth. Besides, his conveyance itself only purports to convey *such interest as the grantor had*, which, under the circumstances, is a fact of great significance. Cameron himself testifies that he knew that Gerke was not in possession, and that the premises were occupied and claimed as a public square; that he had an abstract of the record of the title, and consulted several eminent lawyers as to its validity before the conveyance to him. The conveyance to the plaintiff must also have been with notice; certainly with ample means of knowledge. Besides, he was not a purchaser for a valuable consideration. The conveyance purports on its face to have been made for the nominal

sum of one dollar; but it is clear from the testimony that no consideration was in fact paid. This conveyance was, manifestly, made merely for the purpose of putting the title in an alien, in order to enable the action to be prosecuted in the national courts instead of the state courts in the city of San Francisco. The testimony of Cameron is that he had no agreement with the plaintiff, Hamm, in regard to the matter before the conveyance was made; but that he made the conveyance to plaintiff by direction of his attorney, without at the time asking the reason why. Plaintiff himself was not present when the conveyance was made. The attorney—not one of the present attorneys in the case—subsequently, he says, gave, as one reason for the conveyance, his desire to relieve the state judge of the responsibility of deciding against the city. Plaintiff testifies that after the commencement of the action he reconveyed three-fourths to Cameron, (and Cameron admits a reconveyance of a part,) but that he is not certain whether he has conveyed the remainder to any one or not. The attorney, he says, and himself had an interest in it for services to be rendered in recovering the lot. He also testifies that he does not know that he ever saw the deed from Cameron to him; that he does not control the suit; that he does not pay the expenses of the litigation, and does not know who does. I think I am fully justified by the evidence in finding that both Cameron and the plaintiff had ample notice of the condition of the title, and that the action is a mere speculative one, entitled to no more consideration than a court under the strict rules of law is compelled to give it. The stake played for was a very large one, and the parties to the action, ostensible and real, took the chances on the supposed defective title of the city. But if the record title in the defendant is in any particular defective, it is cured by the statute of limitations. The action was clearly barred under the statute long before its commencement.

I have no doubt as to where the title is, and there must be findings and a judgment for the defendant; and it is so ordered.

SIMPSON *v.* LA PLATA MINING & SMELTING CO.

(*Circuit Court, D. Colorado.* July 2, 1883.)

1. NEGLIGENCE—PERSONAL INJURY TO MINER.
   A complaint in an action to recover damages for personal injuries caused by the negligence of an employer to an employe, should clearly state facts sufficient to make it appear to the court what the act of negligence that caused the injury was.

At Law.

D. J. Haynes, for plaintiff.

Markham, Patterson & Thomas, for defendant.

HALLETT, J., (*orally.*) In the case of William Simpson against the La Plata Mining & Smelting Company, an action to recover damages for injuries received while in the service of the company, the plaintiff avers that the defendant, through its superintendent, brought into the smelting-house certain tanks or jackets, and stacked them up, or placed them on end, near where the plaintiff was required to pass, in the performance of his usual duties, in wheeling out slag, and that while he was passing these tanks some one of them fell upon him and injured him. He has not described with particularity the position of the tanks, and what neglect there was in the superintendent in placing them where they were. He states briefly that the tanks were placed there, and that one of them fell upon him. I think that he should give in detail the position of the tanks, so that it may be seen what the act of negligence was on the part of the superintendent; how the tanks were placed, as evincing carelessness in the superintendent; and in what way they were left so as to be a source of danger to those who should pass by them. Certainly it is not enough to aver that the tanks were put there, and that one of them fell down. It may have been some extraordinary circumstance that caused the falling. If they were so placed that it might be reasonably expected they would topple over, he ought to state that fact—describe the position so clearly that we may see from the complaint that the superintendent was careless in leaving them in the way in which they were left.

Demurrer to complaint sustained, with leave to plaintiff to amend in 30 days.

MANVILLE *v.* BATTLE MOUNTAIN SMELTING CO.

(*Circuit Court, D. Colorado.* June 27, 1883.)

1. PRACTICE—FORM OF PROCESS—CONSTITUTIONAL PROVISION NOT FOLLOWED BY STATUTE.
   The legislature of a state may prescribe the form of process, but in so doing the provisions of the constitution must be observed; and where the constitution provides that every summons shall run in the name of the people, a summons in the form given in the statute, but not in the name of the people, is deficient.
2. SAME—SUMMONS RETURNABLE—GARNISHMENT.
   A garnishee in Colorado is entitled to 10 days in which to appear and answer, "as in other summons in courts of record;" and when the summons is made returnable *within* 10 days from the date of service, it is a fatal defect.

At Law.

Mr. Campbell, for plaintiff.

Henry T. Rogers, for garnishee.

HALLETT, J., (*orally.*) Manville recovered a judgment against the Battle Mountain Company in the district court of Lake county, and took out execution, and procured the Belden Mining Company to be

summoned as garnishee. That company entered a motion to quash the summons and the return of the sheriff thereon, and removed the cause into this court. The motion has been presented here.

Objection is made that the summons does not run in the name of the people, as required by the constitution of the state, article 6, § 30. And the objection seems to be well taken. Unquestionably the legislature may prescribe the form of process, but in doing so the provisions of the constitution must be observed. This process appears to be in the form given in the statute, (2 Sess. 1879,) but it is deficient in that it does not run in the name of the people, as required by the constitution. That it is not in the form of other process used in law actions is not important, and the circumstance that it was issued by the sheriff, rather than the clerk, is not important. In these particulars the authority of the legislature cannot be denied; but the constitution cannot be disregarded.

The statute also provides that in courts of record "the summons shall be made returnable, and be served the same as other summonses in courts of record;" and this seems to require that the time for answering shall be the same as in actions at law. In this instance the summons was made returnable within 10 days from the date of service. This is a fatal defect. The garnishee was entitled to 10 days in which to appear and answer, and if service was not made in the county where the judgment remained, then to a longer time.

The motion will be allowed, and the cause dismissed.

THURSTON v. UNION INS. CO. of Philadelphia.

SAME v. MERCHANTS' INS. CO. of Newark.

SAME v. METROPOLE INS. CO.

SAME v. HOWARD INS. CO.

(Circuit Court, D. New Hampshire. July 12, 1883.)

1. FIRE INSURANCE POLICY—STORE FIXTURES CONSTRUED.
   When a fire insurance policy contains clauses excepting from the insurance "store fixtures," and "store and other fixtures," the words "store fixtures" mean store fittings or fixed furniture, which are peculiarly adapted to make a room, a store rather than something else.
2. SAME—STORE—FACTORY.
   Store being the American word for shop or warehouse, is never applied to a factory; and fixtures in a shoe factory are not covered by the term "store fixtures," in a policy of insurance.

At Law.

John S. H. Frink and *Joseph F. Wiggin*, for plaintiff.
Batchelder & Faulkner, for defendants.

LOWELL, J. The plaintiff, who sues in behalf of a mortgagee, was owner of certain property described in the four policies as "his three-story frame building and additions, occupied for stores and shoe factory, situate on the north side of Third street, in Dover, N. H." Possession was taken by the mortgagee, the Cocheco Savings Bank, November 3, 1881, of which notice was given, and the companies agreed to pay to the bank in case of loss. The four policies were for $2,000 each, and there was a loss by fire, December 28, 1881, of which due notice and proof were furnished. The cases were, by agreement of the parties, sent to a referee to find the amount of injury and the character of the property injured in detail. His report is very full, and states the damage in 18 items. The dispute arises upon the construction of the policies.

In each of the first three policies there is a printed clause, substantially like that which I copy: "*Fences and other yard fixtures, sidewalks, store furniture and fixtures* are not covered by insurance on the building, but must be separately and specifically insured." The policy of the Howard Company, which I call the fourth, contains this printed sentence:

"The insurance under this policy does not apply to or cover jewels, plate, watches, musical or scientific instruments, (piano-fortes in dwellings excepted,) ornaments, medals, patterns, printed music, engravings, paintings, picture frames, sculpture, casts, models or curiosities, or friezes or gilding on walls and ceilings, fences, privies, or other yard fixtures, store or other furniture or fixtures, or plate-glass in doors or windows, (when plates are of nine feet square or more,) unless each are separately and specifically mentioned, and then not exceeding the actual cost of the same."

The plaintiff bought the land in 1858, and made additions to the buildings, which is the meaning of the word "additions" in the policy. He fitted the buildings for stores and for a shoe factory, and occupied them himself for some years. I infer from the statement of the referee that some or all of the premises were occupied by tenants at the time of the fire. But this is immaterial. The question is, what are the "store fixtures" excluded from the contract under three policies, and the "store or other fixtures" excluded from the policy by the Howard Company?

There is no doubt that an exception of fixtures out of a policy upon buildings refers to things which are, under some circumstances, removable, and not necessarily and always a part of the buildings. If we could suppose a printed exception in a policy to be intended to adapt itself to the various relations of landlord and tenant, mortgagor and mortgagee, heir and executor, so that fixtures refer to what may be removed in the particular case, all the disputed items in this case would be within the policies, because they are undoubtedly irremovable, as between the plaintiff and the mortgagee. But if these

same things had been affixed by a tenant, there is no doubt that he might remove them during his term. Such a shifting construction would be unreasonable. We must look for a meaning of "store fixtures" which has a more general application. And I find it in the context and the popular meaning of the words. I hold it to mean, in this connection, store fittings or fixed furniture, which are peculiarly adapted to make a room a store, rather than something else. It is plain that "store fixtures" does not refer to the fixtures of the shoe factory, for the written part of the policies distinguishes the stores from the factory, and so does the common use of the words. Store is the American word for shop or warehouse, and is never applied to a factory. The words "store fixtures" are construed in *Whitmarsh* v. *Conway F. Ins. Co.* 16 Gray, 359, though that case is not of special importance in deciding this case.

For the convenience of counsel I number the items in a copy of the referee's report which I place on file. And first I will say what items I find to be covered by all the policies. These are items 1 and 2, which were admitted by the defendants' counsel to be within the contract; they are the walls, roofs, floors, partitions, doors, and windows, including the show windows which last had not plate-glass of the prohibited size. 11. Boiler fixtures in boiler-room. The boiler cannot be removed without taking down part of the boiler-house, and is used, among other things, to heat the building. 13. Elevator machinery, which, in recent usage, is as much a part of the house as are the stairs. 14. Steam piping, radiators, and iron tanks, which, both from their mode of annexation and their use, which is equally applicable to a dwelling-house, a factory, or a shop, are part of the building. 16. Gas piping, for similar reasons. 10. Speaking tube, for similar reasons. I exclude from all the policies, items 6, wooden tank; 17, gas-fixtures, which are chattels,—the former by its construction, the latter by usage. Also, as "store fixtures," 3, 4, and 5,—shelving and counters in the stores, and shelving and basin in the barber's shop.

For all items not above excluded the three companies are liable. The fourth, or Howard Company, by my construction, escapes by virtue of "or other" from the fixtures of the shoe factory, which are items 7, 8, 9, 12, 15, and 18.

I believe I have mentioned every item and that the parties can assess the damages against each company without difficulty, in accordance with this opinion.

FOSTER *v.* OHIO-COLORADO REDUCTION & MINING CO.[1]

(*Circuit Court, D. Colorado.* June, 1883.)

1. NOTE OF CORPORATION—WHO MAY EXECUTE.
The authority of an officer of a corporation to execute its note depends upon the by-laws, or upon the custom of the corporation. If it be the custom of a corporation to permit the treasurer to execute its promissory notes, the corporation will be bound by such note; especially, if it received the benefit of the money for which it was executed.

2. EVIDENCE—WEIGHT OF.
When there are written evidences made by the parties at the time the transactions occurred, these are entitled to more weight than contrary statements made subsequently, and after a litigation has sprung up. The jury are to judge of the evidence.

At Law.

Browne & Putnam, for plaintiff.

Wells, Smith & Macon, for defendant.

MCCRARY, J., (*charging jury.*) This is largely a case to be determined upon questions of fact. Such questions are exclusively for the consideration of the jury. The province of the court is only to call your attention to the principles of law by which you are to be guided in the application of testimony.

The plaintiff, Mrs. Susan Foster, sues the defendant, the Ohio-Colorado Reduction & Mining Company, a corporation, and she alleges that company is indebted to her upon a promissory note for $10,500. The defense is twofold: *First*, that this is not the note of this defendant corporation; and, *second*, that there was no valid, subsisting debt from the corporation to Mrs. Foster at the time the note was given, and for which it was given.

These, then, gentlemen, are the two matters for you to consider.

Upon the first question, as to whether this is the note of the defendant corporation, that is to be determined upon the question whether the person who executed the note on behalf of the corporation, Mr. Penn, the treasurer of the company, was authorized to execute such an instrument. The law upon this subject is that the authority is not presumed from the mere fact that the person assumed the right to give a note in the name of the corporation. A corporation is an artificial person, which must act within certain limits. It differs from a natural person. If an individual gives his note, it is not necessary to prove anything in the way of authority, but a corporation must act by way of agents, and the authority of the agent who acts for it is not presumed. It may, however, be shown, either by showing an express authority,—as, for example, a resolution of the board of trustees authorizing a certain party to execute a note on behalf of the corporation,—or by a provision of the constitution or by-laws of the corporation authorizing a certain offi-

[1] From the Colorado Law Reporter.

cer to execute promissory notes. It might be shown in that way; but I believe it is not claimed that there is anything of this kind here. It may also be shown by the course of dealings of the corporation, and by facts and circumstances which are sufficient, in the judgment of the jury, to show that the party who executed the note had the authority. If it was the custom of this corporation to permit the treasurer to execute its promissory notes, and if he was in the habit of doing so, with the knowledge of the trustees, or of the corporation,—which means, of course, the trustees,—they had, by recognizing that custom, and acting upon it, themselves become bound by it, and especially if they received the benefits of transactions of this sort, which they permitted the treasurer to enter into. It is only, therefore, necessary for you, in considering this branch of the defense, to inquire whether the evidence here establishes the fact that Mr. Penn, the treasurer, was in the habit of acting for and on behalf of the corporation in executing promissory notes and other instruments of like character, and whether the corporation was aware of that fact, and made no objection to it. If you find this to be so, then you will come to the conclusion that the note was executed by the corporation, and you will proceed, then, to the other question; that is, whether the corporation was indebted to Mrs. Foster in the amount of money for which this note was given. Upon that question there is a great deal of testimony, and I do not know that I can say much which will aid you in its elucidation. It is to be determined upon all the circumstances developed before you in evidence. In looking into it, you will have to consider what has been testified here upon the stand, and what has been testified by the witnesses whose depositions have been taken.

You will have to look into such documentary evidence as is before you; as, for example, the books of the corporation, and the correspondence which is in evidence—the letters; and it is not improper for me to say that the letters that are written by a business man, in the course of a business transaction, at the time that the events are transpiring, if they bear upon the question that you have to consider, are often very satisfactory evidence,—much more satisfactory than the statements of parties after they have come into conflict, and after a controversy has arisen, and they have become biased and heated and excited by that controversy. If you can go back to the time when the transactions were going on—when there was no difficulty between the parties—and if you can find either in the records they kept, or letters they wrote, anything that bears directly upon the question in controversy, you are authorized to give a good deal of weight to anything of that kind; and therefore you will look into the letters which are in evidence, and see how far they corroborate the statements of Mr. Penn upon the stand. If they corroborate them,—if there is nothing in them in conflict with his statements here,—they may be taken as important in the support of the claim of this plaintiff; but if, at

the time these transactions were transpiring, he made any statements in this correspondence which contradict the claim of the plaintiff here and now, or contradict Mr. Penn's statements upon the stand, that would throw some suspicion upon that much of his testimony. I do not say to you, gentlemen, whether there is anything in these letters that contradicts Mr. Penn, or anything that confirms or corroborates him. That is for you to say. I only say that the contemporaneous writings are often very satisfactory, where there is a conflict of testimony, such as you have here. Here are these books; you take them and examine them for what they are worth. If they do not purport to be a record of such transactions as that which is now in controversy, why, of course, they are not important; but if they do contain records of such transactions,—if they show, in other words, what moneys were borrowed by the corporation, and do not show any transactions with Mrs. Foster of this character,—it is for you to consider what weight should be given that fact. In determining the question before you, you will also look at the testimony that bears on the question, how much money was raised by this corporation, and from what sources, and give the testimony such weight as it is entitled to in determining the question whether this amount of money was furnished by Mrs. Foster and put into its business or not. There is some dispute as to whether any money was furnished by Mrs. Foster. If any money was furnished, the principal controversy is as to whether it was furnished to the corporation, or furnished by her to Mr. Penn, to be used on his own behalf, and as an advancement by her to him. If, when the corporation was in trouble, Mr. Penn went to her, induced her to loan money to the corporation, gave the note of the corporation for money that went into its business, then she ought to have judgment for the amount. If, on the other hand, Mr. Penn obtained money from her to be put into the business on his own account, and afterwards gave this note in settlement of that account, in the name of the corporation, of course, if that be the fact, the plaintiff is not entitled to recover.

These are the two theories, gentlemen, and here is all this evidence. You must take it and determine.

It appears that it is a controversy of long standing; the parties live at great distance; it is, necessarily, very expensive litigation. Therefore, it is exceedingly desirable that you should go to your room in a spirit of mutual concession, to hear and receive each other's judgments and views, to arrive at a conclusion, and put an end to this controversy.

If you find for the plaintiff, your verdict will be the amount of this note, with interest to this date. If you find for the defendant, you will simply say so.

Verdict: "We, the jury, find the issues in this case for the defendant."

ADAMS v. SPANGLER.[1]

(*Circuit Court, D. Colorado.* June, 1883.)

1. NEW TRIAL.
   Motion for a new trial in a case tried before the district judge, will be heard by the circuit judge only on the request of the former, and not as a matter of right to the unsuccessful party.
2. OFFICER—RESPONSIBILITY OF, IN EXECUTING PROCESS.
   The rule is that the sheriff to whom a valid process is issued is bound to exercise ordinary skill and diligence in its execution, and in case of his neglect in this regard is liable for any damages which the party interested may have sustained in consequence of such neglect.
3. SAME—ORDINARY DILIGENCE.
   In case of an attachment placed in the hands of a sheriff to levy, it is not the exercise of ordinary diligence for the sheriff to take the representation of the defendant in attachment as to the value of goods seized thereunder. And in such case, when it appears that there were in the possession of defendant goods amply sufficient to satisfy the sum named in the attachment, and the sheriff, relying upon the representation of defendant, fails to levy upon a sufficient quantity, he will be held responsible for such failure.
4. PEREMPTORY INSTRUCTIONS.
   The rule in federal courts is that if the court be of opinion that, upon the evidence as it is presented, a verdict one way or another would have to be set aside on motion for new trial, on the ground that it is not supported by the evidence, the court is not bound to submit the question to the jury, but may charge the jury in accordance with the view the court takes of the proof. The court is not bound to go through the form of submitting a case to the jury, when satisfied in advance that in case the jury find one way the verdict will be set aside.
5. SAME—MEASURE OF DAMAGES.
   In such case, when it appears that the defendant in attachment is insolvent, the measure of damages will be the difference between the amount named in the attachment, with costs, and the amount realized from sale of the goods seized—the actual damage sustained.

On Motion for New Trial.

W. S. Decker, for plaintiff.

Wells, Smith & Macon, for defendant.

MCCRARY, J., (*orally.*) This case is before the court upon a motion for a new trial. The suit was brought by plaintiff against the sheriff to recover for the alleged neglect of the sheriff in making a levy by virtue of a writ of attachment sued out by the plaintiff. The allegation is that the sheriff failed to levy upon sufficient property to pay the debt. The case was tried before the district judge and a jury, and resulted in a verdict for the plaintiff. At the request of the district judge, the motion for new trial has been heard by the full bench. I mention this lest counsel might fall into the misapprehension that motions of this character are heard by the circuit judge as a matter of course. It is only when the district judge requests it that they are so heard; if it were left to counsel, every case tried before the district judge would have to be reheard.

The question in this case was, whether the sheriff was negligent.

[1] From the Colorado Law Reporter.

It appears that when he received this writ the defendant in the attachment was in possession of a stock of goods amply sufficient to pay the entire demand of the plaintiff. When the sheriff or his deputy went to make the levy, being himself ignorant of the value of such goods as those in the possession of the defendant, he made some effort to inform himself with respect to their value; he sent for a person who was supposed to be an expert upon the subject, and was not able to find him. Upon his failure to obtain the advice of this particular individual, he contented himself with such information as he was able to obtain from the defendants in the attachment themselves, and relied upon their representations, and upon the invoices of the goods which they submitted to him. The goods taken under the writ sold for something over $200, I think, whereas the debt amounted to some $900 or $1,000; and in the store, it is admitted, were goods of sufficient value to have paid the entire debt.

As to the law which governs a case of this sort, there is not room for much controversy; indeed, there is no real difference between the counsel for plaintiff and the defendant. The rule is laid down by Shearman & Redfield on Negligence that a sheriff to whom a valid process is issued is bound to exercise ordinary skill and diligence in its execution, and for any neglect to exercise such skill and diligence, is liable for any damages which the creditor named in the process may have in consequence sustained. In other words, what is required of the officer is the exercise of ordinary care and diligence—such care and diligence as a man of common prudence would exercise with regard to his own private affairs. He is not responsible for the use of more than ordinary diligence. Admitting this to be the rule, the difference between the counsel arises here upon the question whether, upon the evidence in this case, the court was authorized to say that the sheriff was guilty of negligence, or was bound to submit the question to the jury. In view of the facts which I have stated, I think it will appear clearly enough that the sheriff did not exercise ordinary care and prudence, and that the court was authorized so to say to the jury. The rule which prevails in the federal courts upon that subject is this: If the court is of the opinion that, upon the evidence as it is presented, a verdict one way or the other by the jury—a verdict, for example, for the defendant in this case—would have to be set aside upon a motion for new trial, upon the ground that the evidence does not support it, in such a case the court is not bound to submit the question to the jury, but may charge the jury in accordance with the view the court takes of the proof. We are not required to go through the form of submitting a case to the jury, if we are able to say in advance that, in case the jury finds one way, the court will set aside the verdict.

Now it is laid down, in the same authority that I have quoted, that, where the debtor has sufficient property to satisfy the writ, it is negligence in the sheriff not to levy upon sufficient to satisfy the writ.

In estimating the property he should use a sound discretion, and is not liable if it turns out to be insufficient. But is it the exercise of a sound discretion, is it the exercise of ordinary prudence and care, for the sheriff to submit the question to the debtor, the defendant in the attachment suit, and be governed by his opinion, and such information as he gets from him with respect to the value of the property? I think most clearly not; and as that is all, according to the testimony in this case, that the sheriff did in his endeavors to ascertain the value of the property, we are bound to say that the case falls clearly within the doctrine that I have announced, and that the evidence shows that ordinary care and prudence were not exercised; and if the jury upon such evidence had found for the sheriff, the court would have been obliged to set the verdict aside.

There is one other question in the case, and that is as to the measure of damages. The court instructed the jury that, upon the issues in this case, if they found for the plaintiff, they were bound to find for the difference between the amount of his judgment and the amount realized upon the property which was seized under the attachment; it being a conceded fact that there was sufficient property in the store at the time the levy was made, if it had been taken upon the writ, to pay the entire claim. There is in the books some conflict upon the question as to the measure of damages in such a case. In some states it is held that the plaintiff is *prima facie* entitled to recover the difference between the amount realized on the property levied upon and the amount of the judgment, with interest and costs, without showing that the defendant in the attachment and in the judgment was insolvent, and that nothing can be realized by a general execution. In other states it is held that if it appears that the money could be made by another writ, that the measure of damages is the actual damage which results from the delay, costs, etc., which would be involved in the pursuit of the remedy. It is not necessary in this case to determine which of these rules is the correct one, because we are very clearly of the opinion that, under the admissions of the answer in this case, the charge of the court was correct. The answer admits that at the time of the delivery of the writ of *fieri facias*, in the complaint mentioned, to this defendant, the said Dufur, Coffin & Co., (who were the debtors,) had at said county of Arapahoe no lands, tenements, goods, chattels, or effects liable to execution, save the goods, wares, and merchandise so as aforesaid levied upon and taken by virtue of said writ of attachment as in the complaint mentioned.

It is suggested that this is not an admission that these defendants were insolvent, but we think it is very clearly. The terms "lands, tenements, goods, chattels, and effects," cover and embrace all kinds and every character of property, and if the defendant has neither he is certainly insolvent. It is true that this allegation relates to the time when the execution was delivered to the sheriff, which, of course,

was a period somewhat later than the day of the levy of the attachment; but the court will presume that if they were entirely insolvent at the time of the delivery of the execution, they were so at the time of the issue of the attachment. At all events, the allegation is sufficient to shift the burden, and to make it the duty of the defendant to show that the defendants in the attachment were solvent, and that the money could have been realized.

It follows that the motion for a new trial must be overruled.

WALKENHAUER *v.* CHICAGO, B. & Q. R. Co.

(*Circuit Court, D. Iowa.* February, 1882.)

RAILROAD—CODE, IOWA, § 1289—FENCING—INJURY TO CHILD.

Section 1289 of the Iowa Code of 1873, providing that "any corporation operating a railway, that fails to fence the same against live-stock running at large, at all points where such right to fence exists, shall be liable to the owner of any stock injured or killed by reason of the want of such fence, or for the value of the property or damage caused, unless the same was occasioned by the willful act of the owner or agent," does not impose on such railroad corporation the absolute duty of fencing, and it will not be liable for an injury caused to a child by reason of the absence of a fence alone, no other fault or negligence being charged.

At Law.

T. C. Whiteley and *Newman & Blake*, for plaintiff.

P. Henry Smyth and *H. H. Trimble*, for defendant.

MCCRARY, J. Where the statute imposes upon a railway company the duty to fence its track, it may well be claimed that the neglect of that duty is negligence, for all the consequences of which the company would be liable; and such being the rule, it might be contended, with much force of argument, that the company would be liable for an injury to an infant child caused by the absence of such fence, notwithstanding the fact that the purpose of the statute may have been to prevent injury to live-stock. It is not, however, necessary in the present case to consider these questions, for we are of the opinion that the Iowa statute did not impose upon the defendant the duty of fencing its track. The statute provides as follows:

"Any corporation operating a railway, that fails to fence the same against live-stock running at large, at all points where such right to fence exists, shall be liable to the owner of any such stock injured or killed by reason of the want of such fence, or for the value of the property or damage caused, unless the same was occasioned by the willful act of the owner or his agent; and in order to recover, it shall only be necessary for the owner to prove the injury or destruction of his property. And if such corporation neglect to pay the value of, or damage done to, any such stock, within thirty days after notice in writing, accompanied by an affidavit of such injury or destruction, has been served, * * * such owner shall be entitled to recover double the value of the stock killed or damages caused thereby," etc. Code of 1873, § 1289.

This statute does not provide that every railway company shall fence its track. It imposes no positive or imperative duty to do so. It is a statute plainly intended to protect the owner of live-stock running at large, and this purpose is sought to be accomplished, not by imposing the duty of fencing upon the railway companies, but by providing that if they shall fail to fence, they shall be liable to the owner of any stock killed or injured for the want of a fence, unless occasioned by the willful act of the owner, and that in case such owner is not paid the amount of his damages within 30 days from the time he shall give notice of his loss to the company, and prove the amount thereof by affidavit, he may recover double damages. Under the statute the railway company is not bound to fence its road, but is subject to a certain liability if it fail to do so. If the company chooses to run the risk of leaving its road unfenced, and to assume the pecuniary liability imposed by the statute as a consequence of so doing, it has a right to do so. It cannot, therefore, be said that the statute imposed upon the company the absolute duty of fencing; and as negligence can only be imputed to the company in consequence of a failure to discharge a duty imposed by law, the defendant cannot be held liable upon the facts stated in the petition.

The demurrer to the petition is accordingly sustained.

I am authorized to say that LOVE, J., concurs in this opinion.

UNITED STATES *v.* SIX HUNDRED TONS OF IRON ORE, etc.[1]

(*District Court, D. New Jersey.*)

FORFEITURE FOR UNDERVALUATION OF IMPORTS—EXCEPTIONS TO COMMISSIONER'S REPORT—ACT JUNE 22, 1874, §§ 17 AND 18.

Exceptions to the report of a United States commissioner, to whom a case has been referred for summary investigation under the provisions of sections 17 and 18 of the act of congress of June 22, 1874, to ascertain the amount of freight due the owners of a vessel on importations forfeited by reason of undervaluation, should not be passed upon by the court, but go with the report to the secretary of the treasury, and be considered by him in making up his judgment in the case; and an expression of the commissioner as to the law of the case should be stricken from the report as not coming within the reference.

On Petition for Remission, etc.

A. O. Keasbey, U. S. Atty., for the United States.

Henry T. Wing, for petitioners Henderson and others.

B. F. Lee, for petitioner Wells.

NIXON, J. Six hundred tons of iron ore, imported into this country from Spain by the steam-ship Italia, have been forfeited for under-

[1] See S. C. 9 FED. REP. 595.

valuation. Since the forfeiture, Thomas Henderson and others, owners of the steamer, have presented a petition to me, pursuant to the provisions of sections 17 and 18 of the act of June 22, 1874, praying for an allowance of freight from the proceeds of the sale, and one Joseph Wells has also petitioned to be reimbursed for certain advances of money made by him on the purchase of the property without knowledge of the violations of the revenue laws by the importer.

Under the provisions of the eighteenth section I directed the summary investigation, provided for by the act, to be made by William Muirheid, Esq., one of the United States commissioners for the district, ordering him to state and annex to the petition the facts appearing from the evidence, together with a certified copy of the evidence, in order that the same might be transmitted to the honorable secretary of the treasury for adjudication.

The commissioner has made his report, finding the facts which he was ordered to do, and also finding the law, which was not within the reference. The counsel for the petitioners, Henderson and others, have filed exceptions to the report of the commissioner, and asking that numerous changes should be made by the judge.

I think the fair construction of the act is that these exceptions should go with the report to the secretary of the treasury, and should be considered by him in making up his judgment in the case. I have accordingly declined to pass upon them. I should direct all expressions of opinion by the commissioner, as to the law of the case, to be stricken from the report, as not coming within the reference, if I supposed they would tend to prejudice the judgment of the secretary of the treasury.

In re Accounts of the Shipping Commissioner of the Port of New York.

(*Circuit Court, S. D. New York.* June 8, 1883.)

Shipping Commissioner of Port of New York — Salaries of Deputies — Reference to Master.

While, on the facts before the court, it cannot assume that the salaries of $3,648, paid by the shipping commissioner of the port of New York to his three sons, whom he has appointed as his deputies, are excessive and should not be allowed, it is ordered that the accounts be referred to the master to take proof and report explicity upon the reasonableness of the salaries paid by the shipping commissioner to his deputies, upon notice to the United States attorney, and with leave to the United States attorney to introduce testimony.

Objections to Master's Report.

H. E. Duncan, on part of shipping commissioner.

Elihu Root, U. S. Atty., *contra*.

Wallace, J. Upon the presentation of the report of the master, to whom it was referred to examine the annual account of Mr.

Duncan as shipping commissioner, and report to the court, the United States attorney appeared, and objected that the salaries paid by the shipping commissioner to the clerks in his office, and included in such account, are excessive. The objection is particularly addressed to the salaries paid by the shipping commissioner to his three sons, each of whom is a "deputy commissioner," by the appointment of his father, and each of whom was paid for the year 1882 the sum of $3,648. In view of the testimony of Mr. Duncan before the master as to the nature of the duties which are discharged by these deputies, and the compensation which they fairly earn, the court, in the absence of any controverting testimony, cannot assume that the salaries paid are exorbitant. The objection now made has been urged on former occasions, when the accounts of the shipping commissioner were presented to this court for approval, and has been overruled by each of my predecessors,—Judges WOODRUFF, JOHNSON and BLATCHFORD, each of whom has sanctioned the payment of larger salaries to these same deputies for the same services than were paid to them respectively in 1882. *In re Account of Shipp'g Com'r*, 16 Blatchf. 92. Nevertheless, the objection has been uniformly made by the United States attorney when these accounts have been presented; not perfunctorily, but because he has deemed it his duty to urge it in the proper discharge of a responsibility imposed upon him by the court under its order made in 1876. While it is not just to indulge a presumption against the honesty and propriety of the action of the shipping commissioner merely because these salaries are paid to his sons, who were made deputies by his own appointment, still, the shipping commissioner must concede himself that the circumstance that these salaries are adjusted upon a flexible scale, which increases or decreases them so that, in connection with the other expenses of the office, they always absorb the entire receipts, is well calculated to excite unfavorable criticism. It is not strange, therefore, notwithstanding the action of this court on former occasions, that the propriety of paying these salaries should be questioned again. I think it is due to the court whose officer Mr. Duncan is, to the United States attorney, and to Mr. Duncan himself, that there should be a thorough investigation of the whole matter, in order that if any abuses exist they may be effectually suppressed, and if none are found to exist that the shipping commissioner may be exonerated henceforth from unjust suspicions.

It is ordered that the accounts be referred back to the master to take proof and report explicitly upon the reasonableness of the salaries paid by the shipping commissioner to his deputies, upon notice to the United States attorney, and with leave to the United States attorney to introduce testimony.

GREENWALD and others *v.* APPELL.

(*Circuit Court, D. Colorado.* June 23, 1883.)

1. STATUTES OF LIMITATIONS.
   Statutes of limitations are statutes of repose, and are enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time if he has the power to sue. Such reasonable time is, therefore, defined and allowed. But the basis of the presumption is gone whenever the ability to resort to the court has been taken away, and in such a case the creditor has not the time within which to bring his suit that the statute contemplated he should have.
2. SAME—BANKRUPTCY—DELAY IN APPLYING FOR DISCHARGE.
   Proceedings in bankruptcy amount to an injunction against any proceedings against the bankrupt to enforce his contracts in the courts, but if he delays for an unreasonable time to apply for his discharge, the right of action against him upon his contracts or debts, which was suspended by the commencement of proceedings in bankruptcy, revives, and during the time that the right of action was suspended by the bankruptcy proceedings the statute of limitations will not run in his favor.

MCCRARY, J., (*orally.*) This is an action at law upon certain promissory notes, and also, I believe, upon an open account. There is a demurrer to the complaint, which raises the question whether the action is barred by the statute of limitations of this state. The defendant, Appell, was adjudicated bankrupt in the state of Pennsylvania some years ago, and the proceedings in bankruptcy were continued for some years, and are probably still pending; but Appell has never been discharged.

The theory of this suit is that, having delayed for an unreasonable time to apply for his discharge, the right of action against him upon these debts, which was suspended by the commencement of proceedings in bankruptcy, has revived; and the question here is whether, during the time that the right of action was suspended by the bankruptcy proceedings, the statute of limitations of the state of Colorado continued to run in favor of the bankrupt; or, in other words, does the bankruptcy of the debtor suspend the running of the statute of limitations in his favor? That it suspends the right to sue, by the very terms of the bankrupt act, is not disputed. After the commencement of proceedings in bankruptcy against the debtor, and after an adjudication in bankruptcy, no suit can be brought against him in any court; certainly, not without the consent of the bankruptcy court. It amounts, in other words, to an injunction against any proceedings against the bankrupt to enforce his contracts in the courts of the country. If he is not discharged, then the action revives after the proceedings in bankruptcy are ended.

The old rule upon this subject was very strict, and many authorities have been cited which clearly hold that if the statute of limitations begins to run, nothing will stop its running except something that is expressly provided in the statute itself; and it was formerly

held that even a state of war was not sufficient; that an injunction against the creditor from bringing a suit was not sufficient to suspend the statute, and that it continued to run notwithstanding these things. That rule will be found laid down in Angell & Ames on Limitations, and I think in some other standard authorities. But the more modern rule is otherwise. It has been settled now, by the decisions of the supreme court of the United States, that there are certain exceptions to the statute of limitations other than those which are expressed in the statutes themselves. The old rule has been qualified by later and better rulings, especially in the supreme court of the United States. These later decisions hold that an exception may be allowed where a party is prevented by some superior law or public calamity, such as war, from bringing the suit. The cases growing out of the late rebellion are illustrations of this doctrine. Although none of the statutes of limitations had any exception which applied to the case of a debtor who was within the lines of the rebellion, and therefore beyond the reach of civil process, so he could not be sued, the supreme court, in a series of cases, laid down the doctrine that that was an exception which was created by the necessities of the case. And this exception has been established by the case of *Bailey* v. *Glover*, 21 Wall. 342. That is a case which arose under the bankrupt act of 1867, which has a limitation clause embodied in its second section. That clause provides that no suit at law or in equity shall in any case be maintained, etc., "unless the same shall be brought within two years from the time the cause of action accrued." That is as broad, as sweeping, and comprehensive as any statute of limitations can be made. It applies to suits both in law and in equity; it applies to all classes of suits, and declares that no suit shall be maintained unless it be brought within two years. The question arose whether, under that statute, courts would create an exception in the case of concealed fraud. In an elaborate opinion by Mr. Justice MILLER, the supreme court laid down the rule that this was an exception, notwithstanding the clear and comprehensive terms of the statute itself. The ground upon which these later rulings proceeds is well stated in a sentence which I will read from the case of *U. S.* v. *Wiley*, 11 Wall. 513:

"Statutes of limitations are indeed statutes of repose. They are enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time if he has the power to sue. Such reasonable time is, therefore, defined and allowed. *But the basis of the presumption is gone whenever the ability to resort to the courts has been taken away.* In such a case the creditor has not the time within which to bring his suit that the statute contemplated he should have."

I think this case falls within that doctrine. The right to sue was undoubtedly suspended during the pendency of proceedings in bankruptcy, and to say that the statute continued to run, would be to say

that the plaintiff is deprived of his right to sue, without the slightest fault on his part.

The demurrer to the complaint is overruled. Defendant to answer in 30 days.

UNITED STATES *v.* RAND and others.[1]

(*District Court, E. D. Pennsylvania.* May 24, 1883.)

NEUTRALITY—VIOLATION OF—CONSTRUCTION OF SECTION 5286, REV. ST.

The captain and mate of a United States vessel, who, knowing the character of their cargo and its intended purpose, transported arms from a port within the United States to a foreign port, together with men and stores, to be used in a military expedition against a people at peace with the United States, are guilty of violating section 5286 of the Revised Statutes.

This was an indictment against Augustus C. Rand and Thomas Pender, the captain and mate of the steamer Tropic, for the violation of section 5286 of the Revised Statutes, relating to military expeditions against people at peace with the United States.

The facts are set forth in the charge of the court.

H. P. Brown, Asst. Dist. Atty., and *J. K. Valentine*, Dist. Atty., for the United States.

Alfred & Arthur Moore, for defendants.

BUTLER, J., (*charging jury.*) On the fifteenth day of March last the ship Tropic sailed from this port in command of the defendants—the one as captain and the other first mate—with a cargo of arms and military stores, consisting of rifles, muskets, cannon, cutlasses, ammunition, and uniforms. She proceeded direct to Inagua, where she arrived on the twenty-second of the same month, and during the night and the next day, took on board a large number of men, who were soon after put into uniforms, drilled, and prepared for active military service. She then proceeded to Miragoane, Hayti, where the men were disembarked, and an attack made upon the representatives of the Haytian government, there in command, and the town captured. During the attack the vessel rode outside the harbor, and immediately after ran in and landed her stores. On the return of the ship to this port the defendants were arrested, and are now on trial for an alleged violation of a statute of the United States, which reads as follows:

"Every person who, within the territory or jurisdiction of the United States, begins or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, colony, district, or people, with whom the United States are at peace, shall be deemed guilty of a high misdemeanor."

[1] Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.

That the attack upon and capture of Miragoane was the result of a *military expedition*, is clear. Was it begun or set on foot within the territory of the United States, to be carried on from thence, or the means here provided for such an expedition? As we have seen, the arms, military stores, and means for the transportation of them, and of the men subsequently taken on board, were here provided and started out. That the men were not taken on board until the vessel reached Inagua, is not, in the judgment of the court, material. The expedition, as it left this port, viewed in the light of subsequent events—(the shipping of the men at Inagua, and the attack upon Miragoane)—was, in the judgment of the court, a *military enterprise*, within the terms and spirit of the statute,—a military enterprise *begun or set on foot within the territory* of the United States, *to be carried on from thence*. To enter upon a critical, abstract definition of the statute, here, would serve no useful purpose. The signification of its terms, in the aspect now involved, is sufficiently defined by what has been said. I repeat, the expedition which sailed from this port, as described by all the testimony in the cause, was a *military expedition*, within the scope of the statute. The language—"to be carried on from thence"—is employed in the sense of *carrying out*, or *forward*, from thence.

The only controverted question of fact for your determination, therefore, is, were these defendants, or was either of them, connected with it, with knowledge of the circumstances, and with design to promote it? That they commanded the vessel, took out the arms, stores, and men, and landed them at the place of attack, is undisputed. Their defense is that they were ignorant of the enterprise; that they did not know what the cargo consisted of; that when the men were shipped they were supposed to be passengers; and that all the defendants subsequently did was the result of coercion. If this is true, it is a complete defense. Is it true? The defendants appeared before you as witnesses, and swore to it, circumstantially and in detail, as you heard. The engineer and the second mate, who bears the same name as one of the defendants, were called to prove the alleged coercion. You heard their testimony,—the statement that the captain appeared anxious to get away without landing the stores, etc.,—and must judge what weight this testimony is entitled to. Other witnesses testify that the captain exhibited alarm towards the close of his voyage, as the expedition neared its destination, and that he then declared his ignorance of its purpose at starting. What weight should be attached to these declarations, and to this exhibition of alarm, you must judge. Whether such alarm is inconsistent with a belief that he was aware of the character of the enterprise from the start, you will consider. The instances are probably rare in which men carry out to the end hazardous enterprises involving property and life—even where most deliberately entered upon—without temporary moments of hesitation and alarm. In the light

of surrounding circumstances, is the defense, (that the defendants were ignorant of the character of the expedition, and were not intentionally connected with it at the time of starting out,) probable and credible? As you have been informed, the clearing of the ship here was irregular. The cargo was put on board in the manner stated by the witnesses, and the vessel sailed without making the usual entry at the custom-house. The captain appears to be a man of experience and intelligence. His failure of duty in this respect is, therefore, somewhat remarkable, if he was ignorant of the character of his cargo. You will judge whether his explanation (if what he says may be called an explanation) is satisfactory. Notwithstanding the cargo was destined for Port Antonio, he went to Inagua, where he arrived about 10 o'clock, and remained until the next morning, taking on board during the night a large number of men. You heard his explanation of this: that he was directed, on leaving this port, to touch at Inagua for orders, and that in taking the men on board he was obeying the orders there received. Is this explanation probable? The ship was not fitted out for the transportation of passengers, and, as he tells you, he knew that it was unlawful to carry them, in its condition. After starting out from Inagua, and returning with the steamer Alva, which he met, and being informed from the British man-of-war, lying near by, that he would not be permitted to take the additional large number of passengers which he desired to carry to Miragoane, he ran out to sea some 15 miles, and lay there in the night, with his lights down, awaiting the arrival of these passengers, in pursuance of an arrangement that they should be brought to him at that place. He tells you that his lights were down because he was coerced into removing them; but in view of the fact that he was seeking to carry the men away against the orders of the man-of-war, and was manifestly lying where he was with a design to take them without discovery, you will judge whether the removal of his lights was not consistent with, and in furtherance of, this purpose; and whether, therefore, his statement that he was coerced into removing them is worthy of belief. You now find him at Inagua, with his cargo for Port Antonio, his vessel crowded with men, voluntarily taken on board,—a vessel unsuited to the carriage of passengers, and on which it was unlawful to carry them. He says he did not know why he was forbidden to carry the men to Hayti. You will judge, however, whether he did not understand that it was because the public peace there would be jeopardized by his doing so, and whether, therefore, he did not understand the character and purpose of these men when he voluntarily took them on board. Thence he started to Miragoane. He tells you that he now, or soon after, discovered the character of the expedition, and all that he subsequently did was the result of coercion. The men and stores were taken to Miragoane, and there put ashore in the manner and under the circumstances described by the witnesses. No fare or freight was paid or demanded. Although the

American consul at Miragoane was seen and communicated with, no complaint appears to have been made, nor redress sought, for the alleged outrage upon the vessel; nor was any complaint made elsewhere subsequently; nor was the transaction reported to the consignors of the cargo, or the owners of the vessel, prior to the arrest. In the light of these circumstances, and of all the testimony bearing upon the qnestion, do you believe that the defendants did not know the character of their cargo, and were not aware of the intended attack on Hayti, on leaving this port? If you do so believe, you must acquit them; and it will, no doubt, in such case be a pleasure to do so. On the other hand, if you believe they were aware of the character of the cargo, and started out for the purpose of carrying it, and the men subsequently taken on board, to Hayti, for the purpose of making the attack afterwards made there, you should convict them. The defendants are entitled to the benefit of any reasonable doubt you may have on the subject. The case is an important one, and deserves your most serious consideration. The statute involved is founded in a wise and beneficent purpose—the discharge of an important national duty towards other friendly powers; and its violation involves the national honor as well as the public peace.

You will bear in mind that you may convict one of the defendants and acquit the other, or convict or acquit both, as your judgments dictate.

UNITED STATES v. WATSON and others.

(*District Court, N. D. Mississippi, W. D.* July 7, 1883.)

1. CONSPIRACY—COMMON LAW.
   By the common law a conspiracy is an agreement between two or more persons to do some unlawful act, or to do a lawful act in an unlawful manner. The agreement itself constitutes the offense, whether an act is done in furtherance of the object or not.

2. SAME—ACTS OF CONGRESS.
   By acts of congress the conspiracy to do numerous acts stated in the different sections of the Revised Statutes and acts of congress are made offenses, and in which the agreement to do the forbidden act constitutes the offense, whether any act is done in furtherance of the object or not.

3. SAME—REV. ST. § 5440.
   To constitute a good information or indictment under section 5440 of the Revised Statutes, it must charge that the conspiracy was to do some act made a crime by the laws of the United States, and must state with sufficient certainty the offense intended to be committed, and must then state some act done by one of the conspirators towards effecting the object of the conspiracy.

4. PLEADING—SETTING OUT WRITTEN DOCUMENT.
   By all rules of pleading, criminal as well as civil, when a written document is relied on to sustain the prosecution or plaintiff's case, it must be set out either *verbatim* or in substance, and not a statement of the opinion of the pleader

as to the effect it was intended to or might produce; and a criminal information that does not give the substance of a document relied on, but only its effect, is not sufficient.

5. SAME—CRIMINAL INFORMATION—MOTION TO QUASH GRANTED.
As the information in this case does not contain a sufficient averment of any act done by any one of the conspirators to effect and carry out the object and purpose of the alleged conspiracy, it must be quashed.

Motion to Quash Information.

G. C. Chandler, U. S. Atty., for the United States.

J. W. C. Watson, and *H. A. Barr*, for defendants.

HILL, J. The questions now for decision arise upon defendants' motion to quash the information against them. The information in substance states and charges as follows: That an election was held in the second congressional district of this state, on the seventh day of November, 1882, for a representative for said district in the forty-eighth congress of the United States; that the defendants conspired, confederated, and agreed together to procure from the governor, lieutenant governor, and secretary of state of this state the appointment of one Dunlap as one of the commissioners of election for Marshall county; that said Dunlap was wholly unsuitable to discharge the duties of said office; and that there were competent persons of different political parties then and there to discharge the duties of said office who could have been appointed to discharge the duties of said office of commissioner of election for said county. The information further charges that said defendants conspired, combined, confederated, and agreed together to procure one Johnston to be appointed one of the inspectors for said election for the eastern precinct of the town of Holly Springs, and that said Johnston was then and there wholly illiterate, unable to read or write, and not a fit or suitable person to discharge the duties of said office. The information further states the names of the county commissioners for said election for the counties of De Soto, Lafayette, Benton, Tippah, and Marshall, respectively, and charges that it was the duty of said commissioners, within 10 days after said election, to make out and transmit to the secretary of state of said state a statement of the whole number of votes given in their respective counties for each candidate voted for at said election. The information charges that the defendants did knowingly and unlawfully conspire, confederate, and agree among themselves to advise, counsel, and procure all the said commissioners of election aforesaid to omit, refuse, and neglect to perform their duties in relation to the making the returns of said election in manner and form as aforesaid, and did then and there invite and solicit the assistance of other persons, naming them, to incite, counsel, procure, and advise the said commissioners of election to change their statement to the secretary of state of the votes cast in their respective counties,—cast for the persons voted for at said election,—so as to make only a partial statement of the votes cast as aforesaid for representative in congress aforesaid. The information further charges

that the defendants combined, confederated, conspired, and agreed together to counsel, advise, and procure the commissioners of election for Marshall county to transmit, with their statement of all the votes cast at said election for each candidate for representative in congress as aforesaid, a protest or statement to the effect that their statement of votes of said county so transmitted was made under the influence or threats of J. R. Chalmers and the United States attorney for said district, which was scandalous in this: that it was calculated and intended to vitiate and destroy their own official statement of the votes so cast and transmitted by them. The information then charges that the defendants did then and there unlawfully and knowingly conspire, combine, confederate, and agree together, by unlawful means, by advice, counsel, and procurement, aforesaid, and by other means unknown to the district attorney, to procure from the secretary of the state of Mississippi a false count of the votes cast for representative in congress aforesaid, and from the governor of said state a certificate of the election of Van H. Manning as representative as aforesaid, well knowing that then and there he, the said Van H. Manning, had not received the largest number of votes given in at said election, and well knowing that James R. Chalmers had received the largest number of votes given in at said election, and that he was lawfully and duly elected as such representative in congress, and was entitled to said certificate. The objection taken to the information, and grounds relied upon to sustain the motion insisted upon in argument, are—*First*, that it charges no offense known to the law; and, *secondly*, that it charges different acts, which, if constituting offenses cognizable in this court, are contained in one count, and therefore multifarious.

The first objection will be first considered, and will be decisive of the case. It is insisted upon the part of the prosecution that there is but one offense charged in the information, and that is a conspiracy to obtain from the secretary of state a false count of the votes cast for the persons voted for in said election, and a false certificate from the governor certifying that Van H. Manning had received the largest number of votes cast at said election, and that he was duly elected as such representative, and that the other acts stated constituted the evidence of the truth of said charge. We will consider the charge as being as stated, and as only alleging one offense—a conspiracy, as stated. By the common law a conspiracy is an agreement between two or more persons to do some unlawful act, or to do a lawful act in an unlawful manner. The agreement itself constitutes the offense, whether an act is done in furtherance of the object or not. By acts of congress the conspiracy to do numerous acts stated in the different sections of the Revised Statutes and acts of congress are made offenses, and in which the agreement to do the forbidden act constitutes the offense, whether anything is done in furtherance of the purpose agreed upon or not. But the acts set out in

the information are not embraced in either of them; and, as this court has no jurisdiction of common-law offenses, we must look further into the statutes of congress to see whether or not there is any section under which the information can be maintained. Section 5440, Rev. St., is as follows:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years."

It is clear that, under this section, to constitute a criminal offense, something must be done by one or more of the conspirators to effect the object of the conspiracy. The object of the conspiracy or the thing to be done must be to commit some offense against the United States; that is, to do some act made a crime by the laws of the United States, or to defraud the United States. This law was enacted March 2, 1867,—some time before most of the conspiracy acts first referred to became laws.

To constitute a good information or indictment under this section, it must charge that the conspiracy was to do some act made a crime by the laws of the United States, and must state with sufficient certainty the acts intended to be effected or carried out by the conspiracy or agreement of the parties; in other words, must sufficiently state the offense intended to be committed, and must then state some act done by one of the conspirators towards effecting the object of the conspiracy.

The next question is, does the information charge a crime against the United States, which, by the conspiracy and the agreement charged, was intended to be committed by the conspirators, or either of them? The offense charged is a fraudulent count of the votes cast, to be made by the secretary of state, the purpose of which, as charged, was the procurement of a false certificate of election by Van H. Manning, instead of by James R. Chalmers, who, as it is alleged, was entitled to it. Section 5515 of the Revised Statutes, in relation to congressional elections, adopts the laws of the state in relation to elections. Section 141 of the Code of 1880 makes it the duty of the secretary of state to receive the statements and returns made to his office within not more than 30 days after such election, to sum up the whole number of votes given for each candidate, and ascertain the person having the greatest number of votes for each office, and shall declare such person or persons to be duly elected, and thereupon all persons chosen to any office at such election shall be commissioned by the governor; and if the secretary neglects to perform these duties, or knowingly and fraudulently makes out an untrue or false statement with the intent to affect the election or the result thereof, it would constitute an offense against the United States,

as declared in section 5515. Section 5511, among other things, makes it an offense against the United States for any person to interfere in any manner with any officer of a congressional election, in any manner, in the discharge of his duties. This refers to officers holding the election; but the same section provides that it shall be an offense for any person, by force, threat, intimidation, bribery, or reward, or offer thereof, or by any other unlawful means, to induce any officer of election, or officer whose duty it is to ascertain, announce, or declare the result of such election, or give or make any certificate, document, or evidence in relation thereto, to violate or refuse to comply with his duty, or any law regulating the same.

The secretary of state is one of the officers referred to in this last paragraph, and any unlawful means used to induce him to make a false count of the votes cast in such election would constitute an offense against the United States. By unlawful means is meant any fraudulent means, as well as the means expressed in the statute as unlawful. As a matter of course it would not embrace argument of counsel, or statements made by parties in good faith, believing them to be true, and which would leave the mind of the officer free to exercise his unbiased judgment.

I am of opinion that the means intended to be brought to bear upon the secretary of state to induce him to make a false count should be stated so as to enable the court to determine their lawfulness or unlawfulness.

The precise date at which the alleged conspiracy was formed is not given, but it is alleged that at the time it was known to the alleged conspirators that Van H. Manning had not received a majority of the votes cast, and was not entitled to the certificate of his election, and that they did know that James R. Chalmers had received a majority of the votes cast at said election, and was entitled to a certificate of his election. Consequently the alleged conspiracy must have taken place after the election, and consequently the appointment of Dunlap and Johnson, as officers of the election, must have been made before that time, and not contemplated as a means of effecting the conspiracy, and need not be further considered. The allegation that the defendants conspired and agreed together to induce the commissioners of election to make partial, and consequently false and fraudulent, returns of the votes cast, if true, and if any steps were taken or acts performed in carrying into effect the purpose of such conspiracy, would constitute a separate and independent offense against the United States; but as the offense charged in the information is a false count of the votes returned, it cannot be held as an act to carry into effect the false count charged.

The other, and I believe only other, act charged to have been done to effect the conspiracy is the alleged protest sent to the secretary with their return and statement to the secretary of state by the commissioners of Marshall county. By all rules of pleading, criminal as

well as civil, when a written document is relied on to sustain the prosecution or plaintiff's case, it must be set out either *verbatim* or in substance, and not a statement of the opinion of the pleader as to the effect it was intended to or might produce. The information does not undertake to give the substance of the document mentioned, but only its effect. I am of opinion that this is not sufficient, especially in a criminal charge. Had section 5440, referred to, and the only one upon which the charge for conspiracy in the case can be maintained, not required to constitute the offense some overt act to be committed by one of the conspirators, I am of opinion there is enough in the information to require the defendants to plead to it; but, when closely examined, I do not find a sufficient averment of an act done by any one of the conspirators to effect and carry out the object and purpose of the alleged conspiracy, and for the want of which the motion to quash must be sustained, with leave to the district attorney to prefer one or more indictments before the grand jury now in session for any of the alleged wrongful acts stated in the information.

UNITED STATES *v.* MARTIN.

(*District Court, D. Oregon.* June 27, 1883.)

1. OFFICER OF THE UNITED STATES.
   A deputy marshal is an officer of the United States, within the purview of section 5398 of the Revised Statutes, and so is the keeper of a state jail to whose custody a person is committed by legal process issued by a United States court or judicial officer, with the consent of the state.
2. COMMISSIONER OF THE CIRCUIT COURT.
   A commissioner of the circuit court, when engaged under section 1014 of the Revised Statutes in causing the arrest or imprisonment, or holding to bail for trial, any person charged with the commission of a crime against the United States, acts as a committing magistrate, and must proceed according to the law of the state in similar cases.
3. ORDER TO BRING PRISONER INTO COURT.
   Section 1030 of the Revised Statutes does not apply to proceedings before such commissioners acting under the authority of said section 1014; and it is doubtful if a jailer having a prisoner in custody for trial in the circuit or district court is obliged to bring or send him into court, or deliver him to the marshal for that purpose, without a written order to that effect.
4. LEGAL PROCESS UNDER SECTION 5398.
   Under the Oregon Code of Criminal Procedure, §§ 402, 403, and at common law, it is sufficient in a commitment to designate the crime involved in killing a human being with malice aforethought, generally, as "murder;" and therefore a commitment issued by a commissioner of the circuit court, in and for said state, directed to the keeper of a county or town jail therein, and requiring him to receive and safely keep a person therein named, and charged upon the oath of another with the crime of "murder," until discharged by due course of law, is legal process, within the meaning of that term as used in the latter clause of said section 5398; and resistance to the execution thereof, as by taking such person out of such jail or the custody of such jailer without his consent, is a violation of such section.

Information for the Violation of section 5398, Rev. St.

James F. Watson, for the United States.

W. Lair Hill and *W. J. Thompson*, for defendants.

DEADY, J. On January 9, 1883, the district attorney, by leave of the court, filed an information herein, charging the defendant with a violation of section 5398 of the Revised Statutes, which provides that—

"Every person who knowingly and willfully obstructs, resists, or opposes any officer of the United States in serving, or attempting to serve or execute, any mesne process or warrant, or any rule or order of any court of the United States, or any other legal or judicial writ or process, * * * shall be imprisoned not more than twelve months and fined not less than $300."

The information contains two counts, and states that Ah Hote, Weet Soot, Capsula, and Petenus, Indians belonging to the Umatilla Indian reservation, being charged, before a commissioner of this court, with the crime of murder, committed in the killing of one Charles Mulheren, were by said commissioner committed to custody pending their examination upon said charge,—the first-named two, to the custody of the keeper of the town jail of Pendleton, Oregon, and the last two to the custody of the defendant, as keeper of the county jail of Umatilla county, Oregon; that the defendant afterwards knowingly and willfully took and rescued said Ah Hote and Weet Soot from the custody of the keeper of said town jail, and also refused to deliver said Petenus and Capsula to the United States marshal, although demanded by the latter, upon the order of said commissioner, to bring them before him for further examination upon said charge, and with force and violence prevented said marshal from executing said order. The defendant demurred to the information on the ground that this court had no jurisdiction of the crime charged against the Indians. On February 5, 1883, the court overruled the demurrer. 14 FED. REP. 817. Thereupon the defendant surrendered the Indians to the marshal, and they were indicted by a grand jury of this court for the murder of Mulheren. An Indian of the same reservation, named Tummusk, was included in the indictment, and subsequently found and arrested by the marshal. Upon the trial, all of them, except Weet Soot, who was discharged from the indictment and allowed to become a witness for the government, were found guilty of manslaughter, and on May 22, 1883, sentenced to 10 years' imprisonment each in the penitentiary of Oregon. On February 16, 1883, this cause was submitted to the court for judgment upon a stipulation to the effect that a statement of facts then filed in the court should be taken and considered to be the special verdict of a jury in the case, subject, however, to objection for immateriality to all or any portion of such statement. From this special verdict it substantially appears as follows:

(1) That said four Indians all belong to said Indian reservation, and are under the charge of an Indian agent.

(2) That said Charles Mulheren was a white man, and was killed by said Indians on said reservation on November 22, 1882.

(3) That the defendant is, and at and during all the times herein mentioned was, the sheriff of said Umatilla county and the keeper of the jail thereof; that Mr. Fred. Page Tustin is, and at and during said times was, a duly-appointed commissioner of this court, with authority to examine, commit for trial, and admit to bail "all persons committing offenses against the laws of the United States" in the district of Oregon; that S. L. Morse is, and at and during said times was, a duly-appointed and acting deputy marshal of the United States for said district; and that P. M. McDonald is, and at and during said times was, the keeper of the town jail in said town of Pendleton.

(4) That said commissioner, on November 28, 1882, on a complaint duly verified by the oath of said McDonald on said date, charging Weet Soot with the crime of murder in killing said Charles Mulheren on November 22, 1882, in the county of Umatilla and district of Oregon, and on said Indian reservation, issued a warrant for the arrest of said Weet Soot on said charge, upon which he was arrested by said Morse on November 29, 1882, and brought before said commissioner for examination on December 8th; that afterwards Ah Hote, Petenus, and Capsula were arrested by said Morse on similar warrants issued by said commissioner for their respective arrests on similar complaints, verified by the oath of said McDonald, the complaints and warrrants in the cases of Ah Hote and Petenus being each dated December the 4th, and in the case of Capsula on December 16th; that Ah Hote was arrested on December 7th, and brought before the commissioner for examination on December 8th; and that, thereupon, said Weet Soot and Ah Hote were each committed to the custody of the keeper of the town jail aforesaid on a *mittimus* issued by said commissioner, from which it appeared that the prisoners had been charged on oath with the crime of murder committed in Umatilla county, Oregon, on November 22, 1882, and examined by said commissioner on said charge, and required "to render himself in appearance before him," and that said keeper was commanded in the name of the president of the United States to receive the said Ah Hote and Weet Soot, as prisoners of the United States, into his custody in said town jail, "there to remain until discharged by due course of law;" that said Petenus and Capsula were arrested on December 16th, and brought before said commissioner on the same day for examination, and were thereupon each committed to the custody of the defendant, as keeper of the county jail aforesaid, upon a *mittimus* issued by the commissioner, similar to those issued to the keeper of the town jail in the cases of Ah Hote and Weet Soot.

(5) That Ah Hote and Weet Soot remained in the custody of the keeper of said town jail, under said commitments, until December 18, 1882, when the defendant took them from said custody and jail without the consent of said keeper, upon a warrant from the circuit court of the state for said county, directed to him as sheriff thereof, and commanding him to arrest all of said Indians as defendants in an indictment found by the grand jury of said court on said day, charging them with the crime of murder, in killing said Mulheren.

(6) That on said December 18th said commissioner made a verbal order directing said Morse to bring all of said Indians before him for further examination upon the charge aforesaid, which order he then and there attempted to execute, and for that purpose demanded each of said Indians from the defendant, who then had them all in his custody in said county jail, and knew that said Morse was then acting as deputy United States marshal, and made such demand as such deputy, and in pursuance of said order of the commissioner; but the defendant refused to deliver any of said Indians to said deputy, or to permit him to take any of them from said county jail, giving as a reason therefor the finding of the indictment in the state court, and the issuing of the warrant to him thereon, as aforesaid.

(7) That the defendant acted in good faith in the premises, believing it to be his duty as sheriff to take and detain said Indians.

The defendant contends that judgment cannot be given against him on this verdict for a violation of said section 5398 of the Revised Statutes, because it does not appear therefrom that he obstructed or resisted an officer of the United States in the execution or attempt to execute a legal order or process of the United States, or any court thereof, in that it does not appear from the facts found that it was stated or alleged, in any of the proceedings before the commissioner for the arrest, examination, or commitment of said Indians, that Mulheren was a white man, and therefore it does not appear that the commissioner had jurisdiction to issue a warrant for the arrest of said Indians for the killing of said Mulheren, or to make any order concerning the same.

There is no question but that Morse was "an officer of the United States" within the purview of the statute, (*U. S.* v. *Tinklepaugh*, 3 Blatchf. 428,) and that a commissioner of this court might, in a proper case, issue "legal process," within the meaning of the latter clause of said section 5398, (*U. S.* v. *Lukins*, 3 Wash. C. C. 337,) even if it should be held that he is not a "court of the United States" within the meaning thereof. And for the purpose of this case, since the decision on the demurrer, it must be assumed that Commissioner Page had jurisdiction and authority to issue any process, or make any order for the arrest, examination, and commitment of said Indians for trial in this court upon the charge of having killed a white man upon the Indian reservation. Such was the decision of the court upon the demurrer to the information; and, upon a consultation with the circuit judge at the beginning of the April term of the circuit court, he concurred in the conclusion, having already made the same ruling in effect. *U. S.* v. *Leathers*, 6 Sawy. 17; *U. S.* v. *Sturgeon*, Id. 29.

In the case of Ah Hote and Weet Soot it is alleged that the defendant took and rescued them from the custody of McDonald, and the special verdict finds, in effect, that he took them from the jail and custody of the latter without his consent,—the fact being that McDonald was made to understand that it would be no use for him to resist the defendant, and best for him not to do so. By this act the defendant certainly obstructed McDonald in the execution of the commitments from the commissioner, directing him to keep those two Indians in his custody until discharged therefrom by due course of law—that is, the law of the United States. McDonald, while Ah Hote and Weet Soot were in his custody under these commitments, was so far "an officer of the United States" within the meaning of this statute. By the resolution of September 23, 1789, congress recommended to the legislatures of the several states "to pass laws making it expressly the duty of the keepers of their jails to receive and safe keep therein all prisoners committed under the authority of the United States, until they shall be discharged by the due course

of the laws thereof, under the like penalties as in the case of persons committed under the authority of such states respectively." By section 987 of the Code of Criminal Procedure, this state, in pursuance of this resolution, gave the United States the use of its jails, and in section 988 provided that "a sheriff or jailer to whose custody a prisoner is committed, as provided in the last section, [987,] is answerable for his safe-keeping, in the courts of the United States, according to the laws thereof."

In *Randolph* v. *Donaldson*, 9 Cranch, 85, which was an action against the marshal for an escape of a debtor committed by him under said resolution to a Virginia jail, with the consent of the state, the question arose as to the custody of the prisoner under such commitment. The court held that the jailer was not the deputy of the marshal, and that the latter had nothing to do with the prisoner while in the custody of the former. In delivering the opinion of the court Mr. Justice STORY said:

"When a prisoner is regularly committed to a state jail by the marshal, he is no longer in the custody of the marshal, nor controllable by him. The marshal has no authority to command or direct the keeper in respect to the nature of the imprisonment. The keeper becomes responsible for his own acts, and may expose himself by misconduct to the 'pains and penalties' of the law. For certain purposes and to certain intents the state jail, lawfully used by the United States, may be deemed to be the jail of the United States, and that keeper to be the keeper of the United States."

As to the case of Petenus and Capsula, it is found by the special verdict that the defendant refused to deliver them to Morse when demanded by the latter in pursuance of the order of the commissioner, on account, as he said, of the state warrant which he had in the mean time received for their arrest to answer the indictment then found in the state court against them.

The defendant was then in the situation of an officer receiving different and independent writs against the same person or thing. In such case, assuming that each is lawful, it is the duty of the officer to execute them according to the priority of right, which ordinarily depends upon the time of their receipt by him. Freeman, Ex. §§ 129–135, 251. On this occasion the defendant held Petenus and Capsula upon United States process, as a United States officer or jailer, and the process from the state court was directed to him as a sheriff or state officer. Apart from any question of the paramount authority of one of these processes, arising from the exclusive jurisdiction of the United States over the subject-matter, it is plain that the state process was under the circumstances subordinated and postponed to that of the United States, and could not be executed until the latter was *functus officio*. The United States process was received by the defendant, and he was holding the prisoners under it, before the state process was even issued, or the indictment found upon which it was based. When he received the state process the Indians were *in cus-*

todia legis, under the United States process, and the defendant could not execute the former, or even attempt to do so, without obstructing the execution of the latter and thereby committing a crime against the United States, as well as a contempt of the authority of the commissioner. The order of the commissioner to Morse, directing him to bring the prisoners before him for further examination, was also an order to the defendant, in his character as United States jailer, to deliver Petenus and Capsula to the deputy marshal for that purpose.

The only objection now made to the validity of the commitments giving the custody of Ah Hote and Weet Soot to McDonald, and the order to the defendant to deliver Petenus and Capsula to the deputy marshal, is that it does not appear from such commitments or order, or the prior proceedings before the commissioner, that Mulheren was a white man. It is not pretended but that the defendant knew that Mulheren was a white man, and that the homicide occurred on the reservation; in other words, that as a matter of fact he knew, when he obstructed the process and disobeyed the order, of the existence of every fact that gave the commissioner jurisdiction and authority over the case, and that, notwithstanding such knowledge, he willfully obstructed the officer in the execution of such process, and resisted such order.

The order to bring up Petenus and Capsula was, so far as appears, a verbal one, and in this respect may be presumed to have followed the commitments. Whether such an order must not be in writing before it can be resisted, within the meaning of the statute, is a question. Section 1030 of the Revised Statutes is cited as showing that no "writ" is necessary to bring a prisoner into "court" or remand him to custody, "but the same shall be done on the order of the court or district attorney." It may be the practice under this section in the circuit and district courts to bring in and remand a prisoner on the verbal order of the district attorney. But if the jailer should insist on written evidence of the order of such officer to let a prisoner be taken out of his custody, it is not apparent on what ground he could be charged with resistance thereto. But this section does not appear to be applicable to a proceeding before a commissioner. Section 1014 of the Revised Statutes is the authority under which a commissioner of the circuit court acts when engaged in a proceeding for the arrest, commitment, or bail of a person charged with a crime against the United States, and such section provides that he shall proceed therein "agreeably to the usual mode of process" against offenders in such state.

A commissioner acting under this statute is simply a committing magistrate. The ambiguous phrase "mode of process" is interpreted to mean "mode of proceeding," and this proceeding is according to the law of the state in similar cases. *U. S.* v. *Rundlett*, 2 Curt. 42; *In re Martin*, 5 Blatchf. 307; *U. S.* v. *Case*, 8 Blatchf. 250.

The validity of the process and order in question must, then, be determined by reference to the law of Oregon for the arrest, examination, and commitment of persons charged with the commission of crime against the laws of the state. The statute law of the state upon the subject is found in chapters 33, 34, 35, and 36 of the Code of Criminal Procedure, (Or. Laws, 385, 393.)

Briefly stated, this requires that a warrant for the arrest of any one shall not issue except upon a statement on oath to the effect that the person sought to be arrested is guilty of some "designated crime." The warrant for the arrest must "state a crime in respect to which the magistrate has authority to issue a warrant." When arrested the accused may give bail to answer, but if he does not he must be taken before a magistrate for examination, which proceeding may be adjourned from day to day fornot more than six days without the consent of the defendant, in which case the accused may be committed for examination or discharged on bail pending the same.

The commitment for an examination may be made by an indorsement to that effect on the warrant. If the accused is held to answer, the magistrate must make an order in his docket to that effect, "designating" therein "generally" the crime for which he is held, and then make and sign a commitment, "designating" also therein, "generally," the "charge," and deliver the same with the prisoner to the sheriff, who must receive the former into his "custody and detain him until legally discharged."

The temporary commitments in this case were not made by indorsements on the warrants, but by separate writs. But this is only a matter of form, of which the defendant cannot complain. The crime or charge against each prisoner was designated in the commitments generally as "murder." This is the name of the crime which results from the unlawful killing of a human being with malice aforethought, both at common law and in the statute. 4 Black, 195; sections 2145, 2146, 5339, Rev. St. This designation of the crime would be sufficient in a final commitment by a magistrate in a state case, when the prisoner was charged with a felonious homicide. The particulars constituting a crime are not to be stated in a commitment as in an indictment. If the cause of the commitment or species of crime charged against the prisoner be stated in the commitment with convenient certainty, that is sufficient. 4 Black, 300; Bouv. Law Dict. "Commitment;" *Ex parte Burford*, 3 Cranch, 448. And if the offense charged has a specific name, by which it is known in the law, as larceny, arson, burglary, or murder, a designation of it by that name in the commitment is sufficiently certain. Upon a *habeas corpus* to inquire into the validity of the commitment nothing more would be required on this point.

Does the fact that the commission of the crime in this case involved the circumstance that the person killed was "white," make it necessary to state the same in the commitment? I think not. What-

ever killing the law makes murder is murder and nothing more, and is sufficiently designated by the use of that term in a commitment for trial or further hearing. A commissioner of this court has authority, under the laws of the United States and upon proof of probable cause, to commit persons for trial on the charge of murder, either committed on the high seas, in Alaska, in a place in the state within the exclusive jurisdiction of the United States, or, in certain cases, upon an Indian reservation, within the state. But when he does commit a person upon such a charge it is not necessary, either under the Code or at common law, to set forth the evidence or circumstances that in the particular case constitute the crime, or demonstrate the jurisdiction of the officer beyond a peradventure. Under the law of the state (Code Crim. Proc. § 506) a person who kills another in the attempt to commit any or certain felonies, although such killing is accidental, is guilty of murder. But, in a commitment in such case, it would only be necessary to designate the crime as "murder," without mentioning the circumstance which alone made a homicide, otherwise innocent, amount to murder.

These commitments, then, are valid upon their face, and are *prima facie* legal process. Therefore, when the defendant obstructed the execution of the two directed to McDonald by taking Ah Hote and Weet Soot out of his custody, he was guilty of a violation of section 5398 of the Revised Statutes, unless it should turn out that they were void for want of authority or jurisdiction in the commissioner who executed them. But, in the judgment of this court, he had such authority and jurisdiction, and in this respect they are legal process of the United States.

The defendant, with a full knowledge of all the facts, willfully interfered with the execution of this process, and but for the considerate conduct of McDonald might have caused an unseemly and serious conflict between the national and state courts. For this misconduct he had not even the excuse that the state had by its diligence first discovered the criminals, and acquired or attempted to acquire jurisdiction in the premises.

As to the verbal order to the defendant to deliver Petenus and Capsula to the deputy marshal, the case in its legal aspect is not so clear. He is charged in the information with obstructing the deputy in the execution of these orders. But he was then claiming to hold the prisoners as sheriff under the state process, so that, in fact and law, he obstructed the execution of the commitments issued to himself as United States jailer by taking the prisoners out of his custody as such jailer upon the state process issued to himself as sheriff. But this is not the charge in the information. These commitments, being for further examination, should have been made from day to day, unless made for a definite longer period, with the consent of the prisoners. But this is an error which does not concern the defendant. It was his duty to receive and keep safely Petenus and Cap-

sula under these commitments, as a jailer of the United States, until they were discharged by the law of the United States, and, in the mean time, to return the state warrant "not executed," because the persons named therein were already in the custody of the United States upon a criminal charge.

But my impression is that the defendant was not bound to recognize a verbal order delivered to him by the deputy marshal as legal process issued by the commissioner, and that he had a right to insist upon a writing to that effect. If the commitments had been made for a day or other fixed period, there would be less difficulty in holding the verbal order sufficient, as the *mittimus* itself would in that case limit the time during which the prisoners should remain in the defendant's custody. And even then it seems to me that the jailer might demand the written evidence of the official character of such order before he could be compelled to obey it. And although the defendant did not refuse to deliver Petenus and Capsula on any such ground as this, but claimed to hold them as sheriff under the warrant of the state court, I do not think that this helps the case. If such verbal order was not legal process, no guilt was incurred by the refusal to obey it, whatever the reason may have been for such refusal.

The judgment of the court upon the special verdict is that the defendant is guilty as charged in the first count of the information, and not guilty as charged in the second one. Notwithstanding the admission in the verdict that the defendant acted in good faith, the case is one meet for exemplary punishment. But consideration will be given to the fact that the defendant, as soon as the decision on the demurrer to the information was announced, quietly surrendered the prisoners to the deputy marshal, when they were duly committed for trial in this court. The judgment of the court is that the defendant pay a fine of $100 and be imprisoned one day, and stand committed until the fine is paid.

WHITE v. E. P. GLEASON MANUF'G CO.

(Circuit Court, S. D. New York. June 21, 1883.)

1. PATENTS FOR INVENTIONS—REISSUED PATENT INVALID.
Reissued letters patent No. 7,286, granted to J. White, August 29, 1876, for a globe-holder, are invalid.
Gleason Manuf'g Co. v. *White*, 8 FED. REP. 917, affirmed.

2. SAME—OFFICE OF DISCLAIMER.
A disclaimer can add nothing to a patent. It can take away from that which has been described as the invention and claimed as such, so as to be covered by the grant of the patent, but it has no office to make the patent cover anything, however clearly shown in the patent, not described and claimed as a part of the invention.

In Equity.

M. Daniel Connolly, for orator.

Joseph C. Clayton, for defendant.

WHEELER, J. This suit is brought upon reissued letters patent No. 7,286, granted to the orator upon the surrender of original letters No. 162,731, dated April 27, 1875, for an improvement in globe-holders. It has been before heard, and upon that hearing it was decided that the patent was invalid for want of novelty. *White* v. *Gleason Manuf'g Co.* 8 FED. REP. 917; 19 O. G. 1494. Since then the orator has filed a disclaimer, the cause has been opened, and the disclaimer, with some other proof, received in evidence, and a rehearing has been had upon the case so made up. The disclaimer could add nothing to the patent. It could take away from what was described as the invention and claimed as such, so as to be covered by the grant of the patent, but it had no office to make the patent cover anything, however clearly shown in the patent, not so described and claimed as a part of the invention. The patent was for an improvement in globe-holders, not for a globe-holder as a new thing. The improvement consisted in elastic arms, with hooks or catches at the ends for receiving and holding the lower edge of the globe. The patentee, in his specification, said:

"My invention consists broadly of a globe or gas shade-holder or support, formed with spring or elastic arms, terminating in hooks or catches, for embracing the lower edge or flange around the neck or lower opening of the globe or gas shade. These arms are to be fastened to a burner in any suitable manner, as by riveting through a disk having a central aperture, through which said burner passes."

There were two claims: the first was for a globe-holder having such arms, and the second was for a globe-holder having a disk or center, with an aperture for the burner and such arms. It is obvious that he did not think he had invented anything but these arms, and did not intend to, and did not, in fact, describe and claim anything but globe-holders with such arms as his. He did not intend to, and did

not, in fact, patent any center. The disclaimer strikes out the words "broadly," and "in any suitable manner as," in the description, and the word "or" in the second claim. These changes make both the description and claim cover the disk as a center, with the arms riveted to it, as a part of the invention. Such spring-arms in globe-holders were not new, if disk centers were, but were shown in letters patent No. 90,287, dated May 18, 1869, and granted to Charles M. Mitchell for an improvement in lamp shade-holders, and in globe-holders made according to that patent, and were found to have been shown in the defendant's Exhibit C, C, in the former decision, although that finding is now somewhat open again, upon a further examination of some of the witnesses. The effect of the disclaimer is to change the invention covered by the patent from the arms to the center. If the arms had been new he could have a patent for globe-holders with such arms, and if the centers were new he could for such centers; but having taken a patent for globe-holders with such arms, he could not, by disclaimer, change it to a patent for a globe-holder with such centers, although the centers were well shown. Such changes appertain to reissues and not to disclaimers. This view renders it unnecessary to re-examine the question as to Exhibit C, C, or to decide whether the disk center of Mitchell's patent and globe-holder is a full anticipation of the one now claimed in this patent.

Let there again be a decree dismissing the bill of complaint, with costs.

MERCHANTS' NAT. BANK OF NEW YORK *v.* BROWN.[1]

(Circuit Court, E. D. Louisiana. June, 1883.)

1. REMOVAL OF CASES.
   The petition for removal must aver that the parties are citizens of another state; an averment that they are residents of another state is not sufficient.
2. JURISDICTION.
   As the jurisdiction of the state court has never been lawfully divested, it follows that this court has never acquired jurisdiction. The case has never been removed from the state court to this court. It cannot, therefore, be remanded, but all proceedings in this court will be dismissed.

On Motion to Remand.

E. Howard McCaleb, for plaintiff.

John Ray, for defendant.

PARDEE, J. In this case the court notices from the record and supplemental record the following proceedings in the state court:

(1) That a judgment by default was entered against defendant on the tenth day of February, 1883; (2) that the petition for removal was presented and filed on the thirteenth day of February, 1883, and the application refused on the same day; (3) a final judgment was rendered confirming the default, February 14, 1883; (4) an answer, pleading the general denial, was filed February 15, 1883, but without setting aside the default or the final judgment of confirmation rendered the day previous; (5) on the fifteenth of February a motion for a new trial was made; (6) on the twentieth of February, 1883, the petition for *certiorari* was presented to this court, the order issued, and on the twenty-second of February, 1883, this petition was filed. In this petition for *certiorari,* presented and filed after the trial of the cause and rendition of judgment in the state court, is the first averment of the defendant's citizenship.

It is admitted that neither in the record nor in the petition for removal is there any averment whatever of defendant's citizenship, showing that either (1) at the time of the commencement of the action, or (2) at the time of the application for removal, she was a citizen of a different state from the plaintiff. *Beede* v. *Cheeney,* 5 FED. REP. 388; *Kaeiser* v. *Ill. Cent. R. Co.* 6 FED. REP. 1; *Smith* v. *Horton,* 7 FED. REP. 270; *Sherman* v. *Manuf'g Co.* 11 FED. REP. 852. The petition for removal must aver that the parties are citizens of another state; an averment that they are residents of another state is not sufficient. *Parker* v. *Overman,* 18 How. 137; *Bingham* v. *Cabot,* 3 Dall. 382; *Abercrombie* v. *Dupuis,* 1 Cranch, 343; *Wood* v. *Wagnon,* 2 Cranch, 9.

It being conceded that the requisite showing not having been made either in the petition for removal or in the record, it is clear that the state court properly refused to surrender its jurisdiction on the facts and pleadings appearing before it.

[1] Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

"This right of removal is statutory. Before a party can avail himself of it he must show upon the record that his is a case which comes within the provisions of the statute. His petition for removal, when filed, becomes a part of the record in the cause. It should state facts, which, taken in connection with such as already appear, entitle him to the transfer. If he fails in this, he has not, in law, shown to the court that it cannot 'proceed further with the cause.' Having once acquired jurisdiction, the court may proceed until it is judicially informed that its power over the cause has been suspended. * * * This certainly is not stating affirmatively that such was his citizenship when the suit was commenced. The court had the right to take the case as made by the party himself, and not inquire further. If that was not sufficient to oust the jurisdiction, there was no reason why the court might not proceed with the cause." *Ins. Co.* v. *Pechner*, 95 U. S. 185, 186.

"Holding, as we do, that a state court is not bound to surrender its jurisdiction upon a petition for removal until, at least, a petition is filed, which, upon its face, shows the right of the petitioner to the transfer, it was not error for the court to retain these causes." *Amory* v. *Amory*, 95 U. S. 187.

"A petition for the removal of suit from a state court to a federal court is insufficient, unless it sets forth in due form such as is required in good pleading, the essential facts not otherwise appearing in the case, which, under the act of congress, are conditions precedent to the change of jurisdiction." *Gold Washing & Water Co.* v. *Keyes*, 96 U. S. 199.

"We fully recognize the principle heretofore asserted in many cases, that the state court is not required to let go its jurisdiction until a case is made which, upon its face, shows that the petitioner can remove the cause as a matter of right." *Removal Cases*, 100 U. S. 474.

As the jurisdiction of the state court has never been lawfully divested, it follows that this court has never acquired jurisdiction.

The case has never been removed from the state court to this court. It cannot, therefore, be remanded, but all proceedings in this court should be dismissed, and such an order will be entered, with costs.

See *Glover* v. *Shepperd*, 15 FED REP. 833.

RANDALL *v.* VENABLE.

(*Circuit Court, W. D. Texas.* 1883.)

1. DISTRICT AND CIRCUIT COURT—RULES AS TO TAKING TESTIMONY.
   Congress has not conferred power upon the district and circuit courts of the United States to make rules touching the mode of taking testimony.
2. SAME—DEPOSITIONS TAKEN ACCORDING TO STATE LAW.
   Depositions taken according to the mode prescribed by the statutes of a state, for the taking of depositions are not admissible in evidence, in a circuit court of the United States, when the state law governing the same conflicts with the provisions of the act of congress in relation thereto.

Motion to Suppress Depositions.

A. J. Evans, for motion.

Walton & Hill, opposed.

TURNER, J. These depositions were taken according to the mode prescribed by the statutes of this state, and the motion is based upon the proposition that such mode of taking is not lawful in the courts of the United States. In opposition to the motion it is contended (1) that section 914 of the Revised Statutes authorizes it; and (2) that section 918 authorizes the several circuit and district courts to make rules, etc., and regulate their own practice as may be necessary or convenient, etc.; and (3) that this court has, by virtue of the power given, adopted the mode prescribed by the state statutes for the taking of depositions in this court. In 1872 there were certain rules adopted and entered of record in this court. Rule No. 1 reads: "The mode of proceeding prescribed by the laws of Texas, where they do not conflict with the laws of the United States, or a rule of the supreme court of the United States, or of this court, are adopted." Rule No. 15 "provides commissions to take examination of witnesses and depositions, and all testimony in a cause may be taken in the manner and subject to the regulations, so far as they are applicable, *mutatis mutandis*, prescribed by the laws of Texas." I will first consider these rules. It is evident that it was not thought that by rule No. 1 provision had been made for taking depositions. The terms used, however, are: "Proceedings prescribed by the laws of Texas." If this was thought sufficient, then rule No. 15 was unnecessary. What does rule 15 undertake to do? I answer, nothing affirmatively. The depositions must be taken subject to the regulations, and (*mutatis mutandis*) the necessary changes being made. What regulations, and what are the necessary changes? I answer the provisions of the United States statute, viz., sections 863 and 866. This last section provides that a *dedimus potestatem* may issue when it becomes necessary to prevent a failure or delay of justice, and the necessity must be made to appear to the court. A commission is not granted to any and all litigants, but it only issues when the necessity is made to appear. This is one necessary change. By the laws of Texas depositions may be taken in any county, even in the county where the suit is pending, without reference to the distance from the place of trial. Will it be said that depositions may be taken to be read in the federal courts, where the witness resides within 100 miles of the place of trial? I think not. This, then, is another necessary change. Others could be suggested, but it is not deemed necessary. The law of congress, section 861, provides that "the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided."

Section 862 provides for the mode of proof in cases of equity and admiralty, and provides that it shall be in accordance with the rules prescribed by the supreme court, except as therein specially provided for.

Then came the exceptions, sections 863 and 866, and these are the only exceptions in the statutes. So carefully did congress guard the rights of litigants to have the witnesses before the court and jury; and the value of this mode of eliciting evidence is understood by every practitioner.

It is urged that by virtue of section 918 this court was authorized to make rules, etc., and that under that authority this court has adopted rules Nos. 1 and 15, and that is sufficient for the purpose. Let us see what congress has done by way of conferring power to make rules touching the mode of taking evidence.

In section 917 authority is conferred upon the supreme court to prescribe from time to time the forms of writs and other process, the mode of framing and filing proceedings and pleadings, of taking and obtaining evidence, etc., in suits in equity and admiralty. In this section it will be noticed that the power to prescribe the mode of taking and obtaining evidence is specifically conferred, while in section 918, under which it is claimed the same power was conferred upon the district and circuit courts, all mention of the mode of taking and obtaining evidence is omitted, and this is the distinguishing feature in these two sections so far as granting of power is concerned.

I hold that congress thought it necessary, by specific mention, to grant the supreme court the power touching matters of evidence, and I conclude that congress did not believe the other terms would confer the power. Bearing this in mind, we will now look at the next section, viz., 918. This is the section that, it is contended, confers upon this court authority to make rules Nos. 1 and 15. The reply is, congress withheld the very power contended for; or, in other words, declined to give it, by leaving out of this section the words deemed necessary in the preceding section to confer this power upon the supreme court. We are not to assume that words of a statute are unnecessary; and if necessary to be used in section 917, these same words, or words of the same import, were necessary to confer the same power in section 918. I conclude that congress intended to confer a power upon the supreme court which they purposely withheld from the district and circuit courts. There was no necessity for any rules upon the subject; the law of section 861 had secured a valuable right, with the two exceptions provided for. It is again urged that section 914 gives the right; that this section was enacted in 1872, and was not a part of the law at the time sections 861, 863, and 866 were enacted. True, but since 1872 all the laws have been revised, and we have now the Revision of 1875, containing all those various sections, and they should be construed as one act. This section—914—provides that "the practice, pleadings, etc., in cases other than in equity and admiralty, shall conform, as near as may be, to the practice, pleadings, etc., of the state courts." It is claimed that the word "practice" is broad enough to include the mode and manner of taking depositions.

If this be so, then another exception has been added to section 861. Unless congress intended by the term "practice," as used in the law, to ingraft an additional exception upon section 861, it should not have that interpretation, as the taking of testimony by deposition is in derogation of common right.

This brings us again to the consideration of the word "practice," as used in the laws of congress. As has been stated, congress thought it necessary, when conferring power upon the supreme court to make rules governing the courts of admiralty and in equity causes, to not only confer the power to regulate the whole practice in those courts, but also by specific terms to provide that it might provide "the mode of taking and obtaining evidence in those courts." There was a necessity for this, as the law did not fully provide the mode and manner of so doing, and if the power to regulate the whole practice did confer the power contended for, then the specific power to "provide for the mode of taking and obtaining evidence," found in the same section, viz., section 917, was superfluous. I conclude, therefore, that the word "practice" does not confer the right contended for. And when, in this connection, we consider the provisions of section 918, where the word "practice" is used, that it has no larger signification than in the section immediately preceding it. And in section 918 the authority is not given to prescribe the mode of taking and obtaining evidence. I conclude, also, that the word "practice," as used in section 914, has no broader significance than when used in section 917 or 918. There is an obvious reason for this, as provision was made for the taking of evidence in the circuit and district courts, with the exceptions contained in sections 863 and 866.

What authority or control would this court have over a person as commissioner that it had not empowered to take the deposition? Could the courts of the United States punish a witness for perjury committed before an officer not authorized to take depositions to be used in the federal courts? The answer is furnished by the question. Uniformity in the mode and manner of taking evidence is desirable, and by proceeding under the act of congress this end is attained. On the other hand, the modes would be as different as the different state statutes upon the subject. In the case of *Bell* v. *Morrison*, 1 Pet. 351, in speaking upon the question of depositions, the court says, when evidence is sought to be admitted contrary to the rules of the common law, something more than a mere presumption should exist that it was rightfully taken.

Judge BLATCHFORD says, (see 14 Blatchf. C. C. 102:)

"It may well be doubted whether there is anything in section 914 which applies to the subject of the evidence of witnesses, either as to its character, competency, or the mode of taking it. The expression 'practice,' etc., is well satisfied without introducing in it the subject of evidence," etc.

The same view of the law is taken by Judge CHOATE, who succeeded Judge BLATCHFORD. See 4 FED. REP. 714. In the case of

Sage v. *Lousky*, Judge SWING holds the same doctrine. Other authorities might be cited that sustain this view of the question, but it is deemed unnecessary.

The statutes of the United States have provided for the mode and manner of taking depositions. In the case of *Connecticut Mutual Life Ins. Co.* v. *Schaefer*, (see 94 U. S. 458,) Mr. Justice BRADLEY says:

"The laws of the state are only to be regarded as rules of decision in the courts of the United States where the constitution, treaties, or statutes of the United States have not otherwise provided. When the latter speaks, they are controlling. * * * There can be no doubt that it is competent for congress to declare the rules of evidence which shall prevail in the courts of the United States, not affecting the rights of property; and when congress has declared the rules, the state law is silent."

I am not unmindful of the decision of Mr. Justice MILLER in the case of *Flint* v. *Bd. Com'rs*, 5 Dill. C. C. 481. This case arose in the state of Kansas, and the decision is very brief. The question in that case was whether the notice and certificates were sufficient. That is not the question here. The learned judge in that case remarks "that the act of 1872 is broad enough to sanction the practice, where the local regulations do not conflict with any special provision of the act of congress." This decision was made in the state of Kansas, and, in order to understand the import of the same, the laws of Kansas should be seen, in order to ascertain whether the point in question here could or did arise in the case referred to. By reference to the laws of Kansas, (see Revision of 1859, § 135, p. 353,) this section provides that "any court of record of this territory, or any judge thereof, is authorized to grant a commission to take depositions within or without the territory. The commission must be issued to a person or persons to be named therein."

So far, then, as the question now to be determined is concerned, it is sufficient to say that the laws of Kansas, like the laws of congress, provide that a commission to take depositions must be allowed by the court or a judge thereof; and the very point made here is that the *dedimus potestatem* must be applied for to the court before it could lawfully issue, and that the same must name the person who is the commissioner authorized to execute it, neither of which was done in the case now under consideration. It thus appears that the laws of Kansas are in exact accord with the laws of congress, and the decision of Justice MILLER in no manner conflicts with the views I entertain upon this subject. I have extended this opinion beyond what I otherwise should have done had it not been stated that different judges held different views upon this subject. This deposition is suppressed.

See *Sonstiby* v. *Keeley*, 11 FED. REP. 578, and note, 580.

BATES and others *v.* DAYS.

(*Circuit Court, W. D. Missouri.* July 11, 1883.)

1. UNITED STATES COURTS—ATTACHMENT PROCEEDINGS—REV. ST. § 915—PRIORITY.
   Under the provision of section 915 of the Revised Statutes of the United States, a circuit court administers the law of the state in which such court is held regarding attachments; and when property has been attached in a suit in the United States court by the marshal, and the sheriff has levied an attachment issued from a state court on the goods in the hands of the marshal, the priority of the lien of the attaching creditors is to be determined by the state law.
2. SAME—PROPERTY IN HANDS OF MARSHAL—ATTACHMENT FROM STATE COURTS.
   When writs issue from state and federal courts against the same property, the officer first obtaining possession, on being notified that a state court officer has a writ against the same property, should be offered all reasonable facilities to make a full return, and the officer holding the property should show in his return whatever was done by such state officer.
3. FEDERAL COURTS AND STATE COURTS NOT FOREIGN COURTS, OR IN HOSTILITY.
   Federal courts and state courts are not foreign courts, or in hostility to each other, in administering justice between litigants. The citizen of the state in the federal court cannot be deprived of any right he has in a federal court, and the citizen of another state has the same claim to a debtor's property in the state where he resides as a resident, but no more.

At Law.

Dysart & Foster, for Rubey.

Botsford & Williams and *Mr. Carlile*, for Hemphill and Bailey.

KREKEL, J. The facts in the case are as follows:

Bates, a citizen of New York, sued Days, a citizen of Macon City, Macon county, in the state of Missouri, by attachment on a claim amounting to $3,800, and the United States marshal, on the twentieth day of March, 1882, under a writ, seized a stock of goods, books, notes, and accounts, valued at $12,000, as the property of Days. On the day of the seizure, one Rubey, a citizen of the state of Missouri, as assignee of the Macon City Savings Bank, sued out an attachment in the state court against Days on a claim of the bank for $3,500, and the sheriff of Macon county, to whom the writ was directed, undertook to levy the attachment on the property seized by and in the actual possession of the United States marshal. In his return the sheriff states that he levied the attachment on the stock of goods of Days, subject to the attachment of Bates in the United States court, and that he notified the marshal of the attachment and levy, and that he summoned him as garnishee. Some days after the levy by the sheriff, Hemphill and Bailey, two non-residents of the state of Missouri, sued out an attachment each against Days in this court, and the United States marshal levied the same on the goods which he had seized on the attachment of Bates. The property attached was sold under an order of this court, and about $8,000 realized. The first attachment of Bates, amounting, with costs, to about $4,000, has been paid. There remains in the registry of the court the balance of proceeds, which is claimed by Rubey under his attachment, and by Hemphill and Bailey on their attachments. These adverse claims are the matter in controversy.

The difficulty grows out of the construction of the act of congress regarding attachments, and the application of its provisions to the state laws on the same subject. The laws of Missouri make provis-

ion for two or more attachments issuing out of the same or co-ordinate courts in the state, but are silent as to attachments in United States courts. Rubey, assuming that the state attachment laws prevailed in them, heretofore moved this court for an order directing a transfer of the cases from this to the state court, to have them determined under the state law. This application was denied, because non-residents of the state are entitled to have their controversies determined in the federal courts. Rubey thereupon applied to be made a party to the proceedings in this court, so as to enable him to assert his rights. Leave was granted. Hemphill and Bailey, though later than Rubey in time with their attachments, yet claim the proceeds in controversy, because they say Rubey has no standing in this court. This depends upon the construction given to the federal and state attachment laws. And first of the provisions of the federal statute:

Section 915 provides: "In common-law cases in the circuit and district courts the plaintiff shall be entitled to similar remedies by attachment or other process against the property of defendant which are now provided by the laws of the state in which such court is held for the courts thereof." All other provisions regarding attachments, found in the United States Statutes, pertain to exceptions or limitations, or look to the effective enforcement of state attachment laws. The remedies in the United States courts, under the provisions cited, are to be similar to those provided for the courts of the state. What are the remedies provided by the laws of the state of Missouri in cases such as the present? Section 447 of the Statutes of Missouri is as follows:

"Where the same property is attached in several actions by different plaintiffs against the same defendant, the court may settle and determine all controversies which may arise between any of the plaintiffs in relation to the property, and the priority, validity, good faith, and effect of the different attachments, and may dissolve any attachment, partially or wholly, or postpone it to another, or make such order in the premises as right and justice may require."

If the writs issue from different courts of co-ordinate jurisdiction, such controversies shall be determined by that court in which the first writ of attachment was issued.

Under the provisions of the laws of the United States cited, this court administers the laws of the state of Missouri regarding attachments. That law, as is shown in the provision cited, has amply provided for the case in hand, which requires the determination of the property between Rubey, Hemphill, and Bailey. That Rubey, with his attachment in the state court, was prior in time to Hemphill and Bailey, is not disputed. But it is said that Days' property was in the hands of the United States marshal,—in other words, in the hands of the law,—and therefore could not be attached. This is true, if, by attaching in a case like this, is meant the actual seizing of possession of the property and the taking it out of the hands of the officer. In

this case such seizure was unnecessary, for the property, as stated, was in the hands of the law. Yet something indicating the assertion of this right must be done by Rubey in order to entitle him to a lien or claim on the property and give him standing in this court. Rubey being a citizen of the state of Missouri, could not sue Days in the federal court, because both were citizens of the same state. He was remediless unless the courts of the state afforded him redress. The attachment law did this, and upon suing out the writ and causing the same to be levied, and notifying the United States marshal, as he did, it gave him a lien on the surplus and a standing in this court such as enabled him to assert his rights, which he did in due time. Though the marshal's return shows that he made additional levies in the Hemphill and Bailey cases on the same goods he had seized under the attachment in favor of Bates, yet it is apprehended that if he had returned the second and third,—the Hemphill and Bailey writs,—with the indorsement that since the seizure under the Bates attachment additional writs of Hemphill and Bailey against the same property had come into his hands, and that he held the property subject to these several attachments, such a return would undoubtedly have been good. The executive officers of courts should understand that when writs issue from state and federal courts against the same property, the officer first obtaining possession, on being notified that a state court officer, as in this case, has a writ against the same property, all reasonable facilities should be offered such officer to make a full return, and the officer holding the property should show in his return whatever was done by such state court officer. Federal and state courts are not foreign courts, or in hostility to each other, in administering justice between litigants. The citizen of the state in the federal court is as much in his own court as in the courts of the state. The rights he has he cannot be deprived of in a federal court. The citizen of another state has the same claim to a debtor's property in the state of Missouri as a resident, but no more. In the case before the court, Rubey, being prior in time with his attachment to Hemphill and Bailey, is prior in right.

Attachments of state courts are valid and binding in federal courts, and their priorities are to be ascertained under the laws of the state, where no federal law interferes.

It might well be that the levy, as shown by the return of the sheriff, is good under the fifth subdivision of section 418 of the statute of Missouri, which provides "that when goods and chattels, money or evidences of debt, are to be attached, the officers shall take the same and keep them in his custody, if accessible; and if not accessible, he shall declare to the person in possession thereof that he attaches the same in his hands, and summon such person as garnishee." No stress, however, is laid on this provision preferring the placing of the decision on the broader view of the law as stated.

The authorities cited for the non-resident claimants as to the necessity of an actual seizure to make a valid levy, and the want of such, as well as the insufficiency and illegality of garnishing an officer, are not in point. The property being once in the possession of the law, the court determines the rights of the parties before it having claims thereto. The judgment is in favor of Rubey for the balance in the registry of the court.

Upon motion for rehearing in the above cause, McCRARY, J., delivered the following opinion:

Section 447 of the Revised Statutes of Missouri makes careful provision for the adjustment of all questions growing out of the levy of several writs of attachment issued from the same or from different courts upon the same property. The question here is, does it apply to a case where some of the writs issue from a state court and others from a federal court? I am clearly of the opinion that it does. The United States has no attachment law of its own, but its courts are required to administer the remedies by attachment which are provided by the law of the state in which such courts are held. Rev. St. § 915.

We must administer the attachment laws of the state as we find them, and so as to afford to suitors in the federal courts the same remedies afforded to suitors in the state courts; neither more nor less. To exclude the section above named from the attachment law of Missouri, which we are to enforce in the federal courts within that state, would be to favor the non-resident creditor, who can sue in this forum, by giving him an unfair advantage over the resident creditor who must sue in the state court, and who must, of course, abide by that statute. It may be true, as contended by counsel for plaintiffs, that there are difficulties in the way of the enforcement of this statute in the federal courts; but they are not insurmountable. If they were, the result would probably be to deprive this court of jurisdiction in attachment cases. If this court cannot administer the remedies by attachment according to the statute of the state, and afford to suitors *all* the remedies provided by those statutes, it may be doubtful, to say the least, whether it ought to entertain a suit by attachment at all.

The provisions of the attachment law of Missouri providing a mode whereby questions of priority may be determined in such a case as this, are an important part of the state law upon the subject of attachment, and it seems to me that this court should administer the whole statute, and not a part only.

The other question presented relates to the sufficiency of the levy made by the sheriff under the writ of attachment issued from the

state court. Upon this subject I am satisfied to abide by the reasoning of the district judge in his opinion herein upon the former hearing, fortified and supported as it is by the ruling of the supreme court commission and the supreme court of Missouri, in the precisely analogous case of *Patterson* v. *Stephenson*, April term, 1883.

The motion for rehearing is accordingly overruled.

The practice is not for the circuit court judge to hear motions in cases determined by the district judge when sitting in the circuit court, except at the request of the district judge, which was made in this case.

BALTIMORE & O. R. Co. *v.* ALLEN, Auditor, etc., and others.

(Circuit Court, W. D. Virginia. May 15, 1883.)

ENJOINING COLLECTION OF TAXES—FOREIGN CORPORATION—JURISDICTION OF CIRCUIT COURT—TENDER OF COUPONS OF BONDS OF STATE OF VIRGINIA—ACTS OF MARCH 30, 1871; JANUARY 14, 1882, AND JANUARY 26, 1882.

On the thirtieth of March, 1871, the state of Virginia passed a funding act, authorizing coupons, cut from her consolidated bonds, to be receivable in payment of all dues to the state. On the fourteenth of January, 1882, she passed an act reciting that many spurious coupons were in existence, and requiring the validity of all coupons offered in payment of public dues to be tested by a specified proceeding in court. This latter act was pronounced by the United States supreme court at its last term in *Antoni* v. *Greenhow*, 2 Sup. Ct. Rep 91, to be constitutional and an ample remedy for the coupon-holder. On the twenty-sixth of January, 1882, Virginia passed another act, providing that in all compulsory collections of taxes the collecting officer should receive only gold, silver, or national currency for the taxes, but also providing a method by which the tax-payer might pay in coupons to the state treasurer, after the validity of the coupons had been tested by a court proceeding defined, and thereupon receive back from the treasurer the amount of money which had been collected from him, the tax-collector. This last act is identical, in principle and provisions, with the act of the state of Tennessee; which was reviewed by the United States supreme court in *Tennessee* v. *Sneed*, 96 U. S. 69, and pronounced constitutional, and to be an ample remedy for the coupon-holder. The Baltimore & Ohio Railroad Company, a corporation of Maryland, operating certain roads in Virginia, disregarding the acts of January 14, 1882, and of January 26, 1882, tendered the amount of taxes due to the state of Virginia in coupons of the bonds of the state, issued under the act of March 30, 1871, "receivable at and after maturity for all taxes and debts, dues and demands, due the state," which the authorities refused to receive; and having assessed 30 per cent. in addition after 60 days, and seized the property of the railroad company, threatened to sell the same for the amount of taxes and penalty, whereupon the company applied to the circuit court of the United States for an injunction. *Held*, that the coupons tendered must be received in payment of the taxes; that the penalty was improperly assessed; and that the railroad company were entitled to an injunction to restrain the state authorities from selling their property.

HUGHES, J., dissents.

In Equity. On motion for a preliminary injunction.

The railroad which reaches from the border of Virginia beyond

Winchester to Staunton is owned by four several companies, but it is operated by the Baltimore & Ohio Railroad Company, the complainant in this cause. The part between the state border and Winchester is owned by the Winchester & Potomac Company; that between Winchester and Strasburg is owned by the Winchester & Strasburg Company; and that between Strasburg and Harrisonburg, by the Virginia Midland Company. These three roads are under lease to the complainant. The road between Harrisonburg and Staunton is owned by the Valley Railroad Company, and is operated by the complainant. The four roads are operated practically as one line by the complainant; none but its own locomotives, cars, and trains being used upon them, and the complainant having the exclusive control of the running of the trains in all the business which is conducted. These roads are all leased by the complainant except the Valley Railroad, which seems to have a contract by which it has reserved the privilege of employing its own depot agents to collect freights, and its own conductors on passenger trains to collect tickets and fares; but the conductors are employes of the complainant for performing the same duties over the entire line. All four of the roads have as a common treasurer, W. H. Ijams, who resides in Baltimore, and has his office in Baltimore.

These railroads were assessed for state taxes in December, 1882, by the board of public works of Virginia, in pursuance of section 20 of chapter 118 of the Acts of 1881–2, p. 506. That section, after requiring certain annual reports from railroad companies, provides as follows in regard to railroads:

"Upon the receipt of every such report, it shall be the duty of the auditor of public accounts to lay the same before the board of public works, who shall * * * proceed to ascertain and assess the value of the property so reported, upon the best and most reliable information that can be procured, and to this end shall be empowered," etc. "A certified copy of the assessment, when made, shall be immediately forwarded by the secretary of the board to the president or other proper officer of every railroad * * * company so assessed, whose duty it shall be to pay into the treasury of the state, within sixty days after the receipt thereof, the tax which may be imposed thereon by law. A company failing to * * * pay the tax assessed upon its property shall be immediately assessed, under the direction of the auditor of public accounts, by any person appointed by him for the purpose, rating the value of their real estate and rolling stock at $20,000 per mile, and a tax shall at once be levied on such value at the annual rate of forty cents on the hundred dollars."

The amount of the assessment made under the first provision of this law was based on a valuation of $15,000 a mile, and was, for the three leased roads, $4,818.12, and for the Valley road $1,593.04, making a total of $6,411.16. Notice was given, during the first week in December, to W. H. Ijams, treasurer, in Baltimore, of this assessment. This notice was repeated during the week which commenced on the fifteenth of January, 1883. The taxes so notified to be due

were not paid within 60 days after the notices were sent. On this failure of payment the auditor of public accounts again assessed these roads, in accordance with the second provision of the law above cited, "rating their real estate and rolling stock at $20,000 per mile." This second assessment, of course, added 33⅓ per cent. to the former one. In pursuance of the same provision of the law, John E. Hamilton, treasurer of the county of Augusta, "appointed by the auditor for the purpose," proceeded to make a levy for the several amounts of tax thus assessed by the auditor on the following property of the complainant, viz.: On 22 freight cars at Winchester; on 1 engine and 15 freight cars at Harrisonburg; and on 24 freight cars at Staunton. He also levied on an iron safe and some furniture of the Valley company at Staunton, which was all the personalty of that company which could be found. The levies at Staunton and Winchester were made on the twenty-third of March, and that at Harrisonburg on the twenty-fourth of March last.

On the sixteenth of March, 1883, agents of the complainant had appeared at Richmond and tendered tax-receivable coupons of interest, alleged to have been cut from bonds issued by the state of Virginia, in payment of the several amounts of taxes due under the first assessment that has been described. The tender was made first to the cashier of a bank having deposits of the state under a warrant of the treasurer authorizing the bank to receive the amounts of money due for taxes, and was refused. It was then made to the treasurer and the auditor of the state successively, who each refused the coupons. The agents did not tender the taxes in gold, silver, United States treasury notes, or national bank notes, which are required to be paid in the discharge of taxes by the act of January 26, 1882, (chapter 41, § 1, p. 37, Acts 1881–2,) nor did they deliver, or offer to deliver, the coupons for verification, as required by the act of January 14, 1882, (chapter 7, p. 10, of the same volume.)

Complainant now brings this bill into this court, in which S. Brown Allen, as auditor of public accounts of Virginia; David R. Reveley, as treasurer of Virginia; and John E. Hamilton, as treasurer, residing at Staunton, who is treasurer of the county of Augusta, are made the parties defendant.

The bill recites certain acts of the general assembly of Virginia declaring that coupons of interest, such as those tendered by complainant, shall be receivable in discharge of all taxes and dues to the state; avers the tender of coupons made on the sixteenth day of March, which coupons are now brought into this court; and complains among other things of the seizure of its cars and an engine by Hamilton, the defendant; of irreparable injury sustained; of cloud upon title resulting from illegal levy; of threatened multiplicity of suits; of obstruction in the performance of its duties to the public as a common carrier; and of the penalty inflicted upon it by the second assessment. The bill prays that the said Hamilton may be forever enjoined

from further proceeding under the levies he has made; that the court will decree that the taxes first assessed were, by the tender of the coupons and by the bringing them now into this court, paid off and discharged; and that the second assessment and the levies made under it were null and void. On the filing of the bill a motion was made by complainant for a preliminary order enjoining further proceedings under the second assessment, and enjoining the sale of the property levied upon. It is that motion which the court has now to deal with.

Hugh W. Sheffey, *A. R. Pendleton*, and *W. B. Compton*, for complainant.

Frank S. Blair, Atty. Gen., for defendants.

BOND, J. The facts in this case, as shown by the affidavits and proofs filed, are few. The complainant is the Baltimore & Ohio Railroad Company, a corporation of Maryland, which operates certain roads in Virginia. These roads were duly assessed for taxes by the state officers to the amount of $6,411, for which sum the complainant tendered in payment coupons of the bonds of the state of Virginia issued under the act of March 30, 1871, "receivable at and after maturity for all taxes and debts, dues and demands, due the state." Not regarding the tender as a legal settlement of the debt, the defendants, as they were required to do by the state law providing for the taxation of railroads, after 60 days' default, assessed the companies 30 per cent. in addition to their real tax as a penalty for their default. The defendant Hamilton, as tax collector, has seized the property of the complainant, and threatens to sell it for the amount of the taxes and the penalty. The bill asks that he may be enjoined from so doing; that the tender of the coupons may be regarded as payment or extinguishment of the debt; and that the company may not be subjected to a penalty for doing what the act of March 30, 1871, contracted with the holder of such coupons he might do.

That the coupons must be received for public taxes, when tendered, the supreme court of the United States has, at its last term, emphatically decided. *Antoni* v. *Greenhow*, 2 Sup. Ct. Rep. 91. The language of the court is: "The right of the coupon-holder is to have his coupon received for taxes when offered." The fact here is that the complainant tendered coupons, and that they were rejected and the tax increased because coupons, and not money, were so offered. It is clear, then, that a right of the coupon-holder has been denied, according to the interpretation of the act of March 30, 1871, by the supreme court. What remedy has he?

In the case of *Antoni* v. *Greenhow* *mandamus* was sought as the remedy, but the forms of proceeding in that in Virginia were not complied with, for the reason that the complainant alleged: they were unconstitutional because they impaired the obligation of the contract. But the supreme court decided that the writ of *mandamus* now existing in Virginia did not differ so much from the remedy existing when

the coupons were issued as to impair the obligation of the contract. It expressly decided, as we have seen above, that the right of the coupon-holder was to have them received when offered; but it also decided that if he sought by *mandamus* to compel such receipt, he must follow Virginia practice in obtaining that remedy.

The allegation or claim of this complainant is that it owes no taxes; that the tender of the amount in coupons has paid or extinguished the debt. It does not ask the court to compel the tax-collector to do any act he refuses to do, but to stop him from doing an unlawful thing, namely, from taking property for taxes when none are due, and from imposing a penalty where there is no default; and, surely, although the writ of *mandamus* is altered so as to be useless for the purposes of his case, and the writ of replevin is wholly abolished in Virginia, the supreme court has not decided that the complainant has no remedy whatever. Had such been its decision it would have declared that the words "was receivable when offered" meant or should read, "was receivable after they had been reduced to judgment;" for that is the only form under which, by the writ of *mandamus*, the receipt of coupons can be compelled in Virginia.

The complainant alleges that a large part of its rolling stock on the taxed roads in Virginia is in custody; that it cannot, while such is the case, fulfill its transportation contracts, the non-performance of which will subject it to numberless suits for breach of such contracts, and to the liability of large damages.

In general the courts of equity are slow to restrain the collection of taxes. They will not do so because the tax is alleged to be void or illegal, (92 U. S. 515;) but where there will be irreparable damage, as is plain in this case, and where all taxes have been paid by the tender of coupons receivable for taxes and the complainant has been subjected to a larger assessment by reason of its offer of tax-paying coupons rather than money,—which offer the supreme court has decided it was its right to make,—I think an injunction ought to issue.

This is not alleged to be a void and illegal tax; it is asserted to be a paid one, and paid in the way complainant had a right to pay it. The bill does not seek a remedy under any of the methods of practice provided by Virginia. It appeals to the equitable jurisdiction of the United States courts. The complainant is a non-resident of this state, asserting a right which the supreme court, in *Antoni* v. *Greenhow*, as I understand it, decides that it has, and a failure to enforce which will cause it irreparable damage. The complainant has no adequate remedy at law. The writ of *mandamus* is of no avail to it; it has paid its debt once and would have to pay it again to get that remedy; it cannot get its goods back from the purchaser by replevin, for there is no such action in Virginia; it cannot sue the tax-collector for trespass, for since the institution of the suit of *Antoni* v. *Greenhow* this state has by law forbidden it to do so. Altogether, it seems

to me the complainant would be remediless and its "right" a delusion, did not a court of equity listen to it.

The argument of the attorney general that this action is not within the jurisdiction of this court, because it is, in fact, a suit against the state, which does not permit itself to be sued, does not seem to me to be sound. From the case of 9 Wheat., *Bank* v. *Osborn*, down to *The Arlington Case*, 1 Sup. Ct. Rep. 240, recently decided, this form of action has been sustained by the supreme court in proper cases.

You may not sue the state unless she consents; and if she be an indispensable party not consenting, you can maintain no action at all. But she is not a necessary party, and the complainant here can prevent his anticipated wrong and irreparable damage, by restraining the party who is about to commit it, without joining the state. *Litchfield* v. *Co. Hamilton*, 101 U. S. 781, note; *Belknap* v. *Belknap*, 2 Johns. Ch. 463. Nor does the fact that the state has provided a remedy for the complainant deprive him of any other that exists. The complainant is a non-resident of Virginia. His citizenship entitles him to apply to the United States courts for the exercise of their equitable jurisdiction in a proper case. That equitable jurisdiction was not derived from the states, but from the constitution of the United States, and remains the same, no matter what laws are passed by the states respecting legal remedies or forms of procedure. This is the proper forum of the non-resident citizen, and he is not deprived of his rights in it by the passage of any act by the legislature of Virginia respecting suits at law against the tax-collectors of the state. We have here a non-resident citizen. He seeks equitable relief against a tax-collector who is about to do an act which, if this *prima facie* case made in the bill can be maintained, will do it irreparable damage, in violation of the constitution of the United States. This jurisdiction has been exercised many times by the United States courts in like cases, and, in my judgment, the prayer of the bill should be granted and the preliminary injunction issued as prayed, and it will be so ordered.

My brother, the district judge, does not concur, and files a separate opinion.

HUGHES, J., *dissenting*. This is a suit against the state of Virginia, brought in a forum in which she has not consented to be sued in the manner chosen by this complainant. A suit against the public officers of a state, as such, seeking to control the funds of the state in their custody, or to "compel them to do acts which constitute a performance of its contract by the state," is a suit against the state itself. It is useless to cite authorities on this point. Suffice it to refer to the cases of *Louisiana* v. *Jumel*, 2 Sup. Ct. Rep. 128; *Elliott* v. *Wiltz*, Id. 128; and *Antoni* v. *Greenhow*, Id. 91, decided by the United States supreme court at the term just ended. This suit is brought, therefore, in apparent violation of the eleventh amendment of the national con-

stitution, which provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state." It is true that the *gravaman* of this suit is the allegation that the state, by the action of her officers, the defendants, and by the laws under which they acted, has violated that provision of the national constitution (article 1, § 10, cl. I) which declares that "no state shall pass any law impairing the obligation of contracts." But this provision was part of the original constitution, (article 3, § 2, cl. 1,) which declared that "the judicial power of the United States should extend to controversies between a state and citizens of another state;" a clause that was held, in *Chisholm* v. *Georgia*, 2 Dall. 419, to empower the citizen of another state to sue a state of the Union without its consent in a federal court. It was to correct this evil that the eleventh amendment of the national constitution was adopted, and it is, or ought to be, obvious law that unless a state grants the right to be thus sued the right has ceased to exist; and that, if she grants it, the right can only be exercised in the manner in respect to which it shall have been granted. The eleventh amendment gives the state entire control of the remedy, so far as it concerns a federal court, which it may grant or withhold at its sovereign pleasure, and this power over the remedy being granted by the eleventh amendment exists in full force; the clause of the original constitution, forbidding the impairment of contracts, to the contrary notwithstanding. The state of Virginia has not granted the right to be sued in the federal courts upon her contracts, except as to a remedy at law to be mentioned in the sequel; and therefore this court would seem to have no jurisdiction of the present cause, which is a suit in equity.

It is true that the supreme court of the United States, in *The Arlington Case*, cited by complainant's counsel,—*U. S.* v. *Lee*, 106 U. S. 196, [S. C. 1 Sup. Ct. Rep. 240,]—affirming this court in S. C. 3 Hughes, 37, held that the United States might be sued in the persons of its officers, under circumstances which the court was careful to define. But in explanation of this ruling two things may be said, to-wit: *First*, the eleventh amendment does not forbid a suit against the United States; and, *second*, the national constitution provides, in amendment fifth, that "no person shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation." The immunity of the United States from suit is that which inheres in sovereign power, as shown with such transcendent ability by Lord SOMERS in *The Bankers' Case*, 5 Mod. 29–62. This power would have been absolute, except for this controlling and qualifying provision of the fifth amendment. In the case of the *U. S.* v. *Lee* property had been taken without just compensation, and the immunity of the United States from suit had, of necessity, to be quali-

fied in pursuance of this express inhibition of the constitution as amended; and so the suit of the dispossessed owner of Arlington was entertained.

But neither this provision of the national constitution, nor this inherent attribute of sovereignty, applies in the case at bar. The immunity of states from suit in the federal courts is an express constitutional canon; and the sale of private property for public taxes is not an appropriation of property without just compensation, or without due process of law. Whether, therefore, as to such appropriations or as to contracts, it is plain that the states have immunity from suit in United States courts under the eleventh amendment, and this suit does not lie. Nor can it be sustained on other grounds.

Injunctions to restrain the collection of public taxes are contrary to public policy. In granting them the judical department of government brings itself into conflict with the executive in the discharge of one of its most important functions, and violates that comity which should be observed between departments essentially distinct and independent in their respective powers and duties. The legislature of Virginia very jealously prohibits the state courts from granting injunctions in restraint of the collection of state taxes; and congress, in section 3224 of the Revised Statutes of the United States, forbids, in sweeping terms, "any suit" for enjoining the assessment or collection of "any" federal tax from being maintained in "any court."

When, therefore, a federal court, evading both these inhibitions, impliedly binding on it, assumes to enjoin a state in the collection of her public taxes, unless impelled by the most exigent circumstances and justified by the most cogent reasons, it transcends its proper sphere of jurisdiction, violates comity, and commits a trespass upon the most vital rights of the states. The supreme court of the United States has repeatedly condemned such proceedings, more especially in cases similar to the one at bar. *State Railroad Tax Cases*, 92 U. S. 613–617; *Dows* v. *Chicago*, 11 Wall. 108; *Hannewinkle* v. *Georgetown*, 15 Wall. 547.

Since the twenty-ninth of March last, for a period of more than six weeks, this court has stood between the state of Virginia and the collection of an important part of her public revenues. One of the proceedings in which she interfered, viz., the suit which was commenced in replevin, was found to be unauthorized by law, and the court abandoned it after two weeks of obstruction. Thereupon the present proceeding was instituted, which has been pending since the sixteenth of April. Complainant's counsel endeavor to justify it on various grounds; some of them merely technical and nominal, others more deserving of serious consideration.

I will consider the more serious grounds of complaint set out in the bill. But, before dealing with them, I will first mention an obstacle in the way of this proceeding which constitutes a formidable

lar to the relief sought. Interference by a court of equity with the collection of taxes is always discouraged because of the inability of the chancery court to afford complete relief in the premises. It has no power to correct errors and repair mistakes in assessments; that being distinctly and exclusively a function of the executive. It has no jurisdiction to set the taxing machinery of the government in motion for the purpose of making levy and enforcing a legal tax in the event of the tax complained of being found to be illegal or unconstitutional. It is powerless to apportion a tax—ratifying the part that is legal and nullifying the part that is illegal. It has no power to make a new assessment or direct its collection by the proper officer. It can obstruct, but it is hopelessly impotent to accomplish what is rightful to be done; and a court which has power merely to obstruct is always slow to proceed at all. There could not be a more striking illustration of the imbecility of this court in such a cause as the present one for any but an obstructive purpose, than was given the other day by the production at bar and proffer to the court of the coupons and silver that had been tendered by complainant for these taxes. How could we know which of the coupons were spurious and which were genuine; and, as to the former, how could we consent to become the depositaries of contraband debentures. That some of the coupons are spurious is certified by the legislature of Virginia in the recitals of the act of February 14, 1882, entitled an act to ascertain and declare Virginia's share of the public debt.

Suppose we assume jurisdiction of this suit, and also of others pending here, in which jurisdiction is claimed for us in all coupon cases whatever, under section 1979 of the Revised Statutes, and under chapter 137 of the Supplement to the Revised Statutes,—the court would become the depository of hundreds of thousands of dollars in nominal value of these coupons, with no authority to do anything with them, and no jurisdiction to administer complete justice between the state of Virginia and the owners of them. The court should be slow to enter upon a proceeding which can end in no sound and perfect judicial result.

Passing from this obstacle to that complaint of the bill on which counsel lay the greatest stress, complainant avers that it had a right, under former laws of Virginia which embodied contracts with her creditors, to pay the taxes now under consideration in such coupons of interest as were tendered in this case, and that it was prevented from doing so by the observance on the part of the state's revenue officers of the provisions of the act of assembly of Virginia, passed January 26, 1882, (Acts Assem. 1881–82, *c.* 41, p. 37,) which allow payment in gold, silver, and treasury and bank notes only. Complainant denies the constitutionality of that act, and therefore prays that the officers seeking to collect taxes under it may be enjoined from so doing. The hearing of the present motion for a preliminary injunction, based as it is on the question of the constitutionality of

this act, is therefore equivalent to a final hearing on the merits of the bill.

The act of January 26, 1882, now assailed, is auxiliary to that of January 14, 1882, (Acts 1881–82, *c.* 7, pp. 10, 11, 12,) and must be considered in connection with it. The supreme court of the United States, in the case of *Antoni* v. *Greenhow*, has decided the act of January 14th to be constitutional, and has but a few days ago refused a rehearing of that case. We have, therefore, some firm ground to stand on. In order to a comparison of them, I will set out the substance of each of these acts. The supreme court described the act of January 14th as follows:

"Sections 1, 2, and 3 of the act of 1882 provide, in substance, that if coupons are tendered in payment of taxes the collector shall take and receipt for them for the purposes of identification and verification. He shall then require payment of the taxes in money, and after marking the coupons with the initials of the name of the owner, shall deliver them to the judge of the county court of the county, or hustings court of the city, where the taxes are payable. The tax-payer may then file his petition in the county or hustings court against the commonwealth to have a jury impaneled to try whether the coupons are genuine, legal coupons, which are legally receivable for taxes, debts, and demands. The commonwealth may be brought into court by service of a summons on the commonwealth's attorney. Upon this petition an issue and trial by jury is to be had, with ample privileges to all parties of exception and appeal. If the suit is finally decided in favor of the tax-payer, he is to have the amount paid by him for the taxes refunded out of the first money in the treasury, in preference to all other claims."

Of these clauses of the act thus set out in substance by itself the supreme court spoke when it said:

"A remedy which is ample for the enforcement of the payment of the money [which the act provides shall be refunded to the coupon-holder by the state treasurer] is ample for all the purposes of the contract. That, we think, is given by the act of 1882 in both forms of proceeding."

Thus we have the distinct and irreversible decision of the supreme court of the United States that the remedy of the coupon-holder afforded by the first three sections of the act of January 14, 1882, is adequate, and that those three sections are ample to discharge the constitutional obligation of the state in respect to the remedy supplied to the coupon-holder. We come, therefore, to the act of January 26, 1882, whose substance I will state. That act, after requiring that nothing but gold, silver, United States treasury notes, or national bank notes, shall be received for taxes, goes on to provide that "in all cases in which an officer shall take any steps for the collection of revenue claimed to be due the state from any citizen or tax-payer," such person, if he conceives the same to be unjust or illegal, or to be unconstitutional, etc., may pay the same under protest, and, on such payment, the officer collecting the same shall pay such revenues into the state treasury, giving notice to the treasurer that the same was paid under protest. It gives the protesting tax-payer leave, within

30 days after such payment under protest, to sue the collecting officer for the amount which had been paid, in "the court having jurisdiction of the parties and amounts."

If, in such suit, it be determined that the money was, for any reason going to the merits, wrongfully paid, and ought to be refunded, it provides that the court shall so certify of record, and that the auditor of public accounts shall issue his warrant for the amount, and that such warrant shall have preference of payment over other claims upon the treasury, except such as have priority by constitutional requirement. It provides that this shall be the only remedy "in any case of the collection of revenue, or the attempt to collect revenue illegally, or the attempt to collect revenue in funds only receivable [meaning *in such funds only as are receivable*] by said officers under this law, the same being other than, and different funds than, the tax-payer may tender or claim the right to pay." It takes away from the tax-payer the remedy by injunction, *supersedeas*, *mandamus*, prohibition, and all other remedy than that of suing the tax-collector as provided by this act. Observe that the clause just recited refers only to what occurs in cases of the *compulsory collection* of revenue under the act of January 26th, and does not refer to what occurs in cases where the tax-payer comes voluntarily forward to pay, as contemplated by the act of January 14th.

The act goes on to make it misdemeanor, punishable criminally, for the collecting officer to receive other funds than gold, etc. After some immaterial provisions, the act finally provides that no officer shall be subjected to any other suit than the one itself provides for any refusal on his part to accept payment of taxes in funds not authorized to be received by the act.

It is to be observed that this act comes into operation only where the tax-payer "stands passive," and puts the state to the necessity of "taking steps for the collection of taxes due." It then forbids the receipt of coupons in payment, requires payment in gold, etc., and allows the coupon-holder, after paying taxes in gold or other money, to sue the collector for the return of the money paid him. As before said, it allows him to pay under protest, and requires the collecting officer to notify the state treasurer of the protest. The suit may be brought in a state court; or, if proper circumstances of jurisdiction exist, it may be brought in a federal court; and the court may pass upon the validity of the tender of coupons, with reference either to the constitutionality of the act in forbidding the reception of them, or to the genuineness or spuriousness of the coupons tendered, or with reference to any other question going to the merits.

The fundamental error of complainant's counsel consists in assuming that this act of January 26th repeals that of January 14th. It evidently does not do so in terms, but counsel insist that it does so by implication. On the contrary, I think that by necessary implication there is no repeal. The act of January 14th provides a means

of availing of coupons in payment of taxes for "any tax-payer," "whenever he shall tender" to the proper collector "coupons detached from bonds of the commonwealth." This applies to every tax-payer. It grants him the remedy given by sections 1, 2, and 3, "whenever he shall tender" his coupons. He may make this tender at any time before "steps are taken" to collect his taxes coercively. He may make it after such "steps have been taken;" after he has brought suit against the collecting officer; and after the court in which he thus sues has passed favorably upon it.

On the other hand, the act of January 26th applies only to cases in which a collector of taxes has "taken steps" for their compulsory collection. The earlier act applies to voluntary tax-payers. The latter act applies only where the tax-payer has failed to avail of the remedy given by the earlier, and has slept upon his duty as to taxes until aroused by a levy upon his property for them. The act of January 14th covers cases where the tax-payer holds out his hands to pay the state. The act of January 26th covers cases where the state reaches forth her hand to collect from the tax-payer the tax which he neglects to pay. So far from conflicting with each other, these statutes go hand in hand, and are not only consistent, but mutually assistant. The tax-payer who schemes for time and delay may, as complainant's counsel express it, "stand passive" until the collecting officer approaches with his warrant of distraint. Aroused and coming forward, then, the tax-payer may pay in money under protest, and at once sue the officer for refusing coupons. If he succeed in his suit, he will get back his money from the state treasurer, and still avail himself of his rights under the act of January 14th, for his taxes will still remain unpaid.

The act of January 26th does not, as complainant's counsel assert, take away "all remedies" from the tax-payers against whom "steps have been" taken for compulsory collection. It only takes away injunction, *mandamus*, and the ordinary common-law remedies. It leaves the right to petition under the earlier act, which the supreme court decides to be ample in its provisions for the enforcement of the tax-payers' rights in respect to the coupons; and it leaves the right to sue under its own provisions for the restoration of the gold, silver, or other funds which have been paid under protest. Nor does the act of January 26th deprive the tax-payer of the action of trespass against the collector for an illegal levy. It, in terms, only deprives him of the right of suing such collector for a "refusal on his part to accept in payment of the revenue" the coupons or other funds, not gold, etc., which he may have tendered. The act affords no protection to Hamilton, the defendant, in this case, who made the levy on complainant's property, for no coupons have ever been tendered him, or other funds contraband under this law, and the act only protects him from suit for refusing such funds. I repeat that the act of January 26th does not repeal that of the 14th. It does not repeal

expressly. It avoids to do so in terms, and it, by necessary implication, continues the earlier act in force; even re-enforcing it by its own provisions. If it does not repeal the earlier act, then, even though it did not itself afford a remedy to the tax-payer, enabling him to exercise his constitutional privilege of paying his taxes in coupons, the supreme court has decided that the act of the 14th does afford an ample remedy; and it is not incumbent upon the state to afford more than one ample remedy for any right. If it afford no independent remedy, then the narrowest construction that can be put upon the act of the 26th is that it operates as a limitation, shutting off the right of the coupon-holder to pay his taxes in coupons, if he neglects to avail himself of the remedy afforded by the act of the 14th, and "stands passive" until his property is distrained for taxes.

The state has a right, after providing for its creditor ample remedy for enforcing an obligation of contract, to require by statute of limitation a reasonably prompt exercise of that right, and this period may, in respect to public taxes, be measured by weeks or days. Therefore, even though the law of January 26th could be held to shut off the tax-payer from paying his taxes in coupons after steps have been taken for their coercive collection, still it is constitutional, and leaves the tax-payer all the remedy to which he is entitled. But this law is more than one of limitation. It affords the tax-payer an additional remedy to that given by the act of January 14th. The supreme court of the United States has virtually so pronounced, for the act is drawn in language almost identical with that of Tennessee, which was construed by the court in *Tennessee* v. *Sneed*, 96 U. S. 69. It is a copy of that act. Its effect as to coupons is identical with that of the Tennessee statute as to state bank notes, and the point made as to its constitutionality is the same that was raised by Bloomstein and decided against him in that case. And so it is that Virginia has put two acts upon her statute-book, constitutional and affording remedy to the coupon-holder. The act of January 14th has received the express sanction of the supreme court in *Antoni* v. *Greenhow*. The act of January 26th has received that court's equally emphatic sanction in *Tennessee* v. *Sneed*.

It is to be observed, furthermore, that the language of the clause of the act of January 26th, referring to the court in which a tax-payer may sue the tax-collector, is broad enough to give jurisdiction to the federal court, and to relieve this class of suits of the inhibition of the eleventh amendment. The clause confers the right to bring such suits in any court having jurisdiction of parties and amounts; so that, whenever the tax-payer is a non-resident, and the amount of taxes due equals or exceeds the sum of $500, a circuit court of the United States would seem to have jurisdiction. Indeed, the jurisdiction may embrace all cases included in the class defined in the first section of chapter 137, p. 173, Supp. Rev. St. In the present case, the complainant company could have paid the taxes under pro-

test to Collector Hamilton, and could then have sued this collector on the law side of the circuit court for the western district of Virginia, in the mode prescribed by the act of January 26th.

If the statute gives the remedy at law in the federal court, of course the tax-payer has no other, his remedy in equity being barred by the eleventh amendment, and by the rule that where there is a remedy at law equity can give none. The supreme court of the United States, in *Tennessee* v. *Sneed*, construing precisely such a law, held that the act furnished a remedy to the tax-payer, and did not impair the contract by taking away injunction and *mandamus*. The act nowhere seeks to confine the prosecution of the remedy to the state courts. If the amount and other circumstances of the case are such as to give federal jurisdiction, nothing prevents the pursuit of the remedy at law in this court, as freely as in all cases it may be pursued in the state courts. Such being the case, the very definition of equity, that "it is the correction of that wherein the law, by reason of its universality, is deficient," seems to forbid our allowing equity to be invoked in this case, in which relief at law is adequate and complete.

Summing up what I have said on this act of January 26th, the eleventh amendment denies to complainant a remedy in the federal court, unless the state of Virginia grants the right to be sued in that forum. If she grants that right in a particular manner, no other manner can be pursued in exercising it. Having granted it in the manner prescribed by the act of January 26th, and that remedy being a remedy at law, complainant should have followed the method there prescribed; and, having been provided only with a remedy at law, complainant would have no right to resort to equity, even though the eleventh amendment did not bar its doors against him. Therefore the proceedings in equity, which complainant has instituted here, cannot be maintained.

I will now pass on to the minor grounds of complaint relied upon in the bill, one of which is that a penalty is inflicted by the second assessment on which the levies for these taxes were made; an increase of a third having been imposed in consequence of complainant's delay in paying the lesser tax first assessed. The fact that the second assessment, based, as it was, on a valuation of $20,000 per mile, proved to be greater than the first, is an accident which arose out of the peculiar circumstances attending the valuation of these particular roads. The act of April 22, 1882, requires the board of public works to make the first assessment from "the best and most reliable information that can be procured," and is in all other respects silent as to the rate of valuation at which this first assessment shall be made. It nowhere requires, indicates, or implies that this assessment shall in all cases be at a rate of valuation less than $20,000 per mile. The board of public works is required to make it from the best and most reliable information at hand. The board may make

it at the rate of $15,000 or $150,000 per mile, so far as the law is concerned; but whether the first assessment be made on the basis of fifteen, or one hundred and fifty, or forty, or ten thousand dollars a mile, if the company assessed fail to pay the tax resulting, within 60 days, then the act requires that a second assessment shall be made by the auditor, and fixes the arbitrary valuation of $20,000 a mile as the basis of it.

This provision of law is not penal, either in its terms, its spirit, or its legal effect. The only ground on which the second assessment is open to objection, with reason, would be that the valuation of $20,000 is excessive. This is not alleged by the bill. It is notorious that such an averment could not be made with truth, and the bill refrains from making it. The assessment is strictly legal, and is not penal. By the accidents of this case the second was larger than the first assessment, and a mere hardship has resulted—resulted, too, from the laches of the complainant. Equity does not relieve from hardships of this sort, which a reasonable diligence on the part of the complainant could have averted. *Vigilantibus non dormientibus* is applicable here. Self-imposed burdens are not grounds for equitable relief.

Other of the minor complaints of the bill are urged in conformity with the ruling of the supreme court of the United States in *Hannewinkle* v. *Georgetown*, 15 Wall. 547, in which the court held that a bill to restrain the collection of a tax cannot be maintained on the sole ground of the illegality of the tax; but required that there should be either an allegation of fraud, or that the tax sale would bring a cloud upon title, or that a multiplicity of suits would be prevented, or that some other cause presenting a case for equitable relief existed.

The bill, with industrious fidelity, conforms to every suggestion of the court in this case, alleging *seriatim* each of the grounds expressly named, and re-enforcing these with other grounds, numerous enough to satisfy the most exacting requirements in that regard. It charges fraud upon the officers of the state in the assessment of this tax. It sets out no facts creating a presumption of fraud, and throwing upon the officers the burden of rebutting its allegations, but employs only general averments. The first assessment upon the four railroads was made by the board of public works, at the rate of $15,000 a mile, "from the best and most reliable information that could be procured." This was in strict compliance with the direction of section 20 of the act of April 22, 1882. The tax not having been paid within the period prescribed, the auditor, in strict compliance with the same law, made the second assessment at the rate of $20,000 a mile. The latter proceeding was expressly, positively, and peremptorily required by law, and the officer would have been derelict in duty, and would have subjected himself to the imputation of fraud, if he had not made the assessment. A third officer was deputed, in ex-

act conformity with the same law, to collect, and took the steps for collecting, the tax, in doing which this court has obstructed him. Now the presumption is always in favor of the regularity and validity of the conduct of officers engaged in the performance of their official duties, and equity will not enjoin them upon general averments that the assessment was too high. Indeed, in all cases in which fraud is relied upon, the especial facts constituting the fraud must be set forth. Distinction must also be taken between cases in which there is an entire absence of authority in law on the part of taxing officers, and cases of mistaken or wrongful execution of powers conferred by law; and the rule is that where the officer acts under valid authority, and acts within its limits, he will not be enjoined, although errors may have occurred in the exercise of the power conferred. In the case before us these conditions are not supplied, and the averment of fraud is untenable.

Another complaint is that the levies made upon complainant's property, and the sales of it advertised, create a cloud upon the title of the real estate of the four railroad companies for the taxes due for which the levies were made. If the companies owning those railroads were themselves before the court as parties to the bill, the court could hear this complaint; but coming as it does from a complainant which expressly disclaims title in the real estate referred to, it cannot be entertained. Besides, this doctrine of cloud of title applies only in cases where real estate is to be sold, and sold under proceedings which are in fact illegal, but which do not show the illegality on their face. It applies only where a court is about to sell an illegal title to real estate, and where the illegality is not to be found in the record of its proceedings. Here it is not real estate, the sale of which is sought to be enjoined, but personalty, and the objection is untenable. It is also complained that a multiplicity of suits will result from the sale of this property for these taxes. The bill does not set out with any precision *how* such a result will follow. It is certain that no multiplicity of suits yet exists. The better doctrine on this subject is that the mere apprehension of suits not yet brought will not justify the interference of equity. In general, injunction of one suit is only granted where a multiplicity of suits are actually pending, all of the same character, and involving the same question of law. The bill refers to suits about to be instituted by the other railroad companies of the state, involving this right to pay taxes with coupons; but none of them have been instituted, and the proof is that all the companies but this complainant have paid their taxes in money. Therefore, as to other railroad suits, even the apprehension of them is wanting.

As to the liability of the complainant company, as trustees for its stockholders, to actions by them for taxes paid in money, or by sale of property, which it has voluntarily tendered in coupons, the vague apprehension of suits so improbable and remote, and which would be

so untenable if brought, is not worthy of the consideration of the court. So of the equally vague apprehension intimated in the bill, of suits that might be brought against complainant as a common carrier, in consequence of its failure to serve the public effectually, because of a temporary subtraction from its rolling stock of some 60 freight cars and a locomotive. The probability of a great company, owning thousands of freight cars, and probably thousands of locomotives also, being sued for breach of its contracts as a common carrier, by reason of so diminutive a loss of rolling stock, is too remote to be considered by the court, especially as it is not averred that a single suit of the kind has yet been brought.

It is also complained that the treasurer of Augusta county, John E. Hamilton, one of the defendants, who, or his deputy, made the levies, and the seizures of property in this instance, is not pecuniarily responsible for a wrongful sale of this property in the damages that might be recovered from him in trespass; his assessed estate being only of the value of some $4,500. The argument of the bill on this head is that as this same defendant was about to make similar levies on the property of other railroad companies, the damages accruing to all would exceed any possible assets which he might possess for the satisfaction of them. But the proof in the case is that all the other railroad companies have paid the taxes due from them. There is no possibility, therefore, of any such suits, and the premises of the bill are at fault in this particular. It does not appear that Hamilton will be sued for any other seizures than those made in this case, and as it appears that he guided himself in this action by the direction of the law under which he was acting, his liability is covered by his official bond, which was stated at bar to have been given in the penalty of $200,000. The danger of loss to the complainant in this direction is not, therefore, so probable as to be worthy of the court's consideration in the present case.

The complaint just mentioned is made in aid of another complaint of the bill, that irreparable injury would be inflicted upon the complainant by the sale of the property under seizure. The Baltimore & Ohio Railroad Company is too wealthy and powerful to be irreparably injured by these seizures, except, comparatively speaking, to a most diminutive extent. The injury could have been averted in the first instance by taking the steps pointed out by law for verifying the coupons with which the complainant sought to pay the taxes—a law recently pronounced valid by the supreme court of the United States. Even now the measure of irreparable injury threatened is that which would result from first tendering the coupons and advancing the amount of taxes in money, and then obtaining a reimbursement of the money advanced by having the coupons verified according to law. Any injury with which it is threatened is reparable by the procedure indicated, which the court is bound to consider as having been provided in good faith. The court, therefore, must disregard complain-

ant's apprehension of an irreparable injury which seems to have been self-imposed.

A sale of complainant's property by due process of law for the satisfaction of taxes, which may be avoided by complying with a law which, however onerous it may be in respect to men of small means, who are required to verify very small amounts of coupons, yet subjects holders of large amounts to neither an onerous nor an unreasonable proceeding for verification, cannot be regarded as inflicting an irreparable injury, either practically or theoretically.

Still another complaint of the bill is the interruption which the seizure of its rolling stock is alleged to produce in the performance of complainant's duties to the public as a common carrier. If the four companies owning these local railroads were complainants, and if they owned only the quantity of rolling stock properly belonging to short local roads, these seizures might be really amenable to the complaint of the bill in this particular. But the complainant is one of the most wealthy railroad corporations in the world, having unlimited command of all the appliances and instrumentalities for conducting the immense business of its main stem and the auxiliary roads under its control. Its operations are on so large a scale as to be part of the public history of the times, and the court may take judicial cognizance of the amplitude of its resources as to rolling stock. It is hardly possible to believe that the complainant's power to serve the public as a common carrier is appreciably affected by the, to it, inconsiderable levies made by Hamilton, the defendant in this case; and this complaint is untenable. All these minor complaints seem to me to be frivolous; and hardly worthy of the serious attention I have given them. They certainly are not sufficient to justify an injunction against the collection of public taxes.

I think the case is ruled by *Antoni* v. *Greenhow* and *Tennessee* v. *Sneed;* and I am constrained to deny the motion for a preliminary injunction.

The counsel of the respective parties consented to a decree on the basis of Judge BOND'S decision, and the case was certified to the supreme court of the United States on a division of opinion.

Restraining collection of tax. See *Second Nat. Bank* v. *Caldwell*, 13 FED. REP. 429, and note, 434–439.—[ED.

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1. IMMUNITY OF SOVEREIGN FROM SUIT. Sovereignty, under God, inheres in the organic people, or the people *as the republic;* and every organic people fixed to the soil, and politically independent of every other people, is a sovereign people, and, in the modern sense, an independent sovereign nation.[1] The people themselves—the *entire mass* of persons who compose the political society—are the true nation,—the final, permanent depositary of all power.[2] Such

[1] Brownson, Amer. Repub. 192.

[2] Pomeroy, Const. Law, § 37.

a political society is a nation, and this nation possesses political sovereignty.[1] But the nation must exist as an historical fact, prior to the possession or exercise of sovereign power,—prior to the existence of written constitutions and laws of any kind,—and its existence must be established before they can be recognized as having any legal force or validity.[2] The organized government, whatever be its form and character, is but the creature and servant of this political unit, which alone possesses dominion in itself.[3] The rule of the common law, that the sovereign cannot be held amenable to process in his own courts without his consent, is applied in this country to the state, under which designation are included the people within its territorial limits, in whom resides whatever sovereignty the state possesses.[4] That the supreme power in a state cannot be compelled by process of courts of its own creation to defend itself from assaults in those courts, is a fundamental principle that has been adopted in the courts of this country as a part of the general doctrine of publicists.[5] This maxim is not limited to a monarchy, but is of equal force in a republic. In the one, as in the other, it is essential to the common defense and general welfare that the sovereign should not, without its consent, be dispossessed of its property.[6] It would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of a sovereign, to subject him to repeated suits as a matter of right at the will of any citizen, and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on his government in war and in peace, and the money in his treasury.[7] This principle of immunity from suit applies to every sovereign power, and but for the protection which it affords the government would be unable to perform the various duties for which it was created.[8] The principle that no sovereign can be sued without its consent, applies equally to foreign sovereigns, and to sovereigns of the country where the suit is brought. The exemption of the sovereign is not less regarded by its own courts than by the courts of other sovereigns.[9] In the words of Chief Justice TANEY, "it is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, *or in any other*, without its consent and permission."[10]

2. STATUTES CONFERRING RIGHT TO SUE THE STATE — REPEAL. The state may, however, if it thinks proper, waive this privilege, and permit itself

1 Pomeroy, Const. Law, § 41. See, also, Chisholm v. Georgia, 2 Dall. 433, 435; Penhallow v. Doane, 3 Dall. 93; Cherokee Nation v. Georgia, 5 Pet. 52; Texas v. White, 7 Wall. 700; 1 Kent, Comm. 188; Story, Const. §§ 207, 208; 1 Phillimore, Internat. Law, 77; Wheaton, Internat. Law, (Dana's Ed.) §§ 17, 20; Field, Internat. Code, §§ 2, 12; Vattel, Prelim. §§ 1, 2; Morse, Citizenship, § 2; 1 Toullier, n. 20; Merlin, Repert.; Lieber, Hermeneutics, 250.

2 Brownson, Amer. Repub. 201; Pomeroy, Const. Law, § 86.

3 Pomeroy, Const. Law, §§ 37, 86-91.

4 State v. Jumel, 2 Sup. Ct. Rep. 142; Elliott v. Wiltz, Id., per FIELD, J.

5 Cohens v. Virginia, 6 Wheat. 264, 411; United States v. Clarke, 8 Pet. 436-444; Cary v. Curtis, 3 How. 236, 245, 256; U. S. v. McLemore 4 How. 286-289; Hill v. U. S. 9 How. 386, 389; Reeside v. Walker, 11 How. 272, 290; Beers v. v. Arkansas, 20 How. 527, 529; Nations v. Johnson, 24 How. 195; De Groot v. U. S. 5 Wall. 419, 431; U. S. v. Eckford, 6 Wall. 484, 488; The Siren, 7 Wall. 152, 154; The Davis, 10 Wall, 15, 20; U. S. v. O'Keef, 11 Wall. 178; Case v. Terrell, 11 Wall. 199, 201; Carr v. U. S. 98 U. S. 433, 437; U. S. v. Thompson, 98 U. S. 486, 489; Railroad Co. v. Tennesee, 101 U. S. 337; Railroad Co. v. Alabama, 101 U. S. 832; U. S. v. Lee, 106 U. S. 196; 1 Sup. Ct. Rep. 240; State v. Jumel. 2 Sup. Ct. Rep. 128; Ex parte Dunn, 8 S. C. 207; Treasurers v. Cleary, 3 Rich. (S. C.) 372; People v. Dennison, 84 N. Y. 272; People v. Miles, 56 Cal. 401; Chicago, M. & St. P. Ry. Co. v. State, 53 Wis. 509; Raymond v. State, 54 Miss. 562; Chevallier's Adm'r v. State, 10 Tex. 315; Tracy v. Hornbuckle, 8 Bush, 336; Tate v. Salmon, (Ky. Ct. Appeals,) 13 Reporter, 144; Rollo v. Andes Ins. Co. 23 Grat. 515; State v. B. & O. R. Co. 34 Md. 344; State v. Hill, 54 Ala. 67; Ex parte State, 52 Ala. 231; Owen v. State, 7 Neb. 108; Pattison v. Shaw, 6 Ind. 377; Briggs v. The Light-boats, 11 Allen, 162.

6 U. S. v. Lee, 106 U. S. 196; 1 Sup. Ct. Rep. 240; The Siren, 7 Wall. 152.

7 Briggs v. The Light-boats, 11 Allen, 162.

8 Nichols v. U. S. 7 Wall. 122, 126.

9 U. S. v. Lee, 106 U. S. 196; 1 Sup. Ct. Rep. 240; The Exchange, 7 Cranch, 116; Vavassour v. Krupp, 9 Ch. Div. 351; The Parlemente Belge, 5 Prob. Div. 197; Briggs v. The Light-boats, 11 Allen, 162.

10 Beers v. Arkansas, 20 How. 529.

to be made a defendant in a suit by individuals or by another state;[1] but if, in the liberality of legislation, it does permit itself to be sued, it is only on such terms and conditions as are prescribed by statute;[2] for there is vested in no officer or body the authority to consent that the state shall be sued, except in the law-making power;[3] and whoever institutes proceedings against the state must bring himself within some statute authorizing such suit.[4] As this permission is purely voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it.[5] Statutes permitting suits against the state are matters of grace, confer privileges,—they do not create rights,—and are always construed like other statutes conferring privileges or exemptions on the citizen. The power to withdraw is commensurate with the power to confer; and when the privilege is withdrawn, the citizen is remitted to the condition in which he stood when it was conferred.[6] All obligations or liabilities resting upon the state, being creations of the legislative power of the state, it is the good faith of the state alone on which reliance is placed to perform the obligation or discharge the liability. Legal remedies, or their efficacy in enforcing the obligation or liability, are not contemplated as in cases of contracts between individuals.[7] If the state furnishes a remedy by process against itself or its officers, that process may be pursued, because it has submitted itself to that extent to the jurisdiction of the courts; but if it chooses to withdraw its consent by a repeal of all remedies, it is restored to the immunity from suit which belongs to it as a political community, responsible in that particular to no superior.[8]

3. SUITS AGAINST THE SEVERAL STATES — ELEVENTH AMENDMENT TO CONSTITUTION. In our system of jurisprudence these principles are as applicable to each of the states as they are to the United States, except in those cases where by the constitution a state of the Union may be sued in the supreme court of the United States.[9] It is provided by the eleventh amendment to the constitution of the United States that no state can be sued in the courts of the United States by a citizen of another state. The evident purpose of this amendment was to prohibit all suits against a state by or *for* citizens of other states, or aliens, without the consent of the state to be sued; and one state cannot create a controversy with another state, within the meaning of that term as used in the judicial clauses of the constitution, by assuming the prosecution of debts owing by the other state to its citizens.[10] It was intended to operate in the interest of, and for the protection of, the several states, and it cannot be so construed as to allow the property of a state to be alienated or conveyed in a suit in equity against a subordinate official of the state.[11] When a state submits itself without reservation to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the state has, by its act of submission, allowed to be done.[12] And it is held by MATTHEWS, BRADLEY, and GRAY, JJ., that the only remedies which the courts

1 Beers v. Arkansas, 20 How. 527, 529; Ex parte State, 52 Ala. 235.

2 Nichols v. U. S. 7 Wall. 122, 126.

3 The Davis, 10 Wall. 15; U. S. v. Lee, 106 U. S. 196; 1 Sup. Ct. Rep. 240.

4 State v. Hill, 54 Ala. 67; Owen v. State, 7 Neb. 108; Ex parte Dunn, 8 S. C. 207; The Siren, 7 Wall. 152; U. S. v. Clarke, 8 Pet. 444; Tate v. Salmon, 13 Reporter. 144.

5 Beers v. Arkansas, 20 How. 527, 529; The Davis, 10 Wall. 15.

6 Ex parte State, 52 Ala. 235.

7 Ex parte State, 52 Ala. 235. Compare Hancock v. Walsh, 3 Woods, 363; Dabney v. State Bank, 3 S. C. 167; Clark v. State, 7 Cold. 317. 318; Danolds v. State, 89 N. Y. 36; dissenting opinions of FIELD and HARLAN, JJ., in Antoni v. Greenhow, 2 Sup. Ct. Rep. 91, and State v. Jumel, Id. 128.

8 Antoni v. Greenhow, 2 Sup. Ct. Rep. 103, per MATTHEWS, J.

9 Railroad Co. v. Tennessee, 101 U. S. 337; Railroad Co. v. Alabama, Id. 182; U. S. v. Lee, 106 U. S. 196; 1 Sup. Ct. Rep. 240.

10 State v. State, 2 Sup. Ct. Rep. 176.

11 Preston v. Walsh, 10 Fed. Rep. 328.

12 State v. Jumel, 2 Sup. Ct. Rep. 142; Elliott v. Wiltz, Id.

of the United States are authorized to administer, are the remedies that the state itself has provided, and that no remedy is provided by the constitution of the United States against the state itself for a breach of its contract by the state.[1]

4. SUITS AGAINST THE OFFICERS OF A STATE. Where an officer of the state, in violation of law, commits an act to the injury of the citizen, it is an act beyond the scope of his agency, unauthorized by his principal, and the state is not liable, therefore, to the party injured;[2] and where an officer is proceeding under an unconstitutional law to the injury of the citizen, such law will not protect him from suit on the ground that a suit against him is virtually a suit against the state.[3] With this limitation, however, the officers of a state, in the official discharge of their duties, are entitled to the same immunity from suit that the state, *eo nomine*, would be entitled to. We will briefly review the cases bearing upon this point.

In *The Queen* v. *Powell*[4] a writ of *mandamus* to admit to a copy-hold tenement of a manor, belonging to the crown, was directed to the steward alone, on the ground that there could be no *mandamus* to the sovereign, and Lord DENMAN, with the concurrence of Justices LITTLEDALE, WILLIAMS, and COLERIDGE, quashed the writ, and after observing that doubtless there could be no *mandamus* to the sovereign, but that the interests of the crown were to be as much guarded as those of the subject, said: "If we were to allow a *mandamus* to the steward alone, and the writ were obeyed, the property of the crown would be affected indirectly by the *mandamus* to the steward alone, when it cannot be affected directly by making the sovereign a party to the *mandamus;* * * * and if the advisers of the crown were of opinion its interest might be affected, and were to advise the sovereign either to order the steward not to admit the prosecutor of the *mandamus* or to revoke the appointment of the steward, this court could not grant an attachment against the steward, and then the party does not get admitted."

In *The Queen* v. *Comr's of Treasury*,[5] in which the court refused to grant a writ of *mandamus* to the lords commissioners of the treasury to compel them to pay over money in their hands as servants of the crown, Lord Chief Justice COCKBURN said: "I take it for granted with reference to that jurisdiction that we must start with this unquestionable principle: that when a duty has to be performed (if I may use that expression) by the crown, this court cannot claim, even in appearance, to have any power to command the crown; the thing is out of the question. Over the sovereign we can have no power. In like manner, where the parties are acting as servants of the crown, and are amenable to the crown, whose servants they are, they are not amenable to us in the exercise of our prerogative jurisdiction. * * * Though I quite agree that according to the appropriation they (the lords commissioners) were bound to apply the money, upon the vouchers being produced, and had no authority to retax these bills, still I cannot say that there is any duty which makes it incumbent on them to do what I cannot say they ought to have done, except as servants of the crown, because in that character they have received the money, and no other."

BLACKBURN, J., in the same case,[6] remarked: "It seems to me that the obligation, such as it is, is upon her majesty, to be discharged through her servants, and *you cannot proceed, therefore, against the servants.*"

Where an injunction to restrain the auditor and treasurer of the state of

1 Antoni v. Greenhow, 2 Sup. Ct. Rep. 91. See Preston v. Walsh, 10 Fed. Rep. 328.

2 Dabney v. State Bank, 3 S. C. 167; Belknap v. Belknap, 2 Johns. Ch. 463. See Spring Valley Water-works v. Bartlett, 16 Fed. Rep. 615.

3 State Lottery Co. v. Fitzpatrick, 3 Woods, 323; Claybrook v. Owensboro, 16 Fed. Rep. 297; Hancock v. Walsh, 3 Woods, 360; Lynn v. Polk, 8 Lea, (Tenn.) 131; Davis v. Gray, 16 Wall. 203.

4 1 Q. B. 352; S. C. 4 Perry & D. 719.

5 L. R. 7 Q. B. 387-394.

6 Id. 399.

Louisiana from disposing of money in the state treasury to the prejudice of complainant, and a *mandamus* to compel the payment to him of interest on state bonds, held by him, was asked for, it was held that the proceedings were in effect a suit against the state, and that as the state could not be sued the court had no jurisdiction.[1]

Where an action was brought by an insurance policy-holder to compel the state treasurer of Kentucky (Tate) to deliver to the receiver of the company, for the benefit of its policy-holders, a certain fund deposited with the treasurer by the company as a condition to doing business in the state, (Act of March 4, 1870, § 47,)[2] the petition was dismissed. LEWIS, C. J., in delivering the opinion, said: "The general assembly has not seen proper to enact a general law (as by article 8, § 6, of the constitution they have power to do) authorizing such suits to be brought, or conferred upon any court of the state jurisdiction to control and distribute the funds in the custody of the treasurer. It has been repeatedly decided by the court that, in the absence of a law authorizing it, the state cannot be made a party defendant or garnishee, and is not suable in her own courts, and 'that parties will not be allowed to evade this inhibition by ignoring the state in their suits, and proceeding directly against the public officer having custody of the money sought to be reached.' As no law has been passed by the general assembly for the disposal of the fund, it must remain in the custody of the treasurer, subject to such use or appropriation as may hereafter be provided by law, and no suit to recover or dispose of the fund can be maintained until the general assembly shall direct in what manner and in what court it may be brought."

And where a similar fund was sought to be reached by attachment, BLATCHFORD, J., declared that "there was no case of acknowledged authority which held that a public officer of a state, charged with a trust created by a public statute of the state in respect to funds or securities in his possession, could be made liable in respect to them by an attachment in favor of a person not claiming under the trust."[3]

In *Lynn* v. *Polk*[4] it was held that an officer, while executing a void and unconstitutional law, is not to be considered as acting under the authority of the state, and that a suit to enjoin the funding board (created by an act which the court held to be unconstitutional) from funding the bonded indebtedness of the state was not a suit against the state, nor against the officers of the state, within the meaning of chapter 13 of the Tennessee acts of 1873.

The commissioners appointed under an act of the legislature of New York to drain what was known as the great swamp, exceeded their authority, and proceeded in a manner not authorized by the act, to the threatened injury of private land-owners, and it was held they could be restrained by a court of equity.[5]

In *State Lottery Co.* v. *Fitzpatriek*[6] the officers of the state of Louisiana, charged with the enforcement of the penal laws, were enjoined from arresting or otherwise interfering with the officers and agents of the lottery company for acts done by them in the exercise of the rights conferred by their charter, which the court held could not be repealed by a subsequent act of the legislature without impairing the obligation of contract, and that as the officers were

1 State v. Burke, 33 La. Ann. 498; State v. Jumel, 2 Sup. Ct. Rep. 128.

2 Tate v. Salmon, 13 Reporter, 144.

3 Providence & S. Steam-ship Co. v. Virginia F. & M. Ins. Co. 11 Fed. Rep. 287. As to garnishment or attachment of public funds, see Buchanan v. Alexander, 4 How. 20; Averill v. Tucker, 2 Cranch, C. C. 544; Stillman v. Isham, 11 Conn. 124; McMeekin v. State, 4 Eng. (Ark.) 553; Wild v. Ferguson, 23 La. Ann. 752; Tracy v. Hornbuckle, 8 Bush, 336; Rollo v. Andes Ins. Co. 23 Grat. 509; Bank v. Debrill, 3 Sneed, (Tenn.) 378; Bank v. Hodge, 3 Rob. (La.) 373; Spalding v. Imlay, 1 Root, 551; Wicks v. Bank, 12 Ala. 584; Dobbins v. Railroad Co. 37 Ga. 240; Mayor, etc. of Baltimore v. Root, 8 Md. 95.

4 8 Lea, (Tenn.) 121.

5 Belknap v. Belknap, 2 Johns. Ch. 463.

6 3 Woods, 223.

acting under a void and unconstitutional law, which could neither authorize nor protect, they could be called to answer and were individually responsible.

In *Hancock* v. *Walsh*,[1] in which the commissioner of the general land-office of Texas was enjoined from allowing location of land within what was known as the Mercer colony, there was no act of the legislature imposing upon him the duty of location within the Mercer colony;[2] and, if there had been, the court held that such law would have been unconstitutional and void; and WOODS, J., in delivering the opinion said: "If defendant violates the provisions of a contract protected by the constitution of the United States, it is immaterial whether he is doing it with or without the apparent sanction of a law of this state, and no claim that defendant is performing an official duty will avail him."[3]

In *Preston* v. *Walsh*[4] the same view was taken and an injunction granted, but the court refused to grant relief in the nature of specific performance of contract, or at least a decree for title, on the ground that to effect a conveyance of title emanating from the state to public lands, the governor of the state would have to be made a party to the suit; and PARDEE, J., who delivered the opinion, said: "The case of *Davis* v. *Gray*,[5] affirming *Osborne* v. *Bank*,[6] on the subject of making and requiring the state to be made a party where the state is concerned, is very strong, and I feel bound to go as far as that case; but I must leave to the supreme court to go further, or declare the law that the courts of the United States can go further."[7]

In *McCauley* v. *Kellog*,[8] WOODS, J., held that an action in a court of the United States against the executive officers of a state in their official capacity, to compel them to comply with a contract of the state by the enforcement of its laws, is to all intents and purposes an action against the state, and prohibited by the eleventh amendment to the constitution of the United States; and after showing that in *Davis* v. *Gray* and *Osborne* v. *Bank* the officers were acting under a void and unconstitutional law, says: "No case has yet decided that a circuit court of the United States can compel the executive and administrative officers of a state to execute the laws of a state.[9] * * * I have conceded what complainants claim, that the funding bill and the act of March 14, 1874, are both unconstitutional and void, and have regarded the bill just as if those acts had never been passed, to-wit, a bill to compel the defendants, officers of the state, to execute its laws."[10]

Where negro slaves were illegally taken from the owner on the high seas, and afterwards sold to a stranger, who, without the privity of the owner, imported them into the United States in violation of law, and they were seized by an officer of the customs of the United States and delivered to an agent appointed by the governor of Georgia, in conformity to an act of congress, and some of them sold by order of the governor of the state, and the money obtained at the sale was "actually in the treasury of the state, mixed with its general funds," and the rest of the slaves remained in the hands of the agent of the state, "in possession of the government," a libel in admiralty by the owner to recover possession of the money and slaves, though not brought against the state by name, but against the governor in his official capacity, was held to be a suit against the state, and therefore, by reason of the eleventh amendment of the constitution, not maintainable.[11]

In *U. S.* v. *Peters*,[12] in which a *mandamus* was ordered to a district court of

1 3 Woods, 360.
2 Id. 364.
3 Id. 366.
4 10 Fed. Rep. 315.
5 16 Wall. 203.
6 9 Wheat. 738.
7 Preston v. Walsh, 10 Fed. Rep. 328.
8 2 Woods, 13.
9 Id. 22.
10 Id. 23.
11 Governor v. Madrazo, 1 Pet. 110. See, also, Ex parte Madrazza, 7 Pet. 627.
12 5 Cranch, 115.

the United States, sitting in admiralty, to issue an attachment against the executrixes of David Rittenhouse to enforce obedience to a decree of that court for the payment of money, (although Rittenhouse had been the treasurer of Pennsylvania, and the legislature of that state had directed its attorney general to sue the executrixes for the recovery of the money, and the governor to protect them against any process of the federal courts,) the judgment of the supreme court, as stated by Chief Justice MARSHALL, went upon the ground that it was apparent that *Rittenhouse held the money in his own right*, and that "the suit was not instituted against the state or *its treasurer*, but against the executrixes of David Rittenhouse for the proceeds of a vessel condemned in the court of admiralty, which were admitted to be in their possession. *The state of Pennsylvania had neither possession of, nor right to, the property* on which the sentence of the district court was pronounced;" and the court carefully avoided expressing an opinion upon a case in which the money sued for was in the possession of the state, "or the *actual property of the state*, however wrongfully acquired."

In *Osborne* v. *Bank U. S.*[1] the bill was originally filed by the bank against the auditor of Ohio, and a collector employed by him, (the treasurer being subsequently made a defendant by amended bill,) to prevent them from levying a tax imposed by the legislature of that state in *violation of the constitution* of the United States upon the property of the bank; and they, after the service of the *subpœna, forcibly* took from the plaintiff's office the amount of the tax in money and paid it over to the treasurer of the state, who received it with notice of the facts and kept it apart from other moneys belonging to the state; or, in the language of Chief Justice MARSHALL, it was "kept untouched, in a trunk by itself, as a deposit, to await the event of the pending suit respecting it," so that it had never come into the possession of the state; and, as said by Chief Justice WAITE in his review of the case,[2] "was in legal effect stopped while passing from the bank to the treasury. The money seized was kept out of the treasury, because if it got in it would be irretrievably lost to the bank, since the state could not be sued to recover it back. No one pretended that if the money had been actually paid into the treasury it could have been got back from the state by a suit against the officers. They would have been *individually* liable for the unlawful seizure and conversion, but the recovery would be against them *individually* for the wrongs they had *personally* done, and could have no effect on the money which was held by the state."

In *Davis* v. *Gray*[3] the receiver of a land-grant railroad obtained an injunction against the governor and commissioner of the land-office of Texas to restrain them from incumbering, by granting patents to others, lands of which the railroad had the equitable title under a previous grant from the state, and the ground upon which the bill in that case was sustained, was defined to be that when a plain official duty, requiring no exercise of discretion, is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which an adequate remedy at law cannot be had, may have an injunction to prevent it, notwithstanding the officer pleads the authority of an *unconstitutional* and therefore *void law* for the violation of his duty.

It is conceded, in *The Siren*[4] and *The Davis*,[5] that without an act of congress no direct proceedings can be instituted against the government or its property, and in the latter case it is justly observed that "the possession of the government can only exist through its officers; using that phrase in the sense

[1] 9 Wheat. 738.
[2] State v. Jumel, 2 Sup. Ct. Rep. 139.
[3] 16 Wall. 203.
[4] 7 Wall. 152.
[5] 10 Wall. 15.

of any person charged on behalf of the government with the control of the property, coupled with actual possession."

In *Carr* v. *United States*[1] it is said: "If a proceeding would lie against the officers as individuals, in the case of a marine hospital, it might be instituted with equal facility and right in reference to a post-office or a custom-house or a prison or a fortification. In some cases it might not be apparent, until after suit brought, that the possession attempted to be assailed was that of the government; but when this is made apparent by the pleadings or the proofs, the jurisdiction of the court ought to cease."

In *Board of Liquidation* v. *McComb*[2] the board of liquidation of the state of Louisiana was enjoined, at the instance of bondholders, from admitting to the privileges of the compromise proposed by the state of Louisiana, certain persons other than those originally provided for, and on different terms, because the board was, by the terms of the law, charged with the duty of exchanging the bonds specifically set apart by the contract for a particular purpose. They in fact held the new issue of bonds in trust, and every one who gave up his old obligations, and accepted the new in settlement thereof, became a beneficiary under the trust, and entitled to a faithful performance of the terms thereof by the trustees or board of liquidation. It was, in fact, a suit by *cestui que trust* against trustees.

In the *Arlington Case*,[3] Mr. Justice MILLER, in delivering the opinion of the majority of the court, says: "While acceding to the general proposition that in no court can the United States be sued directly by original process as a defendant, there is abundant evidence in the decisions of this court that the doctrine, if not absolutely limited to cases in which the United States are made defendant by name, is not permitted to interfere with the judicial enforcement of the established rights of plaintiffs when the United States is not a defendant or a necessary party to the suit;" and, after reviewing the cases decided in the supreme court, concludes "that the proposition that when an *individual* is sued in regard to property which he holds as an officer or agent of the United States, his possession cannot be disturbed, when that fact is brought to the attention of the court, has been overruled and denied," * * * and "that the court has held the principle to be unsound; and in the class of cases like the present, represented by *Wilcox* v. *Jackson*,[4] *Brown* v. *Huger*,[5] and *Grisar* v. *McDowell*,[6] it was not thought necessary to re-examine a proposition so often and so clearly overruled in previous well-considered decisions."

The extent to which this opinion goes is stated in the Louisiana cases,[7] decided at the same term, to be, "that the officers of the United States, holding in their official capacity the possession of lands to which the United States had no title, could be required to surrender their possession to the rightful owner, even though the United States were not a party to the judgment under which the eviction was to be had;" and the case was decided upon the ground that the possession and retention of the property by the officers of the United States were in violation of the constitutional provision declaring that "no person * * * shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation;" and the court held that "undoubtedly those provisions of the constitution were of that character which it was intended the courts should enforce, when cases involving their operation and effect were brought before them;" and the court considered the case upon its merits, refusing to dismiss for

[1] 98 U. S. 433.

[2] 92 U. S. 531. See, also, Chaffraix v. Board of Liquidation, 11 Fed. Rep. 638; Providence & S. Steam-ship Co. v. Virginia F. & M. Ins. Co. 11 Fed. Rep. 287.

[3] U. S. v. Lee, 106 U. S. 196; 1 Sup. Ct. Rep. 240.

[4] 13 Pet. 498.

[5] 21 How. 305.

[6] 6 Wall. 353.

[7] State v. Jumel, 2 Sup. Ct. Rep. 142; Elliot v. Wiltz, Id. 142.

want of jurisdiction, on the mere suggestion that the United States was the real party in interest.

The Chief Justice, and GRAY, BRADLEY, and WOODS, JJ., did not concur in the judgment of the majority of the court, and Mr. Justice GRAY, in his elaborate dissenting opinion, uses the following forcible language:[1] "The principle upon which we are of opinion that the court below had no authority to try the question of the validity of the title of the United States in this action, and that this court has, therefore, no authority to pass upon that question, may be briefly stated, thus: The sovereign is not liable to be sued in any judicial tribunal without its consent. The sovereign cannot hold property except by agents. To maintain an action for the recovery of possession of property held by the sovereign through its agents, not claiming any title or right in themselves, but only as the representatives of the sovereign, and in its behalf, is to maintain an action to recover possession of the property against the sovereign; and to invade such possession of the agents, by execution or other judicial process, is to invade the possession of the sovereign, and to violate the fundamental maxim that the sovereign cannot be sued. * * * In those cases in which judgments have been rendered by this court against individuals concerning money or property in which a state had an interest, either the money was in the *personal possession of the defendants, and not in the possession of the state*, or the suit was to restrain the defendants by injunction from doing acts *in violation of the constitution of the United States.*"[2]

In *Antoni* v. *Greenhow*,[3] decided a few months later than the *Arlington Case*, Mr. Justice MATTHEWS, who had concurred in the majority opinion in that case, distinctly states that "a suit to compel the officers of a state to do the acts which constitute a performance of its contract by the state is a suit against the state itself," and that the case was within the principle laid down in *State* v. *Jumel*.[4] To this proposition both BRADLEY and GRAY, JJ., expressly declared their assent.

In *Antoni* v. *Greenhow*,[5] a judgment of the supreme court of appeals of Virginia, denying a writ of *mandamus* to compel the treasurer of the city of Richmond, the lawful tax-collector, to accept in payment of state taxes a coupon whose genuineness had not been ascertained according to a law passed subsequent to the act under which the bonds and coupons were issued and made receivable in payment of taxes, and which, it was contended, impaired the obligation of contract, was affirmed, a majority of the court holding, upon an examination of the earlier cases, that the law which the officer pleaded in justification of his refusal to accept the coupon was not unconstitutional and void, as claimed.

In the Louisiana cases[6] the suits were brought by creditors at large of the state of Louisiana to compel the officers of the state, by judicial process, to enforce the provisions of the consolidation revenue act of 1874, funding the indebtedness of the state, and providing for an annual levy of taxes, when the state had, by an amendment to the constitution, adopted in 1879, undertaken to prohibit them from doing so. Chief Justice WAITE, who delivered the opinion, said: "Neither was there when the bonds were issued, nor is there now, any statute or judicial decision giving the bondholders a remedy in the state courts or elsewhere, either by *mandamus* or injunction against the state in its political capacity to compel it to do what it has agreed should be done, but which it refuses to do. * * * The persons sued are the executive officers of the state, and they are proceeded against in their official capacity.

1 U. S v. Lee, 106 U. S. 196; 1 Sup. Ct. Rep. 240.
2 Id.
3 2 Sup. Ct. Rep. 91.
4 2 Sup. Ct. Rep. 128.
5 2 Sup. Ct. Rep. 91.
6 State v. Jumel, 2 Sup. Ct. Rep. 128; Elliott v. Wiltz, Id.

* * * The question is whether the contract [between the state and the bondholders] can be enforced, notwithstanding the constitution, by coercing the agents and instrumentalities of the state, whose authority has been withdrawn in violation of the contract, without having the state itself a party to the proceeding."

After reviewing the authorities, and distinguishing the case from *Osborn* v. *Bank*,[1] *Davis* v. *Gray*,[2] and *Board of Liquidation* v. *McComb*,[3] the chief justice concludes as follows:[4] "When a state submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the state has, by its act of submission, allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a state cannot be sued, to set up its jurisdiction *over the officers in charge of the public moneys*, so as to control them as against the political power in their administration of the finances of the state. In our opinion, to grant the relief asked for in either case would be to exercise such a power." The relief asked was accordingly denied.

The position taken by Mr. Justice FIELD and Mr. Justice HARLAN in their dissenting opinions in *Antoni* v. *Greenhow*[5] and the Louisiana cases,[6] that in the former the statute of the state of Virginia was unconstitutional, as impairing the obligation of the contract entered into between the state and the tax-payers, and that in the latter the constitutional provision of the state of Louisiana was unconstitutional, as impairing the obligation of the contract entered into between the state and the bondholders, would bring those cases within the exception to the general rule mentioned by Mr. Justice GRAY,—cases in which the officers were proceeding under an unconstitutional law.

It it is thought that a careful study of the cases cited will lead to the conclusion that the immunity from suit enjoyed by every state will protect its officers from suit in their *official capacity*, and performance of official duty, except perhaps in those cases where their performance of the acts complained of, or their refusal to perform certain acts, would constitute an infringement or violation of some right guarantied to the complaining party by the constitution; or, in other words, wherever the property sought to be reached in the hands of the officer is in reality the *lawful* property of the state, or the act, the doing of which is sought to be compelled, is prohibited by a valid (constitutional) law of the state, or the act sought to be enjoined is directed and commanded by a valid (constitutional) law of the state, the officer will be protected from the process of the courts to the same extent as the state itself would be protected.

ROBERTSON HOWARD.

St. Paul, Minn., August 6, 1883.

[1] 9 Wheat. 738.
[2] 16 Wall. 203.
[3] 92 U. S. 531.
[4] State v. Jumel, 2 Sup. Ct. Rep. 240.
[5] 2 Sup. Ct. Rep. 91.
[6] State v. Jumel, 2 Sup. Ct. Rep. 128; Elliott v. Wiltz, Id.

KNOWLTON and others *v.* MISH and another.

(*Circuit Court, D. California.* April 2, 1883.)

1. SEPARATE PROPERTY OF WIFE USED BY HUSBAND.
   Where moneys of a married woman are habitually collected and used in his business by the husband for a series or years, and mixed with his property, without any account thereof being kept, thus giving him credit in his business, and there is no specific agreement with his wife for repayment, or that the property purchased with it shall be hers, the moneys so used, and the goods or property so purchased, become his for the purpose of paying his debts.
2. MORTGAGE TO SECURE MONEY OF WIFE—FRAUD ON CREDITORS.
   A mortgage by the husband to secure moneys of the wife so collected and used, kept from the record till after the purchase and receipt of a large amount of goods by the husband and his son, they being at the time largely insolvent, *held* to be fraudulent as to the parties selling the goods.
3. FRAUD—QUESTION OF FACT.
   Fraud is generally a question of fact, to be determined by all the circumstances of the case.
4. WIFE'S SEPARATE PROPERTY.
   A wife, desiring to preserve her rights in her separate property, should take reasonable care to keep it distinct from her husband's business, so that it shall not become the means of practicing fraud upon others.

In Equity.

David Friedenrich, for complainants.

Daniel Titus, for defendants.

SAWYER, J., (*orally.*) The bill in this case is brought for the purpose of having appropriated to the payment of debts certain property alleged to have been fraudulently mortgaged and transferred to Mrs. Mish, the wife of one of the defendants. Without going into them fully, a brief outline of the facts is as follows: In December, 1879, P. Mish & Son, a firm doing business in San Francisco, in a certain line of merchandise, was manifestly insolvent,—their indebtedness largely exceeding their assets. In that month P. Mish executed to his wife a mortgage for the sum of $54,000, upon property which was already subject to a mortgage for a large amount, the two mortgages being more than sufficient to absorb the property. The alleged indebtedness for which this mortgage was given arose from rents and sales of certain separate property of the wife, which had been given to her by her brother so far back as 1863. For years the husband had been collecting the rents of this property, using the money in his business, and for the support of his family, and for other purposes, and no book-account or memorandum of it was kept by either party. At the date mentioned, Mr. Mish and his wife figured up the amount which they claim he had received from the income of her property and added a large amount to it as interest, making the total indebtedness $54,000, for which sum the mortgage referred to was executed. The mortgage was not put on record at the time. About the time of its execution, the younger Mish left San Francisco for New York, where he purchased for the firm from various parties, upon a

credit of several months,—four months, I believe,—goods to the value of $63,000,—his firm being then undoubtedly insolvent, it being indebted to an amount much larger than the value of all its assets. The goods were purchased during the winter of 1879–80, and immediately shipped to San Francisco. In March, 1880, soon after the arrival at San Francisco of the last of the goods, Mrs. Mish put her mortgage on record. Immediately afterwards a suit was brought on behalf of a relative, a brother-in-law of Mrs. Mish, and the stock in the store of P. Mish & Son attached. The stock was sold under execution in that suit, and Mrs. Mish became the final purchaser; she having in the mean time bought up another judgment against the firm. The consequence was, not one cent of this indebtedness of $63,000 referred to was ever paid, and these complainants, being among the sufferers, bring this suit to have the property covered by the mortgage to Mrs. Mish appropriated to the payment of their debt. The defense is that this is the separate property of Mrs. Mish. I think no one can read the testimony and the record in this case without being satisfied that these transactions are fraudulent with reference to these creditors. It is not necessary for me to go into a discussion of the subject; it would be unprofitable to do so; but, in my judgment, it is clearly manifest, from the facts and the surrounding circumstances in this case, as to these creditors, that this transaction between Mish and his wife was fraudulent. A great many ear-marks of fraud are apparent. Fraud cannot usually be proved directly. It is a question of fact, to be inferred from the surrounding circumstances. The circumstances in this case, certainly, justify the inference of fraud.

It is highly probable, and for the purposes of this decision I shall assume, that much of this money making up the alleged indebtedness of $54,000 was income from the wife's separate property. But it was collected by the husband, who used it for such purposes as he saw fit,—without any specific agreement in writing, or otherwise, in regard to it,—no accounts or traces of it being kept, and he was not called upon to give any account of it until the time when the mortgage was executed to the wife, under the circumstances named, many years after its collection and use; and the execution of the mortgage was kept secret until after the delivery of the last goods bought in New York by the son. The attachment referred to followed so quickly and under such circumstances as, at least, to suggest a suspicion of co-operation and information on the part of the attaching creditor not possessed by other creditors. I think this point in the case comes clearly within the ruling in the case of *Humes* v. *Scruggs*, 94 U. S. 22–28, where, in the case of such a use of a wife's property as is here shown, under similar circumstances, it was held that there was a dedication of the money on the part of the wife to the general uses of the husband. I think the circumstances in this case show a dedication to the husband by the wife of the income of her property

collected and used by him, so far, at least, as the interests of these creditors are concerned. If married women desire to preserve their rights of property, they should take reasonable care to keep it separate, and in such condition as not to mislead those dealing with their husbands. They should so manage their property, as not to make it an instrument of fraud upon the rights of others. There must, therefore, be a decree for complainant in conformity with the prayer of the bill.

THE "ELEVATOR CASE."

KANSAS CITY ELEVATOR CO. *v.* UNION PACIFIC RY. CO. and others.

UNION PACIFIC RY. CO. and others *v.* KANSAS CITY ELEVATOR CO. and others.

(*Circuit Court, W. D. Missouri, W. D.* May, 1881.)

1. LEASE—FORFEITURE—RE-ENTRY.
   The right of a lessor to determine, without recourse to the courts, a lease of real estate as forfeited, and re-enter upon the premises, is a harsh power, and it is the duty of the court to restrain it to the most technical limits of the terms and conditions upon which the right is to be exercised, and a court of equity, when necessary, when this power has been exercised, will come in and afford relief.
2. SAME—CONDITION PRECEDENT—TAXES AND RENTS.
   Where a lease provides for re-entry upon failure to pay taxes and rents, a demand for the payment of such taxes and rents is necessary as a condition precedent to the right of re-entry.
3. SAME—SUBLEASE.
   Where a lease contains a provision that the lessee shall "not sublet, nor assign or transfer this agreement, without the written consent thereto of the superintendent" of the lessor, the lessee may either sublet or assign, with the assent of the officer named; and where, during two or three months of the term, the property was turned over to another without the assent of the lessor, by acquiescing, and failing to object for a considerable period of time, the breach of the agreement will be considered as waived by him.
4. SAME—RECEIVER—SUPERINTENDENT.
   Under such a lease, the superintendent appointed by the receiver, into whose hands the railroad company, the lessor, has passed, is to be regarded as the superintendent, and his assent to a sublease will be sufficient.
5. SAME—POOLING ARRANGEMENTS.
   When a party seeks to declare a contract forfeited by an act of his own, he must point out specifically some clear act, in violation of the terms thereof, which authorize said forfeiture, and in this case the alleged pooling arrangements on the part of the lessees are not sufficient to constitute a breach of the agreement that it "will use the premises for no other purpose than a legitimate business," and will charge only reasonable and compensatory commissions.

In Equity.

Gage & Ladd and *Karnes & Ess*, for the elevator company.

J. P. Usher, A. L. Williams, and *Charles Monroe*, for the railway companies.

MILLER, J., (*orally.*) We will proceed this morning to dispose of what is called the "Elevator Case," which has occupied several days in argument.

I shall not be able to-day to deliver any but a very brief opinion.

There are two bills. One is brought by the elevator company, the main purpose of which seems to be to prevent the railway company from pulling down and removing the elevator itself. No other relief is asked, except that the railway company shall be enjoined from pulling down, or tearing down, and removing the elevator.

The other is the bill of the railway company, and it states the reasons why they entered on the ground which is the subject of controversy. They justify their act by reference to the power which the lease or contract under which the elevator company held conferred upon them, being the right of re-entry. And they ask a declaration or decree that their act, in that particular, shall be affirmed, and their right to re-entry shall be held to be valid. That is the substance of the relief asked in this case. There is no prayer for damages, or compensation, or restoration of possession, or anything of that kind, which will shorten very much the consideration of the case.

We are to consider the sufficiency of the reasons alleged by the railway company for its re-entry upon the ground which it had leased (for I think the instrument is a lease) to the elevator company.

There are several of these reasons. I do not feel called upon to go into any lengthy discussion of them.

The first two of them are that the elevator company had failed to pay its rent, and had failed to pay its taxes, according to the terms of the instrument. I am quite satisfied that neither in regard to payment of rent, nor in regard to payment of taxes, was there any sufficient foundation for declaring the lease forfeited, or for the exercise of the power of re-entry on the part of the railroad company.

As a proposition pervading this doctrine of the right of re-entry by the forfeiture of a lease of land, it is to be observed that the power to be exercised is a very strong power, and it is one which is exercised without the judgment of a court of justice or of anybody else but the party who is exercising it. The party determines for himself whether he has the right of re-entry, without any resort to a court of justice. This is always a harsh power. It has always been considered that it was necessary to restrain it to the most technical limits of the terms and conditions upon which the right is to be exercised. Hence it is that the old common law provided in this class of contracts that it was the duty of the court to see that no injustice was done. It is reasonable, it is natural, that when a contract puts into the power of one man to say that under certain contingencies, of which he is to be the judge, he shall enter upon the house or home or property of another, and eject him instantly, and take possession,—it is reasonable, it is proper, that the contract and the acts which justify such a course of conduct should be construed rigidly

against the exercise of the right. A court of equity, when necessary, when this power has been exercised, will come in and afford relief.

In regard to the taxes and rents, the law is well settled, I think, that a demand for the payment thereof is necessary as a condition precedent to the right of re-entry.

The next proposition upon which the re-entry in this case depended is that there was a period of two or three months during which this elevator was run under a verbal lease, without the approval of the railway company or any of its officers. It is sufficient to say, as to this, that if it was provided by the lease that this elevator should be kept in the hands of the original parties, (as it probably was,) it seems to us that the time which elapsed before the railroad company undertook to enforce their rights under that breach of the terms of the lease is enough to condone or waive it. If the written lease under which Mead & Templer held the property is a valid instrument, and if the approval of the superintendent is a valid approval, they waived the former use of it for a month or two by the same parties prior to the execution of that lease.

The next question is whether the parties forfeited their lease from the railway company by the making of a lease to Mead & Templer. The argument (and it is a very ingenious one) is that, under this seventh clause of the original lease between the elevator company and the railway company, there was no power to lease or sublet at all, and that the approval and consent of the superintendent were with relation to allowing an assignment of the contract. The article reads as follows:

"And the said party of the second part further covenants and agrees that it will not sublet said elevator and warehouse, nor assign or transfer this agreement, without the written consent thereto of the superintendent of the party of the first part, and that it will not use said building for any other purpose than that contemplated by the terms of this contract."

It is said that the meaning of that is that they will not sublet the elevator at all, and that they can only assign upon the written consent of the superintendent of the railway company. As I stated before, I cannot enter into a full discussion of these questions, but it is sufficient to say that, in my opinion, it embraces the subletting, and that it may be done with the consent of the officer named in the instrument.

This sublease to Mead & Templer did have the approval of a man who said on the back of it that he was the superintendent. The only question is, was he such superintendent? It is said that he was not the superintendent of the company, because the railway had been put into the hands of receivers, who exercised general control over the road and its property, and that this man, Mr. Oakes, who approved of the instrument, was the superintendent of the receivers, and not the superintendent of the company. I think that his approval was sufficient to justify the lease in this case. This railway

company existed when this contract was made with an officer known as superintendent, and among his duties it was specially stated in the by-laws of the company that he should have charge of all the property and depots of the company. It is my opinion that when the former superintendent resigned or was removed, and the receivers were appointed, and they appointed Mr. Oakes superintendent, that he was the legal superintendent of that road, with the power to exercise those very functions that the prior superintendent had possessed; that his acts in pursuance thereof were properly and legally the acts of the railway company. That simply means that the lawful superintendent of that railway corporation at that time was Mr. Oakes. Therefore, I think that the sublease was a valid lease, and creates no right of re-entry on the part of the company.

I do not think it is necessary to enter into an inquiry as to whether this lease, in the nature of its terms, is *ultra vires*, or beyond the power of the company, or not.

The argument now is that this lease was to run for 20 years, and that the probability was that the company would need the land for the ordinary uses of the railroad, and that, therefore, it had not the power of putting this land out of its *control*. This argument is not sound. The company owned the land, and, not having any immediate use for it, it made a lease, fixing its own terms and the time when it could resume possession, and it is not, according to the law, for it to turn around now and say that they need the land. All the doctrines of contracts, all the doctrines of the rights of corporations, are opposed to it.

I do not recollect now of any other but one proposition that has been urged. One other ground has been urged as supporting the right of re-entry, and to declare the instrument forfeited; that is, the pooling arrangement which the elevator company entered into. What that arrangement was is not very definitely stated. All we know is that it was a contract, one clause of which is pointed out as authorizing the party to re-enter, in consequence of such contract, upon the ground that it violates the fifth clause of the original lease between the elevator company and the railway company, which says:

"And said party of the second part further covenants and agrees that it will use said premises for no other purpose than a legitimate business of receiving and forwarding grain, and that it will charge for storage and delivery of grain from said elevator only reasonable and compensatory commissions, and such as may be charged for like service at other elevators of similar character at Kansas City, and that it will in every way accommodate and serve shippers and the general public, so as to transact its business, to the best of its ability, to the satisfaction of the patrons of said party of the first part."

As I said before, when a party seeks to declare a contract forfeited by an act of his own, he must point out specially some clear act in violation of the terms of the lease which authorizes said forfeiture.

This pooling may be a very bad business; it may be very wicked; it may be as wicked as counsel represent it to be; but by the terms of the agreement such wickedness is in no way made a reason for the forfeiture of this lease. Besides, in regard to this clause, the only point is that it is provided that "said elevator will receive and deliver grain for reasonable and compensatory commissions." There is no proof in this case that they ever refused to do so. The proof, on the contrary, is that the commission they received was reasonable. Here is an agreement under which a forfeiture is claimed on the ground that there must have been exorbitant charges by the elevator company. But the railroad company have attempted to make no such proof here; and the proof on the other side negatives it; and there is no proof that they ever made any but reasonable and compensatory charges. It may be that this pooling arrangement confers rights that may be maintained in other cases and other suits, but it did not confer the right of re-entry. This is not the proper place for me to consider that question. It may come up hereafter in another shape in other suits. All that I have to say now is that the provisions of the lease have not been violated so as to forfeit the lease *ipso facto*.

I want to call the attention of counsel to what seems to me to be an error in regard to the rights assumed as growing out of these suits. I have already said that the right of re-entry and forfeiture, in regard to the terms of the lease, is a right which the courts at common law dealt with very rigidly and strictly, while a court of equity very often sets aside and restores the parties to their former position, and refuses compensation for any damage done. There is, however, a different mode of proceeding to declare the lease forfeited. When either party, lessor or lessee, claims that acts have been done which render the continuing of the relation no longer proper, such party can go into a court of equity, on general principles, and ask to have that lease set aside, canceled, and annulled. In that case the court of equity sits holding the scales of justice evenly between the parties, and may say that it believes that such acts have been done by the lessee, for instance, as ought to terminate the agreement, or that he shall account by compensation and by payment of damages. And the court will declare the agreement at an end, and set aside, and annulled, and will make such orders as seem proper and right. So a party might bring an action for ejectment or for forcible entry and detainer, and these questions might be submitted to a jury and the rights of the parties determined. But in this case the railway company has gone with a high hand and asserted its rights with a strong power. And the question, and only question, to be considered here is whether it was justified. They did not bring an action in which the question of the pool might be considered, but they have simply stated certain reasons why they entered,—why they exercised this power of re-entry; and they ask that their action be approved,

and their possession quieted. Now, as to this question of pool, whether there is any reason in it, or whether it amounts to anything, is not for me to say in this case. It is not a defense for their having taken forcible possession of this property.

The result of these views is that the prayer of plaintiff's bill, asking that the railway company be restrained from tearing down and removing the elevator, will be granted, and the temporary injunction will be made perpetual. A declaration will be made that there is not sufficient ground for the railway company to exercise the right of re-entry. And the bill of the railway company will be dismissed.

WEST PORTLAND HOMESTEAD ASS'N *v.* LOWNSDALE, Assignee.

(*District Court, D. Oregon.* July 20, 1883.)

1. PLEA IN EQUITY.
   A plea of the statute of limitations to a bill in equity is a pure plea, and need not be accompanied by an answer, unless the defense is anticipated by the bill, and some equitable circumstance is alleged therein for the purpose of avoiding the statute.
2. LIMITATION IN SECTION 5057 OF THE REVISED STATUTES.
   On September 6, 1871, G. and wife conveyed block 67 in Carter's addition to Portland to C., and on August 11, 1875, conveyed the same to the West P. H. A., and on February 19, 1878, L. was appointed the assignee in bankruptcy of C., and on March 27, 1883, was about to sell said block as said assignee, when said West P. H. A. brought suit against said assignee to enjoin said sale, alleging that the conveyance to C. was a mistake. *Held* that, under section 5057 of the Revised Statutes, the suit was barred by lapse of time, unless the mistake was not discovered until within two years next before the commencement of the suit, which did not appear to be the case.

Suit in Equity for Injunction.

C. P. Heald, for plaintiff.

George H. Williams, for defendant.

DEADY, J. On March 27, 1883, the plaintiff, a corporation formed and existing under the laws of Oregon, brought this suit to have the defendant, as the assignee in bankruptcy of Charles M. Carter, perpetually enjoined from selling block 67 in Carter's addition to Portland.

The case was heard on a plea in bar to the bill, founded on the limitation contained in section 2 of the bankrupt act, (section 5057, Rev. St.,) which provides that—

"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 facts stated in the bill necessary to an understanding of the case are briefly these:

On and prior to September 6, 1871, Joseph S. Smith, Charles M. Carter, T. J. Carter, and L. F. Grover were the owners in common of the unsold portion of the north-east quarter of the donation claim of Thomas and Minerva Carter, situated in township 1 S., range 1 W. of the Wallamet meridian, and bounded on the south by the east and west subdivision line of section 4, in the township aforesaid; and, as such owners, on or before October 1, 1871, caused the same to be surveyed and platted into blocks, lots, and streets, by numbers and names, as Carter's addition to Portland, and divided the same between themselves by deeds of partition, designating therein, according to said plat, the lots and blocks allotted to each; that in the deed so executed to Charles M. Carter there is described block 67, "in Carter's addition," whereas at the date of such deed there was no such block in said addition, the designation of the same therein being a mistake, and without consideration between the parties thereto; that in October, 1871, said L. F. Grover and Elizabeth, his wife, caused to be surveyed and platted into blocks, lots, and streets, by numbers and names, a certain tract of land, owned in severalty by said Elizabeth, and adjoining the first-mentioned tract on the south as a part of said Carter's addition, one of which blocks is said block 67; that afterwards said Grover and wife, in conjunction with the other parties to said partition, executed a general plat of both said surveys and plats of Carter's addition, and acknowledged the same, which was recorded on November 4, 1871; that on August 11, 1875, said Grover and wife, for a valuable consideration, duly conveyed to the plaintiff said block 67; that at the date of such conveyance, and prior to the one to Charles M. Carter, said Grover and wife were in the exclusive possession of the said block and paid the taxes thereon, and the plaintiff since the conveyance to it has been and is now in the exclusive possession of the same, and has paid the taxes thereon; and the said Charles M. Carter was never in the possession of the same or paid any taxes thereon, "but was ignorant that said mistaken designation was in his deed."

The bill also alleges that the plaintiff purchased the premises in good faith, and that no creditor of said Carter was deceived by the fact; that said block 67 was included in said deed to him, and that the defendant, as assignee aforesaid, now claims to be the owner of the same, and as such is about to sell it at public auction.

On the argument the point was made that this was not a pure plea, and therefore it ought to be supported by an answer. Where the matter of the plea is anticipated by the bill as a release, but circumstances are also alleged that may avoid its effect, as that it was obtained by fraud or mistake, the plea is not a pure one. In such cases the plea must deny the circumstances, and be supported by an answer making a discovery touching the same. Story, Eq. Pl. §§ 674, 675. A pure plea is founded on new matter, not apparent on the face of the bill, or it is limited to a denial of some allegation therein, which goes to the foundation of the suit—as the fact of partnership. Story, Eq. Pl. §§ 660, 668.

The material facts contained in the plea appear on the face of the bill, except the recording of the deed aforesaid to Charles M. Carter on September 20, 1871, and the date—February 19, 1878—of the defendant's appointment as assignee in bankruptcy of said Carter; and if these two facts had been stated in the bill, the defense might have been made by demurrer.

The right to maintain a suit to correct the alleged mistake in the conveyance to Carter was not barred by the law of the state at the date of the appointment of the defendant as his assignee in bankruptcy, and therefore the qualification of section 5057, *supra*, that it shall not have the effect to "revive a right of action barred at the time when an assignee is appointed," has no application to the case. But I do not perceive that any attempt is made in the bill to anticipate this defense of lapse of time and avoid it, and therefore it seems to be a case for a pure plea of the statute—a simple statement of facts which show that the right to maintain this suit is barred because it was not brought within two years from the time it accrued.

The allegation concerning the possession of the premises in the mean time is not pertinent to this matter, as the right to maintain this suit is not affected by that fact, whatever weight it might have as evidence upon the question of mistake. If the plaintiff is in the possession of the premises, and the defendant's right thereto is barred by the adverse occupation of the former and those under whom it claims, it may avail itself of that fact as a defense when the defendant or his grantee seeks to recover that possession. So with the allegations of good faith on the part of the plaintiff, and the creditors of Carter not being deceived: they in no way excuse the delay in bringing this suit, or tend to avoid the bar of the statute. Neither is the allegation of Carter's ignorance of the fact that block 67 was included in the conveyance to him material in this connection. But if it had been alleged that the plaintiff was ignorant of the mistake, and did not discover it or become aware of it until within two years next before the commencement of this suit, that would be a circumstance sufficient to avoid the apparent bar of the statute, and to require an answer from the defendant in support of this plea, and a denial of the same therein; for in case of fraud or mistake a court of equity does not allow the statute to run until the discovery thereof. Story, Eq. Pl. § 1521*a*. And this rule has now been incorporated into the statutes of many of the states, including Oregon, (Code Civil Proc. § 378;) and in *Bailey* v. *Glover*, 21 Wall. 347, was applied to this very statute by the supreme court in a case of fraud, and by a parity of reasoning and authority would doubtless be similarly construed in a case of mistake. See, also, *Nicholas* v. *Murray*, 5 Sawy. 324; *Carr* v. *Hilton*, 1 Curt. 390. Counsel for the plaintiff also contends that the right to maintain this suit against the assignee did not accrue until the defendant set up a verbal claim to the property by advertising it for sale in March last, as the assignee in bankruptcy of Carter, and therefore the statute has not run.

But this view of the statute cannot be maintained. The deed to Carter vested the legal title to the premises in him, and the conveyance by the register in bankruptcy to the defendant passed the same to the latter. Under the subsequent conveyance by Grover and wife to the plaintiff, the latter only took what was then left in its grantor,

—the equitable estate, with the right to maintain a suit to correct the mistake and acquire the legal title. This, if anything, was certainly an "adverse interest," touching property subsequently vested in the assignee, and the plaintiff was thereafter "a person claiming an adverse interest" in such property. The right to maintain this suit against Carter accrued to the plaintiff as soon as it succeeded to the rights of Grover and wife in the property, and it accrued, as against his assignee in bankruptcy, as soon as the latter was appointed. The two-years' limitation then began to run, and had expired before this suit was commenced.

There are two absolute conveyances to this property from the same parties, and as only one can stand and have effect according to its purport, they are necessarily in conflict from the date of their existence, and the parties claiming under them are therefore claiming adversely to each other. This point was practically decided in *Bailey* v. *Glover*, *supra*, 346, in which the assignee brought a suit more than three years after his appointment, to set aside certain fraudulent conveyances made by the bankrupt just before filing his petition in bankruptcy. In delivering the opinion of the court, Mr. Justice MILLER says:

"Counsel for the appellant argues that the provision of the second section of the bankrupt act has no application to the present case, because it is not shown that the defendants have set up or *asserted any claim* to the property now sought to be recovered, *adverse* to that of the assignee. It is rather difficult to see what is meant by this proposition. The suit is brought to be relieved from some supposed claim of right or interest in the property on the part of the defendants. If no such claim exists, it does not stand in the way of complainant, and he does not need the aid of a court of equity to set it aside. If it is intended to argue that until some one asserts, in words, that he claims a right to property transferred to the assignee by virtue of the act, which is adverse to the bankrupt, the statute does not begin to run, though such person is in possession of the property, acting as owner, and admitting no other title to it, we think the construction of the proviso entirely too narrow."

True, there is no claim that Carter or the assignee was ever in the possession of the premises, and the contrary is alleged in the bill. But ever since September 20, 1871, the duly-recorded deed of Grover and wife, under whom the plaintiff claims by a conveyance of August 11, 1875, has, in contemplation of law, given notice and been a claim to all the world that Carter, and the defendant, as his successor in interest, had an interest in the premises adverse to any claim inconsistent with such deed. See, also, *Freelander* v. *Holloman*, 9 N. B. R. 331.

The plea is sufficient.

STROUSS and others *v.* WABASH, ST. L. & P. RY. CO.

(*Circuit Court, N. D. Ohio, W. D.* June Term, 1883.)

1. CARRIER OF PASSENGERS — LIABILITY FOR MERCHANDISE CARRIED AS BAGGAGE.
   A carrier of passengers is liable as a common carrier for the ordinary baggage of passengers upon its trains, but it is not liable for loss or injury to packages of merchandise, passed as baggage, unless its agent having control of the receipt of the baggage was informed or knew what was contained therein, and no misrepresentation was made by the owner to the agent having charge of the business of checking the baggage.
2. SAME—LIABILITY FOR EXTRA BAGGAGE—DELIVERY.
   A railroad company is liable as a common carrier to the owners of extra baggage, where it is shown that the baggage-master accepted it with the knowledge, and with the understanding and arrangement between the passenger and himself, as the agent of the company, that extra pay should be made for the transportation thereof, and if he receive the extra baggage, gives his checks therefor, upon payment of the extra charge, the company will be liable as a common carrier to deliver the trunks at the place designated by the checks or contract of carriage, and is responsible for any injury occurring to the baggage in its transportation, and before its delivery at the place where it was to be delivered.
3. SAME — IMPLIED AUTHORITY OF BAGGAGE-MASTER — ACT OF GOD — LOSS OF BAGGAGE.
   Where a railroad company place a baggage-master in its baggage-room it holds out to the public that he has authority to make arrangements as to what sort of baggage shall be carried by the company, and a contract to carry extra baggage upon the payment of an extra charge made by him will be binding on the company, and it can only be excused from the safe delivery of such baggage by showing that it was lost by some act of God, or the public enemy, which could not be prevented by the exercise of proper care on its part.
4. SAME—SUDDEN FLOOD—QUESTION FOR JURY.
   A sudden and extraordinary flood in a river is to be regarded as the act of God; and in an action by the owner of baggage for damage caused thereby, the jury are to determine, from all the circumstances of the case, whether, after the baggage- master of the railroad company received and checked such baggage the flood came so suddenly that, under the circumstances, the injury could not have reasonably been prevented by the company or its agents by the use of all possible means; and if they find that it could have been done with the exercise of reasonable and proper and all possible means that could be exercised and used by its agents, it was bound to place such baggage in a place of safety and prevent damage to the goods, and the owner is entitled to recover.
5. SAME—PRESERVATION OF GOODS AFTER DELIVERY TO CARRIER.
   After goods are delivered to a carrier to be transported to a particular place, they are in the custody of the carrier, and it is the duty of the carrier to preserve them from damage by reason of a sudden flood, as far as is in his power, and not the duty of the owner thereof.
6. SAME—MEASURE OF DAMAGES.
   The measure of damages in such a case is the loss which the owner of the goods has sustained by the breach of the contract. The jury are to judge of the value of the goods, and where a part of them have been sold, whatever was realized from such sale is to be deducted from the general value thereof, and the balance would be the measure of damages.

At Law.

Mr. Hubbard, for plaintiffs.

John R. Osborn, for defendant.

WELKER, J., (*charging jury.*) The plaintiffs were clothing merchants in the city of Rochester, New York, and one of their firm—Mr. Isaac J. Beir—was in the city of Toledo, on the eleventh day of February, 1881, with three trunks, such as are usually carried by commercial travelers, filled with goods in their line,—with clothing belonging to plaintiffs,—and Beir desired to go as a passenger on the passenger train of the defendant, to start that night at 12:05, from Toledo to the town of Napoleon, on the railroad of the defendant, and take with him, as baggage, the three trunks. He left the Boody House shortly after 10 o'clock in the evening, on the omnibus of the Toledo Transfer Company, with his three trunks, and went to the depot of the defendant, where the trunks were placed by the agent of the Transit Line, on the truck of the defendant, and placed by him in the baggage-room of the defendant at the depot. Shortly afterwards, Beir, having purchased a ticket for Napoleon, went into the baggage-room and asked the baggage-master to check the three trunks to Napoleon, informing him they weighed some 600 pounds more than was allowed as baggage, whereupon the baggage-master charged him two dollars and forty cents extra for the trunks, which he then paid him, and the baggage-master gave him three checks for the trunks, in the usual way. Beir then soon after went on to the passenger train of the defendant to await its starting for Napoleon. While Beir was in the baggage-room of defendant the water began to cover the floor of the room, and the baggage-master left the trunks in the room on the trucks, and carried Beir on his back to a higher point near the ticket-office, where he left him, and did not return for the trunks to put them in the baggage-car, but, soon after, left the depot in the United States mail wagon on account of the high water. Soon after, the water came in and submerged the trunks, and the depot and the railroad tracks, so that the train did not leave that night, and Beir was taken from the train in a boat. By morning there was some six feet of water in the depot, wetting the goods in the trunks and doing great damage to them.

Plaintiffs sue to recover the loss of the goods contained in the trunks, on the ground that the defendant did not deliver the trunks at Napoleon according to its contract as a common carrier, and was also guilty of negligence and carelessness in not placing the trunks in a safe place, and in not taking proper care of them as common carriers, by reason of which the goods were damaged and injured. This carelessness and negligence are denied, and it is claimed by defendant that the injury was occasioned by a sudden and unexpected flood of the river, being the act of God, and which the defendant could not foresee or provide against.

The defendant, being a carrier of passengers, is liable as a common carrier for the ordinary baggage of the passengers upon its trains. As carrier of passengers, defendant was not liable for loss or injury to packages of merchandise, packed as baggage, unless its agent

having the control of the receipt of the baggage was informed or knew what was contained in the trunks, and no misrepresentation made by the owner to the agent having charge of the business of checking the baggage on that occasion. The company is liable as a common carrier to the owners of extra baggage where it is shown that the baggage-master accepted it with the knowledge, and with the understanding and arrangement between the passenger and himself, as the agent of the company, that extra payment should be made for the transportation thereof. If he took, under such an arrangement as that was, the three trunks, and gave his checks for them, then it made such a contract between the railroad company and the plaintiffs in this suit, for the breach of which an action might lie in favor of the plaintiffs for injuries sustained to the goods. If the baggage-master had knowledge of the character of these trunks, that they contained merchandise, and contained other matters than the personal baggage of the plaintiffs, or this member of the firm of the plaintiffs, then if he charged for the extra baggage and accepted it as such, it makes the company liable as common carriers to deliver the trunks at the place designated by the checks or contract for carriage between the plaintiffs and the railroad company, and it would be responsible for any injury which would occur to this baggage in its transportation and before its delivery at the place where it was to be delivered. The railroad company, having placed the baggage-master in its baggage-room, holds out to the public that he has authority to make arrangements as to what sort of baggage shall be carried by the railroad company, and having given him the direction and the control and the management of these articles of freight, he, in the eye of the law,—so far as the outside public is concerned,—would be authorized and have authority to make such contract as is claimed by the plaintiffs in this suit that this baggage-master did make, and to bind the company in that respect. So that, although these trunks were not filled with the ordinary baggage of the passenger, if he accepted them as merchandise and took extra pay for them, and gave a check indicating their receipt on behalf of the railroad company, that would be such a contract as would authorize plaintiffs to bring suit in case it was broken.

As soon as the baggage-master in the room accepted the extra pay and gave his checks to Beir, the trunks passed into the possession of the defendant, and at that time the relation of common carrier between the plaintiffs and the defendant railroad company was created, and the responsibilities and rights growing out of that relation, attached thereto. Now, by the implied contract resulting from this relation of common carrier of these goods,—(and it does not matter very much whether they were shipped as mere baggage or as merchandise, if they were accepted by the baggage agent without any misrepresentation or fraud on behalf of the plaintiffs, or member of their firm; it makes but very little difference as to their liability

whether they were to be shipped as merchandise, or as trunks of bag gage,—the same liability is upon the company, as a common carrier of merchandise, as is incumbent upon the company as a common carrier of passengers,)—by the implied contract the defendant undertook to carry this baggage to Napoleon. The defendant can only be excused from the safe delivery of these trunks by showing that the baggage was lost by the act of God or the public enemy, and which could not be prevented by the exercise of proper care on its part. A sudden and extraordinary flood in the river is to be regarded by you as the act of God. The fact of the rumors of flood up the river, and the indications of a rise of the water, in the Exchange-room and about the city of Toledo for two or three days before, does not have much bearing upon this case, because, until the baggage of the plaintiff went to the depot and the trunks were checked, this railroad company owed them no duty. There was no contract between them which required the defendant to know whether there was going to be a great flood or a small freshet. That does not enter into the character of this contract; but when these trunks were delivered there, then there was created a relation, and a duty incumbent upon this railroad company to transport these trunks according to contract.

You will take the parties, then, as they were at the time when this contract was made, and you will measure the rights of the plaintiffs and the liabilities of the defendant from that time forward; so that although, as a matter of fact, the rumors were afloat around the city, (and it may be that in another class of cases this railroad company and its officers were bound to take notice of an impending flood and take care of property intrusted to their care in other relations as well as common carrier; it may be they were required to use such means as would protect the property before the flood came on, but that would only be in cases where it had the property of the party in posession before that time, and while that relation existed between plaintiff and defendant;) but this relation was created so late in the evening that you must take the parties at that time, and judge of their rights and liabilities in that connection.

In the first place, the defendant, at the late period when this contract was made, could not change its depot grounds and property—could not make them any more secure against the impending flood. Immediately after the receipt of these goods the defendant was bound, in its relation of common carrier, to exercise certain care and duties connected with these trunks, and that duty consisted in taking care of them, and preventing them from being damaged by the flood that had then commenced to come into the depot.

You will see, then, from the statements of these general principles, that the important question for you to settle from the evidence is whether, after these trunks were received by the baggage-master and checked, the flood came so suddenly that, under the circumstances, the injury could not have reasonably been prevented by the defend-

ant, or its agents in charge of the trunks, by the use of all possible means. If it could have been done with the exercise of reasonable and proper and all possible means that could be exercised and used by these officers, then the defendant was bound to place the trunks in a place of safety and prevent damage to the goods in the trunks. If, under the circumstances, it could not have been so reasonably and possibly done,—with the surroundings of the parties at that time, from the impending flood,—the sudden character of the flood,—if they could not take care of the goods under these circumstances, then you will be justifiable in saying that they were injured by the act of God; but the theory of that is that the company must use every possible means to prevent the flood from damaging the goods. The general rule is that if goods in the hands of a common carrier are damaged by the public enemy,—as in case of the army destroying goods at a depot in the late war,—then the law says the common carrier is not to be held responsible for the loss of the goods. And so of sudden floods and cyclones, that render it beyond the power of the company to take care of the goods and protect them. And this question narrows itself down to the fact as to what care this defendant gave, under the circumstances, to these goods that night, in order to save them from injury, and what it did do. If, by the exercise of the means within its control, with all the surroundings as the depot was fixed, (the plaintiffs put their trunks there in the depot as it was constructed,) and you could not expect the railroad company to make any extraordinary provisions such as were only required on extraordinary occasions, but it would be required to use all the machinery it had around it to make this baggage secure, —its officers did all that was possible to be done under the circumstances, then it is not liable; if they did not do that, then it is liable to this plaintiff for the damages resulting from its failure to carry these goods safely to Napoleon, and is only to be excused from the performance of this contract by the happening of an act of Providence that they could not avoid. Apply the evidence to that point and that will settle the liability of this railroad company. Do not bother yourselves very much about these general rumors, because, at the time these rumors were on the street, this contract did not exist between these parties; no relation existed between them.

Something has been said in regard to the duty of the plaintiffs after the flood was over. It is claimed by the defendant that Col. Andrews, the general agent, said to the plaintiff, "Go and get your trunks down at the depot and take care of them yourself." And it is said by the plaintiffs that they offered to give Col. Andrews the keys, so that he might have the trunks opened and save what he could. It seems that the goods where left in there longer than they ought to have been on account of the misunderstanding between the parties. I direct you that this common carrier was to take the goods and carry them to Napoleon, and notwithstanding Col. Andrews said the plain-

tiffs must go and take care of the goods, their failure to do so does not relieve the railroad company for the injury sustained by the delay. The railroad company could have opened out these goods and taken care of them, for the reason that it was the custodian of them; they were in its possession for transportation and delivery at Napoleon, and it could not compel the plaintiffs to take the goods until they were delivered at Napoleon, and if it let them get damaged by remaining longer in the water, it did it at the risk of having to pay more damages than if it had taken them out earlier after the flood. It was the duty of the railroad company, if it wanted to relieve itself from liability, to have taken these goods out as early as possible, and to save as many as it could. It was not the duty of the plaintiffs to take charge of them. They were locked up in the baggage-room, and plaintiffs had no business to take possession of them, and could not. The burden is upon the railroad company to show that it could not, under the circumstances, comply with the contract by reason of the great flood. If it has succeeded in satisfying you that it could not perform this contract, that will relieve it from liability for injuries to these goods; if it has not done so, then plaintiffs are entitled to the damages sustained to the goods. If you find that the defendant did discharge its duty, your verdict will be for the defendant. If you find otherwise, you will proceed to determine the amount of the injury which the plaintiffs have sustained by reason of the failure to perform this contract on behalf of the railroad company. The measure of recovery is the loss which the parties sustained by the breach of the contract. The rule is to restore to them whatever damages they have sustained. You are to judge of the value of the goods. A part of the goods were sold; whatever was realized from the sale of the goods is to be deducted from the general value thereof, and the measure of damages would be the balance after deducting the amount realized from the total damages sustained by reason of the goods having been wet.

Verdict for the plaintiffs, and motion for new trial overruled.

SCHÉU *v.* GRAND LODGE, OHIO DIVISION, INDEPENDENT FORESTERS.

(*Circuit Court, N. D. Ohio, E. D.* April Term, 1883.)

BENEFICIAL SOCIETY—SUIT TO RECOVER BENEFIT—SUSPENDING MEMBER—FAILURE TO PAY DUES.

S. was a member of a subordinate lodge of defendant, and thereby, by the constitution and by-laws, became a member of the grand lodge. The death assessments were required to be collected by the subordinate lodge and forwarded to the grand lodge, the subordinate lodge being compelled to account for these assessments and pay them to the grand lodge, unless the member had

been expelled or suspended. The assessment of S. was paid by the subordinate lodge to the grand lodge, but at the time of his death had not been paid by him to the subordinate lodge. The by-laws provided that "any member failing to pay his assessment within 30 days should be suspended," and that notice should be given to the grand secretary of the grand lodge. On the death of S. his widow brought suit for the amount due him from the grand lodge. *Held*, that the mere non-payment of the assessment did not of itself operate as a suspension, and that the act of the secretary in marking S.'s account as "suspended" was not sufficient, as such suspension must be made by some affirmative act of the lodge, and by payment of the assessment for him to the grand lodge it had waived his suspension, and as the grand lodge received the assessment a recovery could be had in a suit against it.

Tried to the court and finding for the plaintiff, and motion for new trial.

Mr. Wilcox, for plaintiff.

Henderson & Kline, for defendant.

WELKER, J. The plaintiff is the wife and heir at law of Albert Scheu, who died on the second day of April, 1880. The intestate, on the sixteenth day of December, 1879, became a member of Sahbele Lodge, a subordinate lodge of the defendant, and thereby, by the constitution and by-laws, became a member of the defendant lodge. The suit is to recover the sum of $1,000, provided by the by-laws to be paid the widow or heirs of a member on his death. The defendant claims that Scheu, at the time of his death, was not such a member of the subordinate or grand lodge as entitled his widow to recover said amount, having before that time been suspended by the subordinate lodge for non-payment of assessment. It appeared in the evidence that before the death of the intestate an assessment of one dollar had been made on all the members of the defendant lodge, for the purpose of paying the amount which any member's representatives should be entitled to receive on his death, being what is termed in the by-laws "the widows and orphan's benefit fund." This death assessment was required to be collected by the subordinate lodge, and immediately forwarded to the treasurer of the grand lodge. The subordinate lodge was required to account for these assessments and pay to the grand lodge the amount so assessed, unless members thus assessed had been expelled or suspended by the subordinate lodge, and so not members of the grand lodge. The intestate had not paid the death assessment so made upon him before his death; but the subordinate lodge had paid it to the grand lodge; and as to the defendant, the grand lodge, the assessment had been paid before his death. The evidence showed that on the books of the subordinate lodge, where accounts of dues and assessments were kept, black lines were drawn around the intestate's account, and marked "suspended" for non-payment of assessment. When that was done by the officer in charge of the books was left uncertain. There was no record of the subordinate lodge, showing any action of the lodge in reference to the suspension or expulsion of the intestate, besides what appears as before stated. No report was made or notice given to the grand lodge of

suspension of the intestate for such non-payment. In the by-laws of the lodge it is provided that "any member failing to pay such assessment within 30 days shall be suspended from his lodge." And it is also provided that notice of such suspension shall be at once given to the grand secretary of the grand lodge. It also appears that the intestate, after the time for the payment of the assesssment had elapsed, had notice that he was in arrears, by objection in open lodge to his taking part in the business before it on account of the non-payment of the assessment.

If the intestate was in fact suspended by the subordinate lodge for this non-payment of the assessment at the time of his death, the plaintiff is not entitled to recover. The mere non-payment of the assessment does not of itself operate as such suspension; nor does the clerical act of the secretary in so marking the account make such suspension. The suspension must be made by some affirmative action of the lodge, and no such action appears to have been taken by the subordinate lodge. Such suspension may be waived by the lodge either expressly, or by failure to act. And it may itself advance the payment to the grand lodge, which appears to have been the fact in this case. The defendant lodge, which is alone liable to pay the plaintiff, had in fact received the amount of the assessment, and thereby had been paid the consideration for its obligation to pay said sum on the death of the intestate.

The motion is, therefore, overruled, and judgment for the plaintiff.

California Dry-Dock Co. *v.* Armstrong and others.

(Circuit Court, D. California. February 12, 1883.)

1. General Rule of Damages.

   The general rule is that no damages can be recovered until they shall have actually accrued; and that an action cannot be maintained on a mere liability to a third party to which a plaintiff has been subjected by the act of the defendant. The plaintiff, in such a case, must allege and prove that he has incurred actual damage, by showing the payment or other satisfaction of such liability.

2. Liability of Stranger Committing Waste.

   A stranger committing waste upon premises leased, or held by a particular estate, is liable to the tenant for the injury to the possession, and to the landlord, or reversioner, for the injury to the freehold or inheritance. The right of each is distinct from that of the other, and satisfaction made to the one is no bar to an action brought by the other.

3. Liability of Tenant for Waste, and his Rights against Trespasser.

   The tenant is answerable to the landlord, or reversioner, for waste done by a stranger. He has his remedy over against the stranger, but the tenant's recovery against the stranger for injuries to the freehold, or reversion, is dependent on his first having satisfied the landlord's claim by payment, or repair of the injured premises; and, in such case, the stranger is liable only for the payment, or expense necessarily incurred.

   Wood v. *Griffin*, 46 N. H. 231, approved and followed.

4. EFFECT OF EXPRESS UPON IMPLIED COVENANTS IN A LEASE.
Where the parties to a lease of real property have expressly covenanted to repair, it seems that the express covenant takes the place of the implied covenant, and becomes the measure of the tenant's liability.

5. RIGHT OF TENANT AGAINST TRESPASSER WHERE TENANT HAS COVENANTED TO REPAIR.
It being admitted that in a case in which the tenant has expressly covenanted to repair, such tenant has a right to maintain an action against a stranger committing waste, for injuries done to the freehold, *held*, that such right of action does not accrue in favor of a tenant until he has paid or satisfied his landlord, or repaired the premises.

6. COMPLAINT FAILING TO STATE SATISFACTION OR REPAIRS MADE, IS DEMURRABLE.
A complaint setting forth the fact of a lease containing a covenant by the tenant to repair, and an injury to the freehold by a trespasser, (defendant in the action,) and further alleging that, by reason of the tortious act of the trespasser, the tenant (plaintiff in the action) has become, and is, absolutely liable and indebted to the landlord for the damages resulting from the trespass, viz., the necessary cost of repair, but which fails to aver that the landlord's claim has been satisfied, or that any expenditures in repair have been made by the tenant, does not state facts sufficient to constitute a cause of action.

At Law.

Wallace, Greathouse & Blanding, for plaintiff.

Andros & Page, for defendant.

SAWYER, J. The plaintiff alleges in the first count that it was the lessee for a term of years of certain real estate, partly covered with water, upon which there was situated a marine railway, extending into the water; that during the term of said lease, and while the plaintiff was in the possession of the premises under the lease, the ship Alneburgh, of which the defendants were, at the time, owners, negligently ran upon, and came into collision with, said marine railway, and broke down and destroyed it; that by the terms of said lease "it was expressly covenanted and agreed by and between plaintiff, as lessee, and the lessors," that plaintiff would, at the expiration of the term of said lease, to-wit, on the tenth day of November, 1880, quit and surrender said premises, and every portion thereof, to the said lessors in as good state and condition as reasonable use and wear thereof would permit, (damages by the elements excepted,) and that plaintiff, under and by virtue of said agreement and covenant contained in said lease, became and was, on said ninth day of November, 1879, and ever since, continuously, has been, and now is, absolutely liable and indebted to the said lessors for the whole value of said marine railway so constructed upon said premises at the commencement of said lease, and for the whole amount of the damages resulting from the breaking down and the destruction of the same, as aforesaid, being the necessary cost and expenses of putting the said marine railway in as good state and condition, as it was in on the said thirteenth day of November, 1875, reasonable use and wear thereof excepted; that the necessary cost of putting said marine railway in such repair as is required by the plaintiff's said covenant

would be $12,000, and that plaintiff has thereby been damaged and injured to said amount, for which sum judgment is asked.

There is another count for injuries to the plaintiff's possession, not embracing the damages to the inheritance. Defendant demurs to the first count on the ground that it does not appear that plaintiff has made the repairs, or made satisfaction to the lessors under his covenant for the damages to the freehold; that a mere liability to repair, without first satisfying the liability, gives no ground of action for an injury to the reversionary estate of the lessors; that he is not injured, and sustains no real damages till he actually repairs, or makes satisfaction; that as he may never perform this covenant, the injury and damages may never arise, and that there is no right of action till actual damage and injury arise. There are two estates injured here: the temporary estate of the lessee, continuing during his term, and the permanent estate of the lessors, the inheritance,—an injury to the possession and an injury to the land itself; and the owner of each estate has his action against the stranger who commits the wrong or waste, each for the particular injury done to his particular estate. Under the common law the action for the injury done to the lessee's estate would have been trespass, and that to the lessor's, case. 2 Washb. Real Prop. 393; Tayl. Landl. & Ten. § 173; *Starr* v. *Jackson*, 11 Mass. 521.

CHAMBER, J., in *Attersoll* v. *Stevens*, 1 Taunt. 194, says:

"Where different persons have distinct rights in the subject of a trespass, the compensation must be to each in proportion to the injury received. One of them cannot claim that part of the compensation which belongs to the other; *nor can the satisfaction made to one be a bar to an action brought by the other.* It can hardly be necessary to cite cases on this point."

If the tenant is entitled to recover for injury to the estate of the reversioner, it is on the ground of his liability to the landlord to repair. It is admitted that the tenant is entitled to recover in such case, when he is under obligation to repair, provided he has in fact repaired, or made satisfaction to the landlord; and the question now is, whether, although liable, he can recover before he has repaired, or made satisfaction. Strange as it may seem, counsel have been able to find but one case in which this exact point has arisen and been decided, and that is *Wood* v. *Griffin*, 46 N. H. 231. This case bears abundant evidence of having been most thoroughly and carefully considered, and the reasoning appears to me to be unanswerable. It presented the precise question which was fully considered and determined, and the judgment was reversed on that point alone. The action was trespass, brought by the tenant for life for waste committed by felling and carrying away timber trees. I cannot do better than quote some passages from the decision. Says the court:

"The question is whether the plaintiffs are entitled to include in their damages the full value of the wood and timber, upon the ground that they

are liable over to the remainder-men or reversioner; or whether they are limited to damages for the injury to their possessory interest.

"There can be no controversy that the cutting of the wood and timber, by a tenant for life, or a stranger, for the purposes indicated in the case, is waste, (*Miles* v. *Miles*, 32 N. H. 147; *Dennett* v. *Dennett*, 43 N. H. 499;) and it seems to be equally clear that the tenants are liable to the person having the immediate remainder or reversion for such waste, whether committed by themselves or a stranger, or by a part of such tenants only. 4 Kent. Comm. *77, 85; *Cook* v. *Champlain Transp. Co.* 1 Denio, 104; *Attersoll* v. *Stevens*, 1 Taunt. 200; Com. Dig. 517, tit. 'Waste,' *c.* 4; Cruise, Dig. tit. 18, *c.* 1, §§ 63, 20, 54; Washb. Real Prop. 116. * * *

"It may also be considered as established, that, while the tenant is answerable to the remainder-man, or reversioner, for waste done by a stranger, such stranger is liable over to the tenant. 4 Kent, Comm. *77, 85; 2 Saund. 259, and cases cited.

"The precise question, then, is whether, in an action of trespass *quare clausum fregit* by the tenant against a stranger, he can recover damages for the injury to his possession, and also for the injury to the inheritance, without there having been any recovery against him by the remainder-man, or reversioner, or any satisfaction made by him in any form. * * *

"It is clear, from the adjudged cases, that the claims of the tenant and reversioner can be separated; that they are in fact distinct, and that each may maintain a suit for the injury done to him; and that both may be pending at the same time. How, then, can the tenant include in his damages the injury to the reversion? If he can in any case, how is the defendant to avail himself of the fact that another action is pending by him in remainder or reversion?

"Again, there is no necessity for arming the tenant with such power. If he is entitled to recover for the injury to the inheritance, whether he has satisfied the reversioner or not, his recovery must be a bar to a suit by the landlord; and still the trespasser might avail himself, by way of defense, of a license, or admission by the tenant, which might, in effect, defeat the landlord's claim against such trespasser; and besides, the landlord might find his claim against the trespasser defeated by the result of a suit prosecuted without his assent, in a manner opposed to his wishes, or by his *inability to obtain from the tenant himself the fruits of the suit against such third person.*

"The fact that the tenant is answerable for the injury does not, we think, furnish an adequate reason for sanctioning such doctrines. Where waste is committed by cutting down timber trees by a stranger, the property in them at once passes to the landlord, and he may take them, or maintain trover for them; and there surely can be no propriety in holding that the tenant also could have the same remedy, *for he has no property whatever in them.*

"*If the tenant has been compelled to satisfy the landlord for the injury by a third person, he may have his remedy over; but, until then, we think he must be confined to damages for the injury to the possession.*"

After distinguishing cases of personal property in the hands of others than the owner, the court says:

"But beyond this, *the authorities*, so far as we have any, *are opposed to the claim of the tenant to recover damages for an injury to the inheritance, until he has first satisfied the landlord;* and there is nothing in the state of the law in respect to suits by agents, carriers, and others in possession of goods, that would induce us to extend it to a case like the present. We think, therefore, that *on this ground the verdict must be set aside, unless* plaintiff will reduce the amount of the verdict to nominal damages."

In my judgment, also, the tenant cannot recover before repairing, or satisfying the landlord, for the reason that, till then, his cause of action on this ground has not matured. He has sustained no injury till he has done something by way of repairs, or towards satisfying the landlord for the injury to the inheritance. He may never do either, and he certainly ought not to recover unless he does one or the other. A recovery by an irresponsible tenant may wholly defeat the remedy of the landlord. The tenant ought not to recover any more than he pays in satisfaction, or necessarily expends in repairs; and if he has in fact repaired, or made satisfaction, he cannot recover more. Should he be unnecessarily extravagant in either, he might recover less. He may compromise at one-half or one-fourth the amount claimed. The extent of the liability should, in some mode, be fixed before he is permitted to maintain a suit. Generally, in the law relating to other matters, where a cause of action arises out of a liability incurred by reason of one's relation to another, the action cannot be maintained until payment, or satisfaction, of the liability; and I can perceive no good reasons for making a distinction in favor of the tenant in a case of this kind.

Thus, in *Willson* v. *McEvoy*, 25 Cal. 169, it was held, in an action for the breach of an injunction bond, that an attorney's fee, for which plaintiff became liable in resisting the injunction, could not be recovered without having been first paid by the plaintiff. The court observes: "The rule of the common law was, that on a bond to indemnify against the damage the obligee might sustain, he could recover only upon evidence that he had sustained actual damage; that compensation would only be awarded for actual loss. Evidence showing that he was subject to a liability, without showing payment, was not enough;" citing several authorities. This was affirmed in *Prader* v. *Grimm*, 28 Cal. 11, and extended to the expenses of procuring testimony. Also affirmed in subsequent cases. So, without actual payment of the debt, although the liability of the surety has attached, he cannot recover against the principal. *Hayes* v. *Josephi*, 26 Cal. 543. So, also, where an indemnity bond is given to a sheriff to save him harmless from any damages resulting from any trespass he may commit in executing a writ of replevin or attachment, he cannot recover on the bond, notwithstanding the fact that his liability has been *established by a judgment against him*, recovered for the damages resulting from the trespass, unless he has also in fact paid the judgment so recovered. *Lott* v. *Mitchell*, 32 Cal. 24. In this case the condition of the bond was very broad and should authorize a recovery, if any covenant could do so, short of providing in express terms that a recovery may be had upon incurring the liability before satisfaction. The condition is as follows: That the obligors "should well and truly keep and bear harmless and indemnify the said W. O. Middleton, sheriff, as aforesaid, of and from any and all damages, costs, suits, judgments, and executions, that shall or may at any time arise, come,

or be brought against him by reason of the detention of said property, or the delivery thereof to the plaintiff."

The same was held on an indemnity to the sheriff upon the levy of an attachment in *Roussin* v. *Stewart*, 33 Cal. 211, 212. In *De Costa* v. *Mass. Min. Co.* 17 Cal. 616, it was held that "the plaintiff could not recover beyond the injury sustained, and it *was improper to award compensation for an expense which might never be incurred.*" This was an action for a nuisance, in digging a ditch on plaintiff's land, and the estimated cost of filling the ditch had been allowed as damages. So, in *Burt* v. *Dewey*, 40 N. Y. 285, it was held that a liability established by a *judgment against a party cannot afford a ground of action until paid*, as it may never be enforced. The liability sued on in this case rests on the express covenant to repair set out in the complaint, and not upon the common-law liability to repair, and the injury done by the negligence of the defendant. As there is an express covenant, I suppose that it is the measure of the liability, the parties having fixed the extent of the obligation on this point by the terms of the contract. At all events, that is the liability alleged in the complaint. So, also, in the several cases cited upon covenants in bonds, the injuries provided against in some of them are trespasses. Yet in *Roussin* v. *Stewart*, 33 Cal. 212, the court says: "There is nothing in the point that the indemnity is against a trespass." And the same is held in *Stark* v. *Raney*, 18 Cal. 622, where the trespass is not malicious. I see no good reason why these authorities, and numerous others of a similar character, should not be applicable to this case, as to when the right to recover damages attaches.

Whether the liability in this case to repair rests upon the express covenant set out upon implied covenants, or upon principles of public policy, which hold the tenant responsible for a violation of duty to his landlord in failing to protect the freehold, while in his possession as tenant, in my judgment, both upon reason and authority, no recovery can be had until the tenant has made repairs, or made satisfaction to the landlord. It is argued that if this rule be adopted, then the tenant may never be able to recover, as he may not be able to agree with his landlord as to the amount to be paid, and he may not be able, for want of means, either to repair or make satisfaction. If this be so, his damages will never accrue, and he certainly ought not to recover. That is the very question presented. Clearly, the general rule in all matters is that damages cannot be recovered until they have actually accrued, and I can find no possible good ground for applying a different rule to cases of this kind.

It only remains to notice the authorities relied on by the plaintiff, apparently with great confidence. No one of them either presents or decides the exact point. In those relating to real estate, whatever is said bearing upon the precise point is *obiter*, thrown out in the course of the argument by the judge without being called for by the case as presented in the report. The observations in each case are

general remarks, which, considered with reference to the facts before the court, are not inconsistant with the views already expressed, but are mere statements of the general rule as to the liability to the tenant. The first and apparently the strongest case is *Cook* v. *Champlain Transp. Co.* 1 Denio, 92. In this case the question whether the tenant was entitled to recover upon his liability to repair *without* first repairing, or making satisfaction to his landlord, was not *raised by counsel, or discussed or even alluded to by the court.* It does not appear whether the tenant had repaired or not. He may have done so, or have made satisfaction,—probably had repaired; and as there was no question on that point, it was unnecessary to incumber the record by stating facts not necessary to illustrate the points actually made and determined. If the plaintiff had not, in fact, repaired, the case is entitled to little weight as authority, because no point was made upon it; and the distinction not being brought to the attention of the court,—as often happens in judicial opinions,—the point was assumed without considering the question. The statement by the judge that the plaintiff, in consequence of his liability to repair, was entitled to recover the whole value of the buildings, was but the statement of the general rule upon the subject, and is correct, and as specific a statement of the rule as was called for by the points made. The general rule is stated just as specifically and positively in *Wood* v. *Griffin*, 46 N. H. 238. After stating that the tenant is liable to the remainder-man for waste committed by a stranger, the court adds: "It may also be considered as established, that, while the tenant is answerable to the remainder-man or reversioner for *waste done by a stranger, such stranger is liable over to the tenant.*" And for these propositions the court cites, among others, this very case of *Cook* v. *Champlain Transp. Co.* Yet the court, subsequently, considered the precise question now in hand, and reversed the judgment on that point. It evidently did not consider *Cook* v. *Champlain Transp. Co.* opposed to its view in that particular, or as deciding that point; for, although cited as authority upon the general rule, it was not even referred to as bearing upon the question whether the tenant must repair, or make satisfaction, before he can recover for the waste or injury to the freehold. There is another ground upon which the plaintiff was entitled to recover in that case. He was actually the owner of the buildings and machinery destroyed—of the machinery *absolutely*, and of the buildings till the expiration of the term. He erected them himself upon the leased premises for his own purposes, and without any original obligation to do so. They were not there when he took the premises, and, having himself erected them, he was under no obligation to re-erect them when destroyed, at common law. He was only liable on his express covenant, which was that the buildings he should put upon the premises should "*revert to and become* the property of the parties of the first part [the lessors] *whenever by the terms of his indenture they shall come into possession of*

the premises." Until the premises should come into the possession of the lessors, therefore, the buildings remained the property of the tenant, the plaintiff in the case, and he was entitled to recover their value as owner.

So, also, in the case of *Walter* v. *Post*, 4 Abb. Pr. 382, the question is not raised by counsel, or discussed by the court. Certain instructions were asked, and refused, not presenting the point now involved; and the judge passed upon them as presented; and these were not even asked upon the idea of liability of the tenant to the reversioner, but upon an entirely different theory, and they were disposed of upon that theory. The judge afterwards remarks: "Had it appeared, however, that by the terms of the tenancy the plaintiff was bound to repair, * * *" then the "defendant was *liable* to make good all the injury caused by the trespasses, and enable the plaintiff to put the building in as good condition as it was when the trespass was committed." This is but a general statement of the general rule, and is a *dictum* made wholly outside the case. He does not say that the tenant could recover without first repairing, or making satisfaction to the landlord; but, on the contrary, in referring to the defects in the complaint, he distinctly intimates the contrary opinion. He says: "There is not only no averment that the plaintiff was bound to repair, but *it is not even stated that he was put to any expense in repairing, or that he made any repairs;*" as though this averment, at least, was necessary. In effect he says "that this essential fact is *not even stated*," and suggests that when the case goes back this complaint can be amended in this particular. This case, therefore, so far as it is authority at all, is against the plaintiff on this proposition.

Rood v. *New York & E. R. Co.* 18 Barb. 80, does not present the question at all. It is the case of a purchaser of land in possession under his contract of purchase; Rood, the plaintiff, having purchased of Maples and gone into possession, and the action being to recover the value of wood and fences on the land burned up through the negligence of defendant. He was the equitable owner of the land under his contract; and it was very properly held that "the vendee in possession, being the equitable owner of the estate from the time of the contract for sale, must bear any loss which may happen to the estate between the agreement of purchase and the conveyance. * * * The loss in question is, therefore, the loss of plaintiff, and not of Maples." Pages 83, 84. The case of *Gourdier* v. *Cormack*, 2 E. D. Smith, 202, does not present the question. There is a loose remark on a hypothetical case, that assumes the general rule as to the right to recover in a proper way where there is a liability to repair; but there is nothing touching the question now under consideration. All the other cases relate to the taking and conversion of chattels, which depend upon different principles, and have no relation to the question now presented.

Where one wrongfully takes from the possession of another any article of personal property, the party from whom it is taken can, undoubtedly, recover the possession, or the value of the property, without reference to the question as to who really owns the goods. The title will not even be inquired into, unless the defendant connects himself with it. It is enough that one has wrongfully taken goods from the possession of another. He must return them, or respond to the extent of their value. So, in this state, from its first organization, a party who has been dispossessed of land by a party having no title, can recover that possession on his mere possessory title and ouster, and the wrong-doer will not be permitted to show an outstanding title, without connecting himself with it. These cases have no bearing upon the question now in issue, but depend upon other considerations. In *Wood* v. *Griffin*, already cited, the court says:

"This case is unlike the case of goods in the hands of carriers, factors, wharfingers, and other agents, who are responsible for them to their principals, because of the *different rules that apply to lands and goods.* In the case of lands in the possession of a tenant, *his interest and the interest of the landlord are distinctly marked and easily separated; and for injuries to either, there are appropriate and distinct remedies, while as to goods there is, in general, no such distinction; and such is the effect given by the law to the fact of possession, that either trespass or trover may be maintained against one who wrongfully deprives another of such possession, without any injury to the ultimate title.* But beyond this, the authorities, so far as we have any, *are opposed to the claim of the tenant to recover damages for an injury to the inheritance until he has first satisfied the landlord;* and there is nothing in the state of the law in respect to such agents, carriers, *and others* in the possession of goods, that would induce us to extend it to a case like this." Id. 240.

I am satisfied that the plaintiff cannot recover for injuries set out in the first count until he has either repaired, or made satisfaction to the lessors.

The demurrer must be sustained as to the first count, and overruled as to the second, which is for injuries to the estate of the tenant; and it is so ordered.

Ross *v.* Fuller, Collector, etc.

(Circuit Court, N. D. Ohio, W. D. June Term, 1883.)

1. Customs Duties—Erroneous Classification of Importations—Action to Recover Excess.

In an action to recover the excess of duty charged for the importation of certain iron which was classified by the collector of the port of importation as "axles," instead of "hammered iron," whether such classified iron was proper is a question of fact, to be tried by a jury, and if the jury have any doubts as to whether or not such iron was properly classified and charged for as "axles," they should give the plaintiff the benefit of such doubt, and find a verdict for him.

2. SAME—BURDEN OF PROOF—PLAINTIFF TO HAVE BENEFIT OF DOUBT.
In such a case, as in all other civil cases, the case is to be decided by a preponderance of proof. The burden of proof to show that the articles were dutiable is on the government; and the government, by a fair preponderance of proof, must establish what they claim in that regard.
3. SAME—DEGREE OF PROOF.
If the articles were in fact "axles," such as named in the statute, less proof would be required to show that they were understood to be so in commercial transactions; but if they were not *in fact* "axles," greater evidence would be required to show that they were understood to be axles in the commerce and trade of the country, and so recognized.
4. SAME—NAMES OF IMPORTATIONS IN TARIFF LAWS—CONSTRUCTION.
The names given to the different articles in the tariff laws are to be understood and construed to mean what they were understood to mean in the commerce and trade of the country, and among those engaged in trade and commerce at the time of the passage of the acts, and as recognized by the customs department at the same time, and not at periods since the passage of the law.
5. SAME—HOW RECOGNIZED IN COMMERCE.
The commercial character of importations does not depend upon the mere fact that they were or were not *finished axles*, but whether they were understood and recognized in commerce and the business of trade as axles, by those engaged in such trade, at the time of the passage of the law.
6. SAME—MEASURE OF DAMAGES.
If the jury find for the plaintiff they should render a verdict in his favor for the difference between the rates of duty charged and the proper charge, with interest from the time the sum of money was paid until the first day of the term at which the case is tried.

At Law.

Storck & Shuman, for plaintiff.

E. H. Eggleston, U. S. Dist. Atty., for defendant.

WELKER, J., (*charging jury.*) The plaintiff, being a dealer in all sorts of iron at the city of Chicago, imported from Liverpool to the city of Toledo, to fill a contract with a car-manufacturing company of Lafayette, Indiana, 1,000 pieces of iron, formed in a shape and size to be used as car axles, in the manufacture of railroad cars by the car company. They were called in the shipment "iron forgings for axles." When they arrived at the port of Toledo the collector required him to pay the duty provided by law to be charged upon "axles," being $2\frac{1}{2}$ cents per pound. The plaintiff claimed he was only to be charged the duty required to be paid on bars of "rolled or hammered iron," being but $1\frac{1}{4}$ cents per pound. The plaintiff paid the collector, under protest, the sum of $2\frac{1}{2}$ cents per pound, and this suit is to recover from the defendant, under the provisions of the statute, the difference between these rates of duty; being the sum of $3,677.10, and interest thereon from the different times at which the sums were paid.

The statutes of the United States, (section 2504, in Schedule E,) after describing various forms of iron manufactures, and fixing the duty on each class, provides that on "all other descriptions of rolled or hammered iron, not otherwise provided for, one cent and one-fourth per pound." Afterwards, and in another part of the section, after also describing various forms of iron manufactures, provides

that on "blacksmiths' hammers and sledges, axles and parts thereof, and malleable iron in castings not otherwise provided for, two and one-half cents per pound."

In this suit the plaintiff claims that he should have been charged with only 1¼ cents per pound, and that the articles should have been classed and rated as "hammered iron," under the statute; and the defendant claims that he was to be charged the duty provided upon "axles," and should be rated under that provision of the law.

The question for you to determine from the evidence is, to which of these classes of importations the articles imported by the plaintiff belong. Were they axles within the meaning of the law, or were they only bars of "hammered iron?" This is a question of fact that you must settle from the evidence you have heard on the trial of this case. Much of the evidence consists of that of experts engaged in making and trading in iron and manufactures of iron in various forms. This evidence is to be considered by you. Its weight and reliability always depend very much on the capacity and knowledge of the witness as an expert,—his experience and means of enabling him to form opinions upon the subject about which he may testify.

Our tariff laws undertake to regulate our commerce with foreign countries by fixing rates and duties upon some articles of trade used in commerce, and placing others upon what is called the "free list," and it is intended by them to name and cover all articles that may enter into our commercial trade, either on the duty list or on the free list. The names given to different articles in these laws are to be understood and construed to mean what they were understood to mean in the commerce and trade of the country, and among those engaged in trade and commerce at the time of the passage of the acts, and as recognized by the customs department at the same time, and not at periods since the passage of the law. The commercial character of these importations does not depend upon the mere fact that they were or were not finished "axles," fit to be used without any other labor upon them in the construction of railroad cars; but whether they were understood and recognized in commerce and the business of trade as "axles" by those engaged in such trade at the time of the passage of the law. If they were in fact "axles," such as named in the statute, then less evidence would be required to show that they were so understood in the trade. If not in fact such axles, then greater evidence should be required to show that they were so understood to be "axles" in the trade of the country, and so recognized in such trade.

Now, gentlemen, if under the whole evidence there be doubts as to the construction of the statute as to the character of the articles imported, it is your duty to give to the importer, the plaintiff in this case, the benefit of those doubts. So that the evidence ought to satisfy you, by a fair preponderance of proof, that these articles were properly scaled and scheduled in the charging of duties; but if you are not so satisfied, the presumption should be in favor of this plaintiff,—

in favor of this claim. If you find that the articles imported were axles under the law, as I have stated, then your verdict should be for the defendant. If, taking these general principles, from a fair examination of the evidence you are satisfied that they were properly classified by the custom-house officers as axles, then your verdict should be in favor of the defendant, because then the collector had properly charged the duty. If you find from the evidence that they were not properly classed, then they would come under the class of "hammered iron," and your verdict should be for the plaintiff for the amount of the difference between the rates of duty before stated, with interest thereon from the time the sum of money was paid. I believe the sums were paid in two different installments. The petition states the amount. You will count interest on the amount to the first day of the present term of court.

Verdict for defendant. Motion for new trial overruled, and exceptions taken by plaintiff to the charge of the court, and refusal to instruct as requested by the plaintiff.

UNITED STATES v. SEIDENBERG and others.[1]

(Circuit Court, S. D. Florida. May, 1883.)

1. CUSTOMS DUTIES—RELIQUIDATION.
   A reweighing of goods made by the collector and the regular weighers, at which a difference from the original weights in favor of the government was found, but of which no notice or order was given, and no record made, was not a reliquidation of the duties on said goods. See article 361 of the Treasury Regulations.
2. SAME—SECTION 21 OF ACT OF JUNE 22, 1874, (18 ST. 190,)—REV. ST. §§ 2785-2790.
   The entry alluded to in section 21 of the act of congress approved twenty-second June, 1874, (18 St. 190,) is the original entry provided for, regulated, and defined by sections 2785 to 2790, inclusive, of the Revised Statutes.

On Writ of Error.

This was an action of debt in the district court, on five warehouse bonds, for the balance of duties alleged to be due the United States on tobacco imported by defendants. On two of the bonds there is no contest.

(1) On the eighth of October, 1877, 589 bales of tobacco were imported and entered for warehouse, the tobacco weighed, and bond No. 399 executed. Withdrawals of bales of tobacco covered by this bond were made in October, November, December, 1877; January, February, March, June, and July, 1878; and the duties paid on each with-

[1] Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

drawal according to weights ascertained October 8, 1877, the date of bond.

(2) On the twentieth of October, 1877, 184 bales were imported and entered for warehouse, and on the twenty-seventh of October, 1877, the tobacco was weighed and bond 402 executed. Withdrawals were made in October and November, 1877, and January, February, March, May, June, July, October, and December, 1878, and the duties paid on each withdrawal, according to weights, October 22, 1877.

(3) On the twenty-ninth of October, 1877, 71 bales of tobacco were imported and entered for warehouse, the tobacco was weighed, bond 403 executed, withdrawals were made October and November, 1877, January, March, May, June, and July, 1878, and the duties paid on each withdrawal according to weights ascertained October 29, 1877.

On the fourth day of May, 1878, there being in the bonded warehouse 34 bales covered by bond 399, 24 bales covered by bond 402, and 16 bales covered by bond 403, certain inspectors, the collector of customs, and the regular weighers, reweighed 19 bales—10 of 399, 3 of 402, and 6 of 403—of this tobacco, and found there was a difference in favor of the government, and estimated that on the whole of the tobacco covered by three bonds, between the tare originally allowed (at the date of entry for warehouse) and that found on reweighing, May 4, 1878, there was a difference of 1,812 pounds in favor of the government, the duties on which amounted to $634.20. No record was made. Subsequently the remainder of the tobacco was all withdrawn, and the duties paid according to first weights, and the collector made no demand for the additional duties until a reliquidation was ordered by the secretary of the treasury, January 9, 1879, and on the twelfth of April, 1879, this suit was brought to recover the amount claimed.

The defendants pleaded payment of duties on original weights and delivery, and that no demand had been made for additional duties within one year from the date of entry.

On the trial of the case the following charges to the jury were requested:

(1) If the jury find from the evidence that if, at the time the balance of duties was found to be due the United States as alleged, all the merchandise covered by the bonds sued on had not been delivered to the agent, owner, or consignee, and all the duties had not been paid, they must find for the plaintiff; (2) that if the collector failed to properly enter up the duties, as found due May 4, 1878, the plaintiff should not be prejudiced thereby, for the government is not responsible for the laches of its officers; (3) that if the jury find from the evidence that the amounts claimed have not been paid, they must find for the plaintiff in the full amount claimed on each bond, with interest at 6 per cent. from May 4, 1878.

Which said instructions were refused by the court, and the following instruction was given:

"The only question is whether one year had elapsed from the date of entry contemplated by section 21, act of June 22, 1874, and the time of the

final determination or liquidation of duties upon which this suit is brought; and if whether, within that year, all the goods entered under bonds 399, 402, and 403 had been delivered to the importer, and the duties determined within that year had been paid.

"I instruct you that the dates of the entries contemplated in this case were the dates of original entry for warehousing, and the date of such subsequent liquidation, upon which this suit is brought, was the date of reliquidation by the collector, January 16, 1879. The time elapsing had been more than a year, and the goods had all been delivered, and the duties determined at that time paid.

"You will, therefore, not find for the plaintiff on the first three bonds; but as to the amounts due on the other two bonds, viz., 422 and 424, there has been no contest. You are, therefore, instructed to find for the plaintiff in the amount of $477.05, claimed to be due on bonds 422 and 424, with interest at 6 per cent. per annum from January 16, 1879."

To which refusals to instruct, and to the instruction as given, exceptions were taken, and the case comes up on the correctness of the court's rulings.

G. B. Patterson, U. S. Atty., for plaintiff in error.

Bethel & Allen, for defendants in error.

PARDEE, C. J. Two questions are presented for answer:

(1) Was the reweighing of the tobacco, (remaining in the warehouse under the three bonds,) of date May 4, 1878, a reliquidation of the duties on the whole importation? (2) In this case, when did the year of limitation provided by section 21 of the act of congress, approved June 22, 1874, begin to run?

1. The proceedings on the fourth of May, 1878, amounted to no more than an investigation. There was no notice, no order, no record. See Treas. Reg. art. 361. The government was not bound by it, the collector did not act upon it, and that such proceedings were had is now shown, not by the collector's books, but by his personal recollection. On the back of each bond a reliquidation is indorsed, but that is of date January 16, 1879, and there is no reference there to May 4, 1878.

That the collector did not consider it a reliquidation appears conclusively from the fact that he made no record, as required by the treasury regulations, and he permitted the remaining goods to be withdrawn on the payment of duties as fixed by the original liquidation.

That the treasury department considered it nothing more than an investigation, appears from the order of January 7, 1878, directing a reliquidation.

So far as a liquidation is determined by the law, it is the decision by the collector of the amount of duties, charges, and exactions required to be paid on the merchandise. See Rev. St. §§ 2931, 2932.

As shown by the record, the collector made no such decision in this case on May 4, 1878, nor at any time subsequent to the original liquidation, until January 16, 1879.

2. Section 21 of the act of congress approved June 22, 1874, (18 St. at Large, 190,) reads:

"That whenever any goods, wares, and merchandise shall have been entered and passed free of duty, and whenever duties upon any imported goods, wares, and merchandise shall have been liquidated and paid, and such goods, wares, and merchandise shall have been delivered to the owner, importer, agent, or consignee, such entry and passage free of duty, and such settlement of duties, shall, after the expiration of one year from *the time of entry*, in the absence of fraud, and in the absence of protest by the owner, importer, agent, or consignee, be final and conclusive upon all parties."

What *entry* is intended in the foregoing section? An examination of all the statutes in relation to the importation, warehousing, appraising of, and the collection of, duties upon goods, wares, and merchandise shows only one entry required or referred to. That entry is the original entry provided for, regulated, and defined by sections 2785 to 2790, inclusive, of the Revised Statutes. That entry is undoubtedly the one referred to in the section aforesaid. A construction of all the statutes on the subject, or of the particular section, points conclusively to such an entry as being the one from which the year's limitation provided shall commence to run. No other entry can be found as referred to, unless we go outside of the statutes.

The treasury regulations speak of entries for warehouse, entries for withdrawal, and other entries, and Mr. Justice STRONG, in *Westray* v. *U. S.* 18 Wall. 322, speaks of "entry for warehouse" and "withdrawal entry." The entry for warehouse is the original entry, but the term "entry for withdrawal" is a misnomer. There may be an application for permission to withdraw goods already entered, which is called in the treasury regulations the "entry for withdrawal," which has certain requisites as to form, and it may be for withdrawal, for consumption, transportation in bond, or exportation; but certainly no such application can be the *entry* meant in the statute. And I see no good reason for arguing that any other than the original entry of goods was intended by the law.

A full year, in the absence of fraud or protest, is given to ascertain the amount of duties. The time is ample, the opportunities are ample, for the government has possession of all goods in warehouse, and if the government is to be limited at all in the time within which duties may be reliquidated, the term allowed by the statute from the original entry is sufficient. But be that as it may, if the intention was to allow the government to reliquidate at any time while any of the goods remained in the warehouse, and for one year thereafter, congress should have so enacted; but, as I read the statute, the time allowed is only one year from the date of the original entry.

It is, therefore, my decision that there was no error in the charges and refusal to charge of the court on the trial of the case in the court below, and that the jury were properly directed.

The judgment of the lower court will, therefore, be affirmed.

BALFOUR and others *v.* SULLIVAN, Collector.

(*Circuit Court, D. California.* April 16, 1883.)

1. DUTIES—SHRINKAGE IN WEIGHT.
   Where a cargo of coke, imported from Wales, by reason of evaporation of the moisture contained in it during the voyage, weighed several tons less than when shipped, *held*, that duties could only be legally collected on the actual weight at the time of the importation, and not on the weight shown by the invoice.

2. REGULATION OF THE SECRETARY OF THE TREASURY.
   A regulation of the secretary of the treasury, that duties shall be collected according to the invoice, unless the importer accounts, by proofs, for the discrepancy between the amount shown by the invoice and the actual weight at the time of importation, is no defense to an action to recover the duties exacted from the importer on the difference between the amount actually imported and the amount shown by the invoice to have been shipped.

At Law.

Charles Page, for plaintiffs.

Mr. Teare, U. S. Atty., for defendant.

SAWYER, J. The plaintiffs, Balfour, Guthrie & Co., in January, 1882, imported into San Francisco, from Cardiff, Wales, a cargo of coke, which, upon its arrival and entry, was duly examined and weighed by the proper custom-house officers, and was found, and so reported, to actually weigh one thousand and ninety-nine tons, four centals, two quarters, and twenty-six pounds. The weight, as set forth in the invoice which accompanied the importation, was one thousand one hundred and forty-six tons and sixteen centals. The amount of duties payable on the weight shown by the invoice is one thousand one hundred and thirty dollars and fifty cents; while that payable according to the actual weight is one thousand and eighty-five dollars and fifty-nine cents,—making a difference of forty-four dollars and ninety-one cents. The collector demanded and collected the amount due according to the weight shown by the invoice, instead of the actual weight, which sum was paid by plaintiffs under protest, in order to obtain possession of the coke. The importers appealed to the secretary of the treasury, who affirmed the action of the collector; and this action is brought to recover the excess of forty-four dollars and ninety-one cents, so collected, on the ground that duties could only be legally collected upon the weight of the coke actually imported. Coke is a porous substance, subject to change in condition by increase of weight in a moist, and decrease in a dry, atmosphere. Article 532 of the regulations of the treasury department, adopted in 1874, is as follows:

"No allowance will be made in the estimate of duties for lost or missing articles or packages appearing on the invoice, unless shown, by proof satisfactory to the collector and naval officers, not to have been originally laden on board, or to have been lost or destroyed, by accident, during the voyage."

The proofs required by the foregoing regulation were not made by plaintiffs, they insisting that no proofs were requisite under the law other than the amount of coke actually imported into the United States.

The case does not appear to fall within the language of the regulation. There were no "articles or packages appearing on the invoice lost or missing," nor was it claimed that there were. The coke shown by the invoice was all "originally laden on the vessel," and none of it was lost or destroyed by accident during the voyage. So it was impossible to make the required proof, had it been necessary. Yet the whole amount of weight was not in fact imported. The diminution in weight is believed to have resulted from evaporation of moisture in the coke. In *Marriott* v. *Brune*, 9 How. 619, a case of importation of sugar which had lost largely in weight by drainage, the duties on the invoice weight were collected; but the supreme court held that duties could only be collected on the weight actually received. Says the court:

"The general principle applicable to such a case would seem to be that revenue should be collected only from the quantity or weight which arrives here; that is, what is *imported*, for nothing is imported till it comes within the limits of a port. * * * As to imports, they therefore can cover nothing which is not actually brought into our limits. That is the whole amount which is entered at the custom-house; that is all which goes into the consumption of the country; that, and that alone, is what comes in competition with our domestic manufactures; and we are unable to see any principle of public policy which requires the words of the act of congress to be extended so as to embrace more. * * * A deduction must be made from the quantity shipped abroad, whenever it does not all reach the United States, or we shall, in truth, assess here what does not exist here. The collection of revenue on an article not existing, and never coming into the country, would be an anomaly, a mere fiction of law, and is not to be countenanced where not expressed in acts of congress, nor required to enforce just right.

"It is also the quantity actually received here by which alone the importer is benefited. It is all he can sell again to customers. It is all he can consume. It is all he can re-export for drawback." 9 How. 632; affirmed in *U. S.* v. *Southmayd*, Id. 646.

The same rule was upheld in regard to brandy, in *Lawrence* v. *Caswell*, 13 How. 488. So the weight of tea, as actually imported, was adopted as the proper basis for collecting duties, in *U. S.* v. *Nash*, 4 Cliff. 107. See, also, *Schuchardt* v. *Lawrence*, 3 Blatchf. 397.

But if the case is within the terms of the regulation, it is difficult to see where the secretary obtains authority to require what the statute does not. It is not enough that it affirmatively appears what amount of goods is actually brought into the United States, without showing *why* more was not imported. As was well said by counsel, "the *cause*, and not the *fact of non-importation*, is made the ground of relief from the impost to the merchant."

Duties are levied under the statute, and the decision of the supreme court construing the statute upon the amount of goods act-

ually imported; and when it is shown what amount is in fact actually imported, the importer certainly cannot be required, by regulations of the secretary, to show affirmatively why he did not import more, as a condition of being relieved from paying duties upon goods which it appears he did not in fact import. Some express authority should be shown for establishing such a burdensome rule. In many cases it would, doubtless, be impossible for the importer to show affirmatively what had become of his goods; and if it appears that they have not been imported, that should be sufficient. At all events, independent of some act of congress to the contrary, if an importer, under such a rule, adopted for the convenience of the department, is compelled to pay duties, against *his protest*, on goods never imported, the rule cannot avail as a defense to an action to recover the money thus wrongfully exacted. The only statute cited as justifying the regulation is section 251, Rev. St., which provides that the secretary of the treasury "shall prescribe forms of entries, oaths, bonds, and other papers and rules and regulations not *inconsistent with law*, to be used under and in execution and enforcement of the various provisions of the internal revenue laws, or in carrying out the provisions of law relating to raising revenue from imports, or to duties on imports." This certainly does not authorize the collection of duties on goods not in fact imported, unless the importer of goods shows affirmatively why he did not import more. Nor does it authorize a regulation which shall prevent an importer from recovering moneys illegally exacted from him on goods never imported. To thus adopt a rule by which duties are collected on goods not imported, when, under the statute, only duties on goods in fact imported are authorized to be collected, would be to adopt a regulation "inconsistent with the law." Section 2921 of the Revised Statutes expressly provides that "if, on the opening of any package, a deficiency of any article shall be found on examination by the appraisers, the same shall be certified to the collector on the invoice, and an allowance for the same shall be made in estimating the duties;" and section 2920 provides for weighing and measuring when there is a deficiency. The importer is not required by the statute to show why there is a deficiency, or how it occurred, as a condition of not paying duties on more goods than he has actually imported. He is entitled under the statute to the exoneration upon the fact of deficiency appearing. Other penalties are provided by law for certain cases. See *Gray* v. *Lawrence*, 3 Blatchf. 117; *Lennig* v. *Maxwell*, Id. 126. No other statute authorizing such a rule or the exaction of the duties sued for has been brought to the notice of the court.

I think plaintiffs entitled to recover the amount claimed, and judgment will be entered accordingly.

GOLD & STOCK TELEGRAPH CO. *v.* WILEY.

(*Circuit Court, S. D. New York.* June 16, 1883.)

1. PATENT TELEGRAPHIC PRINTING INSTRUMENTS—INFRINGEMENT.
   The third claim of the reissued patent, No. 3,810, granted to plaintiff, as assignee of Edward A. Calahan, January 25, 1870, for an improvement in telegraphic printing instruments particularly designed for registering the prices of stocks, is infringed by machines made under the Wiley patent, No. 227,868, but those machines are not an infringement of the original patent granted to Henry Van Hoevenbergh, April 21, 1868.
2. SAME—REISSUE—JURISDICTION OF COMMISSIONER OF PATENTS.
   Power is conferred upon the commissioner of patents to cause the specification of a patent to be amended, on application for reissue, so as to fully describe and claim the very invention attempted to be secured by the original patent, and which was not fully secured thereby in consequence of inadvertence, accident, or mistake.
3. SAME—FORM OF PETITION.
   It is not indispensable that the petitioner, in his application for a reissue, should use the exact phraseology of the statute, if he employs language which actually conveys its legal meaning.

Dickerson & Dickerson, for plaintiff.
Charles N. Judson, for defendant.

SHIPMAN, J. This is a bill in equity, founded upon the alleged infringment by the defendant of reissued letters patent No. 3,810, granted January 25, 1870, to the plaintiff, as assignee of Edward A. Calahan, and of original letters patent granted July 27, 1871, to Henry Van Hoevenbergh, as inventor. The original Calahan patent was granted April 21, 1868. Each patent is for an improvement in telegraphic printing instruments particularly designed for registering the prices of stocks. The specification of the Calahan reissue describes the invention in general terms, as follows:

"It is often desired, particularly in large cities, to keep a correct record of various fluctuations in the price of gold, stocks, and articles of trade, and to have these fluctuations simultaneously and periodically denoted and registered at the various centers of business connected with one central transmitting station. This invention is intended to accomplish the said objects in a very reliable manner, and to dispense with the complicated mechanism heretofore made use of to cause an impression to be made when the type-wheel has been brought to a proper position. A magnet and armature are employed in effecting the movement of the type-wheel, so that the same is turned to the required position, and then, by an independent motion, separately controlled from that of the type-wheel, the impression is made, so that the type-wheel can remain after it is adjusted, or be again moved previous to the impression being made. The impression is made on a strip of paper by two type-wheels, so that the printing is in two lines, and the figures and fractions for denoting the prices or quotations are contained upon a wheel and combined therewith. Letters are provided for printing on the same strip of paper to denote the articles to which the quotations relate. As the different machines will generally be but a short distance apart, it is preferred to make use of two or more wires communicating through the entire circuit of machines. One of these wires transmits the pulsations of electricity that act upon a magnet and adjust the type-wheel to the proper letter or number. The other wire trans-

mits the pulsations of electricity, which, acting in a magnet, produce the impression upon the paper."

The third and only claim in controversy is as follows:

"(3) The combination of the type-wheels, *k* and *l*, magnets, *f* and *i*, with the magnet, *c*, and impression roller, *u*, or its equivalent, substantially as set forth."

This claim is precisely like the third claim of the original, except that in the original, after the words "substantially as," the words "and for the purposes" were inserted.

The petition of the plaintiff to the commissioner of patents for a reissue averred that the original patent was "not fully operative and valid by reason of a defective specification;" and in the affidavit attached to the petition the affiants made oath that they verily believed that, by reason of an insufficient or defective specification, "the aforesaid patent is not fully valid and available." The defendant says that in order to confer jurisdiction upon the commissioner to grant a reissue, the petition should have averred that the patent was inoperative or invalid, and there being no such averment the commissioner was without jurisdiction, and the reissue is void.

I do not understand that the supreme court has ever held that a reissue can only be granted when the original patent is completely inoperative or is entirely invalid; but, on the contrary, it has held that power is conferred to cause the specification to be amended "so as fully to describe and claim the very invention attempted to be secured by the original patent, and which was not fully secured thereby, in consequence of inadvertence, accident, or mistake." *Powder Co.* v. *Powder Works*, 98 U. S. 126; *Wilson* v. *Coon*, 18 Blatchf. 532; [S. C. 6 FED. REP. 611.] It is not indispensable that the petitioner should use the exact phraseology of the statute, if he employs language which actually conveys its legal meaning.

A reissued patent may be valid as to one claim and invalid as to others. In this case, the only claim in controversy is in substantially the same language with one of the original claims, and, so far as that claim and its subject-matter are concerned, the reissue is a substantial repetition of the original patent. Even if the petition had been technically defective in its allegations, I should not be inclined to hold that the reissue was therefore void as to an original claim which was repeated in the reissue.

The Calahan instrument, as used at the receiving station, is thus described by Mr. Brevoort, the plaintiff's expert. It—

"Consists essentially of two wheels, having respectively letters and figures upon their peripheries, which wheels are capable of independent motion. Each of the two wheels is independently controlled by a separate and independent electro-magnet. Under the wheels passes the strip of paper upon which the information from either one wheel or the other wheel is to be printed. This strip of paper is brought up into contact with the surface of

the type-wheels by being moved upward when it is desired to print by an independent electro-magnet. Thus, in the Calahan instrument, two type-wheels, printing on the same strip of paper, and three electro-magnets, are used, each one of which is operative from the central station by the appropriate device, which sends pulsations of electricity through the wires which connect the central station with the receiving instrument or instruments."

The third claim is for the combination of six elements: the type-wheel upon which are figures; the type-wheel upon which are letters; the electro-magnet operating the letter-wheel; the electro-magnet operating the number-wheel; the electro-magnet operating the impression-roller, so that impressions may be taken from either wheel; and the impression-roller.

The testimony for the plaintiff is to the effect that instruments made under the Wiley patent, No. 227,868, contain the invention specified in this claim.

One of the two experts who were introduced by the defendant said nothing in regard to the Calahan patent or its infringement. The other did not deny infringement, but thought that the Theiler (French) and the Johnson (English) patent, which was also for the Theiler invention, and which invention antedated Calahan's, contained the elements of his third claim: but the witness also testified that the Theiler patent does "not contain two independently moving type-wheels, each advanced by a magnet, independent of the magnet advancing the other type-wheel." The Theiler patent has but one electro-magnet, which moves and stops both type-wheels simultaneously, and neither wheel can be moved independently of the other.

The counsel for the defendant argued earnestly that there was no infringement, because, he insisted, the function of the magnets, *f* and *i*, in the Calahan patent, is entirely positive, *i. e.*, to act directly upon and move a type-wheel without extraneous aid; while the function of the defendant's magnets is entirely negative, *i. e.*, to prevent and regulate continuous extraneous motion imparted to the type-wheel by clock-work; and that these magnets were not, at the date of the Calahan patent, known to be proper substitutes for his magnets, and are not, therefore, equivalents therefor; and furthermore, that the Wiley machine is an improvement upon the Theiler machine, but in a different direction from the Calahan invention.

It is obvious that these various suggestions involve questions of fact, and that the defendant has no testimony, other than that appearing upon the face of the various patents and file-wrappers, upon which to support the theory of his counsel. These questions the patents alone will not settle. A court cannot deem itself called upon to examine elaborate theories upon abstruse scientific subjects, when the theories depend upon questions of fact, in regard to which there is an absence of testimony. In this case, it is to be noticed that the defendant's two experts have virtually declined to adopt his theory.

The conclusion is that infringement of the Calahan patent has not been disproved, and that the novelty of the third claim has not been successfully attacked.

The nature of the Van Hoevenbergh invention is stated in his specification as follows:

"Printing telegraphs have before been made with two type-wheels in line with each other, but revolved independently, so that one can be operative while the other remains quiescent. In machines of this character it is usual to stop one type-wheel when at the *nonius* or dash point, while the other is made use of; but sometimes a letter will be missed and the type-wheel will not properly print when again set going.

"My invention is made to set the type-wheels in their correct positions and consists in connecting latches or catches that are so positioned and operated that the type-wheel that is moved by the step-by-step motion keeps turning the type-wheel that would otherwise be quiescent until it is set, or arrives at the *nonius* or dash point. By this construction it becomes impossible for either type-wheel to remain out of unison while the other is being operated, because a movement given to either one brings the other to its proper place and there leaves it."

The single claim of the patent is—

"The method herein specified of causing one type-wheel to set the adjacent type-wheel by moving it around to the designated point, and there leaving the same, substantially as set forth."

As the mechanism of neither the Van Hoevenbergh nor the Wiley inventions can be understood by quotations from the patents, without an inspection of the drawings, and as the respective devices are described quite clearly and with accuracy in the testimony of the respective experts, I shall make use of their descriptions and omit the language of the specifications

Mr. Brevoort says:

"Van Hoevenbergh accomplishes this result [that of bringing the wheel that is not in use into unison, by the operation of the wheel that is being used to obtain impressions from] by having upon each wheel a prawl and arms, so arranged that the wheel which was not in unison will be moved around by the wheel which is being operated, and which is in unison, by the arm of one wheel interlocking with the arm of the adjacent wheel; and these arms will remain interlocked, and the two wheels will move together until the wheel which was out of unison has been moved into the correct position, when, by one of two stationary arms, the two wheels will cease to interlock with one another, and the wheel which was misplaced will be left in the proper and known position to be started into operation, where it will remain, never mind how long the adjacent wheel may be operated."

Mr. Hicks describes the mechanism of the Wiley device as follows: It contains—

"Two printing wheels, side by side, and arranged to print independently, to be moved independently, to stand normally at the dash point when not in motion, but the type-wheels are so independent that neither is affected by the other's motion while either of them is in motion. * * * The two type-wheels * * * are mounted on two shafts in line with each other, as in the Van Hoevenbergh patent, but with a bearing between them which would prevent

any mechanism of one from driving the other. * * * Each shaft is supplied with gears and a train of wheels, so that it is revolved by a weight or spring, after the manner of clock-work. Each shaft also is provided with an escapement wheel, *b*, into which an escapement engages, and the escapement is attached to the armature of a magnet, so that when the armature is attracted by the magnet one tooth of the escapement is let go, and when the attraction ceases another tooth is let go, thus moving the type-wheel by the clock-work whenever the magnet permits such motion. At each motion of the escapement a letter is presented to the paper for printing, excepting when the dash-point is above the paper. * * * Upon each shaft is a small circular disk attached to and moving with the shaft, and in the circumference of said disk is an insulating plug, extending a short distance on the circumference of the disk. The remaining portion of the disk is made of conducting material suitable for carrying a current of electricity, and the shaft is of a similar material. Now, by the operation of the escapement by means of the magnet, and a current of electricity thrown through its wire, the type-wheel is carried around to the dash point and stands there in its normal position. This is true of both wheels. If, however, by any accident the type-wheel should stand in an incorrect position when the opposite wheel begins to move, a current of electricity is caused to still continue to flow through a portion of the wire to the magnet which operates the incorrect wheel, and so said wheel continues to move towards its correct position until it arrives at that position, when the current ceases to flow and the magnet stops moving and the wheel stands still. The means for shifting the current of electricity, or preventing it from passing to the magnet continuously, is the insulated plug which I have referred to on the disk of the wheel, which, coming opposite the point of contact between the wire which carries a current normally through the disk thereby stops the flow of electricity."

The plaintiff insists—*First*, that the Van Hoevenbergh patent is for a process, and that, therefore, the causing one type-wheel, while it was being operated by a step-by-step movement, to set the adjacent type-wheel by moving it around by a step-by-step movement to the designated point, and there leaving the same, by whatever mechanism the process is used, is an infringement; and, *secondly*, that if the patent is not for a process, the defendant infringes by substituting for the mechanical means of Van Hoevenbergh the same mode of operation between the type-wheels by means of electricity.

I think that the question whether the patent is or is not for a process is immaterial, in view of the question whether the defendant does cause one type-wheel, by its step-by-step movement, to move the incorrect type-wheel around step by step to the designated or unison point and there leave it. The theory of the plaintiff is that the motion of the unison-wheel causes a current to flow through the magnet of the non-unison-wheel, and that the latter wheel is by the current advanced and continued in motion, and so the step-by-step movement of the unison-wheel is transmitted to the non-unison-wheel, until the latter "has reached the unison or dash point, when it will be arrested by a mechanism disconnecting the motion of its armature from the motion of the armature of the unison-wheel."

The theory of the defendant is that the motion of the correct wheel has nothing to do with setting the incorrect wheel at the dash-

point, "and its shaft has nothing to do in producing said result, except to furnish part of an electric circuit;" and further, that "each wheel has its own appliances for stopping the current to its magnet without aid from the other wheel, or its shaft, or its disk, excepting a means of electrical communication."

The correctness of the first part of this proposition is criticised by the plaintiff, and it is true, and is admitted by the defendant to be true, that the unison-wheel must move one step before it makes a complete electrical circuit with the non-unison-wheel and starts it. The circuit is not completed when the unison-wheel is at rest at the unison-point. The starting of the non-unison-wheel in consequence of the completion of the circuit is a different thing from setting the wheel at its dash-point, because it is not the motion of the unison-wheel which keeps up a continuous motion in the non-unison-wheel. The effect of one movement of the unison-wheel is to make a circuit, and by the power of the electrical current the other wheel is started; and so it may, in a certain sense, be proper to say that the movement of the unison-wheel is transmitted to the other wheel, but the motion of the unison-wheel does not keep the other wheel in motion. It is kept in motion because its magnet is continuously energized, and if the unison-wheel is stopped by the hand the electrical current is not affected, but continues, and the other wheel is carried to its unison-point.

In the Wiley machine the electrical current which operates, or is to operate, the unison-wheel is divided, and as soon as an electrical connection is formed by one movement of the unison-wheel and both magnets are energized, both type wheels are moved one step, and are continuously simultaneously moved, until the insulated point in the disk of the non-unison-wheel comes under the spring, when the magnet which moves that wheel is out of circuit, and that wheel stops and the motion of the other wheel continues. The electrical circuit which is formed with the shafts of the non-unison-wheel by the aid of one motion of the unison-wheel and of its shaft, is broken by means of the disconnecting apparatus, which depends upon the non-unison-wheel.

In my opinion, this mode of operation or method differs materially from one which consists in causing the type-wheel that is being moved to keep turning the other type-wheel to a designated point, and there leaving the same, although by a skillful use of words the two modes may be said to be the same. There is no infringement of the Van Hoevenbergh patent.

Let there be a decree for an injunction against the infringement of the third claim of the Calahan patent, and for an accounting, and dismissing the bill so far forth as the Van Hoevenbergh patent is concerned.

BRADLEY & HUBBARD MANUF'G CO. *v.* THE CHARLES PARKER CO.

(*Circuit Court, D. Connecticut.* July 17, 1883.)

1. PATENTS FOR INVENTIONS—INJUNCTION PENDENTE LITE—INFRINGEMENT.
An injunction *pendente lite*, to restrain a defendant from the infringement of a patent, will not be granted when the validity of such patent has never been judicially determined and is in doubt.
2. SAME.
The questions in regard to the validity of the plaintiff's patent, and which prevent a preliminary injunction, stated.

Motion for Preliminary Injunction.

Chas. E. Mitchell and *O. H. Platt*, for plaintiff.

Chas. R. Ingersoll, for defendant.

SHIPMAN, J. This is a motion for a preliminary injunction to restrain the defendant from the infringement, *pendente lite*, of reissued letters patent, dated April 20, 1877, to the plaintiff, as assignee of John A. Evarts, for an improvement in extension lamp fixtures. The original patent was dated October 31, 1876. The invention related to an improvement in the class of lamp fixtures which is so constructed that the lamp and shade, when suspended, can be drawn down together and will rest at different elevations. In the original specification the invention was said to consist "in a weighted ring, which forms substantially a crown for the shade when the two are together suspended by one end of chains or cords over pulleys from the support above, combined with a shade-holder attached to the second end of the said chains or cords, and the lamp attached to the said shade-holder." The claim in the original patent was as follows:

"The combination of the weight-ring, B, the shade-ring, A, to which the lamp and shade are attached; the said shade-ring and weight-ring adjustably connected by chains or cords from a support above the said weight-ring, constructed to rest upon or crown the shade, all substantially as described."

In the reissue the invention is said to consist in "combining in an extension lamp fixture a shade-ring provided with a device for removably securing the shade to the ring, with the lamp attached to said shade-ring, and a weight of ring form to serve as a counter-balance; the said ring-shaped weight and shade-ring connected by chains or cords over a suitable support above, so that the lamp and shade may be drawn down, the weight-ring rising from the shade-ring."

The first claim of the reissue is as follows:

"The combination, in an extension lamp fixture, of the shade-ring, a device for removably securing the shade to the ring, the lamp attached to said shade-ring, the ring-shaped weight and shade-ring, connected by chains or cords over a support above, substantially as described."

In the second claim the shade was added to the combination of the first claim. In view of the history of the original patent in the patent-office, and of the original specification, the claims of the reissue should be so construed as to compel the weight-ring to rest upon or

crown the shade, meaning thereby the shade-ring. No adjudication upon the patent has ever been had. The invention has had great commercial success, and I shall assume that the validity of the patent has been, in substance, acquiesced in from its date to the time of its infringement by the defendant, which has recently entered upon the manufacture of a substantial imitation of the Evarts fixture, to the serious injury of the plaintiff.

A temporary injunction must, therefore, be ordered, unless the defendant can show that, notwithstanding the acquiescence of the public, a fair and substantial question exists in regard to the validity of the patent, and that, therefore, it is proper that its validity should not be prejudged by an injunction order, although the defendant has been until recently a stranger to the lamp business, and is seriously injuring its neighbors by this new rivalry.

The main question which the defendant presents is that of patentability, in view of the state of the art. The tendency of late decisions of the supreme court is to the effect that this question is one which is to be examined with increased care. *Slawson* v. *Grand St., etc., R. Co.* 24 O. G. 99; [S. C. 2 Sup. Ct. Rep. 663;] *Atlantic Works* v. *Brady*, 23 O. G. 1330; [S. C. 2 Sup. Ct. Rep. 225.] The theory of the defendant, and the two questions which, it seems to me, are of sufficient importance to call for a stay of judgment until final hearing, may be stated as follows:

The Mitchell, Vance & Co. fixture, which preceded the Evarts invention, "employed a metal shade, to which the lamp-holder was riveted, so that it became a fixed and permanent part of the lamp-holder. The end of two chains was attached to this shade. The chains, passing over pulleys above, thence down, were attached to a ring-shaped weight, which would set down upon the top of the shade," the weight being of the same circumference with the shade-top. The construction was not adapted to a glass or removable shade. The actual invention of Evarts was the adaptation of this construction to the necessities of a porcelain shade, and consisted in the same arrangement of ring-shaped weight and chains in connection with the metallic rim which received the neck of the shade, and to which was directly attached the lamp-holder. The rim or ring of the shade was provided with a set-screw, so that the porcelain part of the shade could be disconnected from the rim for convenience in packing. The defendant says that this porcelain shade, with its metallic rim and lamp-holder directly attached thereto, was a well-known method of construction, and that when once the idea of a ring-shaped weight, of the same diameter with the top of the shade, suitably connected by chains with the shade-top, which was also firmly connected with the lamp-holder, was known, the method of adapting the invention to the necessities of porcelain shades was a matter of the common knowledge of a maker of lamp fixtures. *Atlantic Works* v. *Brady*, *supra*.

The second point is a more technical one, and is founded upon the principle which is thus stated in *Pickering* v. *McCullough*, 104 U. S. 310.

"In a patentable combination of old elements, all the constituents must so enter into it as that each qualifies every other. * * * It [the combination] must form either a new machine of a distinct character and function, or produce a result due to the joint and co-operating action of all the elements, and which is not the mere adding together of separate contributions."

The defendant says that the object of this improvement was so to construct a porcelain extension lamp fixture that the lamp and shade could together be raised or lowered at the will of the operator, and would remain in position at any desired point; that a device for removably securing the shade to the ring contributes nothing to this result, and does not enter into the combination so as to keep or co-operate with the other elements.

I am of opinion that, in view of the nature of these questions,—the first more particularly,—it is proper that an injunction should not be granted.

EMERY and another *v.* CAVANAGH.

(*Circuit Court, S. D. New York.* June 4, 1883.)

PATENTS FOR INVENTIONS—PUBLIC USE.

Public use of an invention, unless by the patentee himself, for profit, or by his consent or allowance, will not work a forfeiture of his title, as forfeiture is not favored unless it clearly appears that the use was solely for profit, and not with a view of further improvements or of ascertaining its defects, or for any other purpose of experiment in reducing the invention to practice.

In Equity.

Wm. A. Macleod and *George Harding*, for plaintiff.

Wm. S. Lewis and *Lucien Birdseye*, for defendant.

SHIPMAN, J. This is a bill in equity to restrain the alleged infringement of letters patent, granted February 10, 1874, to N. J. Simonds and E. R. Emery, for improved machinery for moulding heel-stiffenings for boots and shoes. The plaintiffs are the owners of the patent, and John R. Moffitt is one of their licensees. The defendant was licensed by Mr. Moffitt to use two machines made in accordance with his patent of June 20, 1876. This license was revoked on August 7, 1878, but the defendant continued to use the machines. The alleged infringement in this suit consists in the use by the defendant, since the revocation of his license, in the two Moffitt machines, of the devices claimed in the first and fourth claims of the Simonds and Emery patent. The infringement of the Moffitt patent is the subject of another action, which was tried at the same time with the present suit. The claims of the Simonds patent, which are said to have been infringed, are as follows:

"(1) The combination of the divided mould, *i*, *i*, and form, *n*, substantially as described and shown. (4) In combination with mould, *i*, *i*, the cams, *a'*, *a'*, substantially as described and shown."

The testimony left no doubt in my mind that the devices named in these two claims were present in the Moffitt machines, and that the Simonds and Emery patent was valid. The defendant's attack upon the novelty of the invention, and upon the existence in the Moffitt machines of those portions of the invention which were claimed in the first and fourth claims, was neither vigorous nor successful. He however insisted with earnestness that the invention had, with the consent of the inventor, been in public use more than two years before June 30, 1873, the date of the application for a patent.

The patentees filed a caveat, dated December 9, 1870, setting forth their invention as it was then conceived. On December 20, 1871, the caveat was renewed. Between the fall of 1870 and the expiration of the renewed caveat the patentees were constantly experimenting, at great expense, upon the machine as finally perfected, and upon machines which should accomplish the same result by different kinds of moulds, but finally came back to the device described in the caveat, a marked feature of which was a divided mould. During this period they used the machine in the condition in which it was from time to time, incidentally for profit, but the witness, whose testimony is hereafter referred to, says: "It was his (Simonds') idea to keep the machine as much from view as possible, and be courteous to visitors."

Mr. Stackpole, a witness called by the defendant, was a machinist in Simonds' employ for five years, commencing about the beginning of 1870, and worked upon this machine. "He saw four years of experimenting on the machine." These experiments finally resulted in the adoption of substantially the original model of 1870, but, meantime, the machine had been changed in the auxiliary parts. Meanwhile it made counters freely, which were sold, but no machines were made which were sold, or were used by others, or were licensed, and the machine could only be tested by the making of counters upon it. Until about the time of the expiration of the renewed caveat, the invention had not reached a position of perfection or of completion where the inventors thought that it was fit, or where it probably was fit, to be patented. "Public use of an invention, unless by the patentee himself, for profit, or by his consent or allowance, will not work a forfeiture of his title, as such forfeiture is not favored unless it clearly appears that the use was solely for profit, and not with a view of further improvements, or of ascertaining its defects, or for any other purpose of experiment in reducing the invention to practice." *Jones* v. *Sewall*, 3 Cliff. 563; *Pitts* v. *Hall*, 2 Blatchf. C. C. 229; *Elizabeth* v. *Pavement Co.* 97 U. S. 126.

Let there be a decree for injunction and an accounting.

SCHILLINGER *v.* GREENWAY BREWING CO.

(*Circuit Court, N. D. New York.* July 11, 1883.)

PATENTS FOR INVENTIONS—REISSUED PATENT NO. 4,364 SUSTAINED—SCHILLINGER PAVEMENT.

Reissued letters patent No. 4,364, granted to John J. Schillinger, May 2, 1871, for an "Improvement in Concrete Pavements," compared with British patents No. 7,489, of 1837, to Claridge; No. 350, of 1852, to Chesneau; No. 2,659, of 1855, to Coignet; No. 771, of 1856, to De La Haichois; No. 7,991, of 1839, to D'Harcourt; No. 9,737, of 1843, to Austin; and United States patents No. 56,563, July 24, 1866, to Huestis; and No. 5,475, March 14, 1848, to Russ,—and sustained as a patentable invention, not anticipated by said patents.

2. SAME—INFRINGEMENT.

The Schillinger patent was infringed by the pavement of defendant, and an injunction, and an account of profits and damages, should be decreed.

3. SAME—INVALID CLAIM IN REISSUE.

The invalidity of a claim in a reissue does not impair the validity of a claim in the original patent which is repeated and separately stated in the reissue.

In Equity.

Duell & Hey, for plaintiff.

John L. King, for defendant.

BLATCHFORD, Justice. This suit is brought for the infringement of reissued letters patent No. 4,364, granted to John J. Schillinger, May 2, 1871, for an "improvement in concrete pavements;" the original patent, No. 105,599, having been granted to him, July 19, 1870. The specification of the reissued patent, reading in the following what is outside of brackets and including what is in italics, and omitting what is inside of brackets, says:

"Figure 1 represents *a plan of* my [pavement in plan view.] *pavement.* Figure 2 is a vertical section of the [pavement.] *same. Similar letters indicate corresponding parts.* This invention relates to [pavements for sidewalks and other purposes; and consists in combining with] *a concrete pavement which is laid in sections, so that each section can be taken up and relaid without disturbing the adjoining sections. With* the joints of *this sectional* concrete [pavements,] *pavement are combined* strips of tar paper, or equivalent material, arranged between the several blocks *or sections* in such a manner as to produce a suitable tight joint, and yet allow the blocks to be raised separately without affecting [or injuring] the blocks adjacent thereto. In carrying out my invention I form the concrete by mixing cement with sand and gravel, or other suitable [materials] *material,* to form a [suitable] plastic [composition] *compound,* using about the following proportions: One part, by measure, of cement; one part, by measure, of sand; and from three to six parts, by measure of gravel; [using] *with* sufficient water to [make] *render* the mixture plastic; but I do not confine myself to any *definite* proportions *or materials* for making the concrete composition. While the mass is plastic I lay or spread the same [upon] *on* the foundation or bed of the pavement either in molds or between movable joists, of the proper thickness, so as to form the edges of the concrete blocks *a, a,* [etc. When the block *a* has been formed, I take strips of tar paper, *b,* of a width equal or almost equal to the height of the block, and place them up against the edges of the block in such a manner that they form the joints between such block and the adjacent blocks,] *one block being formed after the other. When the first block has set, I remove the joists or partition between it and the block next to be formed, and then I form*

the second block, and so on, each succeeding block being formed after the adjacent blocks have set; and, since the concrete in setting shrinks, the second block, when set, does not adhere to the first, and so on; and when the pavement is completed each block can be taken up independent of the adjoining blocks. Between the joints of the adjacent blocks are placed strips, b, of tar paper, or other suitable material, in the following manner: After completing one block, *a*, I place the tar paper, *b*, along the edge where the next block is to be formed, and I put the plastic composition for such next block up against the tar-paper joint, and proceed with the formation of the new block until it is completed. In this manner I proceed [in making all the blocks] until the pavement is completed, interposing tar paper between [their] *the* several joints, as described. The paper constitutes a tight water-proof joint, but it allows the several blocks to heave separately, from the effects of frost, or to be raised or removed separately, whenever occasion may arise, without injury to the adjacent blocks. The paper [does not adhere] when placed against the [edge of the fully formed] block *first formed, does not adhere thereto*, and therefore the joints are always free between the several blocks, although [adherence may take place between the paper and the plastic edges of the blocks which are formed after the paper joints are set up in place.] *the paper may adhere to the edges of the block or blocks formed after the same has been set up in its place between the joints. In such cases, however, where cheapness is an object, the tar paper may be omitted, and the blocks formed without interposing anything between their joints, as previously described. In this latter case the joints soon fill up with sand or dust, and the pavement is rendered sufficiently tight for many purposes, while blocks are detached from each other, and can be taken up and relaid, each independent of the adjacent blocks.*"

Reading in the foregoing what is inside of brackets and what is outside of brackets, omitting what is in italics, gives the text of the original specification.

The claims of the reissue are as follows:

"(1) A concrete pavement laid in detached blocks or sections, substantially in the manner shown and described. (2) The arrangement of tar paper, or its equivalent, between adjoining blocks of concrete, substantially as and for the purpose set forth."

The original patent had but one claim, as follows:

"The arrangement of tar paper, or its equivalent, between adjoining blocks of concrete, substantially as and for the purpose described."

On the first of March, 1875, Schillinger filed in the patent-office a disclaimer, which, referring to the reissued patent, says:

"That he has reason to believe that, through inadvertence, accident, or mistake, the specifications and claim of said letters patent are too broad, including that of which your petitioner was not the first inventor, and he, therefore, hereby enters his disclaimer to the following words: 'and, since the concrete in setting shrinks, the second block, when set, does not adhere to the first, and so on,' and which occur near the middle of said specification, and to the following words near the end of the specification: 'In such cases, however, where cheapness is an object, the tar paper may be omitted, and the blocks formed without interposing anything between their joints, as previously described. In this latter case the joints soon fill up with sand or dust, and the pavement is rendered sufficiently tight for many purposes, while the blocks are detached from each other, and can be taken up and relaid each

independent of the adjoining blocks.' Your petitioner hereby disclaims the forming of blocks from plastic material without interposing anything between their joints while in the process of formation."

This reissued patent was under consideration by the circuit court for the southern district of New York in February, 1877. *Schillinger* v. *Gunther*, 14 Blatchf. C. C. 152. The court (SHIPMAN, J.) gave a construction to it in view of the disclaimer. The defendant's pavement, in that case, had a bottom layer of coarse cement, on which was laid a course of fine cement, divided into blocks by a trowel run through that course while plastic. It possessed the advantage of Schillinger's invention, because any block in the upper course could be taken up without injury to the adjoining blocks. Concrete pavement having been before laid in sections, without being divided into blocks, the invention of Schillinger was held to consist in dividing the pavement into blocks, so that one block could be removed and repaired without injury to the rest of the pavement, the division being effected by either a permanent or a temporary interposition of something between the blocks. It was held that the effect of the disclaimer was to leave the patent to be one for a pavement wherein the blocks are formed by interposing some separating material between the joints; that to limit the patent to the permanent interposition of a material equivalent to tar paper would limit the actual invention; that using the trowel accomplished the substantial results of the invention in substantially the same way devised by Schillinger; that the only difference in result was that the defendant's method left an open joint; that having a tight joint was not a material part of Schillinger's invention; and that the mode of operation involved in using the trowel was within the first claim of the reissue as it stood after the disclaimer.

In the same suit, in August, 1879, the same court (BLATCHFORD, J., 17 Blatchf. C. C. 66) held that the disclaimer took out of the first claim of the reissue only so much thereof as claimed a concrete pavement made of plastic material laid in detached blocks, without interposing anything between their joints in the process of formation, leaving the claim to be one for such a pavement laid in detached blocks, when free joints are made between the blocks by interposing tar paper or its equivalent.

In *California Artificial Stone Paving Co.* v. *Perine*, 20 O. G. 813, [S. C. 8 FED. REP. 821,] in May, 1881, in the circuit court for the district of California, (SAWYER, J.,) the defendant's pavement was made by cutting the lower course into sections with a trowel, and doing the same with the upper course, the upper joint being directly over the lower joint. Into the open joint in each case was loosely put some of the partially set material from the top of the laid course, answering the purpose of tar paper, and leaving the pavement weaker along the joint than in any other place. This was held to be an infringement.

In the present case, it is agreed that the defendant's concrete pavement was constructed as follows:

"The foundation floor, being prepared, has strips or scantlings of wood, 2x4, of sufficient length for the required section, placed in position about 2½ feet out from the coping and parallel therewith. A composition composed of sand, gravel, and cement, made plastic with water, was then spread within the mould formed by the aforesaid scantling, and rammed down so as to come within ½ inch of the scantling. Then a finer course, composed of fine sand and Portland cement, about half and half, made plastic with water, was floated over the coarse material, and smoothed over, or struck off with a straight edge. The block or section was then allowed to set. After becoming sufficiently hardened, the scantling was removed from the outer edge of the block to about the same distance, and parallel with the outer edge of the completed block, and the second block or section formed of coarse material, the same as the first, after which a cutting trowel was drawn across and through the coarse material, along the line of the completed block, and the fine upper finishing course poured in the mold on top of the lower coarse material, and struck off and floated with a straight edge, as in the first block. A straight edge was then applied between the two blocks or sections, over the timber line, and a cutting trowel drawn through the upper course of fine material, over the cut in the coarse material. The edges of the two sections along the cut made by the trowel were then smoothed down with the float or trowel, and the remaining blocks or sections of pavement were formed consecutively in the same way. No tar paper was placed between the blocks."

The only difference between this pavement and that in the *Gunther Case* appears to be that in this case there is an open cut made by a trowel entirely through both courses, the line of the cut in the upper course being directly over the line of the cut in the lower course. In the *Gunther Case* the trowel cut was only through the upper course. It is not stated in the admission in the record as to the mode of the construction of the defendant's pavement, in the present case, that any of the material from the top of the upper course was put loosely into the joint, as in the *Perine Case;* or that the joint was a tight joint, or other than an open joint. Yet, on the cross-examination of the plaintiff's expert, it is proved by the defendant that its pavement is used as a floor in a malt-house, for the storage of malt during the process of malting, and that it is necessary that such a floor should have tight joints. This is confusing, and it is not clear exactly what is meant by the statement, in the admission, that after the cut was made by the trowel through the upper course, the edges of the two sections along the cut were smoothed down with a float or a trowel. If this means that the material from the surface adjoining each edge of the cut was scraped into the cut loosely, and smoothed over the top of the cut, so as to leave a plane surface over the cut, then, by the setting of the material in the cut, the joint was made in a degree a tight joint, and the arrangement was the same in character as in the Perine pavement. In such case there would be a comparatively tight joint made by a substance permanently interposed, yet allowing the blocks to be substantially free, and there would be an infringement of the claim of the original patent. But, independently

of this, under a proper construction of the claim of the original patent and the second claim of the reissue, the interposition of the trowel, effecting the object which it accomplishes, although it is interposed only temporarily, and is not left in permanently, is an equivalent for the tar paper, even though the joint be left open after the trowel is removed, and be not made tight. It may be an advantage to have a tight joint and at the same time a free joint, such as tar paper produces, but the substance of Schillinger's invention is availed of without having the joint tight, if it be free. The plaintiff's expert testifies that the defendant's pavement is a concrete pavement formed in blocks or sections directly on the foundation on which it is to be used, the separation of the blocks being effected by the introduction of the trowel, forming a joint along the line of separation, the joint controlling the cracking of the pavement, and allowing one block to be removed without material injury to the adjacent blocks. This evidence is not contradicted. The second claim of the reissue has, therefore, been infringed, if Schillinger was the first inventor of what it covers.

It is contended that the reissued patent is invalid, because it discards the water-tight feature resulting from the use of tar paper, set forth in the original patent; that unless the paper, or its equivalent in producing a water-tight joint, is permanently interposed in the joints between the blocks, the invention set forth in the original patent is not practiced; and that a concrete pavement with a cut or open joint is not suggested in the original patent. These views are met by the considerations before suggested; and, to whatever extent the reissue might be held invalid in regard to a pavement not covered by its second claim, it was decided by the supreme court, at its last term, in *Gage* v. *Herring*, 2 Sup. Ct. Rep. 819, that the invalidity of a claim in a reissue does not impair the validity of a claim in the original patent which is repeated and separately stated in the reissued patent. That is the present case, and it is unnecessary to determine whether the first claim of the reissue, as amended by the disclaimer, amounts to a claim for anything more than is covered by the second claim of the reissue, or whether such first claim is invalid in any degree. It is not clear that the reissue, as left by the disclaimer, embraces anything of which Schillinger was not the first inventor.

On the question of novelty, the defendant has introduced the following British patents: No. 7,489, of 1837, to Claridge; No. 350, of 1852, to Chesneau; No. 2,659, of 1855, to Coignet; No. 771, of 1856, to De La Haichois; No. 7,991, of 1839, to D'Harcourt; and No. 9,737, of 1843, to Austin; and the following United States patents: No. 56,563, July 24, 1866, to Huestis; and No. 5,475, March 14, 1848, to Russ. No testimony is introduced by the defendant to point out wherein any of these patents are supposed to bear on the invention of Schillinger. But the plaintiff has produced evidence to show that none of them anticipated his invention. The Claridge pavement is not a

concrete pavement, and is not formed in detachable blocks. The Chesneau pavement is formed of a compound which is not such a concrete as that of Schillinger. It is not composed of blocks made detachable to control the line of cracking, but sections of the pavement are set in frames and removably inserted in the surrounding pavement, so as to allow access to gas and water pipes. In the Coignet patent there is not shown a concrete pavement made in detachable blocks in the manner described in Schillinger's patent. In the De La Haichois patent there is no pavement formed in detachable blocks by joints. In the D'Harcourt patent there is nothing to indicate that one section can be removed without disturbing the adjacent sections. In the Austin patent, the pavement is made of wooden blocks, with intervals of an inch and a half in width filled with cement or concrete. The Huestis patent does not show a wearing surface of concrete, or a concrete pavement formed in detachable blocks by joints. The Russ patent shows a concrete foundation for a stone pavement, without joints, and having removable panels, consisting of frames filled with concrete, to be lifted out to give access to water pipes.

It is further contended, that, as plain concrete pavements formed in blocks existed before, there was no patentable invention in making a joint in them. The defect in such pavements is clearly pointed out in the original patent, and repeated in the reissue, that, where there are no free joints between the blocks, they will not heave separately from the effects of frost, and cannot be raised or removed separately without injury to adjacent blocks. No one remedied this defect before Schillinger. His invention was simple, valuable, and patentable. The pavement laid down by Brewster at Syracuse in 1841 had no free joints. Reference is made to the testimony introduced from the case of *Schillinger* v. *Phillip Best Brewing Co.*, in the eastern district of Wisconsin. This testimony was taken in November, 1882. So far as it refers to prior uses in Germany, not shown in a patent or printed publication, it was duly objected to in this case, and must be excluded. As to the cement malt floor which Row laid in Baltimore 25 years ago, he shows that it was not made in sections detachable by free joints. The testimony of Botzler as to a prior malt floor laid by him in Chicago is too indefinite to amount to sufficient evidence to defeat a patent.

The plaintiff is entitled to a decree on the second claim of the reissue, for an account of profits and damages, and a perpetual injunction, with costs.

WORSWICK MANUF'G CO. *v.* STEIGER.

(*Circuit Court, N. D. Ohio, E. D.* April Term, 1883.)

1. PATENTS FOR INVENTION—USE IN FOREIGN COUNTRY.
   A simple use of an invention in a foreign country, if not patented or described in any printed publication, is not a bar to the obtaining of a valid patent in this country.
2. SAME—COMBINATION—ANTICIPATION.
   Where the claim of a patent is a combination claim, consisting of several elements that co-operate together to produce the device claimed, such device can only be anticipated by a prior device, having identically the same elements, or the mechanical equivalents, of those that are not used. It will not do to find a portion of these elements in one machine, and a portion in a second, and a third, and so on, and then say that the device is anticipated.
3. SAME—PATENT NO. 108,898, AND REISSUES NOS. 8,025 AND 8,026, SUSTAINED.
   Letters patent No. 108,898, granted to Herman Fischer, November 1, 1870, for improvements in apparatus for pumping fluid from vessels, was not anticipated by letters patent No. 106,008, of August 2, 1870, granted Abel A. Webster, and the reissues Nos. 8,025 and 8,026 of said original patent are valid, under *Miller* v. *Brass Co.* 104 U. S. 350, and reissue No. 8,026 is infringed by the device used by defendants, and its use should be enjoined.

In Equity.

John Crowell and *M. D. Leggett*, for complainants.

G. W. Shumway, for defendants.

WELKER, J. This suit is brought upon original patent No. 108,898, granted to Herman Fischer, November 1, 1870, and on reissued letters patent Nos. 8,025 and 8,026, granted to the Worswick Manufacturing Company, assignee of William F. Class, the inventor. All these patents pertain to apparatus for pumping fluid from vessels. The answer filed by the defendant puts in issue the validity of the reissued patents, but as they were applied for within about four months from the date of the original, the defendants did not strenuously press the point of their invalidity. In examining these reissues I find nothing claimed that is not clearly shown and described in the original patent, and as the application for the reissues was filed so soon after the date of the original, I see no valid objection to the claims as allowed in the reissues, provided the same is not anticipated in the prior state of the art.

The defendants have set up as anticipating the inventions described in the patents at issue, patent granted to A. L. Webster in 1870, one to J. F. Navarro, and eight other United States patents; and also foreign use of the same prior to the application for patent in this country. The foreign use was conceded by stipulation, but under the statute a simple use of the invention abroad, if not patented or described in any printed publication, is not a bar to the obtaining of a valid patent in this country.

The only device among the several patents produced worthy of consideration as anticipating this invention, is the one shown and de-

scribed in letters patent No. 106,008, of August 2, 1870, granted to one Abel L. Webster.

The Fischer patent, No. 108,898, has a single claim in the following words:

"The combination of the screw tube, A, hollow cross-piece, E, with valve, I, stuffing-box, C, bent tube, B, and stop-cock, D, all constructed to operate substantially as set forth."

The device is adapted to be inserted in the bung of a barrel, or the top of a bottle, and so arranged that air or gas may be pumped through the device into the bottle or barrel, and delivered at a point above the surface of the liquid therein contained, thereby producing sufficient pressure upon the liquid to force the same up through the tube within the device, and deliver it through a stop-cock at or near the end of the tube. The device has a hollow chamber surrounding this delivery-tube, through which the gas or air is pumped into the retainer, and near the top of this air-chamber is a stuffing-box, forming a secure packing around the delivery-tube, thus permitting the up-and-down adjustment of the delivery-tube. At the point where the gas or air is pumped into the retainer there is a valve to prevent the escape of gas or air after the same has been pumped into the barrel. The defendants have attempted to limit the scope of this claim to a device that uses in this place only such a check-valve as would open inwardly to admit the air or gas, but to close automatically against the escape of air or gas from the inside. The defendant's expert, however, when being cross-questioned on this matter, testifies as follows, (D. R. 39:)

"*Cross-question* 19. I call your attention to the following passage to be found in the specification of the Fisher patent: 'Inside of this passage is a valve, *i*, so constructed as to admit a stream of air into the bottle, but not out of it.' Is there anything in the language quoted, or in any other portion of the patent, that is calculated to limit this portion of the Fisher device to any specific construction? *Answer.* I am inclined to think there is not. The valve is not specifically described. I should say that any device that is capable of opening and closing this passage is all that is essential.

"*Cross-question* 20. Would you consider that a device having the other essential elements of the Fisher patent, but provided with an ordinary stop-cock, instead of the valve, *i*, said stop-cock adapted to be manipulated by hand, would come within the scope of the Fisher patent, as pointed out in the claim thereof? *Answer.* It is my opinion that any device capable of opening and closing the air-passage in the hollow cross-piece, E, in the Fisher patent, would come within the scope of the claim of said Fisher patent."

Unless this Fisher patent is limited by the state of the art, I am of the opinion that the patent is not limited to a check-valve acting automatically, but any device that may be opened to permit the air or gas to be forced inwardly, and closed to prevent its escape, would fall within the scope of the claim, especially as admitted by the defendant's expert, as the patentee did not describe any particular form of valve, and did not limit himself to any particular form. It will

be noticed that the claim of this patent is a combination claim consisting of several elements, that co-operate together to produce the device claimed. This device, then, can only be anticipated by a prior device, having identically the same elements, or the mechanical equivalents of those that are not used. It will not do to find in older devices a portion of these elements in one machine, another portion in a second machine, another in a third, and so on, and then say that this device is anticipated. The inventor does not pretend to be the original inventor of any one of these elements. He only claims to have invented such an arrangement and combination of old elements as to produce a new machine. As above remarked, if this device is found in any older one presented in the record, or at the hearing, it is in the Webster patent above referred to. This patent, however, shows no means of checking the escape of gases at the point where the air or gas is forced into the receptacle, and it neither shows nor describes any stuffing-box, nor any means whatever of discharging the contents of the barrel or bottle, without also discharging the gases lying above the liquid in the receptacle. It therefore does not possess the elements of the Fischer invention, and does not anticipate it. In fact, the Webster patent does not seem to show or describe a working practical device. It has some of the elements of the Fischer patent, but it lacks just those elements that made the Fischer patent a practical and successful machine.

I must, therefore, conclude that the Fischer patent, No. 108,898, is not anticipated, and is, therefore, valid.

The defendant's device being constructed substantially in all respects like the Fischer invention, having all the elements of the Fischer claim combined, and operating in substantially the same way, there can be no doubt as to the infringement.

The two reissues involved in this suit are the reissues of original patent No. 191,656. It seems, from the certified file contents from the patent-office that when the applications for the reissue of this patent were filed, it was sought to obtain the matter in a single reissue; but the patent-office decided that the original patent contained two inventions, and that they should be divided; hence, by the requirements of the office, application was made for reissue in two divisions, A and B. One of these divisions, No. 8,026, was for an improvement upon the device patented by Fischer, the improvement consisting in a more simple and effective packing than secured by the Fischer device. This patent has three claims, all of which are involved in this suit. If this reissue is valid, there is no question about the infringement, for the reason that the defendants use a device embracing all the elements of each one of the claims. The references cited against this patent do not seem to embrace its features to any considerable extent.

The combination of no one of the claims is shown in any of the older devices cited. It is true, the claims in this reissue are some-

what broader than the claims in the original patent, but as the patentee did not sleep upon his rights, but returned his original patent to the patent-office inside of four months from the time it was granted, and asked for a reissue with these claims, I think that the reissue with its broader claims is valid, under *Miller* v. *Brass Co.* 104 U. S. 350, and all of the later decisions pertaining to the subject by the supreme court.

Reissue No. 8,025 is the other division of original patent No. 191,656, and is for a pumping device intended to inject air into a receiver. It does not appear from the record that this patent has been infringed by the defendant.

A decree may therefore be entered for the complainant on original patent No. 108,898, and reissued patent No. 8,026, and for the defendant in reissue patent No. 8,025, and the case will be referred to a master for the statement of account.

McFARLAND and others *v.* SELBY SMELTING & LEAD Co.

(*District Court, D. California.* May 28, 1883.)

1. COLLISION—STEAMER TOO NEAR WHARF—FAULT.
   A small stern-wheeler, after giving the usual preliminary signal, a long whistle, was moving slowly and carefully out from her slip, about 2 o'clock in the day, when her stern came into collision, about 90 feet from the wharf, with a steamer that was proceeding at a moderate rate of speed, but within 100 feet of the wharf. *Held*, that the steamer was in fault in proceeding so near to the wharf, and in not noticing the signal of the stern-wheeler and avoiding the collision.
2. SAME—FAILURE OF SMALL STERN-WHEELER TO HAVE LOOKOUT AT STERN—DAMAGES.
   It was not a fault on the part of the stern-wheeler not to have a lookout at her stern, and, as no other fault is alleged, the whole damage for the collision must be borne by the steamer.

In Admiralty.

W. S. Goodfellow, for libelant.

Chas. Page, for claimants.

HOFFMAN, J. The facts upon which the libelant relies for a relief for a recovery are substantially as follows: On the twelfth of May, 1882, about 2 o'clock P. M., the small stern-wheeler Pilot was slowly and carefully backing out from her berth on the north-westerly side of Jackson-street wharf, in this city, on a trip to Black Point. She had given the usual preliminary signal of her intention to come out by blowing a long whistle. She had proceeded down the slip until her stern was about 80 or 90 feet beyond or outside Jackson-street wharf, when a whistle was blown, to which her master at once replied by blowing his own whistle, and ringing the bells to stop and reverse his engine. Before her stern-way was entirely

overcome the vessel was struck by the steamer Bullion, and the damage for which this suit is brought was inflicted.

The master of the Pilot states that when he first saw the Bullion she was about 50 feet off, and that the collision occurred about a minute afterwards. The libel avers that the Bullion was going at the rate of about seven miles an hour.

These statements are obviously inconsistent. The testimony shows, I think, very clearly that the speed of the Bullion previously to blowing her whistle did not exceed three and one-half miles an hour; probably it was less. She is represented to be one of the slowest boats on the bay. Her bottom was very foul, and she had a young flood against her. This latter circumstance is stated as the reason or excuse for her pursuing a course so near to the ends of the wharves.

C. J. Young, a deck hand on board the Bullion, states that the collision occurred about five seconds after he saw the Pilot with her pilot-house opposite the end of the wharf; and although little reliance can be placed upon estimates of minute intervals of time made under such circumstances, his guess is probably much nearer the truth than that of the master. As the collision occurred between two steamers, and in open daylight, it is obvious that one or both of them must have been in fault.

Capt. Young, master of the Bullion, describes the accident as follows: He first saw the Pilot when "he was about one-third north of Washington street, between that and one-half to Jackson street." Looking through the large doors in the shed, by which Jackson-street wharf is covered nearly to its outer end, he saw a wheel turning, and at once knew that a vessel was coming out of the slip, the mouth of which he was approaching. He at once blew his whistle, rang his bells to stop and reverse, and put his helm to port. This was done "quicker than it takes to tell,"—"inside of three seconds." The boat obeyed the helm slowly. "She probably fell off to starboard between two and three points." The Pilot continued to back out of the slip, and, still retaining stern-way, struck the Bullion a little abaft the foremast. Capt. Young asserts, with great positiveness, that she stopped, but did not reverse her wheel. In this statement he is contradicted by every witness who was on board the Pilot, and I think is not corroborated by any witness for the respondent. The statement is, moreover, intrinsically improbable. When, on discovering that a vessel was coming out of the slip ahead of him, he blew his whistle, the master of the Pilot must have known that a steamer was passing along the ends of the wharves, and that a collision was to be apprehended. The obvious mode of avoiding it was to stop and reverse. This, he and all on board his vessel say he in fact did; to suppose him not to have done so would be to attribute gross and inexplicable negligence. But Capt. Young's account of the accident is obnoxious to grave criticism. He states that when he first saw the Pilot's wheel turning he was one-third or one-

half the distance from Washington-street wharf to Jackson-street wharf. This places him, perhaps, 80 feet to the southward of Jackson-street wharf. The latter is 100 feet wide. The slip down which the Pilot was backing is 175 feet wide. The Pilot was about the middle of it. But assuming she was nearer to the Jackson-street than the Pacific-street side, and within 60 or 70 feet of the former, the collision must have been at least 240 or 250 feet to the southward. The Bullion was also, her master states, 100 or 115 feet out from the end of the wharves. If, then, she instantly stopped and reversed, as the captain states, it is difficult to see how the accident occurred. With regard to the speed of the Bullion, her master states that with a clean bottom she will go five knots. "In the condition she was in when the collision happened I don't believe she could go four." "With the tide against her, only one and one-half or two knots. Her bottom is now over two inches thick with mussels from end to end."

It is difficult to see how a vessel not capable of making over one and one-half or two knots with the tide against her, could have failed against a young flood to stop and acquire stern-way in a distance of 240 to 250 feet. And in this computation I have not included the distance between the Pilot's stern and the end of the wharf when first seen by the master of the Bullion, and which, by the latter's account, must have been considerable. Nor have I taken into account any deflection of the Bullion's course caused by her putting her helm to port. The statement of the master of the Bullion, that the latter vessel was struck a little abaft her foremast by the corner of the Pilot's fan-tail, is corroborated by the testimony of his deck hands. It is contradicted by every one on board the Pilot, and particularly by a young man who was standing on the after-part of the Pilot's promenade deck and within four feet of her taffrail, and who observed the occurrence. But in the determination of this point we are not left to a comparison of the credibility or opportunities for observation of the witnesses on board the steamers. Immediately after the accident the Pilot was inspected by the United States inspector of hulls and the inspector of boilers for this district. They found a deep indentation or gash in the port timber of her fan-tail, which they unhesitatingly concluded must have been made by the stem of some vessel striking her at nearly a right angle. The frame of the fan-tail seemed to have been pushed over to starboard, and the large axle on which the wheel revolved was so bent that the inspectors ordered it to be removed and straightened. The corner of the fan-tail which the respondent's witnesses say struck the Bullion was found to be uninjured. If to this we add the fact that the Bullion sustained little or no injury,—"not two bits worth," as the respondent's witnesses admit,—no doubt can, I think, be entertained as to which vessel struck the other.

It is contended on the part of the libelant that the course of the

Bullion was laid too near the line of the ends of the wharves, and especially to that of the Jackson-street wharf, which is covered nearly to its extremity by a shed. Much testimony was taken as to the prevailing usage of steamers, running along the city front, with respect to the distance from the wharves at which they commonly or may safely go. There seems to be no settled rule or practice on the subject, and the experts differ in their estimate of what should be considered a safe distance. Steamers, it appears, frequently run by the wharves at no greater distance from them than from 20 to 50 feet. They seem in the habit, as one of them said, of taking their chances, and to be managed in many instances in an imprudent, if not reckless, manner.

In the recent case of *The Monticello,* 15 FED. REP. 474–476, the court observes:

"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 Relief,* Olc. 104; *The Favorita,* 18 Wall. 598, 601, 602; 8 Blatchf. 539, 541; 1 Ben. 30–39.

It is not necessary in the present case to attempt to determine the minimum distance from the wharfs at which vessels may safely proceed. The collision occurred—Unless the Pilot omitted some precaution she might have taken, such as reversing her wheel, on hearing the Bullion's whistle, or failed to keep a proper lookout, (a point which will presently be considered,) the Bullion was in fault, either in omitting to take means to avoid the accident when the Pilot was first observed, (an omission of which she was not guilty, according to the positive statement of her master,) or in being too near the ends of the wharfs. If she was, as the answer alleges, between 100 and 150 feet distant from them, then the result proves that between 100 and 150 feet was too near. But it is extremely improbable that she was even as much as 100 feet from the wharfs; certainly not 150. If, as is established, I think, by the clear preponderance of testimony, the Pilot's stern projected beyond the end of the wharfs only 90 feet when she was struck, it is clear that the Bullion must have been within that distance from the end of the wharf. And even if at the moment of collision the Pilot's bow was nearly even with the end of the wharf, the Bullion's stern must have been within 123 feet of it, for the Pilot is only 123 feet long. The Bullion's midships was, of course, somewhat nearer, and this position the Bullion must have assumed after putting her helm to port and falling off to starboard some two and one-half points, when she was 240 feet to the southward.

I have already endeavored to show that this distance is overrated by the master of the Bullion,—a conclusion confirmed by the testimony of the engineer of the vessel. He states that he heard a blast

from a whistle, and immediately afterwards he received signals to slow, stop, and back which he obeyed, and that "immediately" afterwards the vessels came together; that after the wheel was reversed it did not make "more than one revolution,—not more than two;" "had not time to get stern-way on her." It is obvious that the Bullion could not have made 240 feet before her wheels could turn over twice.

I am satisfied that the Bullion was not 100 feet from the wharves, although the libel, somewhat incautiously, admits that she was at that distance from them. But whether she was or not, the fact of the collision proves her to have been too near, unless it appears that the collision was caused by this fault of the Pilot.

In the case of *The Favorita*, 18 Wall. 602, the supreme court observes:

"There is a good deal of testimony bearing on the point of the distance of the Favorita from the shore at the time of the collision; but it is unnecessary to consider it, for the estimate of witnesses in times of sudden peril, on such a subject, is mere conjecture, and, necessarily, inconclusive. *That the ship was out of the path she should have occupied, and improperly close to the Brooklyn shore, is evident enough, because both vessels were in perilous proximity the moment the Manhassett emerged from her slip.* Had she been at a suitable distance from the shore, or going with a materially lessened speed, the collision would not have happened, and the inquiry arises whether she alone must suffer for the loss that occurred."

These observations apply, *mutatis mutandis*, with much force to the case at bar, except that no suggestion is here made that the speed of the Bullion was too great. The Pilot, before starting, gave the usual signal that she was about to move out of the slip by blowing a long whistle. This signal, which should have given timely warning to the Bullion, and, if noticed, have enabled her to avoid the accident, was not heard by the Bullion. No sufficient explanation of this apparent inattention and carelessness is offered. It may be considered to have caused the accident, even more directly than the improper course of the Bullion.

The only fault of which the Pilot is accused is the omission to station a lookout on the after-part of the hurricane deck. That this is a useful, prudent precaution, and that it is generally taken by the larger boats, seems to be established. But the practice can hardly be considered general—certainly not universal—with the small stern-wheelers which navigate the waters of the bay. The distance between the pilot-house of the Pilot and the furthest point aft, at which a lookout could have been stationed, was about 60 or 70 feet. At the rate at which the pilot was going this distance would be traversed in about 11 or 12 seconds. In the larger boats, where the distance from the pilot-house to the taffrail is more than twice as great, an officer is often stationed at the stern when the boat is backing out of her slip, especially at night or in thick weather. But this lookout is

either the captain, pilot, or other officer having authority to give orders directly to the engineer, and for this purpose a bell-handle is provided on the after-part of the deck, the wire of which leads directly to the engine-room.

With the usual equipage of stern-wheelers the lookout would necessarily be an ordinary deck hand, perhaps of limited experience and intelligence. I am inclined to think that in practice the Pilot would not instantly and blindly obey any signal given by the lookout, but would wait the few seconds necessary to bring the approaching vessel within his own line of vision, and to enable him to judge for himself what measures to adopt.

However this may be, I am clearly of opinion that the respondent has failed to establish such a generally recognized rule, with respect to lookouts at the stern of the smaller steamers on this bay, as would justify the court in apportioning the damages for a failure to observe it. And especially is this the case when it does not appear that its observance would have had any material effect to avert the accident. There was a lookout or a person looking out on the after-part of the promenade deck—a position in some respects more favorable for observation than the corresponding position on the hurricane deck. This person noticed the Bullion at, at least, as early a moment as a lookout on the hurricane deck would have done. He at once notified the captain of the Pilot. The latter, therefore, had as early information of the approach of the Bullion as a lookout stationed by himself on the hurricane deck could have given. The master of the Bullion states that if the Pilot had had a lookout he could have seen the Bullion as soon as he (the master of the Bullion) saw, through the openings of the sheds, the Pilot's wheel. But he also says that he immediately blew his whistle. The captain of the Pilot had thus almost instantaneous notice of the approach of the Bullion, and nearly, if not quite, as soon as he could have received it from a lookout aft on his own vessel. To this it may be added that the reproach of not having a lookout aft comes with an ill grace from the Bullion, for she herself had not a lookout stationed forward. The deck hands were on deck, but engaged in the performance of their general duties.

I am, therefore, of opinion that the Bullion is liable for the whole damages sustained by the Pilot. A reference will be had to the commissioner to ascertain and report their amount.

THE WM. MURTAGH.

(*District Court, S. D. New York.* June 19, 1883.)

1. TUG AND TOW—NEGLIGENCE—UNSEAWORTHY BOATS.
   Where boats in a tow, by their condition and their loading, are obviously unfit to encounter the perils of a proposed trip, the owners of the tow and of the tug, both concurring in the trip, should be held liable in case of loss or damage.
2. SAME—TRIPS OF EXTRA HAZARD.
   The above rule does not necessarily apply to all trips, about New York bay, of open-deck coal-barges, but only to trips under circumstances of evident hazard.
3. SAME—OWNER OF GOODS CHARGEABLE WITH KNOWLEDGE.
   The owner of goods is legally chargeable with knowledge of the obvious general character and description of the vessel in which his goods are shipped; and if he employ a boat obviously unfit for the trip, and loss happen thereby, as against third persons also chargeable with negligence, he can recover but half his damages.
4. SAME—SHIPPER OF COAL.
   An owner of coal, shipping it on board an open boat, has a right to assume that necessary care and caution will be exercised, both by her owner and by the tug, in not going out in hazardous weather; and if the latter do so, and the owner of the coal is not privy nor consenting thereto, he may recover of either his whole damage.
5. SAME—RHODIAN LAW.
   Though under the Rhodian law the shipper put goods on an old vessel at his own peril, by modern law he is protected by an implied warranty of seaworthiness; and, as against third persons, he can recover his full loss, unless her unfitness were actually known to him, or was a matter of such general notoriety that his knowledge or negligence is presumed.
6. SAME—ACTION FOR DAMAGES—FORMER SUIT A BAR.
   The owner of a vessel, in case of injury to the vessel and cargo, may maintain an action for damage to both against another vessel causing the injury; and after the latter has been once arrested, and given bail for the whole damage, if the owner of the cargo afterwards cause all claim on his account to be withdrawn from the suit, he cannot, ordinarily, again maintain an action against the same vessel *in rem*, and arrest her a second time for the same damage.
7. SAME—AGREEMENT NOT TO SUE—SECOND SUIT IN REM.
   But where an agreement was made with the owner of the cargo that he would not bring suit, but that his claim should be settled according to the event of a suit of the owner of the vessel injured, and pursuant thereto he withdrew his claim as soon as he discovered that it was embraced in the other suit, *held*, that he might afterwards maintain a second suit *in rem* pursuant to the agreement.

In Admiralty.

Beebe, Wilcox & Hobbs, for libelant.

E. D. McCarthy; for claimants.

BROWN, J. The libel in this case was filed by the owner of two cargoes of coal, on board the barge J. Stackpole and the barge A. J. Servis, to recover damages for the loss of the coal through the sinking of the barges on the twenty-ninth of November, 1879, on their way from Port Johnson to New York, in tow of the steam-tug William Murtagh. The two barges were part of a tow of 10 boats which left the "Stakes" near Port Johnson at about 2 o'clock P. M., forming

three tiers, with four boats in the first two tiers and two in the third. The J. Stackpole was the outer boat on the port side of the front tier, and loaded with 225 tons of buckwheat coal. The A. Servis was loaded with 212 tons of chestnut coal, and was the second boat from the port side of the second tier. When the tug started from the "Stakes" the wind was blowing at the rate of about 21 miles an hour. After coming out in the bay, the water was found to be rough, and when near Robbins Reef the boats became filled with water so that they had to be cast off, and shortly sunk. The Stackpole had no cover upon her hatches and had coal upon deck. The Servis was a western open boat. The cause of their sinking was taking in so much water through the open decks in the rough weather.

In the case of *Mason* v. *The Wm. Murtaugh*, 3 FED. REP. 404, the libelant, who was the owner of the J. Stackpole, brought suit to recover for the loss of that boat and her cargo. The facts in regard to the Stackpole are stated in the opinion of my learned predecessor, and need not be here repeated. The present case is submitted upon the same testimony, with some additions in regard to the A. Servis. In the former case it was held that the Stackpole, by reason of her open hatches and coal on deck, was unfit and unseaworthy for the trip across the bay in the state of the wind and tide then existing; that this unfitness and unseaworthiness were perfectly obvious and presumably known both to the owner of the boat and to the pilot of the tug; and that it was negligence in each to undertake the trip in the weather then existing; and a decree was ordered in favor of the libelant for one-half the damages.

As to the facts the same conclusions must be drawn in the present case as in the former; and the principle of the decision then made, that both the tug and tow, under such circumstances, are in fault, has since been repeatedly followed in this court and affirmed in the circuit. *The Wm. Cox*, 3 FED. REP. 645; S. C. affirmed, 9 FED. REP. 672; *Connolly* v. *Ross*, 11 FED. REP. 342; *The Bordentown*, 16 FED. REP. 270.

The obvious unfitness and unseaworthiness of the A. Servis were even greater than in the case of the Stackpole. The Servis was wholly open from bow to stern; she had neither railings nor coamings, and was loaded within 15 to 18 inches of the water. She was also an old boat, and when she sank, broke apart, and, freed from the coal, came up in pieces. As respects both boats, therefore, the tug must be held responsible for negligence in undertaking the trip under the circumstances of that day.

As the owners of the boat sunk could recover but half their damages, it is urged that the libelant, who was the owner of the coal on both boats, can recover no more, on the ground that he is chargeable with similar negligence in shipping his coal on board of such boats for such a voyage. It must be admitted, I think, that a shipper is legally chargeable with knowledge of the obvious general character

and description of the vessel on which his goods are shipped. If he does not personally attend to the loading of his goods on board, he intrusts that service to some one who must be held legally to represent him in shipping them; and the obvious kind, quality, or condition of the vessel on which his goods are shipped, whether steamer or sailing vessel, whether open decked or closed, whether a ship or a scow, must be deemed to have been observed and known by the agent who represents the owner of the goods, and therefore legally brought home to the knowledge of the latter. In this respect transportation by water differs from carriage by land, where the bailee alone is personally intrusted with the goods. From time immemorial the ordinary shipment of goods by water has been upon some specific vessel, whose receipt or bill of lading binds the particular vessel and the goods by mutual obligations.

The oldest records of maritime law impose upon the merchant, at his own peril, the duty of inquiry concerning the age and seaworthiness of the vessel on which he ships his goods. Article 11 of the Second Fragment of the Laws of the Rhodians provides as follows:

"Let not merchants nor passengers put heavy and precious goods in an old ship; or if they do, and the ship setting sail the goods be spoilt or damnified, they must blaim themselves. But when merchants hire ships, let them diligently inquire of others, who have formerly sailed in them, whether they be well provided with all necessary instruments, tackle, good sail-yards, sails, canvas, anchors, ropes, convenient rudders, good boats, and able, skillful, and sufficient mariners, and whether the ship's sides be sound; and, in fine, to comprehend all in one word, let them inquire about the ship's sufficiency in everything, and accordingly venture their goods."

The almost universal practice, which has long prevailed, of having vessels designed for maritime commerce rated and certified in regard to their qualities and seaworthy character by associations, such as the Lloyds, the French Bureau Veritas, and others, whose business it is to examine, classify, and approve such vessels according to their various merits and seaworthy qualities, whose reports and certificates are constantly referred to and relied on by merchants, is in accordance with the principle of this ancient rule; and, in the class of vessels to which such rating applies, it accomplishes the object of the rule far more perfectly than any individual inquiry could do.

If the A. Servis had been visibly and obviously wholly unfit for the voyage for which the goods were shipped, under even ordinary circumstances of wind and weather, or if her unseaworthiness were known to the shipper, and loss had happened through such unfitness and known unseaworthiness, the owner of the goods, upon the principle of the former decisions of this court, above referred to, must have been held chargeable with concurrent negligence, and therefore could have recovered but half his loss.

But it was not held in the previous decision that the employment of barges without hatch covers, or even the employment of open boats,

for the transportation of coal across New York bay from the Kills, a distance of about four miles only, is, in itself, negligence under all circumstances, and without regard to the condition of wind and weather. The passage usually occupies only from two to four hours; and in mild, pleasant weather there is no such appreciable danger in so short a trip as to make it negligence, *per se*, to ship coal for such a trip even in open boats. The decisions of this court in which negligence has been imputed to the parties, have been based upon the particular circumstances of the weather at the time, or had reference to trips on the sound, which are much longer, and subject to other known hazards.

The owner of the coal, in shipping it upon open boats, cannot, therefore, be held to be chargeable with negligence for that act alone. He had a right to assume that the captain or pilot of the canal-boat, as well as the captain of the tug, would exercise all proper and necessary care and caution in navigating her, and not proceed upon the trip when the weather or other circumstances would make it unsafe.

The owner of the coal in this case had nothing to do with the departure of the tow under the dangerous circumstances which resulted in the loss. He was not present at the time, and he was in no way privy to the negligence involved in going out with the tow at the time it went. He cannot, therefore, be justly charged with negligence contributing to the loss, any more than the owner of cargo in ordinary cases, who has a legal right to depend upon the exercise of prudence and diligence in avoiding danger by the captain of the ship with whom he intrusts his goods.

I have no doubt that the Servis was so old and rotten as in fact to be wholly unseaworthy; but I do not find that the libelant knew it, or that it was so generally known or ascertainable on inquiry that he should be held legally chargeable with any knowledge of it. In modern law the shipper has, ordinarily, a right to rely upon the implied warranty of seaworthiness as a part of his contract of shipment; and as between the shipper and third persons, like the owners of the tug in this case, the former is not, I think, chargeable with negligence as respects the defects of the ship, except in case of perfectly plain and obvious unfitness for the voyage, or such general and well-known unseaworthiness as warrants the inference of actual knowledge of it, or of such negligence in fact as is legally equivalent to knowledge. In this case the A. Servis was a western boat, not previously much known here; her rotten and weak condition is inferred only from her breaking up on sinking. These defects were not obvious to the shipper, and they would not ordinarily be learned by him on inquiry, under the circumstances of this case; and knowledge of them cannot, therefore, be legally imputed to him.

Moreover, the sinking of the Servis does not appear to have been in any way due to her weak and rotten condition, as was the fact in the case of *The Bordentown*, 16 FED. REP. 270. Here the

loss arose solely from the Servis being an open boat and taking in water over her sides; not from foundering, or from her planks starting, or her seams opening. As her weakness in no way contributed to the loss, it does not affect the case. As the tug is chargeable with negligence, and as the libelant is not chargeable with any negligence which contributed to the loss, he is entitled to his full damages against the claimant for the coal lost from the Servis. *The Atlas*, 93 U. S. 302.

In regard to the coal on board the Stackpole an additional defense is presented by the fact that in the former suit by Mason, who was her captain and owner, upon which the Murtagh was arrested and libeled *in rem*, the libelant sued to recover for the value of the cargo as well as for the value of the boat. After an interlocutory decree for the libelant for half his damages, an order of reference was taken to ascertain the amount. The agent, the present libelant, was a witness in that proceeding, and in the course of it, he, in behalf of the present libelant, withdrew all claim for the loss of the cargo in that suit. The proctor of the claimant protested at the time that if that was done no subsequent action for the cargo could be maintained. The withdrawal was, however, persisted in before the referee, and the report and decree in that case were entered for half the value of the boat only. The decree was entered in August, 1880, for $764.07, which was paid on September 13, 1880. The present libel was filed October 23, 1880, and the claimants, in their answer in this suit, have pleaded the former suit, decree, and payment in bar.

In the case of *The Nahor*, 9 FED. REP. 213, it was held by my predecessor, under circumstances in all respects similar to the present, that the vessel was not liable to be arrested a second time for the same cause of action after giving bail in the first suit. "The proper and usual course," says CHOATE, J., "if the owner of the cargo desires to be made personally a party to the suit, instead of intrusting its management to his agents, the master and owners of the vessel, is to petition to be made co-libelants with them." In that case, as well as in the case of *Leonard* v. *Whitwill*, 10 Ben. 638, 658, it was held that the owners of the vessel, as bailees of the cargo, have a right to sue on behalf of the owners for its value. As the former suit, therefore, was rightly commenced for the recovery of the value of the cargo as well as of the boat, the Murtagh was not liable to a second suit *in rem* for the same cause, at the instance of the owners of the cargo who were already legally represented in the former action, if there was no other circumstance affecting this right.

It was proved, however, in this case, that the present libelant had no knowledge that the former suit embraced a claim for the cargo, until the proceedings under the order of reference; that the present claimant, the owner of the Murtagh, and the agent of the libelant, in a conversation had at or about the time of the commencement of that suit, agreed together that they would abide by the decision in the

case of the Stackpole; that the libelant would not bring suit; and that, after the decision in the case of the Stackpole, the claimant would settle accordingly without suit. The claimant was a witness in the present case and did not deny this agreement. The decision in that case required the claimant to pay half the damages. Subsequent to that determination the libelant informed the claimant of the result and demanded payment, and, receiving no reply, this suit was subsequently brought.

The agreement was a valid one and upon good consideration; and the withdrawal of the claim in the former suit, when knowledge of it became known to the libelant, was an act conforming to the spirit of the agreement, and the respondent, therefore, cannot complain of the subsequent suit to the extent necessary to enforce the agreement previously made. The agreement, however, was only to abide by the decision of the former suit, and that decision imposed on the Murtagh only half the damages. To this extent, therefore, I think the present libel *in rem* should, under these circumstances, be sustained, notwithstanding the former suit embracing the same cause.

There is an additional equitable consideration why recovery in the case of the Stackpole should be limited to one-half the value of the cargo, viz.: that if the claim for the cargo had not been withdrawn in the former suit, the amount payable to the owner of the barge might have been applied in that suit, so far as it was necessary, to pay his share of the present libelant's full loss. The amount recovered by the owner of the barge was more than enough to pay his one-half of the loss of the cargo. By the withdrawal of the claim for loss of the cargo in that suit, such application of the money could no longer be made, and the claimant, when he afterwards paid the owner of the barge the amount of the decree, had a right to rely on his legal immunity from further suit to that extent, under the agreement, as a consequence of the withdrawal previously made by the libelant. As respects the cargo of the Servis, which was not embraced in the former suit, there is nothing in the agreement, or in the former suit, which prevents the libelant's recovery of his full damages.

Decree for the libelant for the full value of the coal on the Servis, and for one-half of that on the Stackpole, with costs. If the parties do not agree, a reference may be taken to ascertain the amount.

THE LORD DERBY.[1]

(*Circuit Court, E. D. Louisiana.* June, 1883.)

1. ASSAULT AND BATTERY—SIXTEENTH ADMIRALTY RULE.
An assault and battery is where one intentionally inflicts unlawful violence upon another. There may be such gross negligence that an intent to injure may be inferred therefrom, but where the case made by the libel does not show such negligence, nor bring any such negligence home to any particular individual, it is very far from a case of "assaulting and beating" within the sixteenth admiralty rule.

2. LIABILITY OF VESSEL FOR DOG ON BOARD.
A ship is liable for injuries inflicted by the bite of a dog, on board by consent of the master and owners, upon a person lawfully on board, and entitled to be carried safely.

3. NEGLIGENCE.
It was negligence, where a dog is a large, powerful animal, and suspected of a disposition to bite strangers generally, to chain him up under the cabin table, where he was concealed, because the cabin was the place where the libelant had been assigned to sleep, and where he had a right to go.

4. MEASURE OF DAMAGES.
The bite of a dog, particularly in a warm climate, is a very serious matter, outside of the actual pain and suffering experienced. The dangers of lock-jaw and the fear of hydrophobia are added to the mental and nervous sufferings, and to many people the shock to the system is such that no money compensation is adequate.

5. SAME—APPEAL.
When no additional testimony is taken the circuit court will not hastily disturb a decree on the point of damages, nor unless it shows manifest injustice. *Cushman* v. *Ryan*, 1 Story, 91, followed.

Admiralty Appeal.

The libelant, a pilot, was taken on board the steam-ship at the mouth of the Mississippi river, and while on the voyage up the river to New Orleans he was very seriously bitten by a dog, which had been brought from Europe for sale in this country, and which was kept in the cabin, chained under the table. This suit was brought against the vessel *in rem* for damages suffered thereby by the libelant.

E. Howard McCaleb, for libelant.

J. Carroll Payne and *Henry Denis*, for claimants.

PARDEE, J. The questions presented in this case are: *First*. Is the proceeding properly brought against the ship? *Second*. Was there negligence on the part of those in charge of the ship in caring for the dog, resulting in the injuries to libelant? *Third*. What damages, if any, shall libelant recover?

1. It is contended that the case, as presented in the libel, shows a case of assault and battery, which, under the sixteenth admiralty rule, "shall be *in personam* only." The ingenuity which suggested the point has not failed to supply the court with an ingenious argu-

[1] Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

ment to support it. This definition is given of assault and battery, as taken from 3 East, (*Leame* v. *Bray*,) 593:

"Whenever one willfully or *negligently* puts in motion a force, the direct result of which is an injury, it constitutes an assault and battery, and the action brought should be *trespass vi et armis*."

An examination of the case shows that the brief goes further than the authority cited. The question before the court was whether the action was properly brought in trespass, and all the judges agreed that where an injury results directly from force, trespass lies, but nothing is said of assault and battery. The other cases cited (*Gibbons* v. *Pepper*, 1 Ld. Raym. 39; *Blackman* v. *Simmons*, 3 Car. & P. 138) are also cases of trespass. An assault and battery is where one intentionally inflicts unlawful violence upon another, and if there is a case in the books which goes further than this, it is an unsafe case to follow. That there may be such gross negligence that an intent to injure may be inferred therefrom, may be conceded, and perhaps *Blackman* v. *Simmons*, *supra*, shows such gross negligence; but the case made by the libel does not show such negligence, nor does it bring such negligence home to any particular individual, as would be necessary in a case of assault and battery.

In my opinion the case made in the libel is very far from a case of "assaulting and beating," within the sixteenth admiralty rule. And the case, as disclosed by the evidence, seems to me to be a clear case of liability on the part of the ship. The dog inflicting the injuries on libelant was brought over on the ship, with the consent of the master and owners, to be disposed of in this port. It was part of the cargo. The libelant was lawfully on board as pilot, and entitled to be carried safely. An injury to him from carelessness, or negligence in handling or caring for the dog, would entitle him to remuneration from the ship the same as if his injuries had resulted from goods falling on him, or from defective spars or rigging.

2. The evidence shows that the dog was a large, powerful animal, suspected of a disposition to bite strangers generally, and known to be of a good watch-dog breed, likely, when chained, to bite any stranger coming within his tether, and attempting to interfere with things under his guard. This is the character that claimant's witnesses give the dog. The libelant's evidence, and several conceded circumstances, go to show that the dog was ferocious, and that the master well knew his dangerous character and disposition. But it is not necessary to go further than the conceded character of the dog. Taking that as stated, it was negligence to chain him up under the cabin table, where he was concealed, because the cabin was the place where the libelant had been assigned to sleep, had slept, where his baggage was placed, and where he had a right to go and did go for it.

Very able arguments and briefs have been submitted as to the responsiblity arising for injuries inflicted by domestic animals like dogs;

whether they must be known to bite, or wont to bite, before the owner is responsible; and whether there is a difference between the common law and civil law on the subject. But I do not find it necessary to go into the law, being satisfied that enough was known of this particular dog's inclinations and disposition to satisfy the most liberal rule claimed, unless it should be claimed that a dog must actually have bitten somebody before he can have a character, and the owner can be held responsible.

3. The evidence in this case shows that the libelant was seriously bitten in the calf of the leg, with several slight wounds, but one deep one, which really caused pain, sickness, and danger. He went under treatment, and got along well for about four days, when he felt able to and did return to his usual business, making one trip as pilot to the mouth of the river. On his return from this trip his leg swelled, his pains increased, paroxysms followed, and for a time he was threatened with lock-jaw. This relapse kept him confined for several weeks, and at the taking of his evidence he had not fully recovered. The evidence of the doctors show that his early attempt to resume work resulted in protracting his confinement and increasing his sufferings. The district court assessed damages, including loss of time nursing, medicines, doctors' fees, and suffering, at $2,500. This allowance is vigorously combated here as excessive; as judicial liberality, etc.

The point is urged that it was gross negligence on the part of libelant to return to work so soon, and before his wounds had entirely healed, and that this negligence aggravated his injuries and increased the extent of damages, and that for this aggravation and increase he cannot recover. The attempt to return to work too early made by the libelant was certainly unwise and injurious, but I am not prepared to call it gross negligence. The doctor did not recommend it; neither did he forbid it, as he says himself: "I consented to his going, which certainly was a mistake." As it appears to me, it was an unwise step, taken with the commendable desire on the part of a workingman to resume the labor on which he had to rely to support his family. The doctor did not know until after the event that it was unwise; neither did the libelant. So, on this point, I agree with claimants as to the law, but I reject the conclusion of negligence as claimed. See Sherman, Neg. ¶ 35. The bite of a dog, particularly in this climate, is a very serious matter outside of the actual pain and suffering experienced. The dangers of lock-jaw and the fear of hydrophobia are added to the mental and nervous sufferings attendent upon such injuries; and, as the evidence shows, they were experienced by the libelant in this case. To many people the shock to the system resulting from the most insignificant bite of a dog drawing blood is such that no money compensation is adequate. The ghost of hydrophobia is raised, not to down during the life-time of the victim.

On the whole case, while I am not prepared to say that I would have made the same allowance as the district judge has, had the case come before me originally, I now see no good reason to vary the amount. When no additional testimony is taken the circuit court will not hastily disturb a decree on the point of damages, nor unless it shows manifest injustice. See *Cushman* v. *Ryan*, 1 Story, 91; *The Narragansett*, 1 Blatchf. 211; *Taylor* v. *Harwood*, Taney, 437.

In *Cushman* v. *Ryan*, *supra*, Justice STORY says:

"In cases of this nature, where the damages are necessarily uncertain, and are incapable of being ascertained by any precise rule, and therefore unavoidably rest in a great measure in the exercise of a sound discretion by the court, upon all the circumstances in evidence at the hearing, it is with extreme reluctance that the appellate court entertains any appeal, and it expects the appellant to show, beyond any reasonable doubt, that there has been some clear mistake or error of the court below, either in promulgating an incorrect rule of law or in awarding excessive damages, or that new evidence is offered which materially changes the original aspect of the case."

A decree will be entered for the libelant in the same terms as in the court below.

TEILMAN *v.* PLOCK and others.

(*District Court, S. D. New York.* June 20, 1883.)

1. DUTY OF SHIP TO FIND BERTH.
   In the absence of any agreement or contrary usage, it is the duty of a general ship to find a berth where she can discharge on the wharf.
2. SAME—BILL OF LADING.
   On a bill of lading providing that iron rails should be discharged "at the same place as the other cargo—only one place," *held*, the duty of the ship to go to a berth where the rails could be discharged on the wharf.
3. SAME—DETENTION—DEMURRAGE.
   Where the bark A., while discharging petroleum barrels before reaching her berth, gave notice of readiness to discharge the iron rails, and was at a dock where the privilege of landing the rails was refused, even for the necessary purpose of weighing them in the course of discharge, and negotiations in respect to the discharge from the vessel upon lighters were not completed through the mate's not giving unqualified permission to weigh the iron on the ship's deck, *held*, that the defendant was not legally in default, and was not liable for demurrage for the vessel's delay at the dock where she was not allowed to land the rails.

In Admiralty.

Beebe, Wilcox & Hobbs, for libelants.

Edward S. Hubbe, for respondents.

BROWN, J. Demurrage to the amount of $129.60 is claimed in this case for three-days' detention of the Norwegian bark Anna in the delivery of 181 iron rails in September, 1880, consigned to the respondents. The cargo, which was consigned to several different consignees, consisted of pig-iron stowed at the bottom; next, the iron

rails, weighing only about 35 tons; and on top some 600 empty petroleum barrels. The clause in the defendant's bill of lading relating to discharge was as follows: "To be discharged in the same place as the other cargo—only one place; to commence immediately" (immediately?) "after arrival of the ship, and discharge without delay; other terms as per charter-party." By the charter, to which the respondents were not parties, £9 per day demurrage were to be paid.

The bark arrived in New York in the latter part of August and went to Atlantic docks. Shortly after, on September 1st, she was visited by Capt. Gillen, who was in charge of the lighters by which it was expected to receive the rails, and he was told by the mate that the barrels would not be discharged for several days. The bark did not at first get a berth at the wharf, but discharged the barrels while lying outside of another vessel. This was finished by 9 A. M. of Saturday, September 4th. In the afternoon of that day she got along-side a wharf. The custom-house permit for delivery of the rails had been previously handed to the mate by Gillen. On Saturday it was returned to Gillen, who gave it to the United States weigher, by whom it was necessary that the rails should be weighed as delivered from the vessel. As the vessel had no berth along-side till Saturday afternoon, the iron could not have been delivered on the wharf so as to be weighed until Monday. A special custom-house permit could easily have been obtained to weigh the iron on the deck of the vessel. Gillen on Saturday applied to the mate for permission to weigh the iron on deck, preparatory to receiving the cargo on lighters. There is some conflict as to the reply of the mate to this request. I am satisfied, however, that he did not give any unqualified permission, but required Gillen to apply to the captain, who was away from the ship, or to the ship's agent in New York. This Gillen declined to do. On Tuesday the vessel was moved to Merchants' Stores, where all the rails were on Wednesday put upon a wharf, weighed, and thence transfered to Gillen's lighters; and the pig-iron was discharged there also.

The iron rails formed but a small part of the cargo, and the vessel was in no way directed by the respondents to the Atlantic docks or to Merchants' Stores, and the respondents had no control over her movements. The libelants claim compensation for the delay of Saturday, Monday, and Tuesday.

In the absence of any agreement or usage to the contrary, it was the duty of this vessel, as a general ship, to find a berth where she could discharge the rails on the wharf, unless relieved from that burden by some different arrangement, and until then the respondents' duty to commence the discharge did not begin. *Irzo* v. *Perkins*, 10 FED. REP. 779; *Gronstadt* v. *Witthoff*, 15 FED. REP. 265. There was no contract in this case to receive the rails on lighters. The repeated proposals to receive them on lighters was subject to the necessary condition of some arrangement for weighing the iron; and the use of

the ship's deck for this purpose was not authorized by the mate. It was his business, and not Gillen's, to seek the captain or the agents of the vessel to get authority to give that permission, since the whole arrangement was for the purpose of expediting the delivery of the rails and of relieving the vessel from an obligation to deliver on the wharf, which she was not then in a situation to do. For want of permission to weigh on deck, no arrangement was completed for delivery by lighters, and the burden still remained on the vessel to find a proper place of discharge, which she did not do until the following Wednesday.

Moreover, it appears by the testimony of Thompson that the iron rails were not allowed to be landed at the Atlantic docks, as was the case also in *Carsanego* v. *Wheeler*, 16 FED. REP. 248; and I have recently held, in the case of *Gronstadt* v. *Witthoff*, *supra*, that one of several consignees of goods on a general ship, who has no right or power to direct the vessel to a berth, is not responsible for the detention of the vessel until she has reached a berth or proper place to discharge, and is in actual readiness to discharge according to her legal obligation, unless there be some different express contract making the consignee liable before that time. On Saturday afternoon the vessel got a berth along-side the wharf, so that if the rails had been allowed to be landed there, the respondents would have been bound to discharge them during Monday. In answer to a question from the court, Thompson, the libelant's witness, stated explicity that the iron rails were not allowed to be landed at Atlantic docks, even for the purpose of weighing. If the iron rails and pig-iron would have been suffered to be landed there, no reason appears for the vessel's going to Merchants' Stores, nor any reason why notice of her readness to deliver at Atlantic dock after she got a berth on Saturday afternoon was not given. But as the discharge of the rails was not premitted there, even for weighing, the respondents cannot be charged for any delay of the bark at the Atlantic docks.

The stipulation of the bill of lading that the vessel should go to only one place of discharge, could have no force in charging the respondents for delay, unless the dock which the vessel selected was one where she could land the entire cargo, or at least the respondents' part of it. As the respondents were not legally bound to accept delivery on lighters, and as no arrangement was perfected for delivery on lighters while at Atlantic docks, through want of any arrangement for weighing the rails, the vessel must bear the loss occasioned by her first going to a place of discharge where she could not make delivery of the respondents' part of the cargo, as in the case of *Carsanego* v. *Wheeler*, above cited. After reaching Merchants' Stores there was no delay or detention, and the libel must, therefore, be dismissed, with costs.

THE CANIMA. (Two Cases.)

(District Court, S. D. New York. June 26, 1883.)

1. COLLISION—CANAL-BARGE.
   If a canal-boat, after being assigned a berth within the slip, is moved so as to project beyond the pier, and there left with no one on board, it is at her own risk of collision with other vessels making a landing.
2. SAME—DAMAGES.
   The steamer C., in making a landing at the pier below, having struck the bows of the canal-boat in rounding about, *held*, she was also chargeable with fault, as there was room for her to land without coming up so far as the canal-boat; and the damages of the collision were divided.
3. SAME—SET-OFF.
   Where the owner of the cargo recovers his whole damage from one of two vessels in fault, the vessel sued may set-off in another suit between the owners of the two vessels, tried at the same time, the one-half of the damage to the cargo which ought to be paid by the other vessel.

In Admiralty.

J. A. Hyland, for libelants.

Butler, Stillman & Hubbard, for claimants.

BROWN, J. The libels in the above cases were filed by the owner of the canal-boat Charles T. Redfield, and by the owners of the 223 tons of coal on board of her, to recover their respective damages from the sinking of the canal-boat by a collision with the steam-boat Canima, about 11 A. M. of the twenty-seventh of August, 1880.

The weight of evidence shows that the canal-boat, though previously assigned by the harbor-master to a berth wholly within the slip on the north side of pier 48, North river, the afternoon before, had been moved further out that morning by her captain, preparatory to discharging the coal, and that at the time of the collision she was lying on the north side of the pier, with her bows projecting some 10 or 15 feet into the river beyond the end of the pier. The Canima had come up the river with a strong flood-tide and a southerly wind, and was preparing to land at the south side of pier 47, bows out. For that purpose a line had been cast from her starboard quarter and made fast to the end of pier 47, and as she drifted up slowly with the tide, and with her engines reversed, the bluff of her starboard bow struck, or rubbed against, the starboard bow of the canal-boat, causing the latter to sink almost immediately. No one was aboard the canal-boat at the time, and the steamer's hail to move, or loosen her lines, were therefore unheeded. The witnesses from the steamer say that the blow was only the ordinary rubbing of vessels against each other in such circumstances, and that the canal-boat sank only because she was old, and too rotten to withstand the ordinary pressure. The canal-boat was 12 years old, and had been extensively repaired, except her bow and stern. That hails were given to the canal-boat to move, or loosen her lines, leads to the inference that the collision was not a mere rubbing or pressure, but was some-

thing of a blow. I do not think it necessary, however, to determine, upon the meager evidence before me, the question of the soundness of the boat.

The evidence shows that the Canima might and should have avoided the canal-boat altogether, although the latter projected beyond the pier. The Canima, to effect her landing, was under no necessity of going up so far as the canal-boat lay, as is shown by the distance between the piers as compared with her own length,—in this respect differing from the case of *The Cornwall*, 8 Ben. 212; and it is clear that earlier and more effective backing would easily have prevented the collision. She cannot, therefore, be held free from fault.

But the canal-boat is also chargeable with negligence contributing to the collision from the position which her own captain voluntarily assumed; her bows moved out beyond the pier, after having a berth wholly inside the slip. This position was one of peculiar exposure to just such collisions, and has repeatedly been adjudged to be a fault, when voluntarily and unnecessarily assumed. *The Baltic*, 2 Ben. 452; *The Cornwall, supra*; *The Avid*, 3 Ben. 434. After being once safely located inside the slip, she had no right to move her bows so as to project outside, except at her peril. In the case of *The Nellie*, 7 Ben. 497, the elevator was intentionally swung by the tug against the barge, and consequently at the tug's own risk.

In addition to this, the canal-boat was left fastened in this exposed situation with no one on board to render any aid in averting threatened danger. There was negligence, therefore, in both respects; and Grimes, the owner of the canal-boat, is, therefore, entitled to but half his damages, with costs.

Duncan, the owner of the cargo, is entitled to recover his whole damages, with costs, as in the case of *The Atlas*, 93 U. S. 302. But as the steam-ship, in paying the owner of the cargo, sustains damage to that amount, she is entitled on payment to offset this against the loss recoverable by the owner of the canal-boat, so far as that will go; or, what comes to the same thing, the steam-boat may charge against the sum payable to the owner of the canal-boat, the one-half of the damages to the cargo; which the latter ought by reason of his negligence to pay for the cargo, as in the case of *The Eleanora*, 17 Blatchf 88, 105. *The C. H. Foster*, 1 FED. REP. 733; *Leonard* v. *Whitwill*, 10 Ben. 638, 658; *Atlantic Mut. Ins. Co.* v. *Alexandre*, 16 FED. REP. 279.

A reference may be taken to compute the amount.

LEO v. UNION PACIFIC RY. CO. and another.

(Circuit Court, S. D. New York. July 5, 1883.)

1. REMOVAL OF CAUSE—REV. ST. § 639—ACT OF MARCH 3, 1875, § 6.
The act of March 3, 1875, § 6, refers to the stage of the proceedings in the suit at which the proceedings in the circuit court are to commence, rather than to the form, force, or effect of the pleadings in the cause previously had, leaving the provisions of Rev. St. § 639, in force as to them; and if the pleadings are in form, and verified, so as to be regular and valid in the state courts, the intention and effect of the statute and rules would seem to be that they are to be taken to be so on reaching the federal courts in cases of removal.

2. SUIT BY STOCKHOLDER—EQUITY RULE 94.
Equity rule 94 applies only to bills brought by a stockholder against a corporation and others, "founded on rights which may properly be asserted by the corporation," and does not apply to a suit brought by a stockholder, not "founded on such rights," against a corporation to restrain corporate action, and against the president for discovery merely.

3. MOTION FOR INJUNCTION—AFFIDAVITS.
On motion for a preliminary injunction, the case, with its grounds for relief, must be made by the bill itself, and the scope of the bill cannot be enlarged by affidavits filed.

4. CORPORATION—POWER TO PLEDGE SECURITIES FOR DEBT.
The power of a corporation to pledge securities owned by it for the payment of its debts is included in the power to sell such securities for that purpose.

5. INJUNCTION DENIED.
In this case the averments of the bill are too indefinite to entitle complainant to a preliminary injunction as moved, and the motion is accordingly denied.

In Equity.

George Zabriskie, for orator.

John F. Dillon and *Artemus H. Holmes*, for defendant.

WHEELER, J. This suit is brought by the orator as a stockholder in the defendant corporation, of which the other defendant is president, to restrain the corporation from raising money on its bonds secured by a pledge in trust of the securities of other roads held by it, to aid in the construction and operation of connecting roads not a part of its own lines. There is a motion for a preliminary injunction, which has now been heard. The defendants make question in advance of the merits of the case as to whether it is brought within the requirements of the ninety-fourth rule in equity. The suit was commenced in the state court and removed into, and copies of record have been entered in, this court. Section 639, Rev. St., provides, with reference to suits removed like this, that—

"When the said copies are entered as aforesaid in the circuit court, the cause shall proceed in the same manner as if it had been brought there by original process; and the copies of pleadings shall have the same force and effect, in every respect and for every purpose, as the original pleadings would have had by the laws and practice of the courts of such state if the cause had remained in the state court."

Section 6 of the act of 1875 (1 Supp. Rev. St. 172) provides—

"That the circuit court of the United States shall, in all suits removed under the provisions of this act, proceed therein as if said suit had been originally commenced in said circuit court, and the same proceedings had been taken in such suit in said circuit court as shall have been had therein in said state court prior to its removal."

This cause was removable under the act of 1875 as well as under the Revised Statutes, and may be said to be a suit removed under that act, so that the provisions of section 6 of that act would apply to it; and, so far as they would apply, they would supersede the provisions of the Revised Statutes, of course. This provision of the act of 1875 seems to refer to the stage of the proceedings in the suit at which the proceedings in the circuit court are to commence, rather than to the form, force, or effect of the pleadings in the cause previously had, and to leave the provisions of the Revised Statutes in force as to them. The rule could not be intended to apply to the state courts. And if the pleadings were in form, and verified, so as to be regular and valid in the state courts, the intention and effect of the statutes and rules would seem to be that they were to be taken to be so on reaching the federal courts. Further, rule 94 in terms applies only to bills brought by a stockholder against the corporation and others, "founded on rights which may properly be asserted by the corporation." This does not appear to be such a bill. It is brought by a stockholder against the corporation and another, but not founded on such rights. The suit is against the corporation to restrain corporate action, and the president seems to be joined for the purposes of discovery merely, and not as a party against whom specific relief is sought, instead of against the president, to restrain official action, and for relief against him personally; the corporation being joined merely because it had refused to proceed in its own right. Green's Brice's Ultra Vires, 647; *Hawes* v. *Oakland*, 104 U. S. 450. The motion, therefore, is to be disposed of upon its merits.

An answer was filed, the bill has been amended, and affidavits have been filed on each side. Whether affidavits are admissible or not to support the bill on such motion, they cannot enlarge the scope of the bill. The case, with its grounds for relief, must be made by the bill itself. In this case the bill sets forth distinctly and clearly that the corporation is about to raise money in the manner mentioned, and sets forth that the money of the corporation has been used for the purpose of constructing and operating other roads; and that the orator has reason to believe, and does believe, that it will continue to lend and furnish its moneys and credit to such railroad corporations for the purpose of aiding in and promoting the construction, maintenance, and operation of the railroads of such companies; but does not set forth any railroad or corporation that it is about to so aid, nor any place where it is about to so invest its moneys. The answer admits that the corporation is about to raise funds by the

pledge of such securities of other roads, but denies that it is about to use them for such purposes, and alleges that it intends to use them to pay its floating debt. It is said in argument that if the defendants should answer fully the interrogatories in the bill, the intention to aid other roads would appear with much more definiteness. This may be true, but cannot amplify the bill for the present motion. The information thus to be obtained cannot be made available until it is had. These allegations as to intention and purpose of diverting the funds of the corporation seem to be too meager and indefinite to lay the foundation of a preliminary injunction upon, and, such as they are, they are fully met by the denials of the answer.

The purpose to raise money to meet debts, or for other corporate uses, by pledge of these sureties, seems to be clearly within the scope of the corporate powers, and lawful and proper. The corporation has these securities not yet due. Whether it came by them by stretch of its powers or otherwise, no question is made but that it owns them. The bill proceeds upon the ground that it does. It owes debts, and was created with the expectation that it would owe them, and has implied power to raise money to pay them. It is not disputed that it could sell these securities to raise money to pay its debts, and the power to pledge them is included fairly in the power to sell for the same purpose. *Platt* v. *Union Pac. R. Co.* 99 U. S. 48. The orator does not appear to be entitled to have the corporation restrained from raising the money by the pledge of the securities, for that seems to be entirely lawful; nor to have it restrained from using the money for outside purposes, for there is no sufficient allegation or admission of any intention of doing so if not restrained. On the contrary, the intention imputed is denied, and the whole equity of the bill, if any, is denied. As the case now stands the orator does not appear to be entitled to the preliminary injunction moved for.

Motion denied.

TEXAS & ST. L. RY. CO. in Missouri and Arkansas *v.* RUST and another.

(*Circuit Court, E. D. Arkansas.* April Term, 1883.)

1. REMOVAL OF CAUSE—JURISDICTION OF CIRCUIT COURT, WHEN ATTACHES.
   Upon filing the required petition and bond, in a state court, in a cause removable under the act of congress, the jurisdiction of the state court ceases, and that of the circuit court immediately attaches. The entering of a copy of the record in the circuit court is necessary to enable the court to proceed, but its jurisdiction attaches when the requisite petition and bond are filed in the state court.
2. SAME—FILING OF RECORD—TIME.
   The act of congress requires the party removing the cause to file a copy of the record on the first day of the next session of the circuit court occurring after the removal. But it may be filed by either party before that time; and when

filed, and upon due notice, the circuit court will make such interlocutory orders in the case as may be necessary to preserve the property or protect the rights of the parties.

3. SAME—MOTION MADE IN STATE COURT—RECEIVER—INJUNCTION.
Where an injunction is granted and a receiver appointed by the state court without notice to the defendants, and no motion to dissolve the injunction and discharge the receiver is made and acted upon in the state court before the removal of the cause, such motion may be made and heard in the circuit court, upon due notice to the plaintiff, at any time after the record in the case is filed in that court.

4. SPECIFIC PERFORMANCE—WHEN DECREED.
Before a court can decree a specific performance of a contract, the party seeking the relief must establish his right thereto by satisfactory evidence, and this can only be done on the final hearing of the cause.

5. SAME—CASE STATED.
The plaintiff railway company entered into a contract with the defendants for the construction by the latter, for the former, of a railroad bridge across the Arkansas river. Differences arose between the parties as to their respective rights under the contract, which resulted in stopping work on the bridge. The plaintiff thereupon filed a bill, asking the court to take possession of the defendants' plant and complete the bridge, with funds to be furnished by the plaintiff; leaving all questions of difference between the parties for future settlement or adjudication. *Held*, that the court had no power to seize and use the defendants' plant, and that it would not undertake the work of completing the bridge.

On the twenty-second of April, 1882, a contract was entered into between the plaintiff railway company and Rust & Coolidge, the defendants, for building a railroad bridge across the Arkansas river. The defendants were to complete the bridge by the first of November, 1882, and were to receive therefor the sum of $305,000, to be paid on "*pro rata* monthly estimates, ninety per cent. thereof to be paid during progress of the work, upon material furnished and work performed, and balance due upon completion thereof."

The contract contains this provision:

"In case of non-completion of the bridge upon November 1, 1882, or of providing a crossing for trains by said date, then, in such event, the sum of $1,000 per week, for the period of time such completion or provision for crossing of trains is delayed, shall be deducted from said contract price; and in like manner, should the bridge be completed at an earlier date than November 1, 1882, then, in such event, the sum of $1,000 per week shall be added to said contract price for the period by which said fixed date of completion shall be anticipated."

Rust & Coolidge entered upon the work of building the bridge, but it was not completed the first of November, and is not yet completed. The defendants continued to work on the bridge, and their monthly estimates for work done and materials furnished were honored and paid by the railway company down to and including the month of April, 1883. The total amount thus paid by the railway company to the defendants under the contract was $268,000.

The May estimate for work done and materials furnished, amounting to $15,932.58, after deducting the 10 per cent., the railway company refused to honor. In a letter of the defendants of June 29, 1883, they state that unless the differences between the parties are

adjusted at a proposed conference, "we shall, upon Saturday, July 7, 1883, stop or suspend work upon the Arkansas river bridge until a definite understanding is reached." A conference took place between the president of the railway company and the defendants at Pine Bluff on the sixth of July, 1883. They were unable to reconcile their differences, and on the same day the plaintiff brought suit, by attachment, in the Jefferson circuit court against the defendants for $35,000, being $1,000 per week for the number of weeks that had elapsed since the first of November, 1882, and caused the defendants' plant at the bridge, consisting of machinery, tools, houses for hands, camp, camp equipage, and provisions to be attached. The next day the plaintiff filed a bill against the defendants on the equity side of the Jefferson circuit court, setting up, in substance, that the road was completed and ready for traffic, and that the running of trains thereon was only prevented by the non-completion of the bridge; that the bridge could be completed in 20 or 30 days; that the defendants had been paid the full contract price for building the bridge, counting as part payment the weekly forfeiture of $1,000 for 35 weeks; that at the conference between the president of the railway company and the defendants, the day previous, the latter demanded of the plaintiff, as a condition of going on with the work, a release from all claims for damages by reason of the delay in the completion of the bridge, and also $20,000 for extra work and materials, and threatened, if these demands were not acceded to, to stop work on the bridge and remove their plant out of the state; and that plaintiff believed they would carry their threat into execution, unless restrained; that the plant for the construction of the bridge was of such a character that, if removed, it would cost a large sum of money and take months to replace it; and that the plaintiff and the public were deeply interested in a speedy completion of the bridge, to the end that the railroad might be opened for traffic. The bill concludes as follows:

"The plaintiff is willing to pay into the registry of this court such sum as shall be necessary for the completion of said work, if such court shall order and direct the progress of the work by a receiver appointed by the court. The premises considered, the plaintiff prays for process according to law that the said defendants, their agents, servants, or employes, and all other persons, be restrained and enjoined from destroying, injuring, or interfering with, or removing, said tools, machinery, or appliances necessary to said work, or the materials used therein; and that a receiver be appointed by the court to take charge of said work, and the material, fixtures, and tools used therein, and proceed to carry out and complete the same in accordance with the specifications thereof, and for said purpose be fully authorized to employ men and labor, and use the tools of defendant therefor."

Upon filing this bill, without notice to the defendants or their agents, the state court made an order enjoining the defendants from taking possession of, using, or in any manner interfering with their plant at the bridge, and appointing a receiver "with full power and authority, so far as possible for him to do, to carry out and execute

in full, and according to the specifications thereof, the contract between the plaintiff and defendants in relation to the building of said bridge, and for said purpose he is hereby authorized and empowered to take charge of and use all material now in the vicinity of said work, together with all the tools, machinery, or other appliances necessary to the work thereon, offices and houses for hands, kitchen and dining-room furniture," and concludes with an order to the sheriff to turn over to the receiver the defendants' plant in his custody on the writ of attachment. The order does not state from what source the receiver is to obtain funds to carry on the work. On the ninth of July the defendants filed in the state court their petition and bond for the removal of the cause to this court, on the ground of the citizenship of the parties. The record in the case was filed in this court on the twelfth of July, and afterwards the defendants, upon due notice to the plaintiff, moved to dissolve the injunction and discharge the receiver. Thereupon the plaintiff moved for leave to amend its bill, which leave was given, and an amended bill filed accordingly. The amended bill sets out at length the contract and correspondence between the parties; repeats the allegations of the original bill, with some variations of statement and addition of detail; alleges that the defendants, in making their proposal and estimates for the building of the bridge, included in the same the value of the use of the plant, tools, and machinery required to be used by the defendants in the construction of the bridge, and that the estimates that were made from time to time included the value of the use of said plant, and entitled plaintiff to the use of said plant until the completion of the bridge; that at the Missouri and Texas state lines the plaintiff's road connected with roads in these states, making the road in this state a connecting link in a continuous line extending from Gatesville in Texas to Cairo, Illinois, a distance of about 750 miles, and that as soon as the bridge is completed so that trains can cross thereon, the United States mail will be carried over the whole of said line; that the bridge is so nearly completed that the same can be finished in 20 days, at an expense of not more than $10,000, "in connection with the use of the materials, tools, machinery, and plant now at said bridge," but that if defendants are allowed to remove their plant the bridge cannot be finished in a less period than six months, and at a cost of not less than $50,000; that plaintiff "is willing to pay and indemnify the defendants from any and all loss which they may sustain by reason of the institution of this suit, if wrongfully brought, and the use of the plant and property of the defendants by the receiver in the completion of said bridge." The bill does not allege that the defendants are insolvent. The defendants have filed an answer to the original and amended bill, in which the delay in the construction of the bridge is stated to have arisen from sickness of laborers,—particularly skilled laborers, whose places could not be supplied,—from bad weather, repeated and unlooked-for floods in the

river, and other causes of like nature; that from these and like causes the plaintiff was delayed in the construction of its road, and had no use for the bridge down to the time of the institution of this suit; that plaintiff never complained at the delay in the construction of the bridge, and paid the monthly estimates for work and material promptly down to and including the April estimate, and that it waived the weekly forfeiture of $1,000 for the non-completion of the bridge after the first of November; that the whole of the May estimate was due to them, and that plaintiff's refusal to pay same was without excuse or justification; that there is a large sum due defendants for extra work and materials; that defendants did not stop work on the bridge of their own will, but that the work was stopped by the levy of the plaintiff's attachment on the defendants' plant; that defendants did not intend to stop work after their interview with the president of the company, and that at such interview they did not threaten to stop work on the bridge and remove their plant unless the plaintiff would release all damages for non-completion of the bridge and pay them $20,000 for extra work; denies that the defendants or any of their agents, with their knowledge and consent, injured or damaged the plant or materials for the bridge in any way; and denies that plaintiff has paid for the use of defendants' plant, or is entitled to the use and possession thereof.

Several affidavits were filed in support of the answer.

H. K. & N. T. White, Phillips & Stewart, and *John McClure,* for plaintiff.

M. L. Bell and *U. M. & G. B. Rose,* for defendants.

CALDWELL, J. It is settled that upon filing the required petition and bond in the state court, in a cause removable under the acts of congress, the jurisdiction of the state court ceases, and that of the circuit court of the United States immediately attaches. The entering of a copy of the record in the circuit court is necessary to enable that court to proceed, but its jurisdiction attaches when the requisite petition and bond are filed in the state court. *Nat. Steamship Co.* v. *Tugman,* 106 U. S. 118; [S. C. 1 Sup. Ct. Rep. 58;] *Railroad Co.* v. *Koontz,* 104 U. S. 5.

The act of congress requires the party removing the cause to file a copy of the record on the first day of the next session of the circuit court occurring after the removal. But it may be filed by either party before that time. And where any order or direction of the court is necessary to preserve the property in litigation, or protect the rights of the parties before the next session, the court will grant leave to either party to file the record, and will make such interlocutory orders as the case seems to require, and as it would have power to make between the commencement of an action originally brought in that court and the term at which it could be tried. Section 6 of the act of March 3, 1875, provides that the circuit court shall proceed

in a removal cause as if had been originally commenced in that court, "and the same proceedings had been taken in such suit in said circuit court as shall have been had therein in said state court prior to its removal."

Undoubtedly, if this cause had been commenced in this court, and an injunction granted and a receiver appointed without notice, the court, upon notice to the plaintiff, would have heard a motion to dissolve the injunction and discharge the receiver before the term at which the case would be triable.

If this cause had remained in the state court, the defendants would have had the right to make this motion and had it determined before the term to which the writ was returnable. Gantt, Dig. §§ 3477–3480.

But the defendants were not bound to make the motion and submit it to the determination of that court. If they had done so, and that court had denied the motion, and they had then removed the cause, this court would not have entertained the motion on the same record until the trial term. *Hot Springs Cases*, MS. Op.

But the injunction having been granted, and the receiver appointed without notice to the defendants, and no motion to dissolve the injunction and discharge the receiver having been made in the state court, such motion may be made, upon notice to the plaintiff, in this court at any time after the record is filed. Dillon, Rem. § 80, p. 99; *Mahoney Mining Co.* v. *Bennett*, 4 Sawy. 289.

In disposing of the motion before the court it is not necessary to determine whether a court of chancery will, in any state of case, undertake to enforce specific performance of a contract to build a railroad bridge. The plaintiff's bill is not one for specific performance of the contract to build the bridge. The bill is an anomaly in equity pleading. No precedent for it has been produced, and it is believed none can be found. It is not framed to secure a specific performance of the contract by the defendants, nor to settle the controversy between the parties. Whether the plaintiff waived the right to the $1,000 per week after the first of November; whether the defendants were entitled to be paid the May estimate; and whether they are entitled to receive anything for extra work and materials,—are matters which are material and necessary to be determined before specific performance of the contract could be decreed, if, under any circumstances, a court of equity would undertake to enforce specific performance of such a contract; and yet all these disputed questions, the determination of which would be absolutely essential before it could be known whether the plaintiff was entitled to the aid of a court of equity to enforce specific performance of the contract, are by the bill in terms left to be determined after the court has taken it upon itself to seize the property of the defendants and complete the bridge; and then these questions are not to be determined in *this* suit, but in the

suit at law already pending, and such other suits as may hereafter be brought, or by convention of the parties, or by arbitration. The exact language of the bill on this point is that—

"The plaintiff is willing to waive for the time being all questions and differences in relation to the construction to be placed upon the said contract between the complainant and the defendants, as well as the amount that may may be due from one to the other, and hereby proffers to advance this *court*, or to the receiver hereinafter prayed for, such a sum of money as will fully pay for the completing of said bridge, leaving all questions of differences between the complainant and the defendants to be hereafter settled without prejudice to the rights of either of the parties hereto, by compromise, arbitration, or in due course of law, as the said parties may elect."

It is an elementary principle of equity law, that, before a court can decree a specific performance of a contract, the party seeking such relief must establish his right thereto by satisfactory evidence, and this can only be done upon final hearing of the cause. It cannot be done upon an *ex parte* statement, and without notice to the party against whom the relief is sought. In this case, as it stands, there is nothing from which the court can form any opinion to the merits of the case. There is no evidence on the essential points of differance—nothing but the opposing statements of the parties. If, as claimed by defendants, the plaintiff waived the weekly forfeiture, and they are entitled to compensation for extra work and labor, then they were entitled to have the May estimate honored, and the party in default is the plaintiff. So far from asking that the defendants be required to specifically perform the contract on their part, the court is asked to take from them their tools, machinery, camp, and camp equipage, and enjoin them from doing anything in the premises.

Stripped of its irrelevant and declamatory statements, the case made by the bill is this: That the plaintiff and defendants have a misunderstanding as to their respective rights under the contract for building the bridge; that the materials are on the ground to complete the bridge, and that with the use of the defendants' plant—consisting of machinery, tools, and camp equipage—it can be completed in a short time; but that without the use of this plant the completion of the bridge will be much delayed and its cost enhanced, to the great damage of the plaintiff and the inconvenience of the public; and that the use of the defendants' machinery and tools is absolutely necessary to avoid the delay and damage to the railroad company and disappointment to the public. Upon this showing, an injunction is prayed against the defendants, enjoining them from using or taking possession of their machinery, tools, and entire plant used in carrying on the work on the bridge; and the *court* is asked to take possession of this plant, and go forward with the work and complete the bridge "in accordance with the specifications;" the plaintiff generously promising to furnish the means to discharge the pecuniary obligations incurred by the court in carrying out the enterprise, and also offering to give a bond

to pay the defendants the value of the rent of the tools during the time they are used by the court. It is the defendants' plant for building the bridge, and not the materials which enter into the construction of the bridge, which the court is asked to seize and use. The materials for the bridge belong to the plaintiff; the plant to the defendants. What authority has a court of chancery to seize and use the property of one citizen for the benefit of another, without a trial or a hearing? No exigency of a railroad company, and no considerations of public convenience, however great, will justify the act to the law.

If the necessities of the plaintiff, and the public necessity, will warrant the seizure and use of the defendants' tools and machinery, it is not perceived why the same considerations would not make it the duty of the court to seize and use the tools of other citizens, or the mules of the neighboring planters. Courts possess no such absolute and despotic power over the property of the citizen. The citizen cannot be deprived of his property or its possession "without due process of law," and a simple bond to pay the owner the value of a forced loan of his property is not the equivalent of the due process of the law contemplated by the constitution. In effect, the court is asked to compel a forced loan of the defendants' tools, machinery, and camp equipage, and when it secures possession of them it is asked to use them in completing the bridge, and to appoint an agent for that purpose. A receiver is the agent of the court; he is an officer of the court, and his possession is that of the court. He is not the agent of either party, and neither party is responsible for his misfeasance or malfeasance. And for this reason courts should not assume to place the private property of the citizen, or the conduct of his business, in the hands of a receiver, except where both the right and the necessity to do so are clear.

Courts are poorly adapted to the business of building railroad bridges. If not properly constructed, the most serious consequences to life and property are likely to result. Their proper construction requires a high degree of engineering skill, which this court does not possess. Any court which engages in the business is liable to commit grave mistakes, and inflict great wrong and hardship, for which the injured parties will have no redress; for the errors and mistakes of the court, though they may ruin a citizen, are placed in the category of injuries produced by the law, and for which the law furnishes no redress. Certainly no court ought to engage in the business, when it would have to resort, in the beginning, to the exercise of such questionable powers to get the tools to carry on the work. It is obvious that the sole object of the bill in this case is to obtain, through the agency of the court, the use of the defendants' plant until the bridge can be finished. If the court should continue the forced loan of the defendants' tools and complete the bridge, it would have to settle with the plaintiff for the money received, and there

this case would end, leaving every question is dispute between the parties where it stood when this case was begun. This would be proceeding by inversion. The method has too much the air of that proceeding by which a man is first hung and tried afterwards to find favor in a court of equity.

Let an order be entered dissolving the injunction and discharging the property from the custody of the receiver, and requiring him to return the same to the officer or person from whom he received it, and to pass his accounts in the master's office without delay.

See *City of Chicago* v. *Hutchinson*, 15 FED. REP. 129; *Glover* v. *Shepperd*, Id. 833: *Phœnix Mut. Life Ins. Co.* v. *Walrath*, 16 FED. REP. 161; *Public Grain & Stock Exchange* v. *Western Union Tel. Co.* Id. 289.—[ED.

TICE *v.* SCHOOL-DIST. NO. 18, ADAMS COUNTY, NEBRASKA.

(*Circuit Court, D. Nebraska.* August, 1883.)

1. CIRCUIT COURT—CHANCERY JURISDICTION—STATE STATUTE—NEW TRIALS.
   The statute of Nebraska, regulating the practice of the state court in determining applications for new trials, is not binding upon the circuit court of the United States when exercising its chancery jurisdiction; and the limitation in the state statute which forbids the state courts to grant new trials after one year, so far from being a limitation upon the circuit court, sitting in chancery, may be the very ground of its jurisdiction; especially where the facts which make it proper that the judgment should be set aside have been fraudulently secreted until the year has passed.
2. SAME—JURISDICTION, HOW CONFERRED.
   The chancery jurisdiction of the circuit court is conferred by the constitution of the United States and the acts of congress, and is not derived from or limited by state laws. The rules governing its exercise are the same in all the states, and are according to the practice of courts of equity in England, as contradistinguished from courts of law.
3. SAME—STATE STATUTES OF LIMITATIONS.
   Federal courts of equity usually follow by analogy state statutes of limitations, but they will not do so when the effect of such a statute in any case is to limit their general chancery jurisdiction; and although a state statute of limitations may make no exception in favor of a party who is prevented from suing by reason of a concealed fraud, they will enforce such an exception because it is a part of the chancery law as administered in those courts, which the state cannot change.
4. NEW TRIAL—POWER OF CHANCERY COURT TO DECREE.
   It is a general principle of law that a court of chancery may decree a new trial after the courts of law are barred by lapse of time from so doing.

On Rehearing.[1]

Bill in equity brought to set aside a judgment at law in this court, and for a new trial upon the ground of surprise at the trial, and newly-discovered evidence. The original suit was brought by the plaintiff to recover judgment upon certain bonds alleged to have been issued

[1] See S. C. 14 FED. REP. 886.

by the defendant school-district for the purpose of building and furnishing a public school-house. The district interposed the defense that the bonds were never issued by it by a vote of the district, and that no money was ever received by the district for the same. The plaintiff was a purchaser of the bonds in the market, and had no personal knowledge of the facts. Upon applying to the officers of the district for information, he was informed by them that they had no knowledge of the issuance of said bonds, or of the receipt of any money thereon by the district. On the trial of the original case one Alexander, who was then the treasurer of said district, testified that he was likewise such treasurer at the time the bonds were issued, and that he had no knowledge or recollection of the execution or issuance of the same, or of the receipt of any money by the district therefor, and the other officers of the district testified to substantially the same effect. The residents of the district and its officers seem to have combined and conspired together to keep plaintiff from obtaining any evidence to establish the fact that the bonds were issued and the money thereof received by the district and used to erect a school-house. Nevertheless, such now appears to be the fact. In this case Alexander testifies that he *now* remembers that the *bonds* were sold for cash, and that the cash was used in the erection of a school-house. These facts, however, were not discovered until more than one year from the date of the judgment. The statute of Nebraska provides that "where the grounds for a new trial could not with reasonable diligence have been discovered before, but are discovered after, the term at which the verdict, report of referee, or decision was made, the application may be made by petition, filed as in other cases, on which a summons shall issue," etc.; but "no such petition shall be filed more than one year after the final judgment was rendered." The district judge held, on final hearing, that this statute was controlling, and that, therefore, the bill was filed too late, but granted a rehearing, and requested the circuit judge to hear and determine the question.

Harwood & Ames, for complainant.

O. B. Hewett, for defendant.

McCrary, J. After much consideration, I have reached the conclusion that the statute of Nebraska, regulating the practice of the state courts in determining applications for new trials, is not binding upon this court when exercising its chancery jurisdiction. Our jurisdiction in chancery is not derived from or limited by state laws. The rules governing its exercise are the same in all the states, and are according to the practice of courts of equity in the parent country, as contradistinguished from courts of law. It is a jurisdiction conferred by the constitution of the United States and the acts of congress, and if it could be controlled or varied by state legislation, it could be extinguished by the same authority. This proposition was strongly stated by the supreme court of the United States in the early case of

Robinson v. *Campbell*, 3 Wheat. 218, and has been since repeatedly recognized by that court. It is true that the federal courts of equity usually follow by analogy state statutes of limitations; but they will not do so if the effect of such a statute in any case is to limit their general chancery jurisdiction. This, although a state statute of limitations may make no exception in favor of a party who is prevented from suing by reason of a concealed fraud. Yet federal courts of equity will enforce such an exception because it is a part of the chancery law as administered in those courts, and which the state cannot change. *Johnson* v. *Roe*, 1 McCrary, 162; [S. C. 1 FED. REP. 692.]

The present case might, perhaps, be decided upon this doctrine, for it is clearly established by the proof that the defendant, by its officers and agents, fraudulently suppressed the fact that the bonds in question had been regularly issued, sold for cash by defendant, and the proceeds used by the defendant to build a school-house, and they concealed these facts until they supposed it was too late for plaintiff to get relief; after which they disclosed them, and one of them has now sworn to them.

However this may be, I think the statute above mentioned, if construed to mean that a bill in chancery cannot be filed in a federal court to set aside a judgment at law, upon any ground, after one year from its rendition, would be an encroachment upon the equity jurisdiction of the federal judiciary. Anciently, appeals to the courts of chancery for relief against unconscionable judgments at law were frequent; but in modern times courts of law are themselves authorized to grant new trials upon liberal terms, and this mode of relief is, in general, ample, so that the equity jurisdiction in such cases is seldom invoked. It nevertheless exists, and it is a mistake to say that it is simply co-extensive with the powers granted by statute to courts of law. It more frequently begins precisely where the power of the law courts ends. The jurisdiction often depends upon the fact that the court rendering the judgment is powerless to afford a remedy. I hold, therefore, that the limitation in the state statute which forbids the state courts to grant new trials after one year, so far from being a limitation upon this court, sitting in chancery, may be the very ground of our jurisdiction, especially where the facts which make it proper that the judgment be set aside have been fraudulently secreted until the year has passed.

It appears that even the state courts of Nebraska, when sitting in chancery, disregard the limitation of one year. Thus, in the case of *Horn* v. *Queen*, 4 Neb. 108, the supreme court of that state, construing this very statute, held that where it would be proper for a court of law to grant a new trial, if the *application had been made while that court had the power*, it is equally proper for a court of equity to do so if the application be made when the court of law has no means of granting such trial. Certainly, if this be a sound rule for the government of the state court whose jurisdiction, both at law and in

equity, is derived from state law, it is, *a fortiori*, the sound rule here. That it is a general principle of equity law that a court of chancery may decree a new trial after the courts of law are barred from so doing, is abundantly established by authority. Hil. N. T. 588, note (*a*); *Hoskins* v. *Hattenback*, 14 Iowa, 314; Story, Eq. Jur. § 887; *Fletcher* v. *Warren*, 18 Vt. 45; *Colyer* v. *Langford's Adm'rs*, 1 A. K. Marsh. 237; *Ballance* v. *Loomiss*, 22 Ill. 82.

The order dismissing the bill must be set aside; and it is so ordered.

MORGAN *v.* TOWN OF WALDWICK and others.

(*Circuit Court, W. D. Wisconsin.* June 26, 1883.)

TOWNS OF WALDWICK AND MOSCOW, WISCONSIN—LIABILITY FOR RAILROAD AID BONDS—DIVISION OF OLD TOWN.

As the evidence in this case shows conclusively that the people of both of the present towns of Waldwick and Moscow, formed by the division of the old town of Waldwick, in Iowa county, Wisconsin, considered and believed, at the time of the division of the old town of Waldwick, that each town was liable for its just proportion of the aid voted to the Mineral Point Railroad Company, represented by the bonds of the old town of Waldwick, for aid voted thereto, and the division was voted on that understanding, and would not have been voted except for such understanding, and the construction of the order of the supervisors of the original town making the division, and the liability of both towns for their respective portions of the debt, have been repeatedly recognized by the people and officers of said towns, and acted upon accordingly for a period of 20 years or more, although the order of the board of supervisors was somewhat equivocal, it is *held* that the town of Moscow should be held liable for the proportion of said debt then assumed by it, although there may be doubt as to the legal effect of the action dividing the two towns, and that the town of Waldwick should pay the balance.

In Equity.

E. Marriner, for complainant.

Vilas & Bryant, for defendants.

BUNN, J. In 1856 the town of Waldwick, in Iowa county, Wisconsin, issued its bonds to the amount of $10,000, with interest at 8 per cent., to the Mineral Point Railroad Company, to aid in the construction of said road. These bonds were negotiated, and the larger portion of them came into the hands of the plaintiff for value. At the time of the issuing of the bonds, the town of Waldwick was composed territorially of two townships of land running east and west, through both of which the road, as built by the said company, ran. In 1859 the people of the town of Waldwick petitioned the county board of supervisors of Iowa county to divide the town on the township line running north and south, through the middle. A popular vote was taken on the question, and it was carried by a large majority, and on the twenty-ninth of November, 1859, the county board of said county, having ample power by statute to make new towns, to

abolish old ones, and to alter and divide at pleasure, by order and resolution thereof, divided the town as petitioned into two towns, containing each a full township, or six miles square of territory, one town to retain the old name of Waldwick and the other to be called Moscow. After the division was made, and the two towns fully organized and in operation, and after they had paid some interest upon the bonds, each paying its equitable proportion according to the assessed valuation of each, the two towns, in December, 1860, held a joint meeting of their supervisors, and resolved, by joint resolution of the two boards, not to pay over to the railroad company any more of the railroad money then collected, or thereafter to be collected, in the two towns, until further orders.

Soon after this action of the towns, suit was brought against the town of Moscow by the present plaintiff, in the United States district court for Wisconsin, upon the coupons and bonds due and unpaid; and after litigation was had, both towns joining together in defending the suit and paying expenses, a judgment was rendered against the defendant town. This was before the state was divided into two judicial districts. After such division a second suit was brought upon the previous judgment in the western district of Wisconsin, where the two towns are situate, and a judgment again recovered against the town of Waldwick.

The present suit in equity is brought against the two towns, setting forth all of the facts, for a decree requiring them to pay each its due and equitable proportion of the previous judgment against Waldwick. And the question presented by the record is whether or not the court can grant the relief sought. The town of Waldwick makes no defense, but puts in an answer conceding its own liability, and claiming a liability on the part of Moscow to pay its due proportion of the bonds represented by the judgment against Waldwick. The town of Moscow answers, wholly denying any liability on its part.

Though a good deal of testimony has been taken, the facts are for the most part undisputed. Those material to the case, and not already noticed, will be stated as we proceed.

The order of the county board dividing the town is in writing, as follows:

"On motion, the following order relating to the division of the town of Waldwick was carried:

"The board of supervisors of the county of Iowa do order and determine as follows:

"(1) That the town of Waldwick, in said county, be, and the same is hereby, divided according to the petition heretofore presented to said board for that purpose, and the election heretofore had on such division, according to the order of the board, on the township or dividing line between range No. 4 east and No. 5 east of the fourth principal meridian, and that such parts of township No. 4 and 5 north, of range No. 4 east of the fourth principal meridian, as lie within said county, and comprise a part of the present town of Waldwick, retain the name and records of the present town of Waldwick, and that such parts of township No. 4 and 5 north, of range No. 5 east of the fourth prin-

cipal meridian, as lie in said county, and in the present town of Waldwick, be known and designated as the town of Moscow from and after the said second Tuesday of April, 1860.

"(2) That an election be held in the proposed new town of Waldwick, as organized and established by this order, at the school-house, on the second Tuesday in April, A. D. 1860, for the election of town officers, to supply vacancies caused by expiration of office, and also by said division of said town, and as by law required.

"(3) That an election be held in the proposed new town of Moscow, as organized and established by this order, at the house of F. McKennan, in said new town of Moscow, on the second Tuesday in April, A. D. 1860, for the election of town officers of said new town of Moscow, and that said election be conducted in all respects as town meetings are usually conducted, and that the electors present choose inspectors of election, as by law required.

"(4) That the division of said town of Waldwick, and the organization of the said new towns of Waldwick and Moscow, take effect and be in force from and after the said second Tuesday in April, A. D. 1860, and not until then."

The plaintiff contends that the effect of this order was to abolish the old town of Waldwick, and to create two new towns, and that, consequently, both towns remained equitably liable for its proper proportion of the previous indebtedness, within the decision of the supreme court in *Mount Pleasant* v. *Beckwith*, 100 U. S. 514. The order is somewhat equivocal in its language. There are some parts of it, certainly, when taken alone, would justify this construction. The order speaks of the *new town of Waldwick* as *organized and established by this order;* and in the same language it speaks of the new town of Moscow as *organized* and *established* by this order. Again, it speaks of the *division of said town of Waldwick, and the organization of said new towns of Waldwick and Moscow.*

This language would seem to imply the creation of two new towns by the board of supervisors. If it was the intention that the old corporation of Waldwick should remain, and one new town of Moscow only should be created, there was no great propriety in the use of the above language.

There are other provisions, however, in the order, as that providing for an election in the new town of Waldwick *for the election of town officers to supply vacancies caused by expiration of office, and also by said division of said town, and as by law required, and for an election in the new town of Moscow for the election of town officers of said new town of Moscow,* which might favor a different construction. Upon the whole, as there was no necessity for creating more than one new town, or for abolishing the old town, was it not for the practical construction put upon it by the town, perhaps the most rational construction of the order would be that the old town organization was not affected by the order, and that there was but one new town created by the board. But I think the practical construction placed upon the order by the towns themselves, and concurred in for upwards of 20 years, was different. At any rate, the evidence shows conclusively that the people of both towns considered

and believed, at the time of the division, that each town was liable for its just proportion of the railroad debt, and the division was voted on that understanding, and would not have been voted at all except for that understanding. And this construction of the order of the supervisors, making the division and the liability of both towns for their respective portions of the debt, has been repeatedly recognized by the people and officers of the said towns for a period of 20 years or more. And one question is, how much weight the court ought to give to this construction so long concurred in by the two towns? If the order was clear and explicit on its face, probably no weight at all ought to be given to it. But is not the order fairly capable of this construction?

The evidence shows that at the meeting held for the purpose of voting on the question of a division, the question was canvassed by the electors as to the proper division of the railroad debt, and it was then and there publicly read out by the town officers having charge of the election that the debt would be divided between the two towns in proportion to the assessed valuation of each for the year 1859; and there is no doubt in my mind, from the evidence, (whatever weight it should have in the case,) that the division was voted with that understanding by the electors. After the division was made and the towns fully organized, there was a joint meeting of the two towns held for the express purpose of dividing the railroad and other money in the treasury of the old town of Waldwick, and also the railroad and other indebtedness, ratably between the two towns.

At that meeting there was present the board of supervisors of both towns, and many of the prominent citizens; and after canvassing the subject at length it was agreed in writing by the two boards of supervisors to divide the funds on hand in the treasury, and all debts in favor of or against the old town of Waldwick, in the proportion of 37 cents and 1 mill on the dollar for Moscow to 62 cents and 9 mills on the dollar for Waldwick. And the money in the treasury (a good part of it being money that had been raised to pay the interest on these bonds) was divided between the two towns in the proportion so agreed upon. Afterwards the towns raised money and paid interest on the bonds, and compromised and took up some of them in the same proportion. And when suit was brought on the bonds, all through the litigation, they acted together in defending the actions, and in employing and paying counsel, and in defraying the other expenses of the litigation, and in various ways and on different occasions the town of Moscow has recognized its liability to pay its proportion of the railroad debt according to the agreement of their several boards of supervisors and the understanding of the electors when the vote for division was had. As late as 1870, 14 years after the bonds were issued, and 10 years after the division of the towns and the agreement to pay the railroad debt in the above proportion, the two towns took up and compromised certain of the bonds, each town

paying, as they had done before, in the proportion agreed upon by the supervisors.

Again, five years later, on July 23, 1875, at what appears from the records to have been a public town meeting, held by the electors of the town of Moscow, it was resolved that an offer to settle the bonds at 60 cents on the dollar be accepted, and that the amount of such bonds as were held by G. W. Cobb against the towns of Waldwick and Moscow should be raised by tax the next fall.

And, later still, in January, 1878, 18 years after the division of the towns, the records show that at a meeting held on that day for the purpose of taking into consideration the advisability of settling the judgment against the town of Waldwick, said judgment being offered for settlement by Mr. Cobb, it was resolved—*First*, that the town boards of Waldwick and Moscow be authorized to settle for said indebtedness at 60 cents on the dollar; and, *second*, that the town boards are authorized to ascertain from Mr. Cobb whether he will accept payment in two annual installments. If not, they were authorized to levy and collect a tax for the settlement in one year. This meeting appears to have been a joint meeting of the electors of both towns, held at a school-house near Thomas Grubbs', a point designated as "*between the two towns.*" So that, in various ways, whether legal or illegal, by the voluntary action of the people, and by the constituted authorities of the town, Moscow, up to 1878, and perhaps later, had uniformly and always continued to recognize the binding obligation of the agreement to pay its share of the railroad debt, and to carry out the understanding to that effect had upon the division of the old town. And it was some time after this that the town of Moscow made the discovery that it was never under any legal liability for any portion of this debt from the day when the old town was divided and the new town of Moscow was erected and set off.

The contention now is, and it seems to me there is great force in it, that the effect of the order of the county board of supervisors was simply to create a new town out of the territory of the old town of Waldwick, leaving the old corporation intact; that inasmuch as this was done without any provision being made for a division of the property, or the indebtedness of the old town, the legal effect was that the old town took all of the town property and became legally liable for the entire indebtedness; that the subsequent agreement of the boards of supervisors to divide the property and the indebtedness was *ultra vires*, and being without authority of law, and not at all within the powers and jurisdiction of the two boards, the agreement was void, and no subsequent ratification of it by the town authorities or the people of Moscow is binding; that the plaintiff must have taken this view when he brought his action at law and took judgment against the old town; that the plaintiff, still holding that judgment, and no suggestion being made in regard to the re-

sponsibility of the town of Waldwick, that the plaintiff's remedy at law is complete, and that he has no equity as against the defendant Moscow.

After a thorough study of the case I am fully convinced that it is one of considerable embarrassment and difficulty, and I have great satisfaction in the knowledge that it is one where the parties are entitled, by law, to a review of the decision of this court in that higher national tribunal whose decision we are most willingly bound to respect. It may be proper to say that, realizing as I have the difficulty of the case, I have laid it before the circuit judge, and also before his honor, Justice HARLAN, of the supreme court, and counseled with them in regard to it, and while we are not fully agreed upon the grounds of the decision, and the manner of relief against the town of Moscow, we are all agreed that it is just and equitable that that town should pay its proper proportion of this claim. The people and property of that town, before the division, were legally and equitably bound with the other inhabitants and property of the old town for the payment of the railroad debt. The division was voted upon the understanding that the new town should remain so bound. An agreement was made by the proper contracting officers of the town, perfectly just and equitable in its character, founded on a valid consideration, to divide the railroad and other money in the treasury, and to pay each its proportion of the debt in the ratio of taxable property in the two towns. The money in the treasury was actually divided on the strength of that agreement, and the agreement has in various ways been confirmed by the people and officers of the town, —been ratified and carried out for 20 years, without any doubt or suggestion as to the power of the town to make the agreement, or the equitableness of it when made. If it be possible for the people of a town to adopt and ratify such an agreement, it has been done in this case. The agreement has, in part, been executed, and the town of Moscow has had the full benefit of it. It has also had the full benefit of the railroad, for the building of which the debt was originally incurred. Good faith and common honesty, as between man and man, now require that the town should carry out the understanding had when it was set off, and when the contract was made, which has been lived up to for over 20 years by both parties.

Perhaps the only room to doubt is whether the plaintiff has good standing ground in a court of equity, and connects himself with, and is in a position to take advantage of, the equities between the two towns; and whether, in giving a decree for the plaintiff, the court is not invoking a broader equity than is to be found in the books. But certainly the essential justice of the case will not allow the town of Moscow at this late day to repudiate its obligation of upward of 20 years' standing and recognition.

I am not sure but the action of the people of the town at the time of the division, and the subsequent action of the two towns ever since,

amount to a contemporaneous and practical construction of the order of the board of supervisors dividing the old town; that its effect was to abolish the old town, and create two new corporations, which should be accepted by the court as the proper construction of the order, especially as the order is not clear in its terms, and might bear that construction. In that case, that part of the old town which formed the new town of Moscow was never relieved from its obligation to pay this debt; and the agreement of the two town boards would merely be a ratification and recognition of their already existing liability. In any case, there remains the agreement, which seems perfectly rational and equitable, not against public policy, nor immoral, made in accordance with the views and wishes and understanding of the people of both towns, founded upon an actual money consideration, ratified and confirmed by the people repeatedly, and which has been in process of consummation and execution for a period longer than the longest statute of limitations known in the books, and the full benefits of the agreement had and still retained by the party now seeking to repudiate on the sole ground that it is *ultra vires*.

There was some contention on the argument as to whether the county board of supervisors had any power to divide the property or indebtedness of the towns. The legislature had that power, and it conferred on the supervisors the general power to create new towns and to abolish old ones. But, at the time this division was made, there was no express power given to divide the property or indebtedness. That power has been conferred by statute since. But whether it existed at the time as a necessary incident to the other powers granted, I do not find it necessary to decide. There is one other circumstance in the case worthy of mention. The petition of the people for the division of the town was not produced on the trial, and cannot be found. What light it might throw upon the order of the county board cannot be known.

The matter of the petition was referred to a committee, who made a report in writing, which was introduced in evidence, and upon which the order is founded. The order follows the language of the report in all essential particulars.

Not without considerable hesitation I have decided upon a decree in favor of the plaintiff that the town of Moscow pay to the plaintiff that portion of the plaintiff's judgment which represents 37 cents and 1 mill on the dollar of the bonds, and interest to date of decree, with one-half the costs of this suit; and that the defendant the town of Waldwick pay the balance of the judgment and interest, with one-half the costs of suit. I do not intend that the defendant Moscow shall pay any part of the costs of the former suit, nor the compound interest implied by the judgment rendered on the first judgment against Waldwick; but only its ratable proportion, according to the agreement of the town board, of the bonds and interest included in the judgment, the same as though this action was now

brought on the bonds instead of the judgment, without any advantage of the plea of the statute of limitations running upon the coupons.

And the proposed amendment of the defendant Moscow, to set up the statute of limitations against the coupons included in the judgment, is not allowed.

See *Sonstiby* v. *Keeley*, 11 FED. REP. 578, and note, 580.

BARTLES, Jr., *v.* GIBSON.

(*Circuit Court, W. D. Wisconsin.* 1883.)

1. FRAUDULENT CONVEYANCE.
   Upon examination of the evidence in this case, it appears that the deed sought to be set aside was intended as a fraud on the creditors of the grantor, and the prayer of the bill that it be so declared is granted.
2. SAME—KNOWLEDGE OF GRANTEE.
   Where the grantee in a deed made to defraud the creditors of the grantor knows of the fraudulent intent of the grantor, or has knowledge of facts sufficient to excite the suspicions of a prudent man and put him on inquiry, he makes himself a party to the fraud.
3. SAME—INADEQUACY OF CONSIDERATION.
   Where the consideration expressed in a deed of land is far below the value of the land as known to grantor and grantee, this inadequacy of price is a strong circumstance in the case tending to show a fraud on creditors and a secret trust.
4. LIMITATION IN BANKRUPTCY—REV. ST. § 5057.
   Section 5057 of the Revised Statutes is in effect a statute of limitations, but, like any other statute of limitations, must be taken advantage of either by demurrer or answer, or it will be waived.
5. SAME—PLEA AFTER ANSWER TO MERITS.
   Although a court may in its discretion allow the plea of statute of limitations to be put in after an answer on the merits, in an equity case, under the circumstances of this case such plea cannot be allowed at that stage of the case.
6. SAME—DISCOVERY OF FRAUD—LACHES.
   Where a party injured by a fraud remains in ignorance of it, without any fault or want of negligence or care on his part, the bar of the statute of limitations does not begin to run until the fraud is discovered, though there are no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party; and as, in this case, the suit was instituted promptly after the discovery of the fraud, the statute is not a bar to the action, nor can complainant be held to have been guilty of laches in not sooner instituting suit.
7. DISCHARGE OF BANKRUPT—BAR TO SUIT AGAINST GRANTEE.
   The decision and order of a bankruptcy court granting a discharge of a bankrupt, on an issue made by a creditor of the bankrupt, objecting to such discharge, cannot be considered a bar to a subsequent suit by such creditor, as the purchaser of land sold by the assignee of the bankrupt, against a grantee of such land in a conveyance that is a fraud on the creditors of the bankrupt.
8. INADEQUACY OF CONSIDERATION.
   The fraudulent grantee of the bankrupt, in such case, cannot set up as a defense that the creditor purchased said land for less than it was really worth.

In Equity.

Pinney & Sanborn, for complainant.

Bingham & Pierce, for defendant.

Before HARLAN and BUNN, JJ.

BUNN, J. This action is brought by Charles Bartles, Jr., a citizen of Williamsport, in the state of Pennsylvania, against the defendant, Joseph H. Gibson, a citizen of Massachusetts, to set aside as fraudulent a conveyance of an undivided one-eighth interest in a quantity of pine and hard-wood timber lands lying in Lincoln and Chippewa counties, in the northern portion of this state. The conveyance was made by warranty deed, executed by Charles E. Gibson, also a citizen of Williamsport, in the state of Pennsylvania, to the defendant, Joseph H. Gibson, his brother, who resides in the city of Boston, and dated the fifth day of February, 1878. At the time the conveyance was made Charles E. Gibson was insolvent, and owed very large sums of money. He had become security for one Peter Herdic, by indorsement and otherwise, for sums amounting to upwards of $160,000, and for the Williams Rubber Company, of Williamsport, in the sum of $90,000, so that his liabilities were many times the amount of all his assets. On August 30, 1878, six months after, he was adjudged a bankrupt in the district court for the western district of Pennsylvania, and one J. C. Hill duly appointed as his assignee. On the twenty-first of November, 1878, the usual assignment was made of all his property by the register in bankruptcy to the assignee. On the tenth of January, 1881, the assignee filed a petition in the bankruptcy court for leave to sell the bankrupt's interest in the property in question in this suit. The petition was granted and an order made thereon, and on February 16, 1881, the lands included in the deed were sold at public auction by the assignee, pursuant to such order, and the plaintiff became the purchaser for the sum of $200 for the lands lying in Lincoln county and $90 for land lying in Chippewa county.

The sale was reported and confirmed by the court, and on the eighth of March, 1881, a deed was made by the assignee to the plaintiff as purchaser at the bankrupt sale. The plaintiff was also a creditor of the bankrupt's estate in the sum of about $15,000. Peter Herdic was also adjudged a bankrupt by the same court on the same day that Charles E. Gibson was so adjudged. He had, however, failed previously, in November, 1877, for the sum of $2,000,000, before the deed by Charles E. Gibson to his brother was made, and was hopelessly insolvent at that time. The rubber company, for whom Charles E. Gibson had also signed, had also failed, and was adjudged a bankrupt.

The evidence shows that in 1877 Charles E. Gibson had considerable property, but at the time of the making of the conveyance by him to Joseph H. Gibson of the land in question, in February, 1878, he was insolvent. Two suits were already pending against him in the United States circuit court for the western district of Pennsylvania,—one by Jacob Torne for $5,000, and one by the First National Bank of Williamsport for $2,500 and upwards, in which judgment

was rendered against him soon afterwards, on the eleventh and twelfth of February, 1878. Other suits were soon commenced and judgments rendered; and when he went into bankruptcy his scheduled property available to his creditors amounted to nearly nothing. The land in question in this suit was not scheduled by the bankrupt. This suit was begun on April 20, 1881, by Charles Bartles, Jr., claiming to be the owner of the lands by virtue of his purchase at the bankrupt sale against Joseph H. Gibson, the grantee in the conveyance from Charles E. Gibson, alleging the sale to be fraudulent and void as against the creditors of the bankrupt; and the object of the suit is to obtain a decree so adjudging such conveyance, and requiring Charles E. Gibson to convey the lands to the complainant.

The issue is, for the most part, one of fact. Was the sale to Joseph H. Gibson made for the purpose of hindering, delaying, and defrauding the creditors of Charles E. Gibson? and if so, was Joseph H. Gibson privy to the fraud? We find this issue in favor of the complainant, upon the evidence.

Mr. Justice HARLAN, in announcing the decision of the court from the bench, said that his practice at the bar, and such experience as he had had upon the bench, did not enable him to recall a case in which fraud of the character charged had been more clearly and distinctly established than in this. In this judgment of the case I fully concur. The evidence shows the transaction to be marked with almost all the customary badges of fraud. So far as Charles E. Gibson himself is concerned, there is scarcely any attempt at denial of a fraudulent intent.

The grantor was, at the time of the conveyance, hopelessly and irretrievably insolvent, and knew himself to be so. His debts amounted to two or three times the value of his property. He was pressed to pay and could not pay, and suits for large amounts were already pending against him. He had already got much of his property into his wife's hands. He stated repeatedly that he had got his affairs fixed, and that his creditors could not collect from him; said that his wife had property, but that the creditors could not get anything from him. Under these circumstances, he takes his title papers, and Peter Herdic, for whom he had so largely signed, and who had already notoriously failed, and goes from his home in western Pennsylvania to Boston to find his only brother, in order to dispose of his interest in these lands which it seems was about the last property he had then undisposed of. The other part owners of the land resided at and near Williamsport, but he made no effort to sell to them, or to any one else there. His brother, Joseph H. Gibson, was a man of small means, and a superintendent in a piano manufacturing establishment in Boston. Had no money in bank, and kept no bank account. Had never dealt in western lands, and had no knowledge or notion of the value or use of the lands his brother proposed to sell to him. He had never seen the land, and has not seen it since, and had never been

in the lumber business. He took no means to ascertain their value or character, but says he had confidence his brother would not cheat him.

Defendant says that Herdic made the remark that they were pine lands, but that he, defendant, knew nothing about pine timber lands in the west; that they made the arrangement that his brother should sell him the lands for $5,000, and that he should raise the money and pay him for the land; that he did so, and that his brother went away *with both the deed and the money.* The consideration clause in the deed was left blank, and afterwards filled up with $5,000; but the defendant is unable to explain why this was so. The defendant's testimony on this point is as follows: "I can explain that in no other way than this. I don't know that it was. I don't understand it. I didn't know that it was. I have no recollection about it. I remember now that I told Mr. Dimmick to prepare the deed, except the consideration clause, and I would give him that afterwards." This can hardly be said to be a very lucid or satisfactory explanation. Nor is the defendant's explanation of how or when he got the money any more satisfactory. He has no recollection of it, and cannot tell. He presumes he had money by him at the time, but don't know when it was raised. In answer to the question whether it was his habit to keep large sums of money by him, not having any bank account, he says it was not at that time. The evidence shows that he was worth $12,500, Ten thousand of this was his interest in the business where he was employed, and the balance in mortgage securities. He was in no business except as superintendent in the piano establishment, on a salary. A man in these circumstances would usually know and be able to tell how he came by $5,000 in cash at one time to pay for lands that he knew nothing about and had no use for. The defendant, who remembers very little, says it is his impression that he told his brother that if he would take care of the lands and pay the taxes and protect his interest, that he would purchase; and his brother, Charles E. Gibson, says that it was arranged before the sale that he was to have the care of the lands, because the defendant said that he had enough to do and did not want the care of them. Accordingly, a power of attorney was prepared and executed by the defendant to the bankrupt, some 11 months after the execution of the deed, authorizing him to have the entire control and care of the land, * * * to pay all taxes on it, to sell, exchange, or mortgage the same, and in his name to execute, acknowledge, and deliver all deeds and papers necessary to such sale, exchange, or mortgage.

This power of attorney is in perfect keeping with the testimony of the witnesses Troxell and Young, who went to Boston afterwards on pretense of trying to buy the land of defendant, that defendant, in conversation with them in Boston, told them that he was holding these lands for his brother, who lived at Williamsport, Pennsylvania; that his brother owned them; that his brother asked $18,000 or

$20,000 for the land, and that he would write to them and let them know the price.

These facts constitute very strong evidence, in connection with other circumstances in the case, to show that the transaction was in fact a secret trust, and so intended between the parties to it. It is shown that Dimmick, as well as Mary H. Gibson, the grantee's wife, was present when the transaction took place. But they are neither of them called as witnesses to the payment, which is of itself a very suspicious circumstance, and the proof of payment is allowed to stand upon the unsupported testimony of the parties to the fraud, if a fraud was committed, when, if defendant's statements are true, at least one disinterested witness might have been called to put the question of payment beyond doubt in the mind of the court. The testimony of the defendant on this question, as upon others, is exceedingly uncertain and unsatisfactory. And, upon the whole, we entertain great doubt whether any consideration whatever, as a matter of fact, ever passed upon the sale. But if there was any money paid we are convinced beyond a doubt that the payment was a simulated one, and that there was in reality no consideration.

The defendant testifies that he knew that his brother was in some difficulty, and that the trouble was of a financial character. Whether he knew all or not, he knew enough to put him upon inquiry.

The circumstances show that he must have known of the fraudulent intent of his grantor. And if so, or if he had knowledge of facts sufficient to excite the suspicions of a prudent man and put him on inquiry, he made himself a party to the fraud. *Atwood* v. *Impson*, 20 N. J. Eq. 156; *Baker* v. *Bliss*, 39 N. Y. 70; *Avery* v. *Johann*, 27 Wis. 251; Kerr, Fraud, 236; *David* v. *Birchard*, 53 Wis. 492; [S. C. 10 N. W. Rep. 557.]

Many lumbermen and experts in the value of pine lands were examined as witnesses on the question of value. The evidence shows beyond question that the cash value of the land at the time of the conveyance was, at the least, three times the consideration recited in the deed. The consideration named in the deed of the lands to Charles E. Gibson from Early, his grantor, and which he took with him to Boston and which defendant saw, as it was left with him during some part of their stay in Boston, was $14,023. Some of the witnesses, well acquainted with the land and timber, and who are competent to judge, put the value at $25,000. One witness put it at $20,000. I believe the weight of evidence shows it to have been worth at least $16,000. Since the sale it has become still more valuable. This is a strong circumstance in the case, tending to show fraud and a secret trust. And in this case there is no sufficient explanation of the inadequacy of consideration, even if the $5,000 were paid. *Kaine* v. *Weigley*, 22 Pa. St. 179; 1 Swift, Dig. 275.

This disposes of the principal issues in the case. There remains to be noticed some other questions discussed on the argument. After

the suit was commenced and the issue made up, and the time for amending the answer had, of course, elapsed, the defendant asked leave of the court to file an amended answer, among other things setting up the statute of limitations as a bar to the suit.

The limitation in Wisconsin, and the usual limitation for such an action under the state laws, is six years. But it was sought to plead the shorter term of two years prescribed for such cases by the laws of congress. No reason whatever was given for not setting up this plea at the proper time, and as the limitation was a very short one, the court held that it would not be in furtherance of justice to allow the plea at that stage of the cause, and denied the motion so far as the plea of the statute of limitations went, but allowed the other amendments asked for. On the trial the motion was renewed, to allow this amendment also. But the court, Mr. Justice HARLAN concurring, sees no reason for disturbing the former decision of the district judge; especially as the testimony shows, beyond doubt, that there is not sufficient evidence in the case to support the plea. As the assignee in bankruptcy had no knowledge of the fraud until about five or six months before the sale to plaintiff and the commencement of the suit, section 5057 of the Revised Statutes of the United States provides that no suit, either at law or in equity, shall be maintained 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, and this provision shall not in any case revive a right barred at the time when an assignee is appointed.

It is now settled that this section is in effect a statute of limitations, and I think there can be no doubt about its applicability as such to this case, if properly pleaded. Like any other statute of limitations, however, it must be taken advantage of either by demurrer or answer, or it will be waived. *Bailey* v. *Glover*, 21 Wall. 346; *Upton* v. *McLaughlin*, 105 U. S. 640; *Sullivan* v. *Railroad Co.* 94 U. S. 807, 811; *Prince* v. *Heylin*, 1 Atk. 494; *Dey* v. *Dunham*, 2 Johns. Ch. 191; *Hickman* v. *Stout*, 2 Leigh, 6; *Hepburn's Case*, 3 Bland, Ch. 110; *Chambers* v. *Chalmers*, 4 Gill & J. 420, 438; *Parker* v. *Kane*, 4 Wis. 1; *Sears* v. *Shafer*, 6 N. Y. 268; *Gulick* v. *Loder*, 13 N. J. Law, (1 Green,) 68.

Conceding it to be in the discretion of the court to allow the plea to be made after an answer to the merits in an equity case has been put in, still, considering the nature of the facts charged in the bill, and that no excuse was given for not making the plea at the proper time, and that the facts must have been within the knowledge of the party when he made his answer, and as the limitation prescribed by the statute is a short one, we think the discretion of the court was properly exercised in refusing to receive the plea at that stage of the cause.

It was ruled by the supreme court of the United States in *Bailey* v. *Glover*, 21 Wall. 349, as being in accordance with the weight of authority, that where, in such a case as this, the party injured by the fraud remains in ignorance of it, without any fault or want of negligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there are no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party. And the same doctrine is again affirmed in *Gifford* v. *Helms*, 98 U. S. 248, and *Upton* v. *McLaughlin*, 105 U. S. 640, *supra*.

The assignment in bankruptcy was made on November 21, 1878, and of course the cause of action in favor of the assignee would accrue on that day. This suit was commenced by the filing of complainant's bill on April 20, 1881, two years and five months afterwards. But the bill shows upon its face that the fraud charged was not discovered by the assignee or the complainant until within two years previous to the commencement of the suit, and this allegation is supported by the proofs. The property itself was not scheduled by the bankrupt, and it is shown that the assignee had no knowledge of his former ownership of the land, or of the fraud alleged, until December 1, 1881, less than five months before the commencement of the suit. So that it is clear the action was not barred, as against the assignee in bankruptcy, at the time of the complainant's purchase, on March 8, 1881; and if so, whatever right the assignee had to maintain the suit, was, by the sale and conveyance of that date, transferred to the complainant, without regard to the question of the complainant's knowledge, or want of knowledge, of the fraud. He could not bring the action until he got his conveyance from the assignee; and within forty days from the time he acquired the right to sue, this suit was brought, and within six months after the time the assignee first heard of the fraud.

Upon the hearing of the case no sufficient excuse was rendered for not making this defense at the proper time, or for not tendering such excuse before the district judge on the former application; and at this stage of the action, especially in the absence of anything in the evidence commending the defense to the favorable consideration of the court, the plea of the statute of limitations will not be permitted to be filed.

It was also claimed by the defendant that, independent of the statute of limitations, the assignee in bankruptcy and the plaintiff had been guilty of laches in not prosecuting the case sooner; but, for reasons before given, we think there is no ground for this claim.

Other amendments were also asked for on the hearing by the defendant, and offers of documentary proof made to correspond thereto. It was proposed to set up the discharge of the bankrupt granted by the district court for the western district of Pennsylvania, against the objection of the complainant, founded upon the same alleged fraud,

as a defense against the fraud charged in the bill of complaint, and to introduce the record of proceedings in that court as evidence—*First*, as a bar; and, *second*, if not as a complete bar, at the least, as evidence upon the main issue in this case that no fraud was, in fact, committed.

But we do not think this plea would be a good one if offered at the proper time, or that the evidence ought to be admitted to sustain the issue on defendant's part.

It is very probable, from the showing made, that the bankruptcy court did not regard the specifications based upon these frauds as sufficient ground for denying a discharge, for the reason that the alleged frauds were committed prior to the six months immediately preceding the adjudication in bankruptcy. However that may be, it is quite clear that the decision and order made up on that issue between Charles Bartles, as a creditor of the bankrupt, Charles E. Gibson, and Charles E. Gibson, cannot prejudge the present issue between Bartles and Joseph H. Gibson.

Suppose the bankrupt court, instead of granting the discharge, had sustained the objections made by Charles Bartles and refused to discharge the bankrupt. Could it be claimed that such an adjudication would have been evidence in this cause against Joseph H. Gibson? We think not. And if so, it seems equally clear that it cannot be used as evidence in his behalf. Estoppels of this kind should be mutual. That was an issue between Charles E. Gibson, the bankrupt, and Charles Bartles, as his creditor. To that issue the assignee in bankruptcy was not a party. Neither was Joseph H. Gibson. It was no concern of Mr. Hill, the assignee in bankruptcy, whether Charles E. Gibson should be discharged or not. The present issue is between different parties. It is neither between the same parties nor their privies. This is an issue between Charles Bartles, as a purchaser of property at the bankruptcy sale from the assignee in bankruptcy, and the defendant, Joseph H. Gibson. And not only are the parties different, but, in our judgment, the issue itself is a different issue; and it is doubtful whether, if all that is alleged in the bill of complaint be true, it should have prevented a discharge in bankruptcy. And so, probably, the bankruptcy court viewed it.

There is but one question more that is worthy of notice. It is claimed that there is an inadequacy of consideration in the sale to Bartles. But this objection does not lie in the mouth of the defendant to make. Bartles was a creditor of Charles E. Gibson to the amount of $15,000.

The estate of Charles E. Gibson had furnished no funds to enable the assignee to litigate this claim in behalf of the creditors. There was no other creditor who wished to assume the chance of such litigation at a greater price than the complainant paid. The assignee had a right to sell the claim at public auction for the best price it would bring; and the purchaser, whoever he might be, as against

the defendant, whatever the rights of the other creditors might be, would succeed to all the rights and take the title of the assignee. There is no suspicion that the sale was not a fair one. The purchaser took his own chances, and if the claim brought but a small price it was because the title to the property had been clouded by the wrongful act of Charles E. Gibson, in which the defendant voluntarily participated, and to which he made himself a party. *Stevens* v. *Hauser*, 39 N. Y. 302; *Rankin* v. *Harper*, 23 Mo. 586; *Den* v. *Lippencott*, 6 N. J. Law, 473; *Lynn* v. *Le Gierse*, 48 Tex. 140; *McDonald* v. *Johnson*, 48 Iowa, 77.

Decree for complainant according to prayer of bill, with costs.

HARLAN, J., who heard the case with the district judge, concurring.

LOOMIS and others *v.* DAVENPORT & ST. P. R. Co. and others.

PRICE *v.* SAME.

(Circuit Court, D. Iowa. January, 1882.)

1. VENDOR'S LIEN—EQUITABLE OWNER.
   Although the general rule is that a vendor's lien on real estate for the purchase money is given to the person who owns the title and conveys, it is not indispensable that the legal title should have been vested in the party who claims the lien, nor that the deed or conveyance should have been actually executed by him. If he is the owner of the land in equity, and controls the legal title, and causes the conveyance to be made by the holder of the legal title to a third party, and is entitled to the purchase money, he is entitled to a vendor's lien therefor.
2. SAME—COLLATERAL SECURITY—WAIVER.
   A vendor's lien is defeated by any act upon the part of the vendor manifesting an intention not to rely upon the land for security; as, for example, taking a distinct, separate security, as a mortgage or a bond, or note, with security; but the mere acceptance of the vendee's draft, not as security, but as payment of the purchase money, when such draft is not paid by the drawee, will not be considered a waiver of the lien.
3. SAME—MORTGAGE ON AFTER-ACQUIRED PROPERTY OF VENDEE.
   Where land is conveyed to a railroad company, which has given a mortgage covering after-acquired property, such mortgage does not become a first lien on the land, but is subject to the vendor's lien for unpaid purchase money, and, as to such land, the mortgagee is not a purchaser for value.
4. SAME—LIS PENDENS—BONA FIDE PURCHASER.
   Where one of the defendants, in a proceeding to foreclose a railroad mortgage in a circuit court of the United States, by leave of the court, proceeded in the state court to establish a vendor's lien on the road, a purchaser of the property at the foreclosure sale is chargeable with notice of the proceedings in the state and United States courts, and he is put upon inquiry as to the alleged vendor's lien.

In Equity.

MCCRARY, J. The original action was brought to foreclose a mortgage upon the property and franchises of the Davenport & St. Paul

Railroad Company, and, among others, the present complainant, Hiram Price, was made a defendant; the bill alleging that he had or claimed some interest in the premises mortgaged. There was a decree of foreclosure on the twenty-third day of October, 1875, and a sale of the mortgaged property was ordered, subject, however, to the following reservation contained in said decree, to-wit:

"And said sale is to be made subject to any prior liens which may hereafter be established against said property in this court hereafter by any of the parties defendant claiming such lien."

At the time this decree was rendered the said Price had not appeared and answered. At the November rules, 1879, the cause still being undisposed of, default was taken at rules against said Price, but the same was subsequently, upon a showing, set aside by the court, and he was permitted to file the cross-bill now under consideration. Prior to the order setting aside said default, the said Price had, with the leave of this court, commenced suit in the circuit court of Scott county, Iowa, to enforce his vendor's lien against the *Davenport & Northwestern Railway Company* v. *Davenport & St. Paul Railway Company and John E. Henry*, who had been by the court appointed receiver of the mortgaged property. In that suit there was service of process and an answer by the Davenport & Northwestern Railway Company, and by Henry as receiver. Upon permission being granted to said Price to appear and file his cross-bill in this case, he dismissed the proceeding in the state court without prejudice. The facts upon which the vendor's lien is claimed, as we find them from the evidence, are as follows:

(1) That in the summer of 1873 the said Davenport & St. Paul Railroad Company, being desirous of securing the right of way over the land in controversy, applied to said Price to procure it for them. The company desired that Mr. Price should obtain the right of way, because they believed he could contract for it at lower prices than would be demanded of the company, and for a less sum than would be assessed as damages if the right of way should be condemned.

(2) The said Price acceded to said request, and undertook to secure the right of way for the said railroad company as a matter of accommodation, and not with a view to any pecuniary reward of profit. He was to be paid for the land what it cost him.

(3) At that time the land through which the right of way was to be obtained belonged part to Andrew J. Preston, part to Price, Hornby & Kehoe, and part to a street railway company.

(4) For the purpose of carrying out the agreement, the said Price bought the necessary land from all these parties, and paid for it out of his individual funds the sum of $2,500. As a convenient mode of conveying title to the railroad company, he secured a conveyance from Preston and the street railway company to Price, Hornby & Kehoe, and from the latter to the railroad company.

(5) There was no agreement that Price should receive anything but cash, or its equivalent, in payment for his expenditures, nor that he should accept any collateral or other security.

(6) Afterwards Mr. French, president of said railroad company, gave Price as payment for said right of way a draft, as follows:

"$2,500. DAVENPORT, IOWA, July 15, 1873.

"On January 1, 1874, pay to the order of George H. French, president, twenty-five hundred dollars, value received, and charge the same to account of DAVENPORT & ST. PAUL R. Co.

"By GEORGE H. FRENCH, Pt.

"*To Davenport Railway Construction Co., 57 Broadway, New York.*

"Indorsed: 'Accepted;' payable at Gilman, Son & Co., New York.

"DVPT. RWY. CONSTRUC. Co.

"By B. T. SMITH, Pt."

It was customary at that time for the company to pay debts by drafts upon said construction company, and the parties understood that the draft was given and received as equivalent to cash, and as payment and not as security.

(7) Said draft not being paid at maturity, was several times renewed, and finally put in judgment against the construction company, but the judgment was never collected, and the construction company has become insolvent.

(8) In July, 1877, the said Price commenced suit in the circuit court of Scott county, Iowa, to foreclose his vendor's lien. Due service was made in the same month upon the defendants therein, the Davenport & Northwestern Railroad Company, the Davenport & St. Paul Railroad Company, and John E. Henry, receiver; and on the twenty-sixth day of November, 1877, the answer of the first-named company (the real party in interest) and of the receiver was filed. That suit remained pending until the order of this court was made allowing said Price to file his cross-bill herein.

(9) The suit was brought in the state court against the receiver by permission of this court, and the counsel for the railroad company in that case obtained the default in this court in order to set the same up as a bar to action there.

(10) Upon applying for leave to file his answer and cross-bill in this case, said Price offered to dismiss his case in the state court upon the granting of such leave, and accordingly did so.

Upon these facts, the counsel for the Chicago, Milwaukee & St. Paul Railway Company, the present owner of the railroad, submits an able and exhaustive argument, in which he insists that the said Price has not shown himself entitled to a vendor's lien. I will consider the propositions relied upon by the counsel in the order in which they are presented in the brief.

1. It is said that complainant was never the owner of said premises, and never sold or conveyed them to the railroad company. We think, however, that in equity he was the owner. He had certainly purchased the land and paid for it, and had a perfect right to a deed in his own name. If he chose to consummate his contract with the railroad company, with its assent, by causing the conveyance to be made direct to the company by the parties from whom he had purchased, it certainly cannot follow, as a matter of equity, that he thereby lost his right to a vendor's lien for the purchase money. No doubt the general rule is that the lien is given to the vendor,—the person who owns the title and conveys it; but a court of equity must look to the substance, and not to the mere form, of the transaction.

We do not think that it is in all cases indispensable that the legal title shall have been vested in the party who claims the lien, nor that the deed or conveyance should have been actually executed by him. If he is the owner of the land in equity, and controls the legal title, and if he causes the conveyance to be made, and is entitled to the purchase money, he is entitled to the vendor's lien therefor. *Carey* v. *Boyle*, Sup. Ct. Wis. 1881, 21 Amer. Law Reg. 208; [S. C. 11 N. W. Rep. 47.]

2. It is insisted that complainant is not entitled to a vendor's lien, because he accepted the draft of the Davenport & St. Paul Railroad Company, drawn upon and accepted by the construction company for the amount of the consideration, and thereby waived his right to such lien.

It is true that a vendor's lien is defeated by any act upon the part of the vendor manifesting an intention not to rely upon the land for security; as, for example, accepting a distinct and separate security, such as a mortgage or a bond, or note, with security. 2 Washb. Real Prop. b. 1, p. 507; 1 Jones, Mortg. § 207 *et seq.*; *Boynton* v. *Champlin*, 42 Ill. 57; *Gilman* v. *Brown*, 1 Mason, 190; *Vail* v. *Foster*, 4 N. Y. 312; *Fish* v. *Howland*, 1 Paige, Ch. 20; *Kirkham* v. *Boston*, 67 Ill. 599. The question in every case is whether the vendor intended to waive his right to a lien upon the land, and to rely upon other collateral or independent security. In this case, as already stated, we find that such was not the intention of the complainant. The draft was taken as payment. The complainant had not agreed to accept anything besides cash or its equivalent. The construction company held the funds out of which the railroad company undertook to make payment. The draft was given as a mode of payment, and not for the purpose of securing the payment of the debt. The complainant did not agree to, nor intend to, loan the purchase money to the railroad company.

3. It is insisted that a vendor's lien in this case cannot be sustained, because the conveyance of the lands to the Davenport & St. Paul Railroad Company brought the same under the mortgage foreclosed in this case, which thereupon became a valid and legal lien thereon prior and paramount to any claim for such vendor's lien.

It is true that the mortgage covered after-acquired property, and it certainly attached to the land in question as soon as it was conveyed to the company; but whether such mortgage, as to this after-acquired property, became a lien prior and paramount to that of the complainant, for the purchase money, is a question now to be considered. The vendor's lien exists to the extent of the purchase money, not only against the vendee and his heirs, but also against his privies in estate, and against subsequent purchasers who have notice of it, either actual or constructive. It also exists against those who take a conveyance of the estate without advancing any new consideration, because such persons are not, within the meaning of equity, purchas-

ers for value. 1 Jones, Mortg. § 199, and cases cited. A mortgagee who takes a mortgage as security for a debt contracted at the time, is, for the purposes of this doctrine, to be regarded as a purchaser for value, and the vendor's lien is not good as against him unless he have notice. Id. § 200, and cases cited. "If the mortgage be given merely to secure a pre-existing debt, it will not prevail against the lien. The mortgagee is not then a purchaser in good faith for value."

In the present case the property in controversy is not described in the mortgage; it is included with the mortgaged property only by virtue of the clause in the mortgage covering property subsequently acquired by the mortgagor. As to such after-acquired property, is the mortgagor to be regarded as a *bona fide* purchaser for value, or as taking the property *cum onere?* The decisions of the supreme court of the United States seem to settle this question. *U. S.* v. *New Orleans R. R.* 12 Wall. 362; *Fosdick* v. *Schall*, 99 U. S. 235; *Myer* v. *Car Co.* 102 U. S. 1.

In all these cases the rule is laid down, without qualification, that "a mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands." "If," says Mr. Justice BRADLEY, in the case first cited, "that property is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be prior in point of time. It only attaches to such interest as the mortgagor acquires." And in *Fosdick* v. *Schall* the court say:

"The mortgage attaches to the cars, if it attaches at all, because they are 'after-acquired' property of the company; but, as to that class of property, it is well settled that the lien attaches subject to the conditions with which it is incumbered when it comes into the hands of the mortgagor. The mortgagees take just such an interest in the property as the mortgagor acquired; no more, no less."

And in *Myer* v. *Car Co.* the court say, construing the same mortgage now before us:

"In *Fosdick* v. *Schall* we held that a mortgagor, whose mortgage embraced property to be acquired in the future, was in no sense a purchaser of such property. His rights were not granted after the property was bought by the mortgagor. He got nothing by this provision in his mortgage except what the mortgagor himself had acquired. He paid nothing for his new security. He took, as mortgagee, just such title as the mortgagor had; no more, no less."

It is insisted by counsel for the railway company that these cases lay down a rule applicable only to after-acquired *personal* property; but the language of the court admits of no such limitation; nor does the principle upon which the court proceeds. That principle is that, as to after-acquired property, the mortgagee is not a purchaser for value; and it applies with the same force whether such after-acquired

property be personal or real. The character of the property can make no difference. 1 Jones, Mortg, §§ 157, 158, and cases cited.

The cases cited by counsel may, we think, all be harmonized with these decisions of the supreme court. They are, for the most part, cases where the question was between the holder of a vendor's lien, on the one hand, and a purchaser or mortgagee who had paid a present consideration in good faith and without notice, on the other. The case of *Pierce* v. *Railraod Co.* 24 Wis. 551, is the only one cited in which the property in controversy was acquired by the mortgagor after the execution of the mortgage, and in that case the contest was between the vendor and the purchaser at the sale under the decree of foreclosure, who was not charged with notice.

Doubtless such a purchaser, who pays the amount of his bid without notice of the vendor's lien, would be regarded as a purchaser for value and entitled to priority; and so it was held in the case just cited, the court saying:

"It appears that Hunt and Sage purchased the property at the foreclosure sale and have conveyed it, *without notice of any equities of the plaintiff in the premises*, to the defendant company; * * * and that it would be a violation of all principle to permit the plaintiff, after the foreclosure sale and at this late day, to enforce a vendor's lien for the consideration named in the deed given in June, 1856, really seems to us too plain for argument."

There is in the present case a question of notice to the purchaser at the foreclosure sale which will be considered presently. This quotation is here made to show that the decision in the Wisconsin case was placed mainly upon the ground that the purchaser at the foreclosure sale was an innocent *bona fide* purchaser for value, and is, so far, quite consistent with the rulings of the supreme court of the United States above cited. If it contains anything inconsistent with those rulings, we cannot, of course, follow it.

4. It is next insisted that the Chicago, Milwaukee & St. Paul Railway Company is a *bona fide* purchaser of said premises for value, and without notice of the claim of complainant for a vendor's lien thereon. The title of the said company to the premises was derived under the foreclosure proceedings and the foreclosure sale of July, 1879. At that date the present complainant had not answered in this court, but had appeared here and obtained leave to prosecute his claim for a vendor's lien in the state court, and his suit in the state court was then pending against the parties representing the control and ownership of all the mortgaged property.

The record shows that on the sixteenth of August, 1877, Mr. Price presented his petition to this court, asking leave to sue the railroad company and the receiver in the district court of Scott county, to enforce his vendor's lien, and that on the same day that leave was granted. The record of the state court shows that on the twenty-seventh of the same month suit was brought in that court, and that it was prosecuted with reasonable diligence. The effort, at a later

date, to obtain a decree by default in this court, while the parties were in good faith, and with our assent, litigating the question of the vendor's lien in the state court, never met with the approval of this court, and the default obtained at rules was promptly set aside when the facts were brought to our notice.

The court, however, thought that Mr. Price should select one or the other forum, and therefore allowed him to appear and file his answer and cross-bill only upon condition that he should dismiss the suit in the state court without prejudice, which he did. It will be seen, therefore, that at the time of the master's sale under the decree in this case, the record of this court showed (1) that Hiram Price had been made a party; (2) that he had appeared here, and stated on the record that he claimed a vendor's lien on the property now in controversy; (3) that he asked and obtained leave to prosecute a suit to enforce that lien in the state court. And this record was clearly sufficient to charge such purchaser with notice of the suit in the state court.

It is said, however, that the suit in the state court was dismissed, and that, therefore, the notice was not sufficient. Ordinarily this would be so; but it must be observed that this case is very peculiar in its facts and circumstances. No suit could be brought in the state court after the appointment of the receiver without the permission of this court. After such permission was granted, as shown by the record in this case, there was sufficient of record to require the purchaser to take notice of the proceedings in both courts. When the case in the state court was dismissed, it was expressly stated in the record that the dismissal was without prejudice to the right of said Price to bring another suit or to prosecute said claim in the United States circuit court for Iowa.

Immediately upon the dismissal of said suit the complainant filed his answer and cross-bill in this suit. The record of the state court was of itself notice that this might or would be done. Besides, the purchaser at the foreclosure sale, under the peculiar language of the decree, was bound to take notice of all subsequent proceedings in the case in this court. The decree ordering a sale of the mortgaged property was entered at an early stage of the proceedings, and expressly directed that said sale should be made subject to any prior liens which might thereafter be established against the mortgaged property in this court. But few of the parties defendant had formally claimed such prior liens at the time that decree was entered. No defaults had been entered against any of the defendants, and it was clearly the intention of the court to retain jurisdiction of the case for the purpose of determining what, if any, prior liens in favor of any of the parties defendant should be enforced against the mortgaged property.

The reservation in the decree cannot, with any propriety, be construed as applying only to such defendants as had at that time for-

mally claimed a prior lien. It was intended by the clause of reservation to save and protect the rights and equities of all the parties to the suit as they might thereafter appear. We hold, therefore, that enough appeared upon the record in this court, and in the state court, to put the purchaser upon inquiry concerning the claim of the present complainant of a vendor's lien upon the mortgaged property, and that, therefore, the Chicago, Milwaukee & St. Paul Railway Company is not a purchaser without notice of said claim.

The conveyance by the marshal to Rutten & Bonn, and by them to the Davenport & Northwestern Railway Company, and by the latter company to the Chicago, Milwaukee & St. Paul Railway Company, the present owner, were all made pending this suit, and each of the purchasers must, upon the principles already stated, be held to notice of the present complainant's rights. He is not estopped by lapse of time, and has been guilty of no laches. He brought his suit in due time, and has prosecuted it ever since with due diligence, either in this court or in the state court, with our consent and approval. Upon the whole case, we are constrained to hold that the decree hereinbefore rendered in favor of the complainant was strictly in accordance with equity, and should not be set aside.

LOVE, J., concurs.

IRONS, Ex'r, etc., and others *v.* MANUFACTURERS' NAT. BANK OF CHICAGO and others.

(Circuit Court, N. D. Illinois. 1883.)

1. NATIONAL BANKS — INDIVIDUAL LIABILITY OF STOCKHOLDERS — ACT OF JUNE 30, 1876.
   The bill contemplated by the second section of the act of June 30, 1876, to enforce the individual liability of stockholders in a national banking association that has gone into liquidation, need not purport expressly on its face to be filed by the complainant on behalf of himself and all other creditors, for the law would give it that effect and the court would so treat it; but, if this was necessary, the bill might be amended in that respect by leave of the court.
2. SAME—CREDITOR'S BILL—OBTAINING PRIORITY.
   The manifest intention of the national banking act is a distribution of its assets, in case a bank becomes insolvent, equally among all the unsecured creditors; and the diligence of a creditor who files a creditor's bill can give him no greater rights than are given any other creditor to share in the distribution of the assets, and a prayer in the bill that such creditor be given priority over other creditors will not be granted.
3. SAME—AMENDED BILL—MULTIFARIOUSNESS.
   Where the original bill filed before the passage of the act of June 30, 1876, was amended after the passage of that act so as to make the individual shareholders defendants, and subject them to liability, such bill will not be considered on that account multifarious.
4. SAME—EFFECT OF ACT OF JUNE 30, 1876.
   The act of June 30, 1876, did not create any new liability on the part of the stockholders, or provide for enforcing such liability against them under circum-

stances where it could have not been enforced before that act was passed. This act is not retroactive, and does not create rights which did not exist prior to its passage, as against existing stockholders, though it may be construed as limiting the tribunal in which proceedings are to be instituted for enforcing the stockholder's liability to a United States court, instead of allowing creditors to resort to any competent tribunal with equity power.

5. SAME—ORDER CONFESSING PLEA OF BANKRUPTCY.
Entering an order that "the complainants confessing the pleas of bankruptcy of defendants, it is ordered that this case be stayed as to them," does not amount to a final decree, but simply confesses the facts set up in the plea, leaving the court to adjudge the law upon such facts whenever the main cause is heard.

6. SAME—BANKRUPTCY OF STOCKHOLDER A BAR.
Where the original bill was filed February 3, 1875, before the passage of the act of June 30, 1876, and a receiver was appointed February 26, 1875, thereunder, and an amended bill, making the individual stockholders defendants, was filed October 5, 1876, and after the filing of the amended bill certain of the defendants were adjudged bankrupts, their pleas of bankruptcy will constitute a sufficient bar in their behalf.

7. SAME—EVIDENCE OF NUMBER OF SHARES OWNED.
Where it is admitted by the defendants that they were shareholders in a national bank, but the number of shares respectively held by them is not admitted, the names of the shareholders and the number of shares held by each, as shown by the stock ledger, and stubs of the stock certificates, and the dividend sheets of the bank on which they respectively drew the last dividends, will be *prima facie* proof of the number of shares held, and, unless rebutted, sufficient.

8. SAME—TRANSFER OF SHARES AFTER FAILURE OF BANK.
After a national bank has become insolvent and has closed its doors for business, its shareholders' liability to creditors is so far fixed that any transfer of their shares must be held fraudulent and inoperative as against the creditors of the bank.

BLODGETT, J. The original bill in this case was filed by James Irons, a judgment creditor of the Manufacturers' National Bank, in February, 1875. It was in the usual form of a creditor's bill, alleging recovery of a judgment against the bank, issue of execution, and return of "no property." It charged that the bank had suspended payment and gone into liquidation by a vote of its stockholders; that the comptroller of the currency had refused to appoint a receiver; that it had equitable assets, which were not subject to execution; and that such assets were being misapplied by its officers. It was also alleged in the bill that the capital stock of the bank was $500,000, and a list of the stockholders, and the number of shares held by each, was set out in the bill. The bill asked for the appointment of a receiver to take possession of the assets and wind up the affairs of the bank. A receiver was appointed, to whom the officers of the bank were directed to turn over the assets, and the receiver so appointed accepted the trust and entered on the discharge of his duty. The stockholders were not made parties to this bill, and no order was made directing the receiver to take any steps for the enforcement of the liability of the stockholders; and it was at this time insisted that the stockholders' liability could only be enforced through the medium of a receiver appointed by the comptroller of the currency. On the thirtieth of June, 1876, congress, by the second section of "An act authorizing the appointment of receivers of national banks, and for other purposes,"

provided that "when any national banking association shall have gone into liquidation under the provisions of section 5220, Rev. St., the individual liability of the shareholders, provided for by section 5151 of said statutes, may be enforced by any creditor of such association by a bill in equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself, and all other creditors of the association, against the shareholders thereof, in any court of the United States, having original jurisdiction in equity, for the district in which such association may have been located or established." On October 5, 1876, by leave of court, complainant filed an amended bill charging the recovery of the judgment at law mentioned in the original bill, issue of execution, and a return of "no property;" that said judgment was still wholly unpaid; that said bank suspended payment on or about September 22, 1873, and soon thereafter had gone into voluntary liquidation; that no receiver of the bank had ever been appointed by the comptroller of the currency; alleging the names of the several stockholders of the bank, and the amount of stock held by each, making such stockholders parties defendant to the bill; alleging fraudulent dealings in regard to their stock between some of the stockholders and the bank and its officers; and praying that such frandulent transfers of stock be set aside; that said stockholders, now made defendants, as should be found liable to complainant and the other creditors of the bank, upon their stock liability as created by the national banking act, should be decreed to pay whatever amount should be found due from them and each of them, respectively, into court, or to the receiver; and that out of such fund complainant might be paid in full, and the balance distributed among the other creditors of the bank. Most of the stockholders thus brought into court have appeared and answered, setting up various defenses, some special to the particular case of the defendants so especially answering, and all insisting upon certain general and common grounds of defense. These general grounds of defense are:

First. That the bill, as amended, does not purport to be filed in behalf of complainant and all other creditors, within the technical language of the second section of the act of June 30, 1876. The language of this section is that the individual liability of stockholders of national banks "may be enforced by any creditor of such association, by bill in equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself and all other creditors of the association against the shareholders thereof." Neither the original nor the amended bill, upon their face, expressly purport to be brought by complainant in behalf of himself and all other creditors of the association, although, by the prayer, complainant asks that "the said defendants, or such of them as shall be found liable to your orator, and the judgment and other creditors of the said bank upon the said stock liability created by the said banking law, * * * be decreed to pay whatever amount shall be found to be due from them and each

of them, respectively, into court, or to the receiver appointed by the court, and that out of the fund so created orator's judgment be paid in full, and the balance thereof distributed among the other creditors of such bank in such way as the court shall direct." I doubt much whether it is necessary that a bill contemplated by the second section of the act of June 30, 1876, needs to purport expressly on its face to be filed by the complainant on behalf of himself and all other creditors. The law itself gives that direction and force to the bill, and, whether the complainant says so to the court or not, it would be the duty of the court to treat such a bill as only filed in behalf of the complainant and all other creditors of the bank. The complainant in this case proceeded, evidently, upon the assumption that, having been first in diligence, he was to be first in right, and had become entitled to be paid in full, before any part of the proceeds, which should be collected through the agency of his bill, should be distributed to other creditors; but the manifest intention of the national banking act is a distribution of its assets, in case a bank becomes insolvent, equally among all the unsecured creditors, and the diligence of a creditor who files a creditor's bill, especially for the purpose of enforcing the stockholders' liability, can give him no greater rights than are given any other creditor to share in the distribution of the assets. This complainant in effect, as I have already quoted from the amended bill, asks that the benefit of his suit should be given to himself and the other creditors. He asks, however, that he be allowed a priority over the other creditors in the distribution of the fund collected. This the law would not allow, and his praying for it in his bill would not justify the court in giving it to him. If, however, it is necessary that the bill should purport upon its face to be filed in behalf of the complainant and all other creditors, it is not a matter of substance, but only a mere matter of form, which can be amended at any time before the entry of the final decree in the case; and, as a matter of precaution, perhaps, the complainant had better so amend his amended bill as to show that it is filed in behalf of himself and all other creditors. It is stated in the briefs of counsel that if an amendment of this character is allowed, it would be equivalent to the filing of a new bill, and will entitle them to set up the defense of the statute of limitations, which, they insist, has run in their favor since the original bill was filed. I do not agree with the learned counsel, from whom this suggestion comes, in regard to this effect of the amendment; but in order to preserve all their rights, if the complainant amend as suggested, I shall allow defendants to complete the record by amending their answer so as to set up the statute of limitations.

Second. It is further urged in behalf of these stockholder defendants that the amended bill is not germane to the subject-matter of the original bill, and that it makes the bill as a whole multifarious. I do not see that there is any force in this objection to, or criticism

of, the amended bill. The original bill, as heretofore stated, was a creditor's bill. It sought to reach all the assets available for the purpose of paying the debts of this bank. No specific allegation or charge was made upon which to found a decree against the stockholders for their liability on their stock, and the stockholders were not made parties; but the decree against the stockholders would be, in no sense, contradictory to a decree against any other person who might be made defendant for the purpose of reaching assets in his hands, or securing the payment to the receiver of any liability which was owing to the bank. The scope of the bill is in no degree changed. It is, at most, only enlarged in reference to the number of persons to be acted upon, and to some extent in reference to the character of the liability of such persons. I am, therefore, of opinion that this objection is not well taken.

The third objection is, that prior to the passage of the amendment of June 30, 1876, the supreme court of the United States had held, in *Kennedy* v. *Gibson*, 8 Wall. 498, that the stockholders' liability could only be enforced through a receiver appointed by the comptroller of the currency; that a receiver could only be appointed by the comptroller of the currency in certain contingencies, such as that the bank has failed to pay its circulating notes, had failed to keep good its reserve, or to make good its capital stock when impaired; that a receiver could not be appointed by the comptroller of the currency for a bank which had gone into voluntary liquidation, and that the act of June 30, 1876, created a new liability, or rather provided for enforcing the stockholders' liability under circumstances where it could not have been enforced before; and that, therefore, the act of June 30, 1876, is only applicable to banks which shall have gone into voluntary liquidation after the passage of the act, and is not applicable to cases like this, where the bank had gone into voluntary liquidation before the passage of this act.

Section 5151 of the national banking act declares "shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at par value thereof, in addition to the amount invested in such shares." This position on the part of the defendants finds its main support in some of the expressions of the court in *Kennedy* v. *Gibson*, 8 Wall. 498, where it is intimated that the stockholders' liability can only be enforced by the comptroller of the currency through a receiver appointed by him; but it has never seemed probable to me that, even if the amendment of June, 1876, had not been passed, that the supreme court would fully adhere in future cases to the intimations in the case just quoted. The obvious intent and purpose of the national banking act was to make every stockholder liable to the extent of the amount of stock held by him at the par value thereof, in addition to the amount invested by him in such

shares. This stockholders' liability was one of the securities which these institutions gave to those who might become their creditors, and I never doubted that if a case should come before the supreme court, where the comptroller had acquired no right, or had exercised no right, if he acquired one, to appoint a receiver under the power delegated to him by the law, and yet it was found necessary, in order to pay the debts, to resort to the stockholders' liability, that the courts would say that the power to enforce such liability rested in a court of equity, and could be enforced through such court. It seems to me so palpable that this stockholders' liability was one of the securities to the public dealing with the bank, that the court would have been astute, if necessary to find a means of enforcing such liability, whenever a necessity for so doing exhibited itself; and I therefore never doubted that even if the act of June, 1876, had not been passed, the creditors of a national bank could have reached the stockholders, when necessary, through the aid of a court of equity, adapting itself by its flexible methods to all the necessities of the case.

I cannot believe that the courts would have allowed the benefit of this liability to stockholders to be lost to creditors merely because congress had not specifically directed how this liability was in all cases to be enforced. It therefore seems quite evident to me that the act of June 30, 1876, did not create any new liability, nor did it even provide for enforcing such liability against stockholders under circumstances where it could not have been enforced before that act was passed. This act, then, is not retroactive, and does not create rights which did not exist prior to its passage as against these stockholders. If any construction is to be given to this act, it is that of limiting the tribunal in which proceedings are to be instituted for enforcing the stockholders' liability to a United States court, instead of allowing creditors to resort to any competent tribunal with equity power. I am, therefore, of opinion that it was competent for this court to allow the complainant to amend his original bill by enlarging its scope so as to reach the stockholders and enforce their liability as such.

Four of the defendant stockholders—Ira Holmes, Edgar Holmes, M. D. Buchanan, and W. G. E. Pope—have, either by plea or answer, set up their discharges in bankruptcy as a defense in this case. On the seventh of May, 1879, an order was entered in this case of the following tenor: "And the complainants, confessing the pleas of bankruptcy herein filed by Edgar Holmes, [and the other defendants,] it is ordered that this case be stayed as to them." It is now urged that this amounts to a decree in favor of these defendants upon their pleas in bankruptcy. This can, in no sense, it seems to me, be held to be a final decree in favor of these defendants; it is merely an order that the proceedings be stayed as to these defendants, the complainant confessing the facts set up in the pleas, —not confessing the law or the sufficiency of the pleas as a defense,

but simply confessing the facts, and leaving it for the courts to adjudge the law upon those confessed facts whenever the main cause should come on for hearing.

The question then arises, do these pleas offer or present a sufficient defense to these defendants' liability as stockholders of this bank? Section 5068, Rev. St., tit. "Bankruptcy," is as follows:

"(6) In all cases of contingent debts and contingent liabilities contracted by a bankrupt, not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with right to share in the dividends, if the contingency happened before the order for the final dividend; or he may at any time apply to the court to have the present value of the debt or liability ascertained or liquidated, which shall be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained."

The facts in this case, so far as applicable to this defense, are briefly these: On February 3, 1875, the complainant filed the original bill in this case. On the fifth of October, 1876, the amended bill was filed, which brought the stockholders before the court. There has been a receiver in this case, appointed under the original bill, ever since February 26, 1875, and these defendants have all been adjudged bankrupts since the amendment to the bill was filed. After the appointment of this receiver, and especially after the amendment of the bill and enlargement of its scope, so as to reach the stockholders, it was certainly competent for the receiver to have proved the claim in bankruptcy against these stockholders. He could, as readily then as now, have ascertained the amount of the assets and liabilities of the bank, and have made as close an approximate estimate of the amount which would be required to be collected from the stockholders, as he can now. The two factors for estimating the extent of the stockholders' liability, the debts and assets, were as well known then as now. But if he could not have done it at that time; if the assets of the bank had not been then so far converted, or made available, as to be able to show just what would be required from the stockholders,—the court of bankruptcy would undoubtedly have given time, and so far delayed the proceedings as to enable such an estimate to be made before closing the affairs of the bankrupt estate and ordering a final dividend. From the time this bank suspended, the only element of contingency which can be said to have characterized this stockholders' liability, so far as these defendants are concerned, was as to its amount. From the time these men became stockholders, they stood liable for the debts of the bank to the extent of the stock held by them, if it should become necessary to resort to such liability after exhausting the assets of the bank, and therefore the receiver stood in a position, at the time these bankruptcy proceedings were pending, to have proved these claims before the bankruptcy court. In *Riggin* v. *Magwire*, 15 Wall. 549, the supreme court says: "As long as it remains wholly unsettled whether a contract or engagement will ever give rise to an actual duty or liability, and there is no means of removing the

uncertainty by calculation, such contract or engagement is not provable." But here there was a method, as it seems to me, of removing the uncertainty, as to the extent or amount of these stockholders' liability, by a simple calculation as to how much would be needed to pay the debts of the bank after exhausting the assets, and this balance or deficiency was the measure of the stockholders' liability to the extent of an amount equal to the amount of his stock. Without, therefore, discussing the numerous authorities which are cited by the counsel on both sides of this case, I shall hold that these pleas in bankruptcy are a sufficient bar in behalf of these defendants.

By the other special matters of defense set up in the answer of some of the defendants, two questions are raised: (1) The kind and amount of proof required to show that the defendants are shareholders in the bank. (2) Does an assignment of shares, made after the bank suspended payment, relieve the shareholder from liability?

As to the first question, these defendants have all or nearly all of them answered, admitting that they were shareholders in the bank, but not admitting the number of shares they respectively held. The proof in the case, as to the names of the shareholders and the number of shares held by each, consists of the stock ledger and stubs of the stock certificates, and the dividend sheets of the bank, and they all show the number of shares standing in the names of these defendants, and the number of shares on which they respectively drew the last dividends. This certainly is *prima facie* proof of the fact that these defendants were shareholders, and of the number of shares they held, and unless rebutted is sufficient to sustain the allegations of the bill. *Turnbull* v. *Payson*, 95 U. S. 418. As the proof corresponds with the allegations of the bill, the finding must be that these defendants are shareholders as charged.

As to the second point made, the proof shows that some of these defendants have transferred their shares since the bank suspended payment. And in some cases the defendants allege that they had negotiated a sale of their shares before the suspension, but the transaction was not consummated by a transfer on the books of the bank until after the suspension of payment.

The bank act (section 5138, Rev. St.) makes the shares in national banks "transferable in the books of the association, in such manner as may be prescribed by the by-laws or articles of association," and every person becoming a shareholder by such transfer, "shall succeed to all the rights and liabilities of the prior holder of such shares;" and the provisions of the law require lists of the shareholders to be kept by the bank, which list shall be subject to inspection by all shareholders and creditors of the bank.

In the light of these provisions of the law, shareholders of a national bank must remain liable until a transfer of their shares is made on the books of the bank; and a transfer of shares, after the bank has become insolvent, certainly cannot be construed to release

the shareholders from liability to the creditors of the bank, for the reason that it would enable the shareholders to wholly escape liability by transferring their stock to irresponsible persons after it became evident that the shares were not only valueless, but that they involved an actual and pending liability for debts of the bank. After a national bank, therefore, has become insolvent, and has closed its doors for business, its shareholders' liability to creditors must be so far fixed that any transfer of such shares must be held fraudulent and inoperative as against the creditors of the bank. If shareholders, at the time the bank suspended, can evade liability by a transfer of their shares, those to whom they so transfer can also escape by the same method, even after suit is commenced. It seems, therefore, quite clear to me that those who are shareholders when a bank suspends must bear the burden imposed by the law in favor of creditors.

A decree will, therefore, be entered referring the case to one of the masters of this court to hear proof, and report the amount of the debts of the bank still unpaid, the value of the assets of the bank still available for the payment of such debts, and the amount of assessment necessary to be made on each share of the capital stock in order to fully meet the indebtedness.

WROUGHT-IRON BRIDGE CO. *v.* TOWN OF UTICA and others.

(*Circuit Court N. D. Illinois.* July 13, 1883.)

MUNICIPAL CORPORATIONS—OBTAINING PROPERTY WITHOUT AUTHORITY—RESTITUTION OR COMPENSATION.

The obligation to do justice rests upon all persons, natural and artificial, and if a municipality obtains money or property without authority, the law, independent of any statute, will compel restitution or compensation.

In Equity.

C. C. & C. L. Bonney, for complainant.

Lawrence, Campbell & Lawrence, for defendants.

BLODGETT, J. This case is one which it appears to me is to be solved solely upon the undisputed facts, and those facts are substantially these:

The towns of Utica and Deer Park, situate in La Salle county, in this state, adjoin, and the Illinois river forms the boundary line between them; Utica lying on the north and Deer Park on the south side of the river. On the fourteenth of February, 1876, an election was held in the town of Utica, at which a proposition for borrowing money, with which to build a bridge across the Illinois river, was carried by a vote of the legal voters of the town. On the twentieth of May, 1876, a town meeting was held in Deer Park, at which a like proposition was adopted. In pursuance of a notice from the highway commissioners of the town of Utica, a joint meeting of the highway commis-

sioners of the two towns was held in the village of Utica on the eighteenth of March, 1876. This meeting was attended by all the highway commissioners of Utica and one of the commissioners of Deer Park, making four members of the joint body, and having been advised by lawyers in good standing in the profession that in such joint meetings a majority of the entire body was legally competent to transact business, they proceeded to pass a resolution to build a bridge across the Illinois river, at or near the point where the road running south from the village of Utica crosses said river, the cost of which should not exceed $35,000, and to advertise for sealed proposals for the construction of such bridge, and also appointed a committee to obtain plans and specifications for the masonry of such bridge. On the twenty-second of March a further joint meeting was held, which was attended only by the three commissioners of Utica and one from Deer Park, at which the committee appointed by the meeting of the 18th, reported the plans and specifications for the masonry, which report was accepted and the committee discharged, and the form of an advertisement for proposals for the work was adopted and the same ordered published in certain newspapers. On the third day of April, 1876, a joint meeting of the board of highway commissioners of the two towns was held for the purpose of receiving and opening the bids, or proposals, for the building of the contemplated bridge. This meeting was attended by all the highway commissioners of both towns. The bids were opened, and, by unanimous consent of all the commissioners, further business was suspended and the proposals taken under advisement. On the twenty-fifth of May, 1876, a further joint meeting was held, which was attended only by the three highway commissioners of Utica and one from Deer Park, at which meeting a contract for the substructure of the bridge was awarded to Messrs. Fife & Hetherington, for which a written agreement was duly made and executed, signed by the three commissioners of Utica and one commissioner from Deer Park, and the contract for the iron superstructure was awarded to the complainant in this case, and what purported to be a written agreement between complainant of the first part, and the commissioners of highways of the town of Deer Park of the second part, was executed and delivered, bearing date on the twenty-fifth day of May, 1876. This agreement seems to have been duly executed by complainant, through its proper officers, but was only signed by the three highway commissioners of the town of Utica and one highway commissioner of the town of Deer Park. Another of the highway commissioners of Deer Park signed the contract at or about the time the bridge was completed, giving as a reason for not signing at the time the other commissioners signed, that he chose to wait, before signing, until the time for contesting the election by which the vote in his town to borrow money to build the bridge had passed. By the contracts with Fife & Hetherington, the substructure—that is, the abutments and piers of masonry on which the iron bridge was to rest—was to be completed on or before the fifteenth of August, 1876, and they were to be paid 85 per cent. of their contract price as the work progressed, and the remaining 15 per cent. on the completion of their work. The contract with complainants provided for the completion of the iron superstructure of the bridge by the fifteenth of October, 1876, and the complainant was to be paid the sum of $17,400 for said superstructure. A contract was also made between complainant and the highway commissioners of Utica, contemporaneously with the bridge contract, by which it was agreed in substance that Utica should only be liable to complainant for one-half the cost of the superstructure, until Utica should have collected the other one-half from Deer Park, and in case Deer Park failed or refused to pay its one-half of the cost of the bridge, the highway commissioners of Utica would bring suit against Deer Park to recover the money due from Deer Park for the construction of the bridge. On the first of June, 1876, and before complainant had done any work on the bridge, a notice was served by the supervisor of Deer Park on the highway commis-

sioners of Utica, Fife & Hetherington, and the complainant, to the effect that the authorities of Deer Park—that is, the supervisor, clerk, and commissioners of highways—had decided, under legal advice, that the town of Deer Park had no authority, under said vote, to issue its bonds for the purpose of building said bridge, and that the commissioners of highways of the town could not lawfully enter into a contract for the building of such bridge, and that no liability of the town on such contract would be recognized, and they were also forbidden the use of the highways of Deer Park for the purpose of constructing such bridge. The bridge was completed according to contract by complainant, about the twenty-third day of December, 1876, there having been some delay in the work on the substructure which delayed complainant in the completion of the superstructure, and on the day last mentioned a joint meeting of all the highway commissioners of the two towns was held, at which the bridge was accepted and an agreement in writing made between the highway commissioners of the two towns for the maintenance of the bridge in good order, at the equal cost of the two towns. The town of Utica issued its bonds to the amount of $19,000, the proceeds of which were applied to the payment of Fife & Hetherington on their contract, as the money became due; and the town of Utica also paid to complainant $2,609.45, to apply on complainant's contract for the superstructure; that is, when the materials for the superstructure arrived at Utica, the freight on the same, amounting to $2,609.45, was paid by that town and charged or debited to the complainant. At the September meeting, 1877, of the board of supervisors of La Salle county, the sum of $7,000 was appropriated to aid Utica and Deer Park in the construction of this bridge, and as it then appeared that Utica had paid all that had been paid towards the work, it was ordered that $3,500 of said appropriation be paid to Utica, and the same was so paid, and at the March meeting of said board, 1882, the balance of said appropriation was ordered paid to the town of Utica. After the completion of the bridge, the town of Deer Park refusing to make any payment whatever to complainant, and the town of Utica refusing to make any further payment than the $2,609.45 paid for freight on materials, complainant brought an action of *assumpsit* against the two towns in the circuit court of La Salle county, which resulted in a judgment by default against Utica and against Deer Park, on trial of the issues by the court. Damages were assessed against each town separately at $10,096.82, and one-half the costs. From this judgment an appeal was taken by the town of Deer Park to the appellate court of the second district of this state, where the judgment was reversed, (3 Bradw. 572,) the appellate court holding, in substance, that there was no legal liability on the part of either town to pay complainant for this bridge; the conclusion being briefly that there was no such joint action by the board of highway commissioners of the two towns as made the contract with complainant binding on either town. Thereupon, said cause having been remanded to the circuit court, was again tried and the issues found for the defendants and judgment given against complainant, which judgment was afterward affirmed by said appellate court, and on appeal to the supreme court of this state the last judgment of said circuit and appellate courts was affirmed. 101 Ill. 518. Complainant now brings this bill, upon the ground that, in making the contract for the construction of said bridge, complainant acted under a mistake as to matters of law and fact; and, inasmuch as complainant has no remedy at law, prays that it be allowed by the decree and judgment of this court to take down and remove said bridge.

There can be no doubt, from the testimony in the case, that complainant built this bridge in good faith, in the expectation that it would be paid for by one or both of these towns. At the time the

contract for the construction of the bridge was made with complainant both these towns had, by a vote of their electors, authorized by the laws of the state, (Rev. St. *c.* 121, § 111,) decided to borrow money with which to build the bridge. From the nature of the work, the substructure was first to be built, and, as a matter of course, it was the first work to be paid for. There seems to have been no opposing party in the town of Utica in regard to the policy of the enterprise, and as this money became due to the contractors for the piers and abutments, it was paid to them by the commissioners of highways of Utica, so that by the time complainant's contract was completed Utica had exhausted its funds in the payment for the substructure, and complainant was left to look to Deer Park for payment for the iron superstructure, although by the contract with complainant the town of Utica had agreed to pay one-half the cost of the superstructure.

I do not care to spend time upon a metaphysical discussion of the question whether complanant acted under a mistake of fact or a mistake of law in making this contract, or in the building of this bridge in pursuance of the contract. It is not a supposable case that complainant would have built the bridge if it had not expected to be paid for it. The action of the authorities of both towns, up to the time the formal contract was made, justified such expectation, and while the complainant may have been wrongly advised in the matter as to how many members of the board of highway commissioners constituted a quorum in a joint meeting of those boards, there can be no doubt that the complainant would not have built the bridge but for the expectation that the bridge would be paid for, which expectation was, as it seems to me, fully justified by the fact that both towns had voted to raise the money for the purpose. To have assumed that the towns were legally bound by the contract of less than a majority of the highway commissioners of both towns, acting in joint session, may have been a mistake of law; to have assumed that they would honestly carry out the expressed will of the voters, and borrow the money and pay for the bridge, without captious objection, was an assumption of fact, and the mistake in acting upon this assumption was clearly a mistake of fact. When the bridge was completed, the highway commissioners of both towns met, had the bridge examined by their engineer, and he reported that plaintiff had in all respects complied with its contract; and if the plaintiff had not been acting, as a matter of fact, under the belief that the bridge would be paid for under the contract, which this joint meeting of highway commissioners had been so careful to ascertain had been fully performed by the plaintiff, it may be assumed, from all knowledge of human actions, that the plaintiff would never have given to these two towns the possession of the bridge. It was no part of the business of this plaintiff to build bridges gratuitously for the people of these towns, or any other community. The plaintiff was and is a business

corporation, taking contracts like this with the expectation that it is to be paid for the labor and material it expends in constructing works like this.

This case seems to me in all essential principles analogous to the case of *Chapman* v. *County Com'rs*, decided by the supreme court of the United States during its last term. 15 Chi. Leg. News, 193; [S. C. 2 Sup. Ct. Rep. 62.] In that case, the county of Douglas, in the state of Nebraska, had bought a farm to be used for the support thereon of the county poor, and a deed conveying the farm to the county had been executed and delivered. One thousand dollars of the purchase money was paid, and the county gave its obligations, secured by a mortgage on the farm, to secure the balance of the purchase money, and the county took possession and made the improvements. When these obligations given for the purchase money became due, payment was refused by the county on the ground that the notes and mortgage given to secure the same were void for want of power to make them. The seller filed a bill to obtain restitution of his property. In the opinion the court say, by Mr. Justice MATTHEWS:

"The contract for the sale itself had been executed on the part of the vendor by the delivery of the deed, and his title to it had consequently passed to the county. As the agreement between the parties had failed by reason of the legal disability of the county to perform its part according to its condition, the right of the vendor to rescind the contract and to restitution of his title would seem to be as clear as it would be just, unless some valid reason to the contrary may be shown. As was said by the court in *Marsh* v. *Fulton Co.* 10 Wall. 676–684, and repeated in *Louisiana* v. *Wood*, 102 U. S. 294–299, the obligation to do justice rests upon all persons, natural and artificial, and if the county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation. * * *"

The learned judge, after an examination of the authorities, finds that there is no valid reason why restitution should not be made, and concludes by saying:

"The conveyance to the county passed the legal title, but upon a condition in the contract which it was impossible, in law, for the county to perform. There resulted, therefore, to the grantor the right to rescind the agreement upon which the deed was made, and thus convert the county into a trustee, by construction of law, of the title for his benefit. There is nothing, therefore, to prevent the relief prayed for being granted, if it can be done without injustice to the defendant. On this point, it is said, it would be inequitable to decree a rescission of the contract and restoration of possession of the property, because the parties cannot be placed *in statu quo*. * * * If the relief asked was an unconditional reconveyance of the title and surrender of possession, this would undoubtedly be true; but such is not the case. Any such injurious and inequitable results as are deprecated may easily be averted by the simple payment of the amount due on account of the purchase money."

Tested by this reasoning of the supreme court, it seems to me plaintiff's right to the relief asked in this case is clear and undeniable. The delivery of this bridge to the towns of Utica and Deer Park passed to them the apparent legal title, but they have never be-

come the equitable owners. The bridge has not been paid for, and they have, therefore, no equitable right to keep it without paying for it.

As to the objections interposed by the respective defendants to the relief asked by plaintiff, it is only necessary to say: The town of Utica insists that it has expended a large sum of money in paying for the piers and abutments on which this bridge rests; has paid also over $2,500 to plaintiff to apply on the superstructure,—all which will be lost if plaintiff is allowed to remove the iron superstructure; that the town of Utica has actually, in good faith, expended more than its proportion of the cost of the construction of the bridge as a whole. The reply to this is that this defendant agreed to pay plaintiff one-half the cost of the iron superstructure, and has repudiated its contract in that regard, and that this plaintiff should not be made a loser by reason of the default of Deer Park to keep faith with Utica and pay its half of the cost of the bridge. While it was agreed that Utica should only pay for half the cost of the superstructure, it was also agreed that it should collect the other half from Deer Park and pay it to complainant, and this it has neglected to do.

In behalf of Deer Park, it is urged that the plaintiff placed the bridge there voluntarily, and in face of the notice from the officers of the town that the town would not pay for it; that the bridge is built upon a public highway of the town; and that the situation of the bridge is analogous to that of a house knowingly built by one man upon the land of another. To which it may be answered that the plaintiff had as good right to act on the faith that the town would pay for the bridge, because the people had voted to do so, as it had to act upon the notice of the officers of the town that it would not pay for it. There was no attempt on the part of the town to prevent the construction of the bridge, but its proper officers were prompt to accept the bridge, and the people of the town to use it as soon as it was finished, according to the contract; and, if this town has so far used this bridge without intending to pay for it, it cannot complain if the court allows the plaintiff to take it away.

The defense on the part of the county of La Salle is that it has contributed $7,000 towards paying for the bridge, of which it will be deprived if the bridge is removed. This argument would have some force if the county had paid the money to the plaintiff; but the payment of that sum to the town of Utica, which has been applied by that town in the reduction of its own contribution to the bridge, cannot, it seems to me, in any way affect the rights of this plaintiff. If the county authorities saw fit improvidently to appropriate this $7,000 where it would not be applied towards paying for the construction of the bridge, it is the misfortune of the county, and not the fault of the plaintiff.

Utica has paid $2,609.45 to apply on plaintiff's compensation for

the bridge, but this is so small a proportion of the entire cost of the bridge that it ought not to affect plaintiff's right to the relief prayed for, inasmuch as the court can adjust the equities of the parties in that regard.

There will, therefore, be a decree entered that, unless the defendants, the towns of Utica and Deer Park, within 90 days from this date, pay to the plaintiff the amount due upon the contract for the construction of this bridge, deducting the $2,609.45 which has been paid, together with interest upon the balance unpaid at the rate of 6 per cent. from the time of the completion of the bridge, the plaintiff will be allowed to take down the bridge and remove it, under the direction of a proper officer of this court; but that, if the defendants, or some of them, shall not elect to make this payment and thereby save the bridge, plaintiff will be allowed to take down and remove the iron superstructure of the bridge; but before plaintiff so removes the bridge, it will be required to repay the town of Utica the sum of $2,609.45 so paid to plaintiff by said town on account of the bridge.

UNITED STATES *v.* BANKS, Jr.

(*District Court, S. D. New York.* July 16, 1883.)

1. DEED OF GIFT FROM TESTATOR TO DEVISEE—VALUABLE CONSIDERATION.
   A devisee, prior to the testator's death, has no present estate or recognizable legal interest in the property devised; and a deed from the testator to the devisee, which is a charge against his future expected interest only, cannot be deemed given or received upon any valuable or adequate consideration.
2. SAME—ADVANCEMENT—SUCCESSION TAX—ACT OF JUNE 30, 1864, § 132.
   A deed of gift to a son, though made as an advancement, and, as such, chargeable against the son's ultimate share of the father's estate under a will existing at the time of the deed, is a "succession," under section 132 of the act of June 30, 1864, as a conveyance without "valuable and adequate consideration," and is chargeable with a tax of 1 per cent. on the value of the property conveyed.

At Law.

Elihu Root, U. S. Atty., and *W. W. Adams*, Asst. U. S. Atty., for plaintiff.

E. Ellery Anderson, for defendant.

BROWN, J. This action is brought under the act of June 30, 1864, to recover the sum of $120, as a succession tax of 1 per cent. upon a lot of land of the agreed value of $12,000, conveyed by David Banks, senior, to his son, the defendant, in February, 1869. In 1865 the grantor had executed his will, in which he made certain legacies to equalize his prior gifts among his four sons. The will further declared that "all advances which may hereafter be made to either of my sons shall be charged against such son as an advance, and shall

bear interest from the time he shall receive the same." Subsequently, in 1869, the testator designed to make a present gift of a lot to each of his four sons. The deed to the defendant was made and delivered in part execution of that intention. For some reason, which does not fully appear, the other three sons did not obtain any deed of the lots designed for them, and the testator died in September, 1871, leaving his will unchanged. In the mean time, the law imposing a succession tax was repealed. The defendant, in the settlement of the estate, accounted to his three brothers for the value of the lot in question as an "advance" under the will.

Upon these facts the defendant contends that the conveyance was not without a full valuable consideration, inasmuch as by reason of the grantor's intention to make an equal gift to his four sons alike, which was only in part executed, the deed became an "advance" under the will, and as such was, from the moment of its delivery, a charge upon the defendant's expectancy under his father's will to the full value of the lot conveyed.

The clause in the will above quoted relating to "advances" would seem from the context, and the provision relating to interest, to have been drawn in reference to advances of money. *Chase* v. *Ewing*, 51 Barb. 597. Though there is some difficulty, therefore, in bringing this conveyance within the literal reading of the will, still it is within its equitable intention. Conceding this point, however, I think it is not sufficient to relieve the defendant from the tax imposed by the act. Section 132, in defining a taxable succession, includes any "deed of gift or other assurance of title made without valuable or adequate consideration;" and a similar tax was imposed upon a succession by devise. At the time the deed was executed the defendant had no proprietary interest whatever in the property of his father. He had no "expectancy"—*i. e.*, no expectant estate therein—in the sense of our statutes. N. Y. Rev. St. 723, 725. A will speaks only from the testator's death; and in this case his death was two years afterwards. Until then the defendant had no recognizable interest in his father's property, either legal or equitable. He had no vested or contingent estate therein, but only a mere possibility of an interest. This possibility, though the possible subject of a contract which might be enforced in equity after the testator's death, (*Beckley* v. *Newland*, 2 P. Wms. 182,) was not assignable so as to convey any interest in the estate, nor a subject of a present conveyance or of any present charge. *Jackson* v. *Waldron*, 13 Wend. 178; *Munsell* v. *Lewis*, 4 Hill, 635.

The "valuable and adequate consideration" referred to in section 132 must be held to mean either money paid, or some present legal interest or estate parted with or charged, or services rendered, to the value of the property received. *U. S.* v. *Hart*, 4 FED. REP. 293. Here no money was paid, nor had the defendant any present right, interest, or estate, in contemplation of law, upon or against which

the conveyance at the time it was made could be a legal charge. The deed was in law, therefore, a pure gift, although it might, and did, result ultimately in diminishing the devise to the defendant under the will. This devise was also a gift, which would have been subject to the like succession tax had the law not been repealed. As an "advance" the deed was a gift, and none the less so because a subsequent gift by devise was thereby made so much the less. As the defendant, on receiving this deed, parted with no present valuable interest recognizable in law, and was not in consequence of the deed subsequently deprived of anything to which or in which, at the time the deed was made, he had any legal interest, right, or property, the deed must be held to be within the statutory definition of a succession; and judgment is, therefore, ordered for $120, with interest and costs.

In re Glen Iron Works, Bankrupt.[1]

(*District Court, E. D. Pennsylvania.* June 26, 1883.)

1. Corporations—Insolvency—Capital Subscriptions—Liability of Stockholders—Attachment Execution.
   The capital subscriptions of an insolvent private corporation, subscribed by stockholders, subject to assessment calls by a board of directors, remaining unpaid, and not called or assessed by the directors, are liable to judgment creditors of the corporation, and may be seized as well by writs of attachment execution issued against the stockholders as by a creditors' bill.
2. Same—Subscription Notes—Assessments and Calls.
   Where the articles of association of a corporation provided for a capital stock of $140,000, and stipulated that the stockholders should give their notes, without interest, for their respective subscriptions, which notes should not be liable at any time to an assessment for more than 50 per centum of their face, *held* that, in case of insolvency, the whole capital subscribed was liable to creditors; and the corporation having become bankrupt after 20 per centum of the capital had been assessed and paid in, *held*, that the stockholders were liable to creditors for their respective proportions of the whole unpaid amount subscribed.
3. Same—Bankruptcy—Lien of Prior Attachments.
   The corporation having been declared bankrupt, upon proceedings instituted subsequently to the service of such writs of attachment execution upon stockholders, and the unpaid capital having been awarded to the assignee, without prejudice to the rights of attaching creditors, and with provision for their intervention, upon the intervention of the attaching creditors, claiming the amount of their judgment out of the fund in the hands of the assignee, *held*, that the same was liable to the lien of the attachments, and should be awarded to the attaching creditors.

Exceptions to Register's Report.

The subscription list or articles of association of the Glen Iron Works, a corporation, provided, *inter alia*, for a capital of $140,000, and the subscribers agreed to give their notes therefor without interest; not to be liable at any time to an assessment of more than 50

[1] Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.

per centum of their face, nor to an assessment of more than 20 per centum within 18 months after organization.

The notes were in the following form:

One day after date ——— promise to pay to the Glen Iron Works, or its order, the sum of ——— dollars, without defalcation, for value received.

This note is given for the full amount of ——— subscription to the capital stock of the said Glen Iron Works, and is subject to such assessments, from time to time, as the board of directors of the said Glen Iron Works may deem necessary: *provided*, such assessments do not, in the aggregate, exceed 50 per centum of the face of the above note, nor more than 20 per centum thereof within 18 months from the date of the same. All assessments made and paid to be credited hereon. It is further provided that this note is without interest; and that, in the event of the said The Glen Iron Works declaring dividend or dividends out of any profits made, the same shall be credited hereon in the proportion to which the number of shares of the capital stock standing to ——— name may entitle, until the full amount of the above note, by reason of credits by assessments and dividends aforesaid, shall be paid, when the same shall be returned to the subscriber or legal representatives, and in lieu thereof a paid-up certificate of stock be issued.

The stockholders, upon the call of the directors, having paid in 20 per centum of the amount of their subscriptions, Wilson and others, judgment creditors of the corporation, having a judgment for $25,000, on January 1, 1875, issued writs of attachment execution, and summoned as garnishees the respective stockholders and subscribers to the capital stock. An assessment of 30 per centum, in addition to the 20 per centum already paid in, had been called by the directors, but a rescinding resolution had been passed by the directors prior to the issuing of the attachments. Subsequently proceedings in bankruptcy were instituted, and the corporation declared bankrupt. On September 4, 1878, the whole amount of the unpaid capital was awarded to the assignee, subject to the rights of the attaching creditors, and with leave to them to intervene. See the elaborate opinion of CADWALADER, J., *Wilbur* v. *The Stockholders*, 35 Leg. Int. 346.

The register, upon consideration of the claim of the attaching creditors, reported that no lien existed by reason of the attachments, and awarded the fund to the general creditors, whereupon the attaching creditors excepted.

P. K. Erdman, *R. E. Wright, Jr.*, and *R. C. McMurtrie*, for the attaching creditors.

W. D. Luckenback and *Edward Harvey, contra.*

BUTLER, J. The point decided on the assignee's petition was the responsibility of stockholders for unpaid subscriptions. No distinction was recognized between the 30 per cent., liable to assessment under the article of association, and the remaining 50. The company's insolvency being shown, the whole was declared due,—the failure of the company to assess, being treated as immaterial. The effect of outstanding attachments was not considered, the question being expressly reserved, unprejudiced by anything done or said. As the opinion filed shows, the decree rests upon the conclusion that

unpaid subscriptions are assets, available for the payment of debts; that while the company, during solvency, could recover only in pursuance of the articles of association, the limitations of this instrument became inoperative when insolvency occurred; and this latter fact appearing, and the entire amount being necessary to satisfy creditors, its payment should be required. The general subject is fully discussed in the opinion; and little need be added to what is there said, in disposing of the question now in hand.

On behalf of the general creditors it is asserted that the garnishees owned nothing when the attachments issued, that they were subject to *no liability whatever*, and that there was nothing, therefore, upon which the writs could operate. No other question is raised, and no other will, therefore, be considered.

My judgment is against the position stated. The obligation of the stockholders, enforced in the decree referred to, did not commence with the decree. It arose out of the act of subscribing, and continued from that time. To the extent of his subscription the stockholder at once became, and thereafter remained, contingently responsible. It was possible payment might never be required, but to all who dealt with the company it was an existing obligation, liable to enforcement when other means of payment should fail. The obligation (as respects creditors) was similar to that of guaranty. An assessment by the company, or decree by the court, was required to determine the necessity for resorting to it. If the company failed in its duty to assess, when it should, the assistance of the court might be invoked. Usually such assistance is invoked by bill. Why may it not be by this statutory attachment? In every method of proceeding (in such cases) the stockholder is treated as a debtor of the corporation. The obligation is directly to it, though for the benefit of creditors. Recovery, it is true, cannot be had without proof of insolvency; but this fact can as readily be determined in such proceeding, by attachment, as by bill. It need not be determined in advance of the writ. The process will bind whatever is embraced in the obligation, and upon proof of insolvency, recovery may be had. As before stated, this fact can safely and readily be determined in this proceeding. The attachment is of the nature of equity process, and the practice under it embraces the amplest means of discovery, and the fullest opportunity for administering justice to the parties. I cannot doubt, therefore, that the obligation of the stockholders might have been ascertained, declared, and enforced, in that proceeding, nor that it would have been, had not the company gone into bankruptcy, and thus transferred the inquiry to this court. I am at a loss to understand what defense the garnishees, or defendant, could have raised, with any prospect of success. The corporation being insolvent, the money was not simply owing, but presently due. I do not see any other question than the latter, that they could have presented; and this would have involved only the liability to immediate

payment. Money owing under every description of contractual obligation is subject to attachment. As before observed, the writ and practice under it, are of the nature of equity process and practice, devised for the purpose of reaching what a common-law writ will not, and thus avoiding the necessity of resorting to equity proceedings in such cases. I have said the company was insolvent. The fact does not seem open to doubt. The unsatisfied judgments and outstanding executions might well be regarded as sufficient *prima facie* evidence of it; but subsequent events, and the investigation of the court, put it beyond doubt. What constitutes insolvency, and how it must be shown, under the Pennsylvania statute of 1836,[1] relating to execution, are not questions in this case; and what the courts of this state have said on that subject is, therefore, unimportant. The term "insolvency," as here involved, signifies insufficiency of property to satisfy creditors; and this fact may be shown by any evidence that will satisfy the court, and, for the purposes of this case, at any time while the money is undisposed of.

Whether, however, the company was insolvent and the money presently due when the writs issued, I incline to think is unimportant. If it was not due, this fact, I am disposed to believe, would not affect the result. The liability, at least, existed, and this the writs probably attached, entitling the creditors to recovery when the money was subsequently declared due. This, however, need not be decided.

The denial of judgment in the assignee's suits at law, and in *Patterson* v. *Lynde*, 106 U. S. 519, [S. C. 1 Sup. Ct. Rep. 432,] was because of the absence of privity between the parties—without which, of course, such an action would not lie. In *Patterson* v. *Sinclair*, 2 Norris, 250, the supreme court of Pennsylvania recognizes the right to recover by attachment under circumstances such as exist here. I would refer also to *Ogilvie* v. *Ins. Co.* 22 How. 387.

The money covered by the attachment must be appropriated to them.

[1] The Pennsylvania act of June 16, 1836, § 35, provides that an attachment *sur* judgment may issue in the same manner and with like effect as in cases of foreign attachment; and the act of June 13, 1836, relating to foreign attachments, provides for the attachment of the goods and chattels, lands and tenements, of the defendant, in whose hands or possession soever the same may be.—[REP.

In re Cook and another.

(*District Court, S. D. New York.* July 5, 1883.)

1. Bankruptcy—Assignee's Account for Attorney's Charges.
An assignee's account for moneys paid to an attorney for services not authorized by the court cannot be allowed beyond what the evidence shows to be reasonable, having reference to the amount and circumstances of the estate.

2. Same—Concealment of Bankrupt's Estate.
It is the business of the assignee to make reasonable preliminary inquiries as regards the facts of alleged concealment of the bankrupt's property.

3. Same—Assignee Claiming for Services as Attorney.
An attorney, in performing the ordinary duties of the assignee, cannot claim from the estate compensation as for professional services.

4. Same—Expense in Searching for Property.
An assignee cannot be permitted to expend the chief part of the moneys collected by him in the employment of an attorney to find additional property, which results in nothing.

5. Same—Allowance for Attorney's Fees.
Where in 1874 an assignee received $1,250 upon sale of the bankrupt's book-accounts about two months after the adjudication, and in 1883 presented his account, in which $171.20 was charged for his disbursements and $1,068.36 for moneys paid to his attorney for alleged services, none of which was ever authorized by the court, and the attorney being dead and no bill of items being produced, and the testimony as to services being vague and general, *held*, that $300 only should be allowed for the attorney, and that the assignee should account for the residue, with interest,—the money having been used by his own business firm.

Objections to an Assignee's Discharge.

Hoes & Morgan, for the assignee.

D. W. McLean, for creditors opposed.

Brown, J. The assignee of the bankrupts in the above matter applies for the approval of his account, and for his discharge, upon the report of the register, to which objection is made on behalf of the creditors. The entire receipts of the assignee amounted to the sum of $1,250, derived from a single sale of the bankrupt's book-accounts, of $6,500, made on the twenty-fourth day of November, 1874. No other collections were made by the assignee from any source. His charges against the estate, in the account presented by him, are $1,294.86, being $44.86 in excess of his receipts. There has never been any dividend to creditors. The estate is debited $171.20 for fees of the clerk, register, and marshal, and for advertising in the various stages of the case. The residue of the debits is for moneys paid to Mr. E. C. D. Kittredge for his services as attorney for the assignee, as follows: June 13, 1874, $50; December 7, 1874, $250; November 29, 1876, $368.36; December 16, 1876, $400; in all, $1,068.36. The attorney died before the presentment of the assignee's account.

The bankrupts were copartners, doing business in this city, and proceedings in bankruptcy against them were commenced by a peti-

tion in involuntary proceedings presented by the Meriden Company, and Bramhall, Deane & Co., two of their largest creditors. An adjudication of bankruptcy was made on the fifteenth of September, 1874, and on the thirteenth of October following, Mr. Deane, a member of the firm of Bramhall, Deane & Co., was appointed and qualified as assignee. On the fourteenth of November, upon an application to the court for leave to sell the book-accounts, an order of reference was made to ascertain the facts and report; and upon the report thereon an order permitting the sale of the book-accounts for $1,250 was made on the twenty-fourth of November, 1874, and on the same day the sale was made, and the sum of $1,250 paid to the assignee as above stated. This sum was then deposited by him with his own firm of Bramhall, Deane & Co., and an account on their ledger was opened with the assignee. Mr. Kittredge had been previously the attorney of Bramhall, Deane & Co. He conducted the involuntary proceedings upon which the bankrupts were adjudicated. The four sums paid to him, and charged in the assignee's account as above stated, were all paid by Bramhall, Deane & Co.; the first two by their checks payable to his order; the last two by their promissory notes made to the order of Kittredge; the one for $400 payable two months after date, and the one for $368.36 payable one month after date. In the testimony upon the accounting it is stated by one of the firm that the reason why the last two payments to Kittredge in November and December, 1876, were made in notes instead of money, was because "it was not convenient at the time to pay in money." As there was then a large balance in the firm's hands of the money deposited by the assignee with the firm on the twenty-fourth of November, 1874, the above statement is sufficient evidence either that Kittredge was not at that time deemed to be employed by the assignee as such, but by the firm on their own account to investigate the bankrupt's affairs, and that these notes were given in payment of their own debt; or else that the sum of $1,250, deposited with them by the assignee, had been used by the firm for their own benefit; and, in the latter case, as the assignee was a member of the firm, the use of the money must be deemed a use by himself, and he must be charged with interest.

The sums paid to Mr. Kittredge as attorney from 1874 to 1876, making in the aggregate $1,068.36, as above stated, were all paid without any order or approval of the court. To be allowed as charges against the estate, they must, therefore, be shown to have been either necessarily or reasonably incurred by the assignee, or expended for the benefit of the estate. Gen. Ord. 30, § 5099; *In re Noyes*, 6 N. B. R. 277; *In re Warshing*, 5 N. B. R. 350; *In re Davenport*, 3 N. B. R. 77; *Platt* v. *Archer*, 13 Blatchf. 351; *Hunker* v. *Bing*, 9 Fed. Rep. 277; *In re Drake*, 14 N. B. R. 150; *Ex parte Whitcomb*, 15 N. B. R. 92.

It is impossible to say, in reference to most of the payments to Mr.

Kittredge, that they are shown to have been for services either necessary or beneficial to the estate.

The testimony upon the accounting in support of the charges is all vague and general. No bill of items is presented showing what the precise services, or what any of the payments, were for. If any bill of items was ever rendered by the attorney it is lost. The services rendered by the attorney are shown in a general way to have been: (1) Procuring the adjudication in bankruptcy, for which a reasonable sum may be allowed, (*In re N. Y. Mail Steam-ship Co.* 7 Blatchf. 178;) (2) procuring the order for sale of book-accounts in November, 1874; (3) consultations as to a chattel mortgage in this city, and a mortgage on real estate in Warren county, both foreclosed long before the bankruptcy; (4) examination of the bankrupt, which was not concluded, was never signed, and the minutes of which are not produced, but are lost; (5) investigations as to property of the bankrupts alleged to be at Rutland, Vermont, on which business Mr. Kittredge went there twice, the result being that they concluded that the writer of the letters on which this action was based "did not know what he was writing about," and nothing was discovered, nor any legal proceedings, even, were ever instituted for the recovery of anything there.

The larger part of the attorney's charges, namely, those in November and December, 1876, for $768.36, is sought to be justified by the endeavors to find property of the bankrupts alleged to have been concealed at Rutland, and the attorney's necessary visits there on that business, as above stated. But I find nothing in the evidence or the circumstances sufficient to justify any considerable charges for an attorney in that matter. The employment of professional services must be cautiously guarded, and careful regard at all times maintained for the interest of the creditors, and the amount and circumstances of the estate. *In re N. Y. Mail Steam-ship Co.* 7 Blatchf. 178; *In re Drake*, 14 N. B. R. 150.

It is the business of the assignee himself to make all reasonable preliminary inquiries in regard to alleged concealment of property, and not to employ an attorney to do the assignee's proper work. The visits to Rutland were merely for inquiry into facts on the basis of certain letters received from some one there; inquiries such as any intelligent business person was competent to make, either in person or by correspondence. In this case, after the sale of the book-accounts, in November, 1874, the assignee paid little or no attention to the estate, but left everything, according to the testimony, to the management of Mr. Kittredge. If an attorney undertakes such business, he cannot claim compensation from the estate as for professional services. It would be an opprobrium upon the law, and is not to be tolerated, that an assignee, instead of distributing the fund collected among the creditors to whom it belongs, should be allowed to expend it all, or most of it, in the employment of counsel to perform the ordinary duties of the assignee, or in the alleged but vain endeavor to discover

other property, without the consent of creditors or the sanction of the court. Upon this subject I concur fully in the remarks of NIXON, J., in the *Case of Drake*, 14 N. B. R. 150, above cited.

In regard to the other services of the attorney, the evidence is so vague that it is difficult to determine, in the absence of a bill of particulars, what would be a reasonable compensation. There is no evidence of any special difficulty, or of laborious professional work of any kind, and the estate itself is small. Upon the whole, I think that $300, including the two items of June 13 and December 7, 1874, will be a liberal compensation for all services of the attorney which the evidence discloses, or which may be fairly inferred from it; and it is more than could be allowed upon such evidence were the attorney still living and his evidence procurable in support of the charges. The item of $58.55 paid to the attorney, September 18, 1874, appears by the ledger of the clerk of this court to have been paid by Mr. Kittredge for clerk's fees a few days afterwards, and is embraced in the sum of $171.20, disbursements above mentioned.

The assignee should, therefore, be allowed $300 for all the services of Mr. Kittredge as attorney; the sum of $171.20 for further disbursements; and $55.32, his own fees and commissions;—leaving from the sum of $1,250, collected by him, a balance of $723.48, which, with interest thereon from November 24, 1874, (with which the assignee must be charged, as the money was employed in the business of his own firm,) amounts to $1,092.45, on payment of which, less the sum of $50 costs allowed on this accounting, the assignee will be entitled to his discharge.

In re RANSOM.

(District Court, S. D. New York. June 28, 1883.)

1. BANKRUPTCY—EQUITABLE DOWER.
   Under the Revised Statutes of New York a widow is not entitled to equitable dower except in lands of which the husband was equitably seized at the time of his death, and has no interest in contracts of purchase which the husband aliened in his life-time; nor has she any inchoate dower unless the husband have a valid and recognizable equitable estate.
2. SAME—PARTNERSHIP PROPERTY—TITLE IN NAME OF PARTNER—TRUST.
   Where four out of six members of the firm of W. A. R. & Co. contributed the consideration for the purchase of valuable real estate which was afterwards used in the firm business, and the title, by the arrangement and concurrence of the four associates, was taken for convenience in the name of W. A. R. only, and the rents for many years were divided ratably among the four, according to their contributions of the purchase money, until the bankruptcy of all of them, when the property was transferred, first to a voluntary assignee and afterwards to the assignee in bankruptcy, *held* that, under the New York Revised Statutes, the other three associates had no recognizable equitable estate in the property, and that their wives had no inchoate right of dower therein. *Held, also*, that if the associates were regarded as partners in a particular purchase, still the property would be treated as personalty not subject to dower.

Petition for Allowance of Dower.

Butler, Stillman & Hubbard and *J. Notman*, for petitioners.

Marsh, Wilson & Wallace, for the assignee in bankruptcy, opposed.

BROWN, J. On the thirtieth of December, 1865, the premises known as 384 and 386 Broadway were conveyed to Warren A. Ransom for the consideration of $325,000. The sum of $200,000, part of the consideration money, was secured by the bond and mortgage of the grantee. The residue of the consideration was paid in cash by four out of the six persons who then composed the firm of W. A. Ransom & Co., in the following proportions: W. A. Ransom, 40 per cent.; A. P. Ransom, 40 per cent.; R. H. Boyd, 10 per cent.; and D. W. Geer, 10 per cent. The property was not purchased as the copartnership property of the firm of Ransom & Co., and was never intended as such, but as the separate property of the four persons who paid the consideration, and for their benefit, in the same proportions as their contributions to the consideration. W. A. Ransom was then unmarried; the others were married. On full conference and discussion among the four persons interested, it was determined that the title should be taken in the name of W. A. Ransom only. The property was occupied by the firm of W. A. Ransom & Co., who paid rent, which was divided among the four persons beneficially interested in the purchase. Several changes were afterwards made in the individuals composing the firm of Ransom & Co. About 1877 Mr. Geer transferred whatever interest he had in the property to the other three associates in some manner which does not fully appear.

About 1878 the firm of Ransom & Co., becoming insolvent, made a voluntary assignment for the benefit of their creditors, transferring their partnership as well as their individual property, which was executed by the three remaining associates interested in the property in question. Upon subsequent proceedings in bankruptcy an assignee was appointed, in whose favor the voluntary assignment under the state law was set aside, and all the property transferred to the assignee in bankruptcy.

On a subsequent sale of these premises by the assignee, objection to the title was made on the ground that the wives of A. P. Ransom and R. H. Boyd had, or might have, an inchoate right of dower in the equitable estate of their husbands in the property. The title, however, was passed, and the purchase money paid into the registry of the court, subject to any lawful claim of inchoate dower which the wives of A. P. Ransom and R. H. Boyd might have had in the real estate; and the wife of W. A. Ransom, who, in the mean time, had married, executed a release of her dower to the purchaser under an agreement approved by the court that the same should be without prejudice to her claim of dower in the proceeds of the sale, provided the wives of the other associates were held to be legally entitled to dower in the premises.

A petition having been filed for allowance of dower out of the purchase money deposited in the registry, a reference was ordered to the register in charge, by whose report, disallowing the claim, the above facts appear.

Before the revision of the statutes of New York it was well settled that there was no dower in a mere equitable estate. By the Revised Statutes, however, it was provided (vol. 1, p. 740, § 1) that "a widow shall be endowed of a third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage;" and other provisions provide for dower in certain equitable interests. 2 Rev. St. p. 374, §§ 63, 64; p. 112, §§ 71, 72.

In the case of *Hawley* v. *James*, 5 Paige, *318, 452, 453, it was held by the chancellor that by these provisions of the Revised Statutes the legislature "distinctly adopted the principle permitting the widow to receive equitable dower in the descendible equitable interests of the husband in the real estate which belonged to him at the time of his death;" but not as "against a grantee to whom the husband aliened it in his life-time." Id. 454.

In *Hicks* v. *Stebbins*, 3 Lans. 39, it was held that a widow was not entitled to dower in lands held under a contract of purchase, where the husband had aliened his interest in the contract prior to his death.

In *Church* v. *Church*, 3 Sandf. Ch. 434, where equitable dower was allowed, the husband had died in possession of certain real estate, seven-eighths of which he had purchased at the master's sale, for which he paid the consideration, but never obtained a deed.

In the present case it appears from the testimony that one of the reasons for taking the title in the name of W. A. Ransom only was because the other persons in interest were married, and it was deemed "more convenient" to have the title in the name of W. A. Ransom alone; and from this it would seem to have been the intention that the property should not be incumbered by claims of dower. No force, however, can be given to this circumstance, provided the wives are by law entitled to it.

The terms of the statute giving dower as above quoted are not confined to a seizin of a legal estate; but the more natural and probable construction would limit the words used to legal estates only, because the Revision was largely a codification or express enactment of the rules of law previously settled; and if an important change was intended, such as making wives dowable generally in all equitable estates, it would naturally be expected that such an intention would be indicated by words more explicitly and naturally expressing such an intended change. The words do not, however, forbid dower in equitable estates; and to the extent to which the legislature has in other ways indicated its intention to give dower in equitable estates, such equitable dower may be sustained. But this apparent intention extends no further than to equitable interests held by the husband at the

time of his death; and such is the express ruling in *Hawley* v. *James*, and in the other cases above cited.

In the present case the husbands of the petitioners, by their voluntary assignment and their acts of bankruptcy, followed by the due appointment of an assignee, have aliened all their interest in the premises in question during their life-time; as much so as if they had conveyed them by deed or sale to a purchaser.

2. In any view of the statute of this state as to dower, an essential condition before dower can attach is that the husband must at least be seized of an equitable estate of inheritance in the lands in which dower is claimed; and, in the present instance, I am satisfied that the husbands of the petitioners, under other provisions of the Revised Statutes of this state, never acquired any recognizable equitable estate whatever in the lands in question. In the notes of the revisers (5 Edm. Rev. St. 320) one of their declared purposes is stated to be to prohibit for the most part the separation of legal and equitable estates in land, as theretofore largely practiced and recognized by the courts. Express trusts were confined within narrow limits, which do not embrace the present case, and all beyond were declared unlawful. Trusts resulting by operation of law merely were, indeed, preserved, as was necessary to prevent frauds; but the most fruitful source of resulting trusts by voluntary acts of the parties, viz., the payment of the consideration by one person while the title was taken in another, was destroyed by the following express provisions, (1 Rev. St. p. 728, §§ 49, 51:)

"Every disposition of lands, whether by deed or devise, hereafter made, shall be directly to the person in whom the right to the possession and profits shall be intended to be vested, and not to any other, to the use of or in trust for such person; and if made to one or more persons, to the use of or in trust for another, no estate or interest, legal or equitable, shall vest in the trustee."

"Where a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made."

The exception in favor of creditors does not affect the present question. In the view of this case taken by the petitioners, viz., that it was in no respect a partnership transaction, but a purchase in common by the four individuals above named in their individual character, the above-quoted sections of the statute apply in full force. It is not a case of any fraud or breach of trust, such as arises where an agent intrusted with his principal's money wrongfully takes the title in his own name, in which case, to remedy fraud, a trust results in favor of the principal by operation of law. 1 Rev. St. p. 728, § 54.

The title here was taken in the name of W. A. Ransom by the voluntary and deliberate concurrence of all the parties concerned, and, as it appears, from considerations of supposed convenience. The claims of the petitioners, moreover, as to their husbands' interests, rest wholly upon parol testimony, save only some entries upon

the partnership books charging the individuals with certain moneys, corresponding in amount with the shares of the consideration paid as above stated, and some divisions of rents among them in similar proportions; while the statute provides (2 Rev. St. p. 134, § 6) that—

"No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent, thereunto authorized by writing."

Under such circumstances, to hold that there was a resulting trust in W. A. Ransom in favor of his associates in the purchase to the extent of the proportion of the consideration paid by them, or that any equitable estate whatever vested in them, would be to disregard and nullify a statute which expressly enacts the contrary in words as unequivocal as the English language affords. *Garfield* v. *Hatmaker*, 15 N. Y. 478.

The recent case of *Hurst* v. *Harper*, 14 Hun, 280, involved essentially the same question, and it was there held that the person who paid the consideration acquired no equitable estate in the premises; and upon this view of the case no right of dower can be sustained.

Transactions like the one in question are liable to give rise to embarrassing questions, and the oral testimony as to the understanding of the parties would be very likely to vary considerably, and honestly so, according to the exigencies of the occasion; the leading and controlling idea, doubtless, being, in the absence of any forecast of circumstances or definition of legal rights at the time of the purchase, that the parties should all deal fairly and honorably by each other, as co-owners, in proportion to the consideration paid by each, and with equal proportionate rights in the management and disposition of the property, and with similar mutual responsiblities. Had the building been burned down, without insurance recoverable, and a deficiency arisen upon the bond given by W. A. Ransom, he would have expected the others to bear their share of the loss and deficiency. Had the property been sold while the associates were solvent, each would have claimed, and doubtless received, his share of the net proceeds. Had W. A. Ransom insisted on selling the property in opposition to the judgment or wishes of all the rest of his associates, that would doubtless have been regarded as a breach of the original understanding; and in case of serious damage to the property by fire, or of its destruction, the question of selling or of rebuilding, and, if the latter, then of the mode and manner, and of the necessary advances of money or capital for that purpose, would doubtless have involved the assent and joint action of all the associates. The only legal view of the relations of the parties which would afford any near approach to a solution of the questions liable to arise out of the transaction in

harmony with the testimony, and the presumed intention of the parties, would be that of a partnership among the four associates themselves in the purchase, management, and disposition of this property; although no such relation is claimed by either party to this controversy. Such a partnership may exist as to purchases of land, and be supported by parol testimony only; and even in regard to a particular transaction only, if such be the intention. *Fairchild* v. *Fairchild*, 64 N. Y. 471; *Traphagen* v. *Burt*, 67 N. Y. 30; *Chester* v. *Dickerson*, 54 N. Y. 1; *Smith* v. *Danvers*, 5 Sandf. 669. In that case, however, the property, for the purposes of the partnership, is deemed personalty, and on the death of one of the partners does not descend to his heirs in equity, but remains partnership assets in the hands of the surviving partners till the partnership is wound up; and, as personalty, in equity, it is not subject to dower. In either point of view, therefore, the husbands of the petitioners had no legal or equitable estate of inheritance in the premises as realty, and the register's report denying the petition should be affirmed.

MOFFITT *v.* CAVANAGH.

(*Circuit Court, S. D. New York.* June 4, 1883.)

PATENTS FOR INVENTIONS—LETTERS PATENT NOS. 178,869 AND 209,826 CONSIDERED.

Claims 5 and 6, in letters patent No. 178,869, dated June 20, 1876, for an improved process for shaping a heel counter or stiffener for boots and shoes, and for improvements in machinery for the manufacture of counters, and claims 1, 3, and 4, in letters patent No. 209,826, dated November 12, 1878, for improved machinery for the same object, issued to John R. Moffitt, *held* valid, and the unauthorized use of the improvements therein described by defendant restrained, and an account of profits ordered.

In Equity.

Wm. A. Macleod and *George Harding*, for plaintiff.

Wm. S. Lewis and *Lucien Birdseye*, for defendant.

SHIPMAN, J. This is a bill in equity, based upon the alleged infringement by the defendant of letters patent No. 178,869, dated June 20, 1876, and letters patent No. 209,826, dated November 12, 1878, each patent having been issued to the plaintiff as inventor. The first patent was for an improved process for shaping a heel counter or stiffener for boots and shoes, and for improvements in machinery for the manufacture of counters; the second patent was for improved machinery for the same object.

The defendant was licensed on July 17, 1876, by the plaintiff to use two machines containing the improvements specified in No. 178,869. The license was revoked on August 7, 1878. In the spring of 1878 the plaintiff placed upon the machine the alleged improvements,

specified in No. 209,826. The license provided that after a breach, not waived, of its conditions the machines should become infringing machines, and were not to be used. Since the revocation all the improvements have been used by the defendant against the will of the plaintiff.

In the specification of No. 178,869 the patentee says:

"My invention relates to the shaping of the counter from the blank, and it consists primarily in using a double process for effecting this, as will be more fully explained hereinafter; the first process consisting in shaping it by means of a former moving upon an axis and suitable means for holding the blank up to the former, and the second process consisting in moulding the counter so formed over a male mould of the desired form. By this double process a counter is formed which suits the wants of the consumer much better than any other known to me. Another feature of my invention consists in flattening down the flange by means of a pressure-surface, which moves in the arc of a circle, the part which supports the flange of the counter under the action of this pressure-surface formed with a surface which is curved to correspond. Another feature of my invention consists in heating the surface of the blank when it is formed up upon the former, by friction, in order to set the curves formed in the blank. And still another feature relates to the apparatus used in practicing my invention, and consists in certain combinations of parts, hereinafter more fully described. * * * Heretofore counters have been made for the market either by forming them over a male mould,—the process being the same in principle as the second branch of my improved process, and the apparatus the same in principle as my mould, *e*, and the means described for forming the counter over it,—or else by means of a former and suitable means to hold the blank up to the former,—this process being the same in principle as the first branch of my improved process, and practiced with an apparatus the same in principle as my form, a presser-roll, *b*, or presser-surface, *d*; but all counters made by the first of these processes were objectionable, in that the material could not, by this process, be practically curved, as is necessary in the best counters, while all the counters made by the latter process, by which process the main curves desired could be very efficiently given to the back portion of the counter,—that is, the curves from top to bottom, and the curves at right angles to the curves from top to bottom at the back part of the counter,—yet other portions of the counter were necessarily curved in the same way, which is objectionable, even in cheap work, and almost wholly prevents the use of such counters in several large classes of shoes. By my improved process the curves at the back portion of the counter are properly formed, and yet the other portions of the counter are brought to the exact form desired."

The claims are as follows:

"(1) The improved process of shaping counters, above described, consisting in first giving the proper curves by a revolving former, substantially as described, and afterwards giving the exact shape by forming the counter over a male mould, all as set forth. (2) The male mould, *e*, formed with its sole-surface curved, as described, in combination with a pressure-surface arranged to move over it in the arc of a circle, and thereby form the bottom of a counter on a curve, all as set forth. (3) The mode of giving a more permanent set to the curves by running the presser-roll, *b*, at a greater speed than the former, *a*, as and for the purpose described. (4) In combination with the male mould, *e*, the heads, A and B. (5) The guide, C, in combination with the male mould,

e, and mechanism for shaping the counter over that mould, substantially as described. (6) The nee le, *k*, in combination with the male mould, *e*, and mechanism for operating the needle, as described."

On February 24, 1874, letters patent No. 147,906 were issued to Louis Coté for a machine for performing the first part of this double process. Reissued letters patent No. 7,356 were issued to Coté on October 24, 1876.

Moffitt obtained a patent, No. 127,090, dated May 21, 1872, for a machine for performing the first part of the process, which patent was reissued to him on December 8, 1874, said reissue being No. 6,162. The first part of the machine, described in No. 178,869, is the same in its general principles as that described in No. 6,162, except in one particular, which relates to the speeded roll mentioned in the third claim.

Three suits have been tried in the circuit court for the district of Massachusetts upon these two reissues and No. 178,869. On April 23, 1879, Judge LOWELL decided, in a suit of *Moffitt* v. *Rogers*, who were the licensees of the Coté patent, that reissue 7,356 was not an infringement of reissue 6,162. This decision has been affirmed by the supreme court, which held that the Coté machine did not infringe the original patent or invention of Moffitt, and that his reissue was unduly enlarged. *Moffitt* v. *Rogers*, 106 U. S. 423; [S. C. 1 Sup. Ct. Rep. 70.]

On July 2, 1881, in a suit of *Moffitt* v. *Rogers*, Judge LOWELL decided that the first claim of No. 178,809, and the only claim in controversy in that suit, was invalid, upon the ground that the double process was not patentable. 8 FED. REP. 147.

On the same day, in a suit of *Cote* v. *Moffitt*, 8 FED. REP. 152, Judge LOWELL decided that the reissued Coté patent, No. 7,356, was infringed by machines constructed under patent No. 178,869.

For the same reasons which are stated by Judge LOWELL in *Moffitt* v. *Rogers*, 8 FED. REP. 147, I am of opinion that the first claim of No. 178,869 is invalid.

In view of the Simonds and Emery machine, wherein the flange-forming apparatus was moved in a straight line and the heel-seat was formed straight, there is nothing patentable in moving the flange-forming apparatus in the arc of a circle and thereby making the tread curved. There does not seem to have been any practical advantage in having the heel-seat somewhat curved. The second claim is, therefore, held to be invalid.

Much testimony was given by the defendant to show that the running of the presser-roll at a greater speed than that of the former was useless. It was proved that the presence of the speeded roll was not important, and the validity of the third claim was not insisted upon by the plaintiff.

The patentee says in his specification that "heretofore counters nave been made for the market either by forming them over a male

mould,—the process being the same in principle as the second branch of my improved process, and the apparatus the same in principle as my mould, *e*, and the means described for forming the counter over it, —or else," etc. In view of this concession, and of the testimony of the plaintiff's expert in *Emery* v. *Cavanagh*, which was stipulated into this case, I do not think that the heads, A and B, were a patentable improvement upon the pre-existing mechanism, shown in the Simonds and Emery patent, for forming the counters over the mould.

Claims 5 and 6 contain novel and patentable inventions.

The principal feature of No. 209,826 consists in fluting the edge of the counter-former and causing the fluted edge to mesh into the teeth of a gear, so that the edge of the blank which is to form the flange may be fluted or corrugated. The object of these corrugations is to enable the flange to be more easily and evenly turned. Another change consisted in dividing the presser, *d*, of patent No. 178,869 into two "auxiliary supports, D, D'."

The claims are as follows:

"(1) The improved counter-former, A, grooved or fluted around its flange end, substantially as described. (2) In combination, the revolving counter-former, A, presser, C, and auxiliary supports, D, D', arranged together, as described, the parts, C, D, D', being so formed that each will act upon only a small portion of the blank in lines crosswise of the blank and close together, in order that only a small portion of the blank may be acted upon at any given time. (3) In combination, the fluted counter-former, A, gear, B, and presser, C, all substantially as described. (4) In combination, the fluted counter-former, A, gear, B, presser, C, and supports, D, D', all substantially as described."

The fluted counter-former has no utility unless it meshes into a corresponding roller or gear, or mechanism of some sort. The defendant therefore insists that the first claim is void; but the specification makes it apparent that this claim should be construed to mean a counter-former fluted and meshed, as shown, with the gear, B, or with a roller or other equivalent device. The gear, B, or a fluted roller must be implied in the claim, for it is manifest from the specification that the meshing of a fluted former with a gear or roller was the invention.

The third and fourth claims are for the combination of the fluted former with the mechanism, by which it is made available. The new former and the gear are for the same purpose, and operate apparently in the same way as the rollers, *l*, *o*, of the James L. Hatch patent of February 15, 1876, which corrugate the blank before it is projected upon the former. I cannot see that the mere change of location is of any importance or presents a patentable improvement. But the change of location may have required the employment of new devices or of inventive skill to enable the two corrugating rollers to operate in the new location, and thus to enable the Moffitt machine to accomplish a beneficial result which it could not accomplish before, and "thus this location, in connection with such new

devices," will be patentable. *Marsh* v. *Dodge & Stevenson Manuf'g Co.* 6 Fisher, 563.

I cannot say, without any evidence on the subject, that, corrugating the blank by means of a fluted counter-former and a gear, instead of by rollers, before the blank was projected upon the former, did not require such a change and alteration of the mechanism as to amount to a new device, or was nothing more than a mechanical change. This question involves questions of fact upon which no testimony was presented, and therefore the presumption from the grant of the patent remains undisturbed. The first, third, and fourth claims are, therefore, held to be valid.

The second claim is for the revolving counter-former, fluted or not fluted, presser, and auxiliary supports. This combination is substantially the mechanism of the first part of No. 178,869.

Let there be a decree for an injunction against the infringement of claims 5 and 6, of patent No. 178,869, and claims 1, 3, and 4, of No. 209,826, and for an accounting.

UNITED NICKEL CO. *v.* MELCHIOR.

(Circuit Court, N. D. Illinois. July 10, 1883.)

PATENTS FOR INVENTIONS—ELECTRO-DEPOSITION OF NICKEL—PATENTS NOS. 93,157 AND 102,748 SUSTAINED—INFRINGEMENT.

Letters patent No. 93,157, granted to Isaac Adams, Jr., August 3, 1869, for an "improvement in the electro-deposition of nickel," and letters patent No. 102,748, granted to Isaac Adams, Jr., May 10, 1870, for an "improvement in the electro-deposition of nickel," sustained; and the first and fourth claims of patent No. 93,157, and both of the claims of patent No. 102,748, *held* infringed by the solutions used by defendant, and a decree to that effect entered.

In Equity.

Coburn & Thacher, for complainants.

West & Bond, for defendants.

BLODGETT, J. This is a bill for injunction and accounting by reason of the alleged infringement of letters patent No. 93,157, granted to Isaac Adams, Jr., August 3, 1869, for an "improvement in the electro-deposition of nickel," and letters patent No. 102,748, granted to Isaac Adams, Jr., May 10, 1870, for an "improvement in the electro-deposition of nickel." These patents have been so frequently before the United States courts in other circuits, and been so fully discussed and construed, and have been so uniformly sustained, in the face of exhaustive research into the history of the art, and critical analysis of their terms and scope, that little, if anything, more can be said as to the novelty of the invention, or the construction to be given the patents. *United Nickel Co.* v. *Anthes*, 1 Holmes, 155;

Same v. *Keith*, Id. 328; *Same* v. *Harris*, 15 Blatchf. 319; *Same* v. *Manhattan Brass Co.* 16 Blatchf. 68; *Same* v. *Pendleton*, 15 FED. REP. 739.

The defendant is charged in this case with the infringement of the first and fourth claims of the patent of 1869, which 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."

The 1870 patent relates to the anodes employed in nickel-plating, and consists in a mode of preparing the nickel for the anodes by a combination of carbon or some other metalloid or metal acting in the same way to make the nickel more fusible; the claims being: (1) For a combination with nickel of a metal or metalloid electro-negative to the nickel in the solution; (2) for a nickel anode of nickel and carbon combined, and cast in the required form.

Much testimony has been put into the record in this case bearing upon the question of the novelty of these two patents. But a careful examination of this proof satisfies me that all this testimony, which is worthy of attention, has been considered by the courts before whom these patents have been heretofore adjudicated, and that no new light is shed by the testimony upon the question of novelty. The same ground seems to have been gone over in the former cases that is shown in this, and the devices held to be novel and patentable.

The only point made in this case which does not seem to have been directly passed upon in the prior cases is as to the effect of the subsequent patents issued to Dr. Adams upon the patents now before the court; but it seems to me that the obvious and complete answer to this point is that Dr. Adams could not by the disclaimer found in the English issue of his patent of 1869, nor by the claims of his later American patents, invalidate his older patents; so that the only open question, as it seems to me, in this case, is the question of infringement. Does the proof show that defendant infringes both or either of these patents? There is no doubt, from the proof, that when defendant commenced business he used the double sulphate of nickel and ammonia made pursuant to the directions of the Adams patent of 1869. Reiman, by whom the business was first started, and sold to defendant, states that he made and used an Adams solution and turned it over to the defendant. After a time the defendant undoubtedly used a solution which would be chemically described as an ammonia sulphate, when first prepared, but which becomes a double sulphate of nickel and ammonia by the action of the galvanic

current upon it. Defendant afterwards undoubtedly experimented with a solution made up by Prof. Wheeler, after the directions of Prof. Boettger, but he does not seem to have used it very long, and I doubt, from his own testimony, if he ever did any successful plating with what may be called the Wheeler solution; for I do not think it was, as prepared by Prof. Wheeler, strictly a Boettger solution,—that is, made entirely according to the directions of Prof. Boettger. But whether the Boettger directions were strictly followed in making the Wheeler solution or not, it is quite plain from the proof that this was a mere experiment, and that, in his practical work of nickel-plating, defendant used either the regularly prepared double sulphate of nickel and ammonia, or the ammonia sulphate, up to about the time proceedings were had to attach him for contempt for violation of the injunction in this case, and since then he has been using the Pendleton solution.

The late decisions of Mr. Justice BLATCHFORD, in *United Nickel Co.* v. *Pendleton*, 15 FED. REP. 739, holding that the Pendleton solution, although an acid solution, is an infringement of the Adams patent of 1869, not only disposes of this case, so far as the use of the Pendleton solution is concerned, but so construes the Adams patent, in regard to all attempted evasions of it by mere changes in the solutions, as to bring all the solutions used by this defendant within the field covered by this patent. What he says on this point seems to be so fully applicable to the arguments used in behalf of defendant in this case that I quote:

"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 of 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 acid. 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 fit into the solutions referred to by Adams, or into any plating solutions then known. Adams did not invent the 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 re-

sult 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 learned justice goes further in the consideration of the patent, and holds the fourth claim to be a valid claim for a new article of manufacture. He says:

"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 not 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 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. *United States 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 specifications 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."

This conclusion as to the scope of the fourth claim had been suggested in the earlier cases upon this patent, but never so fully and distinctly pronounced before.

As to the patent of May, 1870, I have no doubt from the proof that defendant was using anodes prepared in accordance with the directions of this patent at the time this suit was commenced, and there is no proof that he has abandoned such use. The question as to the extent of the use of anodes will be more appropriate in the further stages of the case upon accounting. There will be a decree entered finding that the defendant infringes the first and fourth claims of the patent of 1869, and both claims of the patent of May 10, 1870.

Eclipse Windmill Co. *v.* May and others.

(Circuit Court, N. D. Illinois. July 10, 1883.)

1. Patents for Inventions—Reissued Patents Nos. 8,826, 8,443, and 9,493—Infringement.
   Reissued patent No. 8,826, granted to the Eclipse Windmill Company, July 29, 1879, as assignee of original patent, granted to L. H. Wheeler, September 10, 1867, and reissued patent No. 8,443, granted to Palmer C. Perkins, October 8, 1878, the original of which was issued August 18, 1869, *held*, not to be infringed by the "improved May windmill," manufactured by the defendant. *Held, further*, that the "improved May windmill" does infringe the third and fourth claims of reissued patent No. 9,493, issued to the Eclipse Windmill Company, December 7, 1880, as assignee of the original patent, granted to William H. Wheeler, dated October 20, 1874.

2. Same—Reissued Patent No. 8,443.
   Whether the reissued Perkins patent is valid, *quære*.

In Equity.

Hill & Dixon, for complainant.

G. L. Chapin and *Coburn & Thacher*, for defendants.

Blodgett, J. This suit is brought to restrain an alleged infringement of the following patents, and for an accounting: (1) Reissued patent No. 8,826, granted to complainant July 29, 1879, as assignee of original patent to L. H. Wheeler, dated September 10, 1867. (2) Reissued patent No. 9,493, issued to complainant, December 7, 1880, as assignee of the original patent to William H. Wheeler, dated October 20, 1874. (3) Reissued patent No. 8,443, to Palmer C. Perkins, dated October 8, 1878, the original of which was issued August 18, 1869. No question is made as to complainant's title.

It appears from the proof that prior to the twenty-third of November, 1880, complainant had brought suit against defendants for infringement of the two first-named patents, reissue No. 8,826, and original patent to W. H. Wheeler of October 20, 1874,—the application for the reissue of the latter being then pending; and on the twenty-third of November, 1880, a written agreement was made between the parties by which defendants admitted the validity of the two Wheeler patents, and agreed that they would not "*contest the validity of said patents or any reissue thereof*," and further agreed that they would "*permanently discontinue and cease the manufacture and sale of windmills constructed with a hinged or pivoted vane, as embodied in said patents, or in any manner infringing upon said patents.*" This agreement takes out of this case all controversy as to the validity of the first two patents set out in complainant's bill, and only leaves open the question whether defendants, by the mill they are now making and selling, infringe these two patents, and the questions of the validity and infringement of the Perkins patent. The object of the L. H. Wheeler patent was to regulate and control the action of wind-wheels for the purpose of rendering their action more uniform and effective than theretofore,

and its distinctive feature is a device whereby the wind-wheel is caused to swing automatically out of the wind, by the direct action of the wind itself, by means of a single pivoted tail-vane, or rudder, standing normally in the line of the wind; the arrangement of the operative parts being such that when the force of the wind reaches or exceeds a certain pressure, the wind-wheel will turn wholly or partly out of the wind, so as to bring the wheel either at an angle to the wind, so that the wind acts with diminished force, or in a line parallel with the tail-vane or rudder, when the wheel will be wholly out of the wind. Through this device it is claimed by complainant the construction of a solid-wheel self-regulating windmill was accomplished. Before the Wheeler invention, as the proof shows, the regulation of wind-wheels in practical use had been obtained by means of adjustable sails or blades, which opened and closed according to the force of the wind. This made necessary a large number of joints and couplings, which were liable to get out of repair, and added much to the complication of the mechanism. There was also the old Dutch form of wheel, in which the sails were unfurled, reefed, and furled by hand. In all the older forms of operative wind-wheels the vane or rudder was a rigid extension of the horizontal axis of the wheel. In the original and reissued L. H. Wheeler patent there was a disclaimer in these words:

"We are further aware that a revolving wheel frame or support has been mounted on a revolving turn-table, which, in turn, is mounted on the top or cap of the tower, so that the turn-table to which the rudder is rigidly fixed rotates on one bearing-joint, and the wheel-support rotates on another formed or placed on the turn-table, both being interposed between the wheel and the tower."

It is conceded that this disclaimer was made by reason of the fact that the records of the patent-office, at the time the application for the L. H. Wheeler patent was filed, showed the issue of a patent on the twenty-sixth of August, 1856, to Chambers and Hargrave for a windmill containing the elements described in this disclaimer; and defendants now insist that they have the right, notwithstanding their admission of the validity of the Wheeler patents, to construct windmills in substantial conformity with the devices shown in the Chambers and Hargrave patent; and the controversy in this case, so far as these two Wheeler patents are involved, is whether the defendants' mill is constructed upon the principle of the Chambers and Hargrave patent, or whether it invades the domain covered by the Wheeler patent; for defendants, by the agreement of November 23, 1880, agree not to contest the validity of the Wheeler patents, thereby conceding the novelty and usefulness of those inventions.

I think it must be admitted that complainant, in the practical adaptation of the Wheeler devices to a working windmill, has made several quite noticeable mechanical changes in the operative parts, although it is of course claimed that these are allowable mechanical changes,

and still preserve the essential principles of the Wheeler inventions; and it is equally obvious, from an inspection of the defendants' mill, that it contains many changes from the form of construction shown in the model and drawings of the Chambers and Hargrave patent, and the important question is whether these are mere allowable mechanical changes, or whether they invade the principle of the Wheeler mill.

The distinction drawn between his device and that of Chambers and Hargrave, by Mr. Wheeler, in the language immediately following the disclaimer quoted, is that the turn-table which carries the wheel in Chambers' and Hargrave's device is mounted on top of the turn-table which carries the vane, so that the weight of the wheel is necessarily carried upon the turn-table of the vane, while in the Wheeler device the vane is "pivoted upon a separate joint, not interposed between the tower and wheel, and therefore not sustaining any part of the weight of the wheel, nor obliged to resist the strain of the working machinery."

In the copy of the Wheeler model, in evidence in this case, the tail-vane is shown pivoted to the turn-table on which the wheel rests, and which carries the weight of the wheel with a drum or pulley and cord and weights so arranged as to hold the vane in line with the axis of the wheel until the force of the wind on the wheel becomes so great as to overcome the power of the weights and allow the wheel to swing out of the wind. In other words, if there was no tail-vane to the Wheeler turn-table to hold the wheel in the wind, it would vibrate in the wind and be liable to swing either way out of the wind; but the vane attached to the turn-table holds the wheel in the wind until the force of the wind becomes sufficient to overcome the resistance of the weight and flex the joint by which the vane is attached to the turn-table.

There can be no doubt, from the drawings and specifications of the Chambers and Hargrave device, that it embodies the idea of a jointed or pivoted vane, whereby it was expected by the inventors that the mill would be self-regulating; that is, that the wheel, when the pressure of the wind became too great, would fold back out of the wind, the vane retaining itself in the line of the wind.

The main differences between the Wheeler and the Chambers and Hargrave devices seem to be: (1) The Chambers and Hargrave mill is so constructed that the weight of the wheel, with its horizontal shaft and driving gear, is carried upon the rudder-head or turn-table which carries the rudder, and the rudder-head also turns upon the cap of the tower, which must cause a large amount of friction—enough, as is claimed by complainant, to make the device wholly useless. (2) The turn-table which carries the rudder, and the turn-table which carries the wind-wheel, revolve upon a common center of motion, which is the center of the plate, *d;* while, in the Wheeler organization, the pivoted joint, by means of which the wheel folds back out of the wind and in a line substantially parallel with

the vane, is outside the center of motion of the turn-table which carries the wheel.

I am not prepared to say that the mere difference in construction between the two devices, which only showed a difference in the amount of friction against the earlier device, would make a difference in principle or a patentable difference, because this excess of friction might be overcome or reduced within practical limits by some mere mechanical appliances, although it may be that the great friction involved in the mechanism shown may have decided the question against the practical usefulness of the Chambers and Hargrave patent, as it is conceded that no machines were made until after the introduction of the Wheeler mills embodying the principles of this patent. But I am of opinion that the change of location in the vibrating joint by Wheeler must be deemed the main element of difference between the two devices; and it must be conceded, from the proof, that the Wheeler device was at once accepted by the public as a practical and useful machine, and has gone largely into use.

The defendants, at the time of the suit mentioned in the agreement between the parties of November 23, 1880, had been engaged in the manufacture of a windmill constructed with a tail-vane pivoted outside the center of motion of the turn-table which carries the wheel; in fact, pivoted to the back side or rear of the mill-head. After the settlement of that suit, defendants commenced the manufacture of what they termed the "improved May windmill," and the question is, does this mill come within the two Wheeler patents? This mill has a pivoted tail-vane, but the turn-table of the wheel is constructed of a hollow column, inside of which the pitman works, and on which is mounted a cap which contains two pillars which carry the axle of the wind-wheel. A thimble or band passes around this hollow column, so arranged that it turns freely about it, and a flange of the column rests upon the top of this thimble, but with friction balls interposed between the top of the thimble and the lower edge of the flange. The column also extends below the thimble, and is stepped upon a plank below the top of the tower. The lower rim or bottom of this thimble or vane-band also rests on the cap of the tower, and is so arranged that it seems to carry some part of the weight of the wheel turn-table or wheel column. Defendants claim that this arrangement is a mere mechanical improvement upon the Chambers and Hargrave machine; that the hollow column surmounted by the two pillars which carry the wind-wheel is but the plate, *f*, of the Chambers and Hargrave device, and the thimble or collar, which carries the tail-vane, is the Chambers and Hargrave plate, *e;* that the plate on the top of the tower on which the bottom of the thimble or collar rests is but the plate, *d*, of the Chambers and Hargrave device; that they have in fact by this construction, by mere well-known mechanical devices and improved construction, reduced the friction which rendered the Chambers and Hargrave device impracticable; but that they have

kept strictly within the distinctive principle of the Chambers and Hargrave mill.

An examination of the model of defendant's mill, as well as the working mill produced in evidence at the hearing, shows that the tail-vane of their mill works around what is the equivalent of the wheel turn-table, instead of being pivoted to the turn-table, as it is in the L. H. Wheeler mill, and as it was in the old defendant's mill upon which the settlement of November, 1880, was made. It seems to me that it must be admitted that in the construction of defendant's mill, the "improved May," "the revolving wheel-frame is mounted on a revolving turn-table, which in turn is mounted on the cap of the tower, so that the turn-table, to which the rudder is rigidly affixed, rotates on one bearing or joint, and the wheel-support rotates on another, formed or placed on the turn-table;" both—that is, both bearings or joints—being interposed between the wheel and the tower. The defendants' arrangement of parts, it seems to me, meets both of these conditions. The rudder turn-table rotates on one bearing, and the wheel-support rotates on the rudder turn-table, and both bearings are between the wheel and top of the tower. It is true, the turn-table column extends down through the rudder-head and below the top of the tower, but this is a necessary mechanical arrangement in order to obtain a safe and steady attachment of the wheel and rudder machinery to the tower, and is no more of a change than what has been done in the practical construction of mills under the Wheeler patent.

I am, therefore, of opinion that defendants do not infringe the L. H. Wheeler patent.

The W. H. Wheeler patent is for a device whereby a varying resistance to the deflecting action of the wind is secured. The element in the mechanism by which this result is obtained is a lever pivoted at one end, with a weight at the other end, and so arranged that, when the wind-wheel begins to deflect or turn out of the wind, the weighted lever hangs in a nearly perpendicular position; but, as the wheel swings out of the wind, it raises the lever, and as it is brought towards a horizontal position the resistance increases so that the wind-wheel, after having been thrown into a position oblique to the wind, will still work, instead of swinging fully into a position parallel to the vane. This patent has been reissued since the agreement of November, 1880, with five claims, the third and fourth of which are claimed to be infringed, and which read as follows:

"(3) The combination of a deflecting windmill, a pivoted tail-vane, and means for resisting the deflection of the wheel out of the wind, with a variable force proportionate to the extent of such deflection, substantially as described. (4) The combination of a deflecting wind-wheel, a pivoted tail-vane, and a weight of varying resistance, for the purposes herein set forth."

The validity of these broad claims in the reissue defendants have admitted, so that no matter what may be the relation of this patent

to the rest of the public, these defendants are estopped from denying their validity.

The defendant obtains a varying resistance to the deflection of the wheel by means of an upright leaved steel spring, fixed upon the shank of the vane, and which is connected by a chain or cord with an arm extending from the wheel support, so arranged that, as the wheel is deflected, the strain upon the spring is resisted by the increased stiffness of the spring, thereby holding the wheel in an oblique position to the wind until the force of the wind becomes sufficient to entirely overcome the resistance of the spring, and bring the wheel into a line parallel to the tail-vane, where it will be held until the force of the wind abates, when the action of the spring will bring the wheel back either fully or obliquely into the wind. I think this device is clearly within the third and fourth claims of the W. H. Wheeler reissue. It is in all respects an equivalent of the W. H. Wheeler device, both in function and mode of operation, and as the defendants are precluded by their agreement from contesting the validity of this reissue, they must be held to infringe.

The Perkins patent is for a device whereby the weight of the tail-vane is made the force for keeping the wheel into the wind, and is an adaptation of the old and well-known device for a self-shutting gate or door, by causing the gate or door to be lifted as it swings, so that its weight will be exerted to bring it back to its closed or normal position. To some extent the tendency of the defendant's spring and chain is to lift the further end of the vane; that is, if there is any room for play of the vane-thimble on the wheel-support. It is quite evident, however, that this lift of the vane by means of the spring and chain, in defendant's combination, is a mere incident, rather than any part of the purpose of the device; while the Perkins vane is wholly organized to accomplish this lift as a mode of utilizing the weight of the vane as a resistance to the deflecting force, as a means of overcoming such force.

The Perkins patent has been reissued twice: original patent No. 93,472, dated August 10, 1869; reissued October 9, 1872; and again reissued October 8, 1878, on application filed June 4, 1878.

There is no controversy in the case as to the validity of this reissue; but, passing on this in the light of late cases involving reissues, much doubt might exist as to the validity of the patent, and the defendants are not estopped by any agreement from denying the validity of the Perkins reissue. That question I do not care to discuss, as I do not think the defendants infringe the Perkins patent.

I therefore find that defendants infringe the third and fourth claims of the W. H. Wheeler patent, and that they do not infringe the L. H. Wheeler and Perkins patents.

BACKUS WATER MOTOR CO. *v.* TUERK and others.

(*Circuit Court, N. D. Illinois.* July 10, 1883.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—NOVELTY.
The pocket device shown in the sixth claim of reissued patent No. 5,590, dated October 7, 1873, granted to Isaac Hyde, assignor of O. J. Backus, for an "improvement in combined water-wheels and sewing-machines," (original patent having been issued September 24, 1872, No. 131,616,) is void for want of novelty, having been clearly shown in the provisional specifications of James Pilbrow for English letters patent in 1857.
2. SAME—WATER MOTORS.
The first claim in letters patent No. 146,120, dated January 6, 1874, issued to O. J. Backus for an "improvement in water motors," is void for want of novelty, and the second therein made is not infringed by the Tuerk water motors, claimed to be an infringement of the Backus patents.

In Equity.

Munson & Phillip, for complainant.

P. C. Dryenforth, for defendants.

BLODGETT, J. This is a bill to restrain the alleged infringement of reissued letters patent No. 5,590, dated October 7, 1873, to Isaac Hyde, assignor of O. J. Backus, for an "improvement in combined water-wheels and sewing-machines," the original patent having been issued September 24, 1872, No. 131,616, and of patent No. 146,120, dated January 6, 1874, issued to O. J. Backus, for an "improvement in water motors." The defendants are charged with the infringement of the sixth claim of the reissued Hyde patent, and of the first and second claims of the Backus patent. The defenses set up are—*First*, that the patents in question are void for want of novelty; *second*, that the reissued Hyde patent is void, by reason of its describing a different invention from that contained in the original patent; and, *third*, that the defendants do not infringe.

The sixth claim of the Hyde patent is as follows: "A vertically revolving water-wheel, in combination with an inclosing case, which has a projecting spent-water pocket, D, to prevent the spent water from acting on the wheels, substantially as described." The drawings and model of the Hyde patent show an elongation downward of the wheel-casing, so as to give room for the escape of the spent water, without its huddling or otherwise retarding the motion of the wheel; and this feature of the Hyde device is specifically covered by the sixth claim of the reissued patent, it not having been claimed in any form in the original patent. The defendants manufacture a water motor, the wheel of which is inclosed in a metal case, in one form of which there is an elongation of the case downward, so as to give room for the free escape of the spent water. Their other form of wheel-case is nearly circular. The wheel, however, in the circular case is set eccentrically to the center of the case, so that a larger space is left below the wheel than above it, and from this larger space the

spent water escapes freely through an opening in the bottom of the case.

It is obvious that any person entering upon the construction of a water-wheel inclosed in a case like either of these devices must make some ample provision for the escape of the spent water in such a way that it will not clog or impede the motion of the wheel; and the most natural way would be to provide a space for the escape of the spent water at the bottom of the wheel, after the water had performed its function as an impelling power. It would hardly seem to require invention to leave space enough in this case below the wheel to allow the water to escape freely, so as not to interfere with the action of the wheel; and this was what Hyde did, and what he assumed to cover by what he calls his spent-water pocket in the sixth claim of the reissued patent. It is not necessary, perhaps, to say, in disposing of this case, whether a claim of this character, if Hyde had been the first to use such a device as a spent-water pocket, would be valid as coming within the field of invention or not, because I find in the proof sufficient evidence to satisfy me that the pocket device shown in the Hyde patent is old.

It is clearly shown in the provisional specifications of James Pilbrow, in evidence in this case, for English letters patent, produced from the files of the United States patent-office, dated in 1857. Pilbrow's patent was for a water motor in principle the same as the Hyde patent, which he described in his own language, as follows: "This wheel is inclosed in a metal case, having an outlet at F. This case may be supported in any way found most convenient for its practicable application by supports or bearers of wood. Into this case will project the nozzle of a pipe having a cock upon it. This nozzle being pointed tangentially to the wheel, as shown, and being connected with a water-main or pipe, when the water is under high pressure, and the cock being open, the jet of water issues into the cavities of the wheel, urging it around in the direction of the arrows, and the waste or expended water escapes by F," which is the escape-pipe located in the corner of the case opposite the inlet-pipe.

The drawings attached to this specification show a wheel-casing with a wheel revolving therein, with an induction-pipe located so that the jet of water strikes the buckets at the lower side of the wheel, and the water-pocket or escape at the corner of the case opposite the injection-pipe. This wheel is located eccentrically in the case, so that the upper part of the wheel revolves near the top of the case, leaving a much larger space below the bottom of the wheel, and in form of construction is very similar in principle to that adopted by the defendant's second form of wheel. With this device known to the art, to say nothing of the various other devices which are shown by the proof in regard to the construction of water-meters and casings for water-wheels, where the same principle is to some extent shown, it seems to me there was, and could be, no invention in mak-

ing the Hyde water-pocket as an almost necessary adjunct to the successful operation of any water motor, operated upon the principle involved in his device. The pocket was old, and hence unpatentable.

The defendants are charged with infringing the first and second claims of the Backus patent of January 6, 1874. These claims read as follows:

"(1) The single casing-plate, A, having an induction nozzle and waste-water pocket and a discharge nozzle formed thereon, substantially as and for the purpose described. (2) The annular chamber, M, between the plates, A and K, surrounding the elongated bearings for the wheel-shaft, C, substantially as described."

In other words, Backus, in his first claim, seeks to cover the idea of making a casing for his wheel of two plates, in one of which plates was cast the opening for the induction and escape pipes.

It seems to me that if any mechanic had been directed to make a wheel-case of two plates, which should contain water-tight openings for the induction and escape pipes, he would have found it almost a necessity to cast the openings upon one of the plates; and I think there is no invention whatever involved in the idea of casting these openings upon one plate, instead of casting half, or a portion, in one, and the other part in the other. As to the second claim in the Backus patent, it is sufficient to say that I do not find in the defendant's wheel-case the part covered by this claim. It is true, the Tuerk casing contains an elongated bearing for the support of the wheel-shaft, but it does not contain the annular chamber, M, which is specifically covered by this claim; that is, a chamber or space overhung by the eyebrows, D, for the purpose of preventing the water, which dripped or followed along the inner surface of the plates, from running out along the journals. The defendant's axle-bearing is elongated from the surface of the casing both inwardly and outwardly, projecting into the annular space, and there is no equivalent for the eyebrows, D, in connection with this annular chamber. The original Hyde wheel showed the inlet-pipe upon the top of the casing, so that the jet of water would enter at the top of the wheel, and acted, or was expected to act, partly by impact and partly, perhaps, by the gravity of the water, as it was carried in the buckets around from the point where it was received by the wheel. The water passing in at the top of the wheel, there was, perhaps, some occasion for making provision to prevent the drip of the water through the opening for the journals. In practical application, however, of the principles of the Hyde motor, as shown in the drawings of the Backus patent, the jet of water was introduced near the bottom of the wheel, and it is undoubtedly, from the construction of the wheel, expected that the wheel will be substantially clear of the water by the time the buckets have passed the lowest point in the periphery of the wheel. It may be, however, that it was still deemed best to make some provision for preventing the

water, which might drip down the sides of the casing, from flowing out through the journals of the wheel. Whatever may have been the purpose of the inventor, it is clear that Backus made a specific provision for this annular chamber, which he supposed would perform a certain function in his machine. The defendant may be said to have an annular chamber, but I do not find it to be the same annular chamber that is described in the Backus patent, and I therefore find that there is no infringement of the second claim of this patent.

I am, therefore, satisfied that this bill should be dismissed for want of equity: *First*, because the water-pocket of the Hyde patent is old, and even if it were not old, I should doubt its patentability; and, *secondly*, because the first claim of the Backus patent does not involve invention, and is not worthy of being the subject-matter of a patent; and, *thirdly*, because the defendant does not infringe the second claim of the Backus patent.

THE MARY E. DANA.

(District Court, E. D. Virginia. March 22, 1882.)

SALVAGE SERVICE—MEASURE OF AWARD.

A brig loaded with lumber is water-logged off Ocracoke inlet, in January, 1882, and telegraphs for a public vessel of the United States revenue service. The libelant hears in Norfolk of her flying signals of distress, and sends a strong wrecking steamer, with pump and all wrecking material on board, 157 miles, to her relief. This tug and the revenue cutter both arrive, and the brig engages the tug, chiefly because she needs such a pump and engine as one on board the tug, which can be got nowhere else between Norfolk and Charleston, and which is necessary to her reaching port. The brig is taken in tow by the tug on a Saturday, and is towed to Norfolk in rough sea and weather, though there were no dangerous storms; but, owing to a deficiency of coal on the tug, they have to lie by during head winds for 50 hours out of 96, and do not reach Norfolk until Wednesday night,—the brig all the while having had the libelant's pump and engine on board, and in necessary use. The value of all property saved was $4,300. A libel being filed for salvage, and $1,000 deposited by way of tender by the respondent,—

Held, that that amount must be allowed, but the court stated that a less amount would have been granted if there had been no deposit.

Held, further, that as every salvage award consists (1) of the *compensation* due for the labor and materal actually expended by the salvor, and (2) of the *bounty* allowed for enterprise, risk, and success in the service, this latter ingredient should be larger for salvage services on the long and dangerous sea-board stretching from the Delaware capes to Key West, than on other coasts; especially in cases like the present, where the salvor went 157 miles along a dangerous coast, in rough winter weather, to the rescue of a vessel in distress.

In Admiralty.

The brig Mary E. Dana, from St. Simon's Mills, Georgia, bound for New York, loaded with 100,000 feet of lumber, when about 50 miles E. N. E. off Cape Lookout, sprang a leak in a gale of wind,

and at 9 P. M. of Tuesday night, the seventeenth of January, 1882, was leaking so badly that her master, Capt. Benson, found it necessary to make for land. The gale abated on Wednesday morning, and on Thursday morning, the 19th, the brig had anchored off Ocracoke inlet. She lay easy all that day and night, and the captain having, with his crew, gone ashore, telegraphed to Washington, North Carolina, at the life-saving station at Ocracoke inlet, asking that the United States revenue cutter Colfax might come to his assistance. Capt. Benson and his crew, on going ashore, took with them their most valuable personal effects. The brig was water-logged, and drew 12 feet forward and 13 feet aft. Her deck was out of water, and, being filled with lumber tightly stored, there was no danger, or very little danger, of her being foundered or broken up. There was also a telegram sent by some one to the Baker Wrecking Company, in Norfolk, to the effect that a brig was anchored off that inlet, showing signals of distress. This telegram arrived in Norfolk between 9 and 10 P. M., Thursday night, the 19th; and the Victoria J. Peed, a very strong wrecking steamer and tug-boat, of 132 tons, worth $25,000, having on board wrecking material worth $6,000, set out for the place where the Dana lay, at about 11 P. M. that night, under command of Capt. Orrin S. Baker, with five or six other seamen on board.

The Peed reached the brig at about 7:30 P. M., Friday night, the 20th, having gone a distance of 158 miles from Norfolk. Having found by inquiry on board that the brig needed and desired assistance, the Peed anchored at a short distance until the morning. At 4:30 next morning the Colfax arrived. Early on this morning (Saturday, the 21st) Capt. Benson, of the brig, was in conference with the master of the Colfax, the master of the Peed, and Capt. Sol Dickson, a pilot on that coast. The question for him was whether he should put his vessel in charge of the Colfax to be towed to New Berne or Beaufort, or into the sound through Ocracoke inlet, piloted by Capt. Dickson; or whether he should put himself in charge of the Peed. The brig needed to be pumped out, and the Colfax had no sufficient engine and pump. There was no such pumping engine on the coast, south of Norfolk, except those of the Baker Wrecking Company, one of which was on the Peed ready for use. There were 12 feet of water on Ocracoke bar, and Capt. Dickson thought the brig could be taken in on high tide without much risk. The brig was not in the danger in which water-logged vessels generally are, from the fact of being loaded with lumber tightly stowed in the hold. If kept pumped out, she could proceed under sail. The fact that her captain did not get himself towed inside the bar, through Ocracoke inlet, by the Colfax, would seem to argue that he was not in a desperate or very dangerous condition. It would seem that two considerations moved Capt. Benson to engage with Capt. Baker and the Peed: (1) That he thereby secured at once the use of a pump; (2) that in going with Baker into Norfolk he would be proceeding towards his port of destination.

He accordingly put himself in charge of Capt. Baker, and the engine and pump were put upon the brig on the morning of Saturday, the twenty-first of January, and the pump was got to working after some delay produced by the difficulty of getting the suction hose through the deck and down through the lumber to the keelson of the vessel; say at 2 P. M. The pump was found to be very efficient, and was able, during the trip to Norfolk, to keep the water down by pumping one-fourth the time. By 3 P. M. the water was reduced some two feet in the hold, and the vessel's draught in the water lightened about one foot. At that hour she was taken in tow by the Peed.

A breeze had sprung up from the southward, which increased as the two vessels proceeded towards Hatteras; growing squally, and rain coming on about 5 P. M., and the wind increasing into a gale by 12 P. M. The wind, however, was favorable, and the brig had some of her sails set. They were moving very rapidly in a trough of the sea, and by 10 P. M. were heading easterly. This strong wind from the southward would have obstructed and endangered the brig if she had gone in tow of the Colfax in the direction of Beaufort. The vessels made considerable headway until 8 A. M. on the morning of Sunday, the 22d, and got past Cape Hatteras; but by 9 A. M. the wind had changed and was ahead, blowing very hard until 6 P. M. of the same day; the distance gained in the last nine hours being only 10 miles. At dark, on Sunday evening, they were north of Hatteras and about 8 miles south of Body island, off Chicamicomico. Here they anchored, having in this first movement consumed 25 hours. Here both vessels anchored, each with one anchor; the Peed taking in her hawser, and laying off about a mile from the brig. Owing to the head-winds, the two vessels lay off Chicamicomico all Sunday night, and on Monday till 3 P. M.; at which hour the Peed again took the brig in tow and proceeded up the beach. During this anchoring the wind had not been strong enough to cause the brig to drag her anchor, but had been strong enough to cause the Peed to draw hers, which was a light one, until she put down her heavy anchor. It was during this interval, say about 10 A. M. on Monday, that Capt. Baker went along-side the brig and informed her that he would have to be careful of his coal, as he was short of it. The two vessels having got under way the second time, on Monday, at 3 P. M., proceeded up the beach with the wind blowing from north and west. The wind increased during the night, and after midnight blew hard. About 4 A. M. Tuesday, the 24th, it had got so strong that the vessels were making no headway, and the brig was directed to let go her hawser and to anchor. Capt. Benson objected strongly, but complied with the order and came to anchor; putting down but one anchor.

The Peed moved off under steam until she got in the hawser, and then, without putting out her anchor, stood off under a staysail and a slow action of her engine and screw for about four hours, when she returned to the vicinity of the brig, which was between 7 A. M. and 8

A. M., Tuesday, the 24th. In this second movement, which lasted about 13 hours, the vessels had gone from off Chicamicomico to a point off Oregon inlet and Wash Woods, or False cape. Capt. Baker had no intention of abandoning the brig on the morning of Tuesday, the 24th, when she anchored at this latter point. The wind blew heavy, and the two vessels lay at anchor all day Tuesday, and all the following night, during which time the wind was too much ahead and too heavy to afford the hope that any progress could be made with a limited supply of coal. The wind became favorable early on Wednesday morning, the 25th, and the vessels proceeded to take in their anchors; but the brig was delayed in getting hers up, and lost it by the parting of her anchor chain. They got away from False cape about 9 A. M. on Wednesday, passed Cape Henry about 12 M., and arrived in the port at Norfolk about 5 P. M. that day,—four days and four nights from Ocracoke.

The trip seems to have been prolonged by a deficiency of coal. The capacity of the coal-bunkers of the Peed is 35 tons. The daily consumption is six tons. She left Norfolk without filling her bunkers. Capt. Baker says she had four and one-half days' supply when she left; that is to say, about 25 tons. The engineer, Sutton, says she had enough coal for the trip; within three or four tons of her full supply, which would be about 30 tons. The first mate, Johnson, says she took no coal on before leaving Norfolk, and had within four or five tons of her full supply. The second engineer, Corprew, says she had 21 or 22 tons. Capt. Benson, of the brig, says that at Ocracoke, on the morning of the 21st, the mate and the master, Johnson and Capt. Baker, both asked him about coal, and told him that they did not have enough. The Peed consumed some six tons on the way to Ocracoke, and her officers say they put two to two and a half tons on the brig at Ocracoke, to be used in the donkey engine. It is not probable, therefore, that the Peed had much more than 15 to 17 tons when she set out from Ocracoke on Saturday in charge of the brig. Much economy was used on the trip to Norfolk; and on arrival there the coal on board was only about three-quarters of a ton. While under way the first time they were in motion 25 hours; during the next time they were under way they were moving 13 hours; and on Wednesday, the last day of the trip, they were in motion eight hours. All this made 46 hours; and so there could not have been consumed more than two days' supply; say 12 or 15 tons of coal. It would seem pretty clear, therefore, as before suggested, that when the Peed first took the brig in tow she had not more than some 16 tons of coal, and that she would have been short of coal if she had not stopped on several occasions, and laid by, when the wind was ahead and heavy. This deficiency of coal, however, does not signify much in this case, especially as Capt. Benson admits in his testimony that both Capt. Baker and Mate Johnson informed him at Ocracoke that the Peed was short of coal. He engaged her with knowledge of the

fact. As to the weather, there was no storm to endanger either vessel, though both wind and sea were in general rough. Capt. Benson says that the fire in the donkey engine, the door of which was 14 inches above the deck of the brig, was at no time put out by the sea coming over his deck. The brig lay at anchor during the roughest weather, and at no time had down more than one anchor, and at no time dragged that anchor. Capt. Benson says his vessel could have carried his topgallant-sails at any period of the trip. Towing off that coast by such a tug as the Peed is worth $200 a day. Such a pump as hers is worth $25 a day. The value of the brig was $3,000, and that of her cargo $1,300; the whole value saved, therefore, being $4,300. The value of the property risked by the wreckers was, as before stated, $31,000. The claim of libelants is for one-half the value of the property saved. Respondents have deposited in court as a tender $1,000, together with costs up to the date of tender, to-wit, $36.87.

Ellis & Thom, for libelant.

Sharp & Hughes, for respondent.

HUGHES, J. In this case the questions are, was this a meritorious salvage service? and, if so, what ought to be awarded to the salvors by the court? The amount of salvage to be accorded in any case depends upon the following considerations:

(1) The degree of danger from which the lives or property are rescued; (2) the value of the property saved; (3) the risk incurred by the salvors; (4) the value of the property employed by the salvors in the wrecking enterprise, and the danger to which it was exposed; (5) the skill shown in rendering the service; (6) the time and labor occupied.

Estimated by these considerations the case at bar does not, in its facts, present a claim of high grade. The reported decisions of the admiralty courts do not justify a large award in the way of *bounty* for such a service as was rendered here. See *The Albion*, Lush. 282; *The Coromandel*, Swab. 205; *The Cleopatra*, 3 Prob. Div. 145; *The Senator*, Brown, Adm. 372; *The Rebecca Clyde*, 5 Ben. 98; 2 Parsons, Shipp. & Adm. 293, and cases cited in them.

The vessel saved, though in much danger, was not in extreme peril. True, she had been water-logged; but, being loaded tightly with lumber, she was simply reduced to the condition of a *raft;* but of a raft having a keel, a rudder, masts, and sails, and capable of moving without help, especially if relieved by a pump; and of saving itself, if there should be no violent storm. No such storm did, in fact, come on for four or more days; and so her escape from wreck would have been secured if only she could have got the use of a pump, and of a donkey engine with which to operate it. This is enough to say as to the condition of the brig.

As to the salvage service, I will premise that I feel at liberty to give a larger award in the present case than the admiralty courts usually allow in suits of like character, for several reasons, which I

will state: Salvage services rendered on the long and dangerous coast which stretches from the Delaware capes to Florida ought to be more liberally rewarded than on other coasts. It is not a seaboard studded with harbors and prosperous commercial cities and towns, from which salvors may run out short distances along shore and render successful services in a few hours. It is a long coast, dangerous and barren, constantly swept by strong winds and currents, where the ordinary tide varies only three feet, and on which wrecking enterprises cannot be successfully accomplished by individual exertion and capital. Wrecking service here can only be successfully performed by organized capital, enterprise, and skill,—by capital, skill, and enterprise so organized as to be capable of maintaining a constant provision of experienced mariners, powerful wrecking vessels, and ample wrecking implements and material, ready at all hours for immediate service. The business cannot sustain itself in the hands of reputable men and companies unless the admiralty courts shall give exceptionably liberal rewards in all cases of meritorious and successful service on this seaboard. And surely it is in the interest of commerce to sustain the wrecking business in these waters and latitudes.

For these reasons, I repeat, salvors on this coast must be more liberally dealt with by the admiralty courts than on other coasts. The salvage service which was rendered in the present case, though not of any unusual difficulty and risk, was yet highly meritorious.

1. The promptitute with which the Peed was sent out 150 miles along a dangerous coast to the succor of a vessel in distress, deserves marked recognition.

2. The disproportionate excess in value of the property placed at risk by the salvors, compared with that of the property saved, deserves consideration.

3. The excellence of the vessel sent out; and of the wrecking material, including the engine and pump on board of her; and the skill and worth of the officer in command, and of the men under him,—are to be recognized by the court.

4. That the Peed had not on a full supply of coal, does not affect the merit of the service; the fact that she went out without staying long enough to complete her already good supply of coal is rather an element of merit than otherwise; for delay in such a case might be fatal. The deficiency of coal, therefore, only affects the *quantum meruit*, by diminishing the time to be computed for the towage service.

For the several reasons which have been thus stated, I feel justified in granting a more liberal reward in the present case than would seem to be warranted by the general current of decisions in salvage suits. But, obviously, I am not at liberty to disregard too far the average teaching of the precedents. I must at least keep in sight of land.

5. I am the more emboldened to such a course in this particular

case because of the fact that the respondent has made a deposit in the nature of a tender in the suit, of an amount as great as I could, on the most liberal principles, allow.

The award in salvage causes consists generally of two ingredients, viz.: *First*, the *quantum meruit*, which is a certain quantity to be paid in any event if the saved property will yield it; and, *second*, the *bounty*, which is a variable element, depending upon the accidental circumstances of each case.

In the present case I think I ought to give in payment of services according to their actual worth, viz.:

For 48 hours, or two days of actual towing, at $200 a day,	$400 00
For 4 days' hire of pump and engine, at $25,	100 00
For 1 day of the Peed in going out from Norfolk to Ocracoke,	100 00

And I think that I ought to give—

For *bounty*,	400 00
Total,	$1,000 00

I would not give so large a *bounty* as is allowed in the last item, but for the fact that the respondent has presumedly conceded it was due by his tender. In the *Sandringham Case*, where the vessel saved was in extreme peril; where the property of the salvors was in considerable risk for a week; and where there was a week of service—hard service—during two storms, I awarded a *fourth*. Here, where all the conditions were such as to make a case of far inferior merit, I award nearly a fourth. I excuse the apparent discrepancy almost exclusively on the ground that in this case there was a tender, which, in some degree, operates as an estoppel. Else I would not have allowed more than $200 or $250 for *bounty*.

The amount of $1,000 having been deposited by way of tender by the respondent, and also the sum of $36.87 as the costs of the suit accrued up to the time of the deposit, the respondent must let the latter amount remain, and the rest of the costs must be paid by the libelant out of the fund in court.

See *The Egypt, infra.*

THE EGYPT.

(District Court, E. D. Virginia. July 2, 1883.)

1. SALVAGE—INCORPORATED SALVAGE COMPANY.

An incorporated company, organized for the purpose of engaging in the meritorious work of saving ships in distress, and devoting themselves diligently to that pursuit, may be granted salvage award as liberally as natural persons so engaged.

2. SAME—TOWAGE—VALUE OF PROPERTY.
Towage is not salvage, and when considered by itself is never compensated except on the principle of paying according to its worth for work and labor performed; and the value of the property towed is but slightly, if at all, considered in determining the compensation to be awarded. Consequently, precedents as to amounts awarded for towage furnish no guide or rule in cases of pure and true salvage where towage is but an incident, and figures only as a winding-up formality after an arduous and difficult salvage service.

3. SAME—AMOUNT OF AWARD.
The courts ascertain the value of the property saved, and grant such a sum in reward as they deem proper; and, although the ancient rule as to the value of the property forming the basis of the award has been somewhat relaxed in modern times, they still adhere in general to the rule of measuring the amount of their rewards by some proportion of the aggregate value of the property saved.

4. SAME—COMPENSATION AND REWARD.
Salvage consists (1) of an adequate compensation for the actual outlay of labor and expense used in the enterprise; and (2) of the reward as bounty allowed from motives of public policy as a means of encouraging extraordinary exertions in the saving of life and property in peril at sea. The first of these items of award admits of computation; the second does not, and is usually determined with more or less reference to the value of the property saved.

5. SAME—RISK OF LOSS—CHARACTER OF COAST.
Where the coast is thinly settled, and lined with dangerous sand-bars, and frequently visited by violent storms and hurricanes, this fact may be considered in ascertaining the amount of a salvage award.

6. SAME—CASE STATED.
Where a steam-ship of great value, carrying a valuable cargo, went ashore off Paramore's island, Virginia coast, on the Atlantic ocean, where it was thinly settled, and ship and cargo were in imminent peril of total loss, and the salvage service rendered was rendered with extraordinary skill and success, consumption of much time and labor, and great risk to the property used in the enterprise, which was of great value, one-fifth of the value of the ship and cargo and the salvor's expenses were allowed for the salvage service, considering the fact that efficient aid was afforded by the ship's crew in saving the ship and cargo.
The Sandringham, 10 FED. REP. 553, distinguished.

In Admiralty.

STATEMENT OF FACTS PREPARED BY THE JUDGE.

The British steam-ship Egypt, of Liverpool, England, Robert Reavely, master, went ashore off Paramore's island, Virginia, at about noon on Thursday, the eleventh of January, 1883. She was a vessel of 1,550 tons burden, with iron compartments and water-ballast tanks; of great length, and proportionally narrow beam, and difficult of management when aground. Paramore's island is off Accomac county, on the Atlantic coast, about 33 miles north of the channel which makes out of Hampton Roads into the ocean between the capes of Chesapeake bay. The island lies between Wachapreague and Machipungo inlets. The Egypt was loaded with 3,835 bales of compressed cotton. The value of ship and cargo is fixed by agreed estimation at $250,000. The ship had cleared at Charleston, and was bound for Bremen, via Hampton Roads, the intention being to enter the capes of Virginia for the purpose of taking on coal at Newport News.

At 8 o'clock on the morning of the eleventh of January she was 32 miles to the northward of where her master supposed her to be. He was unaware of having passed the capes, and had not seen land since leaving Charleston. The weather had been exceptionally severe during the voyage, and foggy and hazy. No observation for the latitude was practicable, and the force of the current was unknown to her navigators. The ship first struck on the reef or sand-bar which lies abreast of Paramore's island, and 400 to 500 yards off from it. She lay there for more than 24 hours. Passing that reef, she then struck the main shore of the island at a distance, first, of about 400 yards from low-water mark; and afterwards she was driven to within 250 yards of the shore, where she became imbedded in the sand, and where she threw out her anchors. The ship struck the outer reef at 12:15 P. M. of the 11th, the wind being then a moderate breeze from W. N. W. A thick snow was falling, the snow-fall having begun about 11 A. M. The ship was provided with but a small anchor, and the master and crew were unable to get her off. She lay at an angle of about 45 deg. with the shore, heading to shore north-westerly, and was badly listed to starboard. She lay in that position all the rest of the day, and all the night, of the 11th. No sail was seen until 10 A. M. on the 12th, when flags of distress were hoisted to the United States revenue cutter Hamilton, which was going into Hampton Roads. The Hamilton came to anchor as near to the Egypt as the shallow water would admit, and sent her a boat to see what she needed. The officer from the Hamilton was informed that the steamer could not get off without the assistance of wreckers, in the position in which she was lying. The officer said to the master that the Baker people were the nearest and best wreckers to be had, (meaning the Baker Salvage Company, of Norfolk, the libelants in this cause,) and, finding that he could do nothing himself, he returned to the cutter and proceeded to Old Point Comfort. On arriving there, Capt. Deane, of the cutter, at once telegraphed to Capt. E. M. Stoddard, superintendent of the Baker Salvage Company, at Norfolk, the condition and position of the Egypt; Capt. Stoddard receiving the telegram at 6 P. M. on the twelfth of January.

The Baker Salvage Company, of Norfolk, is a corporation organized for the purpose of performing salvage services, and devotes itself at all seasons to that business. Its capital stock is $100,000, and it claims to own, and keep on hand at all times for use, wrecking property, vessels, and apparatus costing more than a hundred thousand dollars. Embraced in this outfit are two large wrecking steam-tugs, —the Victoria J. Peed, of 134 tons, and the Resolute, of 124 tons; the schooners B. & J. Baker, Breed, Cruze, and Maria Jane; three or more wrecking surf-boats; three or more wrecking steam-pumps; a number of very heavy anchors, three of these weighing, respectively, 1,800, 3.000, and 3,500 pounds, with chain-cables, and manilla and steel-wire hawsers of strength to be used with such anchors; and

hoisting and heavy tackle, and other wrecking apparatus and appliances in full complement. All of this wrecking outfit was brought into requisition by the libelants in saving the Egypt and her cargo. They also employed the small steam-tug William Gates, and the powerful towing-tug of 172 tons, the Argus, in this service.

The value of the property employed on the occasion is estimated, by witnesses on the part of the libelants, at about $125,000. It can be safely placed at $100,000. The libelants employed about 135 men in this undertaking, made up of the crews of the several wrecking vessels, and that of the Egypt, numbering 23, who were hired by the libelants for the occasion, and of experienced wrecking laborers and cotton stevedores. It is to be remarked, as to the property employed by the libelants in this salvage enterprise and all others, that it was not insured; the hazard to which it is subjected making insurance companies unwilling to take risks upon it. The libelants aver that the cost of keeping up their wrecking establishment is, for eight months of the year, about $5,000 per month; and for the rest of the year about $2,500 per month. It is in proof that all or nearly all of the wrecking companies of the Atlantic seaboard, except the libelants, have gone out of existence, in consequence of losses in business, caused in great part by the inadequate amounts of salvage awarded them by the admiralty courts, and that the business of the libelants has not been prosperous. The operations of the Baker Salvage Company, of Norfolk, extend over the whole Atlantic coast, the West Indies, and the Gulf of Mexico, and the bays and rivers connected with them.

When Capt. Stoddard received the telegram of Capt. Deane, on the night of the twelfth of January, the wrecking steam-tug Victoria J. Peed was engaged in a salvage enterprise off Kitty Hawk, 40 miles south of Cape Henry. He at once ordered her by telegraph to leave there and proceed forthwith to the relief of the Egypt. The wrecking steam-tug Resolute happened at that time to be undergoing repairs for injuries received on the preceding day, and could not at once proceed to the Egypt. Capt. Stoddard, therefore, hired the small steam-tug William Gates, the only available vessel in Norfolk harbor at the time, and left Norfolk at 12 in the night to go to the Egypt; arriving at 9 A. M. on the thirteenth of January at the place where she lay. The Gates was too small to take along any wrecking apparatus, and Capt. Stoddard's object in going off in the night was to acquaint himself without delay with the condition of the Egypt; to know positively what was needed for her relief; and to ascertain whether his company would be engaged for this salvage service. On his arrival he was requested by Capt. Reavely to undertake the service; Capt. Reavely expressing the belief that the ship could not be saved, especially if the wind should get again to the eastward. Capt. Stoddard agreed to undertake the service, upon the condition that he should have exclusive direction of operations, deeming this

condition essential to success in the tedious and critical enterprise he was undertaking. He was employed on those terms, the amount of salvage not being stipulated. Capt. Stoddard at once employed the crew of the Egypt to assist in the service, on wages then agreed upon. He sent the Gates off to Norfolk at once, with full instructions to the company here as to what should be sent him and what should be done. With the assistance of the Egypt's crew he at once addressed himself to preparations for the work before him. He found the Egypt, as before described, lying south-east of the island, inside of the reef that has been mentioned, and between two sand-bars which stretched out for more than a mile from either end of the island. These bars had been formed by the tides running in and out of the two inlets lying north and south of the island. These bars placed at hazard all vessels coming to the assistance of the Egypt, making it necessary for them to keep away during the prevalence of easterly or north-easterly winds, whether they were sail-vessels of light draft coming to receive cargo taken from the ship, or steam-vessels of greater draft giving aid in laying ground-tackle, and in attempts to pull the ship off the sand-beach.

Thus the Egypt was lying in a shallow bay, bounded on three sides by sand-reefs, and on the other by Paramore's island; the eastern side of which was a marsh swept over by the higher tides; the island itself being desolate and uninhabitable. The depth of water where the Egypt lay, was, at low tide, seven feet at her stern, and five and a half feet at her bow. She drew, with the load she had upon her, thirteen feet and a half. She was, therefore, imbedded in the sand at least seven feet, at low tide. She lay upon a sand bottom, which is hard when still, but which, when a heavy body rests upon it, causing currents, is cut away by the flow of the water, leaving the body to sink deeper and deeper in the sand the longer it remains. This sort of quicksand exists all along the Atlantic seaboard south of the capes of the Delaware, and it is found that wrecked vessels left to their fate on this coast gradually sink lower and lower in this sand until they finally disappear below the surface of the water. The Egypt lay nearly broadside on the beach of Paramore's island, so badly listed to starboard that it was difficult to walk on her deck; and liable to be broken up and wrecked at any recurrence of an easterly or northeasterly storm. Under the action of the currents upon the sand on which she lay she was forming a bed, or pool, which became deeper with the length of time she remained. That she did form such a pool is proved by the testimony both of the ship's crew and of the libelants. The officers of the ship, sounding with leads, dropped close along her sides, found 12 to 14 feet of water; while the soundings made by the libelants, at a distance of 30 or 40 feet off from the ship, showed only 5 to 7 feet of water, at low tide.

The variation of the tides on the Atlantic, near the mouth of

Chesapeake bay, is only about two and a half to three feet; and this circumstance renders it impossible to rescue a ship of the size, tonnage, and depth of draught of the Egypt from such a position as she was in, by pulling at her with tugs at high tide. Before the ground tackle was planted she had sunk below the ground level of the sand bottom from five and a half to seven feet, and a tide of only two and a half to three feet could not by possibility elevate her sufficiently to enable her to be drawn off by main force. High tide did not lift her above the general level of the bottom, where she lay by three to four feet; and it was not, therefore, in the power of tugs to draw her off. This condition of things differs greatly from that which exists in waters of the higher latitudes of both continents. On the coast of Great Britain, especially, the variation of the tide is 10 feet in some localities, and much greater in others, running up as high as 40 feet at many points of the coast. There, the usual method of rescuing vessels that have been stranded is by attaching powerful tugs to them, waiting for the tide, and then pulling at them with might and main. Familiar with this plan of operations, the masters of English vessels, stranded on our seaboard, almost invariably complain of the refusal of our wreckers to resort to this expedient for getting their ships off. The master and crew of the Egypt labored under this same delusive predilection. Deceived by the soundings made from the sides of their ship into the pool which she had made for herself in the sand, they could not realize why their ship could not be drawn off by tugs, with the water apparently at 12 to 14 feet at high tide. Another disadvantage which beset the Egypt was that the beach where she lay was desolate,—far removed from any habitation,—beyond the reach of, and without communication with, any life-saving station; and possessing no means of communication, by telegraph or otherwise, with sources of assistance or places of refuge from storms. This placed her master at first, and the salvors afterwards, at great disadvantage, and subjected them to all risks of the sea, except such as could be avoided or combated by constant wariness and skilled seamanship. The service of salvage performed here was necessarily a service involving continual risk to life and property, in which success was only to be achieved by skill, experience, and unfaltering alertness on the part of the salvors.

The plan of operations necessary to be pursued, and which was determined on from the first by Capt. Stoddard, who is conceded to be one of the most experienced and successful wreckers on the Atlantic coast, was, (1) by means of ground-tackle, of heavy anchors, and strong cables, to bring the ship around perpendicular to the shore, and hold her in that position to prevent her from being broken up by the sea; and (2) to lighten her of her cargo, by means of surf-boats and light-draught sail-vessels, to a sufficient extent to allow of her being drawn off into deeper water, first by the cables, and then by these cables reenforced by the powerful tugs Argus, Peed, and Resolute. Such was

the plan of operations patiently, perseveringly, and laboriously pursued by Capt. Stoddard and his assistants. In the course of the work they made constant use of the Egypt's engines, winches, cables, and tackle, in conjunction with the wrecking implements of their own which have been mentioned.

The planting of the ground-tackle was the first thing to be done. The Victoria J. Peed arrived from Kitty Hawk at 6 P. M. of Saturday, the 13th, and anchored near the Egypt. She was commanded by Capt. C. D. Jenkins, an experienced seaman and skillful wrecker, and had on board a surf-boat, a stationary steam-pump, and other wrecking apparatus. The Resolute, bringing in tow the wrecking schooner B. & J. Baker, with the large anchors and cables of the libelants, one or two surf-boats, and various wrecking apparatus on board, arrived at 7 A. M. on the morning of the 14th; but the weather was thick, and, though her whistle was then heard, she could not get near enough to the Egypt to be seen until about 11 o'clock on that morning. A strong wind blew almost a gale from the north on that day, making it extremely difficult to run a line from the Resolute to the Egypt, without which the anchors and cables could not be laid. As many as three unsuccessful attempts were made to run a line, and the salvors failed, in consequence, to lay their ground-tackle on Sunday; but they did succeed in taking off nine bales of cotton on surf-boats on that day. On the morning of Monday, the 15th, the weather and sea had moderated sufficiently to allow the ground-tackle to be laid without much difficulty. Accordingly the 3,000 pounds anchor of libelants was laid to seaward south-easterly from the ship, with 90 fathoms of manilla hawser, and the same length of steel-wire hawser belonging to the ship. The 1,800 and the 3,500 pounds anchors were also laid out, with 140 fathoms of steel-wire hawser, 212 fathoms of 12-inch manilla hawser, and 30 fathoms of chain; all belonging to the salvors. These hawsers were connected by falls to the ship's machinery, which was used in heaving on the cables during the entire salvage operations. By means of this ground-tackle the ship, which had finally worked up to a position nearly broadside to the beach, had sunk to eight feet in the pool, and had taken water in her hold until it covered her water-tanks, was hauled around square with the beach, with her head close to low-water mark. On this same day the salvors were able to begin the work of surf-boating the cotton from the ship to the B. & J. Baker; the sea being, on that and on all other days but one, too rough to permit of the schooners being brought along-side. The work of breaking the cotton out of the ship, listed as badly as she was, was exceedingly laborious, and the operation of letting it down over the sides of the ship into the surf-boats, on a rough sea, was attended with much danger to all employed in the task,—especially to those in the surf-boats; the heavy bales being liable to fall upon them and to crush them. It may here be remarked that during the week commencing on this Monday, the 15th, 700 bales of cotton were taken out of the

ship, lightening her about 150 tons, and that this work was done with so much care and skill that not a single bale was lost or a man injured.

On Tuesday, the 16th, the wind shifted to the north-east and north, and the weather and sea were so rough, snow constantly falling, that the surf-boating of cotton was rendered exceptionally difficult, and but few bales could be removed. The salvors, however, succeeded in moving the ship four feet to the seaward, and materially relieving her in her position. It was on this day that discovery was made that the ship's rudder was broken, and by its swinging motion was endangering the stern of the ship, which was already much injured from this cause. Measures were at once taken to make fast the rudder to prevent further injury; and it was afterwards drawn up on deck. On the evening of this day the schooner Baker was dispatched to Norfolk in tow of the Peed with a load of cotton.

On Wednesday, the 17th, the weather was foul and rainy, with wind varying and the sea heavy, growing more and more so as the day advanced, so that the salvors succeeded in shifting but one surf-boat of cotton. The ship had now listed to port, in consequence of so much cotton having been taken from her starboard side, and was in danger of going over on her beam-ends, and it became necessary to work much of the night in shifting cotton bales to the starboard side of the ship.

On Thursday, the 18th, the weather had again moderated, and the salvors succeeded in moving the ship astern about 12 feet. They also surf-boated a good deal of cotton from the forward hatch to the schooner Breed. Moreover, the schooner Cruze, which drew less water than any of the sail-vessels, was hauled along-side the after-part of the ship and loaded with cotton from the after-hatch. Between four and five hundred bales were taken off on this day. The ground-tackle was also shifted further out to the eastward. The Resolute went off that night, having tow of the Cruze to Norfolk. That night the weather again became bad, the wind again shifting to the eastward; and on Friday, the 19th, the weather and sea were so rough that the Peed had to put in to Wachaprague inlet, and the schooner Breed to go into the capes. But the salvors succeeded in moving the ship 200 feet astern, until she struck on the reef.

On Saturday, the 20th, the sea was too rough to allow the boating of cotton, or to leave it safe for the wrecking vessels to cross the breaker line. But on that afternoon the salvors moved the ship astern about 200 feet, continuing to heave upon the cables during the night, thus increasing this distance to 500 feet; and at 7 A. M. on the morning of Sunday, the 21st, they finally succeeded in getting the ship afloat. The rest of the 21st was spent in getting up the ground-tackle, and in towing the ship into Hampton Roads by means of two steamers,—one forward of the ship, and another in the rear to steer her, in the absence of her rudder. She was brought to the quarantine station

below Norfolk at about 2 o'clock on the morning of Monday, the twenty-second of January,—eight days having been employed in effecting the salvage service; the vessel and all her cargo being brought safely into port, with no other injury to either than the broken rudder, and the damage inflicted by it to the stern of the vessel.

It is to be added that there was no other organized and abundantly furnished wrecking force that could have been brought to the rescue of the Egypt than that of the Baker Salvage Company, and that the cash outlay of this company in the enterprise was $4,256, besides regular expenses.

Sharp & Hughes and *Ellis & Thom*, for libelants.

John H. Thomas, for respondent.

HUGHES, J. This case corresponds so nearly in its general character and in its details with that of *The Sandringham*, 10 FED. REP. 556; S. C. 5 Hughes, 316, decided by this court a year ago, that I do not feel called upon to deal particularly with every question of law arising in it. There was no appeal from my decision in the case of *The Sandringham*, and the questions of law therein decided must be regarded, until reversed by some appellate court, as the law of this court and of this port.

The present is a case of salvage of the most meritorious character. The service was rendered under all the circumstances which constitute merit in a salvage enterprise. There was (1) great danger, from which the property of respondents was rescued; (2) great value in the property saved; (3) serious and continual risk incurred by the salvors and their property; (4) great value in the property that was put at risk and employed in saving the ship; (5) extraordinary skill and success in rendering the service; and (6) much time and labor spent in the enterprise. These, the six ingredients usually held to constitute a salvage service of the highest merit, all entered conspicuously into the enterprise under consideration. In these respects the case is, I repeat, so like that of *The Sandringham*, that I need only refer to the reasons I then gave for granting a liberal award in the present case. Adopting that decision as furnishing the rule of decision here, I will do no more on the present occasion than treat one or two questions which have been elaborately discussed at bar, and review the authorities cited by counsel for respondents in opposition to a large award.

I shall treat as settled law the point that an incorporated company, organized for the purpose of engaging in the meritorious work of saving ships in distress, and devoting themselves diligently to that pursuit, may be granted salvage reward as liberally as natural persons so engaged may be. *The Camanche*, 8 Wall. 448. This being assumed, I will first consider one of the principal questions of law discussed at bar. Let it be premised that it has been the habit of admiralty courts for centuries to estimate their awards of salvage by proportions of the value of the property saved. This practice arose

in those times when there often was no other practicable method of bestowing salvage rewards than by a division in kind of the property saved. That reason having now ceased, the courts in modern times are more and more abandoning that method of distribution. They ascertain the value of the property saved. They grant such a sum in reward as they deem proper; and if this sum is not paid, they decree a sale of the ship, or of so much other of the saved property, if there be any, as shall be necessary to satisfy the award. But they still adhere in general to the practice of measuring the amount of their rewards by some proportion of the aggregate value of property saved. It thus happens that where this value proves to be very large, as in the present case, respondents in admiralty suits object to the practice; urging that the awards being in great excess of what the labor of effecting the salvage is worth, the owners of the property in such cases are made to pay indirectly for services rendered in cases where the amount saved is small and the compensation received by the salvors inadequate. I am inclined to believe that the courts will in time come to fix the amount of their awards with very little reference to proportions. But if they do, I am sure the reason of so doing will be founded on some other objection than the one which has been indicated. The defense in the present case is only nominally made by the owners of the Egypt. It is really made by the agent in this country of the Board of Foreign Underwriters. Now, the practice of determining salvage rewards by proportions is really based on the principle of contribution from the fortunate for the benefit of the unfortunate; which is the principle on which all insurance is based. It is but another application of that principle; and I am inclined to think that insurers, if no other class, are morally estopped from objecting to its application in salvage cases. It is for the advantage of commerce, and certainly in the interest of human life risked at sea, that respectable and thoroughly organized and equipped wrecking companies should be encouraged and sustained on the wild and stormy coast which stretches from the Delaware capes to the Gulf of Mexico. The danger of this coast is so great that many vessels are lost in spite of the most arduous and expensive exertions of the wreckers, who lose their labor and property, and risk their lives, in fruitless attempts to save them. In other cases the total value of property saved, after great labor and risk, is often far below the cost of rendering the service. When, therefore, a valuable ship and cargo is rescued from the jaws of destruction by this same class of men, would it be just or wise to deprive them of the benefit of an ancient rule of maritime reward, and cut them down to a sum not greatly exceeding a *quantum meruit pro opere et labore?* Surely, if this be done, the change of rule ought to have some better justification than the objection that the old rule required contribution from the fortunate for the benefit of the unfortunate. For one, I am unwilling to be instrumental in inaugurating the new rule on this dangerous coast, where

it may be said, I think, with truth, that a majority of salvage services bring either no compensation at all to the salvors, or compensation far inadequate to reimburse them for the work and labor and risk attending their enterprises. Passing to another question, I think the present case furnishes a fit occasion for repeating what I said in the case of *The Mary E. Dana*, decided last year, 5 Hughes, 369; [S. C. *ante*, 353.] I there said:

"Salvage services rendered on the long and dangerous coast which stretches from the Delaware capes to Florida, ought to be more liberally rewarded than on other coasts. It is not a seaboard studded with harbors and prosperous commercial cities and towns, from which salvors may run out short distances along shore, and render successful services in a few hours. It is a long coast, dangerous and barren, constantly swept by strong winds and currents; where the ordinary tide varies only three feet, and on which wrecking enterprises cannot be successfully accomplished by individual exertions and capital. Wrecking service here can only be successfully performed by organized capital, enterprise, and skill,—by capital, skill, and enterprise so organized as to be capable of maintaining a constant provision of experienced mariners, powerful wrecking vessels, and ample wrecking implements and material ready at all hours for immediate service. The business cannot sustain itself in the hands of reputable men and companies, unless the admiralty courts shall give exceptionally liberal awards in all cases of meritorious and successful service on this sea-board. And surely it is in the interest of commerce to sustain the wrecking business in these waters and latitudes. For these reasons, I repeat, salvors on this coast must be more liberally dealt with by the admiralty courts than on other coasts."

What I then said I have found sanctioned and sustained, by anticipation, in a passage quoted in Cohen's Admiralty Law, 131, from a publication of Judge MARVIN, printed in 1861, in which that able admiralty judge is shown to have said, while judge of the southern district of Florida, in the case of the ship *Belle Ocean and Cargo:*

"What would be no more than reasonable on this coast, where so many shipwrecks occur, and where the assistance of so few transient or trading vessels can be had to save the property, and where, consequently, the employment of a number of regular wrecking vessels has been found necessary for that purpose, might be unreasonably large in the neighborhood of commercial ports, on the coast of England or the United States, or in any place where regular wrecking vessels were unnecessary, because wrecks were fewer, and the assistance of transient persons or vessels could be more easily obtained."

It is to be observed that the bottom on the west Florida coast is, in general, hard and rocky, with no quicksand such as that on our coast. I am firmly of opinion that it is incumbent upon admiralty courts, in dealing with salvage cases arising on the long and dangerous coast extending from Delaware bay to Florida, as well in the interest of commerce as of humanity, to be exceptionally liberal in their awards to regularly organized salvage companies, in order to provide a certain and continuing reliance for vessels in distress upon trained and experienced wreckers, reputable in character, honest in their

dealings, and of position in society rendering them responsible to public opinion for their conduct.

I will now examine briefly the cases cited by respondent's counsel in opposition to a liberal award to the libelants in the case at bar; for I do not deem it necessary to more than advert to what seems to be the principal ground of criticism and complaint on which the respondents base their defense, which is that Capt. Stoddard, on arriving at the Egypt at 9 o'clock on the morning of Saturday, the thirteenth of January, did not then have along with him the Peed, the Resolute, and his four wrecking schooners, with a full complement of men and wrecking implements and apparatus. If there had been any failure in the salvage enterprise, if the ship had gone to wreck, if any part of the cargo had been lost, or any disaster or destruction whatever sustained in the course of the salvage operations, this objection would have been pertinent, provided the misfortune could have been colorably traced to the delay in the arrival of these vessels and equipments. More reasonably still: if Capt. Stoddard, before he went to the Egypt, had been seen by Capt. Reavely at Norfolk or at Old Point, and engaged there for the salvage service, and informed then and there what material, vessels, and men he would need, the objection might be urged with some force. But I have not thought it worthy of any serious consideration, in face of the fact that Capt. Stoddard was not employed in the salvage service until he went to the ship in distress; and that every bale of cotton was saved, not a single particle of the cargo was jettisoned, and that the ship herself was brought from her position of apparently hopeless danger on the beach, safely into port, so little injured that, after repairs to her rudder and stern, she was able in a few weeks to resume and complete her voyage with all her cargo on board.

Disregarding this objection of respondents, therefore, I pass to a review of the authorities cited by their counsel in his brief.

I will remark in advance that *towage* is not *salvage*, and, when considered by itself, is never compensated, except on the principle of paying according to its worth for work and labor performed; that is to say, in legal phrase, it is paid for on the basis of *quantum meruit pro opere et labore*. Of course, when this rule of compensation obtains, the value of the property towed is but slightly, if at all, considered in determining the compensation to be awarded. There are, indeed, frequent cases where, although towage is the dominant feature of the service rendered, yet the ship towed was in a situation of greater or less danger when taken in tow. In these cases an inconsiderable bounty, or salvage reward, is brought into the award, the case in its main feature being a towage case. But nothing could be more illogical than to argue, from the awards of courts in towage cases, what amounts they should decree in cases of salvage.

In the case of *The Plymouth Rock*, 9 FED. REP. 413, where the value of ship and cargo was $60,000, which was a case of simple towage,

the vessel being disabled off Sandy Hook, a tug was allowed $2,000 for bringing her into the port of New York, a distance of some 20 miles. There was no element of salvage in the service, except that the vessel was disabled, had a number of impatient passengers on board, and her own machinery was too much out of fix to bring her in.

In the case of *The Camanche*, 8 Wall 448, where a vessel laden with valuable machinery had sunk in the harbor of San Francisco, and the salvage service consisted in diving at leisure for it and drawing it up by strong steam appliances, consuming four months of time, and where there was but a partial salvage of the property sunk, the supreme court of the United States allowed $24,062 on a value of $75,000 saved. That is to say, one-third; the salvors receiving other and larger remuneration by contract in the same service from insurance companies.

In the case of *The Blackwall*, 10 Wall. 1, a ship took fire while lying in the harbor of San Francisco. The city firemen, availing themselves of the aid of a tug, went to her relief, and in 30 minutes extinguished the fire. The supreme court of the United States allowed $10,000 for the service; what remained of the ship saved from the flames being valued at $60,000. There was scarcely more than one ingredient of a true salvage service in the case, viz., the ship was in imminent danger of destruction.

In the case of *The Adirondack*, 2 FED. REP. 387, the service performed was simple towage. The ship was disabled at sea in her machinery. Another steamer took her in tow and brought her about 600 miles into New York. The court awarded $7,500, or $1,500 a day, for five days' towing. The value of the Adirondack, which is an immaterial circumstance in a case of mere towing, was $300,000.

In the case of *The Colon*, 4 FED. REP. 469,—which was another case of mere towing,—a steamer was disabled in her machinery at sea, and was taken in tow by another steamer, and towed 720 miles into New York. The court awarded $10,000 for six days' work; the towing vessel in this, as in the preceding cases of towage, being herself bound for New York.

The case of *The Edam*, 13 FED. REP. 135, was another case of mere towage. The Edam had broken all the blades of her propeller, and was disabled at sea, a few hundred miles from New York. She was taken in tow by a strong steamer, the Napier, and brought into New York in three days. The award was $25,000; the more, in this case, because the towing steamer reversed her own course (having been bound for Liverpool) in order to return to New York.

In the case of *The America*, Marvin, Wreck & Salv. 217, lost on the Tortugas, the cargo only was saved, and the success of the salvage service was but partial. Here $47,971 was allowed for saving portions of the cargo,—being at the rate of one-fourth on that which was saved in uninjured condition; one-half on that saved in a wet and

damaged state, and three-fifths on that which was saved by diving. The wrecking vessels used on the Florida reefs are not "large." They are very small. They are mere smacks. Some of them are a little larger than others; and it is only in that sense that they are termed "large" in the reports of salvage cases arising on those waters.

In this case of *The America*, Judge MARVIN applied his rule, which will be found to have entered into all his decisions in the Florida court, viz.: that where the salvage service was not successful, and more or less property was lost, the award was smaller in proportion as the property lost was greater. See what he said on this head in the case of *The Isaac Allerton* quoted by me in *The Sandringham Case*, and appearing in 10 FED. REP. 579. The salvage service in the case of *The Allerton* was wholly successful, and the learned judge awarded half of the value of the property saved ($96,000) to the salvors. I repeat here what I myself said, in commenting on this rule of Judge MARVIN, (Id. 579:)

"I think, with the court in *The Allerton Case*, that the proportion of the property lost must enter into consideration. In a case in which, out of property worth $200,000, only the value of $50,000 was rescued, I would give a smaller percentage for salvage than I would in a case where, other circumstances being equal, property worth $50,000 was in danger, and all was saved. In the first case, other circumstances being the same, and the service such as equally to deserve a liberal allowance, I might feel it unjust to give more than one-tenth; while, in the second, I might think it equally unjust to allow less than a half."

It will be observed, in the case decided in the Florida court by Judge MARVIN, cited by Judge LOCKE, his successor in the case of *The Neto*, 15 FED. REP. 819, that in most of the cases arising on the Florida coast there were greater or less losses of property; and that, acting upon his own rule, Judge MARVIN diminished his rewards of salvage with reference to these losses.

Returning now to cases cited by respondent's counsel:

In that of *The Crown*, lost on Ajax Reef, on the Florida coast, 300 bales of cotton being also lost, property to the value of $131,000 was saved piecemeal by a horde of native "wreckers." Here $23,000 was allowed, or one-sixth.

In the case of *The Neto*, 15 FED. REP. 819, the ship was saved, but 500 bales of cotton were jettisoned and lost. The success of the salvors was, therefore, very bad, and Judge LOCKE said that, if there had been means adequate to save all the property at risk, an extraordinarily large salvage could have been paid more easily than a small one could be under the existing circumstances. He therefore awarded, *as* a small salvage, the sum of $9,625. The value of the ship and saved cargo is not given in the report of the case, and we are unable to know the ratio which the award bore to it.

In his opinion in this case of *The Neto*, Judge LOCKE cites, from the records of the Florida court, a number of cases previously decided by

Judge MARVIN, but gives very meager particulars of the facts of them. These records show that in one case, where much property was lost, Judge MARVIN awarded 40 per cent. on a value of $30,000 saved. In another case, where there were "no circumstances of peril," $16,975 was awarded, or 10 per cent. of the value saved. In another case $21,805 was allowed, or one-fourth of the value saved. In another case a vessel was saved which "lay on a smooth and even, though a hard, rocky bottom," and $9,200 was awarded, or 8 per cent. In another case, where the ship rested on a boulder and was rescued from it, $5,700 was awarded, or 18 per cent. In another case, where the vessel rescued was in no great or unusual peril, an eighth of $9,000 was awarded. In another case, where a steamer was pulled off a shoal, and broke her rudder in coming off, so that she had to be steered by a schooner in the rear, while coming into port, $16,000 was awarded, or 10 per cent. In another case $17,500, or an eighth, was awarded for rescuing a vessel from a position of discomfort, but of "comparative safety." In another case an award of 10 per cent. was given on $75,000 worth of cotton saved in a vessel,—30 per cent. on cotton saved when afloat, and 50 per cent. on property saved by diving. In another case the *City of Waco* was saved, when stranded on a rough, rocky bottom, by means of ground-tackle and lightening the ship of her cargo, and an award of $16,000 was made on a supposed value of $250,000. In the case of *The City of Houston*, which the court considered only nominally a case of salvage, an award of $17,500 was made on a supposed value of $400,000. In the case of *The Hector*, laden with $300,000 worth of cotton, which was a case in which much labor was expended under circumstances of very slight risk, $20,000 was awarded. In the case of *The Buoneventura*, which had got among shoals, and when a government schooner had helped her to get out, by aiding with its anchor, and had taken on board 175 bales of cotton, 150 bales having been jettisoned, $3,000 was awarded for the assistance given, the value saved being $200,000. The foregoing are all the cases that were cited by Judge LOCKE in his decision in the case of *The Neto, supra*.

In the case of *The Suliote*, 5 FED. REP. 99, cited by counsel of respondents in the argument at bar, the vessel took fire in the cargo in her hold, while lying at her wharf in New Orleans. The fire was extinguished by three tugs, which came to the Suliote's assistance. There were few, if any, of the ingredients of true salvage in the service, except that the ship was in danger from smothered fire in her hold. There was no danger encountered by the tugs. If the fire had been above-board, the service could have been completed in an hour; but, being in the hold, it required a day or more of time for its complete extinguishment under decks, which was effected by water, hose, and pumps, and by the use of carbonic acid gas. The district court awarded $37,500 on a value of $250,000; but the circuit court, Mr. Justice BRADLEY sitting, reduced the allowance to $19,824.

In the case of *The Swiftsure*, 4 FED. REP. 463, referred to in argument, but not cited in respondent's brief, the ship went ashore north of Cape Charles, uninjured, not very far from the vicinity where the Egypt was stranded, at about 9 o'clock one May morning, and remained there until 2 P. M., waiting for a tide, her chief officer being drunk. At the latter hour, two strong steam pilot tugs, which were cruising outside the capes looking for a job, took hold of her, drew her afloat, and in three hours got her into the channel coming out from Hampton Roads. The court (Judge MORRIS, of Baltimore) awarded $2,500 for this towage service. The only element of true salvage in the case consisted in the fact that if the vessel, which itself was a strong steamer, with nothing the matter but drunken officers, had not sobered up and steamed off into deep water on that day, the worst might have happened to her in the event a storm should come on. Except as to this prospective danger, the case was one of mere towage. Ship and cargo were worth $125,000.

Coming now to the English cases cited for respondents, the first is the case of *The F. T. Barry*, L. R. 6 P. C. 468–475. The Barry was one of three steamers which were severally engaged in towing the ocean steamer, the Amerique, from where she had been unaccountably abandoned by master, crew, and passengers, to the amazement of the world, and bringing her into the port of Plymouth, England. The ship when found had some water in her, which had to be pumped out. Except this, and that she was found abandoned, the case was one of mere towage. She was brought into port in about three days. The lower court awarded $150,000 on a value of $650,000. The house of lords reduced the award to $90,000, or $30,000 a day for three days' towing; holding that this was not a case in which a court should make an award of salvage with reference to a proportion of the value saved.

In the case of *The Cleopatra*, 3 Prob. Div. 145, the service was but little more than one of towage. It is true that, when the Cleopatra was discovered by the Fitzmaurice, much difficulty was experienced in making fast to her by hawsers. She was in the shape of a "ship's boiler with a bridge in the middle;" and, when loose in the sea, was much given to rolling over and whirling around. She was a species of hollow raft which had been constructed for the especial purpose of transporting Cleopatra's Needle from the Nile to England. She had been abandoned in the bay of Biscay in a storm by the steamer which had had her in tow. After an effort of an hour and a half an officer of the Fitzmaurice succeeded, at some personal risk, in getting on board and running a line to his vessel. The towing was then easy, and occupied 52 hours. The award was $10,000. The value of the obelisk and her artificial raft, the Cleopatra, was nominal.

In the case of *The Glenduror*, 1 Asp. Mar. Cas. (N. S.) 31, the service rendered was prolonged to a week; but all dangerous work

was done in a single night. The rest of the service was of the class proper to be compensated on the basis of *quantum meruit*. Hence, $10,000 was allowed on appeal, on property saved to the value of $270,000; the appellate court being restrained in its allowance, which was conceded to be low, by the illiberal award which had been made by the court below.

In the case of *The Kenmure Castle*, 7 Prob. Div. 47, $20,000 was awarded to one steamer for towing another by sea and partly on the Suez canal for 10 days; the judge saying that the weather was fine, and that there was no danger.

In the case of *The Ville d'Alger*, not yet reported, but tried and decided by Sir ROBERT PHILLIMORE judge of the English court of admiralty, the steamer City of Berlin broke her shaft about midway in the Atlantic ocean. The Ville d'Alger first took hold of her, and, after towing less than 24 hours, desisted for want of power or of coal. Then the steamer Samaria took hold of her, and towed her into New York, the port of her own destination, in six days. The amount awarded was $42,500, for seven days towing; of which $2,500 was decreed to the Ville d'Alger. The City of Berlin had merely broken her shaft, and could have repaired it and come into port unaided, but did not wish to spare the requisite time. It was a case of mere towage.

I believe I have omitted no case which was cited for the respondents. Most of them are cases where the service rendered was but little more than that of mere towage; cases in which the amount allowed is always based upon the idea of *quantum meruit*, with no reference to a proportion of the value saved. They furnish no guide or rule in case of pure and true salvage, where towage is but an incident, and figures only as a winding-up formality after an arduous and difficult salvage service.

Those cases of salvage proper which are cited for respondents are all of them cases in which many of the most important ingredients of a true salvage service are wanting, and they accordingly furnish no guide in determining the awards due in cases where all of these ingredients are prominent and continuing features of the service to be rewarded. But, even taking these numerous cases as they are, I think their teaching is strongly in favor of liberal awards. In the towage cases, the amounts decreed are strikingly liberal; and when we consider that the salvage cases cited all either lacked most of the ingredients which constitute a true salvage service, or else are qualified by Judge MARVIN'S rule of diminishing the award with reference to the amount of property *not* saved, I think even they fail to enjoin a narrow policy of salvage awards. They certainly have very little application to a salvage service such as that now under consideration, in which every circumstance constituting true salvage is conspicuously present, and which, moreover, was characterized by a completeness of success almost unparalleled.

Salvage consists—*First*, of an adequate compensation for the actual outlay of labor and expense made in the enterprise; and, *second*, of the reward as *bounty* allowed from motives of public policy as a means of encouraging extraordinary exertions in the saving of life and property in peril at sea. The first of these items of award admits of computation; the second does not, and is usually determined with more or less reference to the value of the property saved. I have said that the salvage service rendered the Egypt is nearly identical in its features with that which was rendered in the case of *The Sandringham*. Yet there are one or two differences between the two. I do not think that the Egypt was in as desperate a condition before she was taken in charge by the salvors as the Sandringham. It is true that the latter lay off Cape Henry life-saving station in direct telegraphic communication with Norfolk, and at a point readily accessible to the wrecking vessels and assistance sent from this city; whereas, the Egypt lay on a desolate coast, 40 miles away from telegraphic and all other overland communication with sources of assistance, amid shoals and sand-bars and shallows, which rendered approach to her by wrecking vessels in midwinter difficult and hazardous. But the Egypt was not, like the Sandringham, swept entirely over by the sea where she lay, and did not thump against the bottom so long or so violently, and had not been abandoned by her crew in the face of danger. When boarded by Capt. Stoddard she still had on her a faithful crew, commanded by a brave and skillful seaman and a true gentleman in the person of Capt. Reavely. The master of the Sandringham lost no opportunity of displaying his entire unfitness, in temper, character, and acquirements, for the responsible position which he held; and his crew during the entire salvage service were, with four exceptions, idle and ill-natured spectators of the brave men who were saving their ship and the property she carried. The crew of the Egypt, on the contrary, though working for wages freely offered them, worked faithfully, and in the spirit of a genuine loyalty to their ship. I think, therefore, that a discrimination ought to be made between the two cases, in the award of the court; and so, whereas a fourth was awarded in lump in the case of *The Sandringham*, I will in this case award a fifth, and add to that amount the sum expended by the libelants in the enterprise, viz., $4,256.55.

I will decree a fifth of the agreed value of the ship and cargo, *plus* the amount of expenses just named.

See *The Sandringham*, 10 FED. REP. 556, and note, 584.

THE MONTANA.[1]

INS. CO. OF NORTH AMERICA and others *v.* LIVERPOOL & GREAT WESTERN STEAM CO. (Three Cases.)[1]

(*District Court, E. D. New York.* June 29, 1883.)

1. STRANDING OF VESSEL—JURISDICTION—COMMON CARRIER—EXEMPTION IN BILL OF LADING FROM LIABILITY FOR NEGLIGENCE.

The British steam-ship M. was stranded in Church bay, on the coast of Wales, while on a voyage from New York to Liverpool. Insurers, who had paid losses on goods which were on board, filed libels against the owners of the steam-ship *in personam*, to recover the amount so paid by them, averring that the steamer was stranded by negligence of the master of the steamer. The bills of lading contained a clause exempting the owners of the steamer from a loss by stranding, even though caused by negligence of the master. *Held*, that the liability of the respondents must be determined by the law of the United States; that, under the case of *Railroad Co.* v. *Lockwood*, 17 Wall. 357, in the supreme court of the United States, as well as other cases in the circuit and district courts, the provision in the bills of lading exempting the ship-owners from the consequences of the negligence of the master was null and void; that the libelants were entitled by subrogation to the rights of the owners of the goods; and that the case, therefore, must be determined by the question whether there was negligence which caused the stranding.

2. SAME — NEGLIGENCE IN NAVIGATION — BURDEN OF PROOF — SUBROGATION OF INSURERS.

The facts on which the question of negligence turned were substantially as follows: The steamer went ashore about 2:45 A. M. in a dense fog, and the shore was not seen in time to stop the vessel. The master and his officers, who were on the bridge, averred that the fog was a fog on the land only, and that, till within a few minutes before the vessel struck, it had been a fine, clear night, and they had no idea of there being a fog. The master claimed that he had passed Tuskar light, on the coast of Ireland, the evening before, about four miles off, as usual, with a flood tide; that the vessel was kept on the usual course of N. 42 deg. E. up the channel; that he next made South Arklow light, on the coast of Ireland, which showed him that the flood tide was carrying his vessel more than usual over towards the Irish coast; that the next light to be made was the South Stack light, on the coast of Wales; that instead of making that light bearing, E. N. E., he made it S. E. by E., a point forward of his vessel's beam; that he judged the flood tide had carried her so far over towards the Irish coast that she was 15 miles from that light; that he had that light in sight an hour, and then lost sight of it a point off his vessel's beam; that as the light on the Skerries (which is a light about 8 miles N. 42 deg. E. from the South Stack) was not then visible, he changed his course to E. ¾ S., and ran on that course for five minutes, when he heard a gun, which he knew to be the fog-gun on the North Stack, about two miles from the South Stack, and he thought it sounded from four to six points abaft his starboard beam, whereupon he resumed his original course of N. 42 deg. E., and 15 minutes thereafter the vessel went ashore. *Held*—

That, inasmuch as the bills of lading contained an exemption from loss caused by stranding, the burden was on the libelants to prove that the stranding was caused by negligence of the master.

That although doubt was thrown upon the master's evidence that he had no suspicion of fog, by the fact proved that the lookouts on his vessel were doubled and the whistle blown; also upon his statement that he ran his vessel at half speed, by the evidence of the engineer in charge that the engines were run at full speed until just as the steamer struck,—still the case would be determined on the story told by the master himself.

That from the place where the steamer struck it was manifest that the

[1] Reported by R. D. & Wyllys Benedict, of the New York bar.

steamer could not have been run upon her course of E. ¾ S. for only five minutes, as the master said, for in order to do that she would have had to run over the land; that if the master did not note the time of his running on that course, directly towards a dangerous coast, under the circumstances he was guilty of gross negligence, and if he did note it, it was incumbent on him to have stated it correctly.

That the result showed that the vessel, instead of being 15 miles off the South Stack light, passed it close at hand, and the master conceded that he must have done so; that his story, therefore, of having had that light in sight an hour, and changing its bearing only two points while running at the rate of 14 miles an hour, could not be true.

That at the point where the master said he supposed he was when he lost the South Stack light, the light on the Skerries would have been visible, as was shown by the chart, and that the fact that he did not see the light on the Skerries should have told him that there was a fog; and that this fact should have raised a doubt in his mind as to the correctness of his opinion that his vessel had been carried over towards the Irish coast, and he should have heaved the lead, which would have told him where he was.

That when the master heard the gun on the North Stack he was, as the result shows, east of it and in Holyhead bay, and if he knew that he was so, it was gross negligence to take a course N. 42 deg. E.; and that he did know it, was fixed by his own repeated statement that, with his vessel heading E. ¾ S., he heard the gun abaft the beam, and knew it was the gun on the North Stack.

That the stranding was, therefore, due to a want of reasonable care and skill in the navigation of the ship by the master, and the libelants must have a decree for the damages by them sustained.

In Admiralty.

Butler, Stillman & Hubbard and *R. D. Benedict*, for libelants.

Beebe, Wilcox & Hobbs, for claimant.

BENEDICT, J. These actions are to recover the value of goods shipped on the steam-ship Montana, in New York, to be transported therein to Liverpool, and destroyed by the stranding of the steamer at Church bay, on the Welsh coast, in March, 1880. The goods were insured by the several corporations—the Insurance Company of North America, the Phenix Insurance Company, and the Ulster Marine Insurance Company—who bring these suits, and the loss having been paid by the insurers, they now seek to recover of the owners of the steamer the amounts so paid by them respectively. Their claim rests upon the proposition that the stranding of the steamer, and consequent loss of the goods insured, was caused by the negligence of the master of the steamer, who was at the time responsible for her navigation.

On the part of the defendants the right of the libelants to recover is disputed upon several grounds:

First, it is said the facts proved do not make out a case where the insurers are subrogated to the rights of the owners of the goods, and therefore no recovery can be had in these actions. But, in my opinion, the testimony is clearly sufficient to bring these cases within the settled rule, and entitles the libelants to enforce against the owners of this steamer any right which accrued to the owners of the goods by reason of the bills of lading, and subsequent loss of the property shipped.

Next, it is said in behalf of the defendants that their liability upon these bills of lading must be determined by the law of England. But the undisputed facts show that there is no ground for such a contention.

Next, it is contended, and with much apparent earnestness, that the law of this country permits no recovery, because of the fact that the bills of lading sued on provide for exemption from liability for losses caused by the negligence of the defendant's servants. But this court is bound by authority to hold such a provision in the contract of a common carrier to be null and void. Upon this point the decision of the supreme court of the United States in *Railroad Co.* v. *Lockwood*, 17 Wall. 357, in my opinion controls the present case. The only distinction between *Railroad Co.* v. *Lockwood* and the present case is that here the contract is a bill of lading for goods shipped on a vessel, while the contract passed on in *Railroad Co.* v. *Lockwood* was for the transportation of a passenger, and by railroad. I am unable to see that this distinction creates a difference between the cases. The defendants here were common carriers, and the reasons for the rule declared by the supreme court in *Railroad Co.* v. *Lockwood*, appear to me to apply with full force to a contract for the carriage of goods in a ship. But if this court be not bound by the decision of the supreme court in the case referred to, it is controlled on this occasion by decisions, in cases precisely similar to the present, which have been made by this court, and by the circuit court in this circuit. See *The City of Norwich*, 3 Ben. 575; *Nelson* v. *National S. S. Co.* 7 Ben. 340; *The Colon*, 9 Ben. 354; *The Hindoo*, 1 FED. REP. 627; *The Powhatan*, 5 FED. REP. 375, and 12 FED. REP. 876. It would be a waste of time, therefore, to follow the elaborate argument that has been presented in regard to the effect to be given to the provisions of the bills of lading under which the goods in question were transported.

My decision of this case must turn, not upon any question as to the form of the contract, but upon a question of navigation, and I am required to say whether the stranding of this steamer was caused by a failure on the part of the master to use reasonable care and skill in the navigation of his ship.

The decision of this question may well be approached with solicitude, but it is not seen that it involves an inquiry different in character from the inquiry so often forced upon the attention of courts of admiralty in cases of collisions of ships.

Upon this inquiry I enter with the remark that, inasmuch as the bills of lading sued on contain an exemption from liability for loss caused by stranding, I consider the libelants bound to prove that the cause of the stranding was negligence of the master. It will not be sufficient to show an error of judgment on the part of the master, either in selecting one of two courses open to be pursued by him, or in coming to one rather than another of two conclusions possible

to be drawn from the facts as known, or as they ought to have been known by him. He must be proved to have displayed a want of reasonable care and skill in view of the facts as they appeared, or ought to have appeared, to him.

Moreover, the liability of the defendants will be determined upon the testimony of the master himself, who is produced as a witness by the defendants, and neither he nor they can complain if his statement of what was done, and the attending circumstances, be made the basis of my decree.

The master's statement is, in substance, as follows: That, bound up the Irish channel, when Tuskar light was about abeam some four miles away, he put the steamer upon a course N. 42 deg. E. On that course, South Arklow light, upon the Irish coast, ought not to have been seen, but was seen plainly. From this circumstance the master, as he says, judged that the flood tide then running was carrying him to west of his proper course; but, nevertheless, he made no change. He passed North Arklow light without seeing it, and made no other light until he made the South Stack light. This light, which should have been made when bearing E. N. E., and about 20 miles away, was made bearing S. E. by E., one point forward of his beam. That light, he says, he held in sight for an hour, during which time he ran at full speed, and without change of course; that at 1:45 the light was abeam, and about 2 o'clock the bearing of the light had changed two points; and then the light was lost, bearing at the time one point abaft his beam. The master further says that the night was clear, and the South Stack light appeared to be dipping upon the horizon, from which circumstance he judged himself to be 15 miles away from it; and that, acting upon that assumption, when he lost the light, not having made the Skerries light, he changed his course from N. 42 deg. E. to E. $\frac{3}{4}$ S. On the latter course, he says, he ran five minutes at half speed, when, while running E. $\frac{3}{4}$ S., he heard the North Stack gun on his starboard quarter. He immediately altered the course of the steamer to N. 42 deg. E., and on that course ran slow for about 15 minutes, (the answer says about half an hour,) when the steamer brought up on the shore in Church bay, in a thick fog, without giving him time, after discovering the shore, to reverse his engines.

That this account as given by the master, and presented to the court for its consideration by the defendants, is untrue in important particulars, cannot be doubted.

The place where the steamer stranded is fixed. It is in Holyhead bay, east of the Skerries and east of the North Stack. If, as the master says, and as is not doubted, the steamer was running upon a course N. 42 deg. E., when the shore in Church bay was made ahead, it cannot be true, as the master and also the answer says, that he ran five minutes at slow speed upon the east course; for upon such a course she would not have cleared the South Stack, and would

have run over the land. No explanation of this statement of the master in regard to the length of time he held his easterly course has been given. He was running his vessel directly towards a dangerous coast. He was himself upon the bridge. His position was in doubt, and it is difficult to believe that he did not note the exact time of his running to the eastward. If he did note the time, it was incumbent upon him to state it truly, and he has not done so. If, under the circumstances, he ran E. ¾ S. without noting the time, he was guilty of gross negligence.

Again, the result leaves no room to doubt that the steamer, instead of passing the South Stack at a distance of 15 miles, as the master says he at the time supposed, in fact passed the South Stack close at hand. The master now concedes such to have been the fact. How, then, can the master's statement be accounted for, when he says in positive terms that he had the South Stack in sight about an hour; that he examined it with glasses and timed its revolutions; and that, while running for this hour at full speed on a course N. 42 deg. E., the bearing of the light changed but two points, namely, from one point abaft to one point forward of his beam? If he saw the South Stack light at all, he must have seen it close at hand, for the result proves that he passed it close at hand. If he had seen the light, as he says he did, he would have passed it some 20 miles away. If he never saw that light, why does he swear not only that he saw it, but examined it with a glass, and timed its revolutions by his watch, and knew at the time that it was the South Stack light, and observed that its bearing changed but two points while running an hour.

Still again, the master marks upon the chart the point at which he changed his course from N. 42 deg. E. to E. ¾ S., when, as he says, he lost the South Stack light. At that point the South Stack light and the Skerries light should have been in full view, as his chart told him, and he lost the South Stack without having made the Skerries light. Yet he says it was clear where he was, and it did not occur to him to consider that the lights might be obscured by fog. No explanation of this failure to know what the surrounding circumstances, as he narrates them, were proclaiming, namely, that there was fog on the shore, has been given. Nor has any modification of the testimony of the master been made, although the defendants have had time and opportunity to correct his testimony if they had desired.

Still again, when the master, according to his statement, lost the South Stack light, two conclusions were, perhaps, possible to be drawn from the fact: one, that he lost it because he had been carried so far to west by the tide; the other, that fog had shut out the light from him. Without using his lead, he acted upon the assumption that he was too far to the west, and so ran his vessel on shore. His excuse for not using the lead is that there was nothing in the circumstances to lead him to believe that he was near the east shore, or that the lead would disclose his true position; but the fact stat-

by him, that he lost the South Stack light, and had not made the Skerries light, when both those lights should have been visible if he was where he supposed himself to be, should have raised a doubt as to the correctness of his assumption that he had been carried by the tide several miles to west of his true course, and made it incumbent on him, in the exercise of reasonable care, to heave the lead at the time he changed his course to east. He was bound to suppose it possible that he was mistaken as to his position, and equally possible that his failure to make the lights was because of a fog, and not because of distance from the Welsh coast. He was bound to know that the lead would tell him whether he was where he supposed himself to be, or near the Welsh coast, and the result shows that if the lead had been used it would have told him, and at once corrected his erroneous and unfounded assumption that he was 15 miles west of the South Stack light.

Still again, the master says that the weather was entirely clear about him, and he had no suspicion that fog was obscuring the lights until, when on the E. ¾ S. course, he heard the North Stack gun on his starboard quarter. But the fact that neither the South Stack light nor the Skerries light was visible to him while on the E. ¾ S. course was loudly proclaiming the presence of fog, and yet the master, according to his own statement, navigated his vessel up to the time of his hearing the North Stack gun as if there was no fog, and without any regard whatever to the warnings of fog plainly given by the circumstances as they are narrated by him.

It should, perhaps, be remarked here that doubt is cast upon the master's statement that he never thought of the presence of fog, by the fact proved by other witnesses for the steamer, that the lookouts were doubled and the whistle blown. As, also, doubt is cast upon his statement that he ran at half speed on the easterly course, and slow after again changing to N. 42 deg. E., by the testimony of the engineer that the engine went at full speed until just as the steamer struck. But I judge him by what he says, and he says most earnestly that he had no suspicion of the presence of fog about the lights until he heard the North Stack gun.

Lastly, the master says that while running E. ¾ S. he heard the North Stack gun; that he concluded from the sound that the gun was abaft his beam; that he at once changed his course from E. ¾ S. to N. 42 deg. E., and proceeded slow some 15 minutes until he brought up on the shore at Church bay.

The position of the North Stack is fixed, and the point where the vessel stranded is also fixed, and these positions show that when the master changed his course from E. ¾ S. to N. 42 deg. E., he was east of the North Stack gun, and in Holyhead bay. If the master, at the time he abandoned his easterly course, knew that he was east of the North Stack, and in Holyhead bay, it was a gross mistake in navigation for him to take and hold a course N. 42 deg. E., as he did

after hearing the gun; and we have his own word for the fact that at the time when, upon hearing the gun, he abandoned his easterly course for the course 42 deg. E., he knew that the North Stack was abaft his beam on the starboard quarter, as in fact it was.

Upon the master's showing, therefore, it is impossible to conclude otherwise than that he conspicuously failed to use reasonable care and skill in navigating his vessel upon hearing the North Stack gun, and that the loss in question was the immediate result of his negligence in that particular.

The only suggestion made in regard to this aspect of the case is that the master, when he heard the sound of the North Stack gun, could not have been sure of its bearing. But the difficulty with this suggestion is that the master repeatedly swears that when he heard the gun he knew that it was the North Stack gun, and that he did conclude that the gun was abaft his beam, as in fact it was. Upon the facts as they were, it was great negligence to take and hold a course N. 42 deg. E. after the North Stack gun was heard, and the master swears that he understood the facts to be as in truth they were. How is it possible, then, to absolve him from the charge of having run his ship ashore by failing to exercise reasonable care and skill in her navigation? It is to be remarked in this connection that the fact that the master, when he changed from E. ¾ S. to N. 42 deg. E., knew that he was in Holyhead bay, and east of the North Stack, is fixed beyond dispute by the statement in the defendant's answer, where it is said: "After running on such east course five minutes, a gun was heard on the starboard quarter."

My conclusion, therefore, is that the proofs show that the loss of the goods in question was caused, not by a mere error of judgment on the part of the master of the steamer Montana, but by a failure to exercise reasonable care and skill in the navigation of his ship.

The liability of the defendants follows, of course. Let decrees be entered in favor of the libelants, with an order of reference to ascertain the amount of the loss.

THE ARKANSAS.

(District Court, S. D. Iowa. 1883.)

1. JURISDICTION IN ADMIRALTY—COLLISION OF VESSEL WITH STRUCTURES IN RIVER AND ON LAND.

   There is a clear distinction between torts arising from the collision of boats with structures placed in the navigable bed of a river, and torts resulting from collisions of boats and vessels with structures on land, whether immediately along the shore or not. Torts of the former class are within the admiralty jurisdiction, and torts of the latter class are of common-law cognizance; and whether the structures are solid or floating, realty or personalty, firmly fixed to the bed of the river or otherwise, does not affect such jurisdiction.

2. SAME—PROCEEDING IN PERSONAM—UNLAWFUL OBSTRUCTION.
Where a vessel is injured by a collision with a structure unlawfully placed in the navigable bed of a river, the party creating the obstruction may be sued for the injury in an action *in personam* in a proper court of admiralty; but the owners of the vessel cannot in such a case proceed *in rem* against the solid structure, whatever it may be, because there can be no maritime lien upon such a structure to be enforced in the admiralty by its seizure and sale.

3. SAME—LAWFUL ERECTION OF STRUCTURE.
Where a structure lawfully created in the navigable bed of a river is injured by a collision caused by the negligent management of a vessel, the owner of such structure may proceed in an admiralty court by action *in personam* against the owners of the vessel, or *in rem* against the vessel itself.

4. SAME—COMMON LAW—LIEN ON MOVABLES.
The admiralty jurisdiction owes its existence chiefly to the fact that the common-law tribunals, by reason of their modes of procedure and their doctrine that possession is indispensable to a lien upon movables, are wholly inadequate to give relief against ships and vessels afloat upon the high seas and navigable waters of the earth.

5. SAME—FLOOD—COLLISION OF VESSEL WITH BUILDING ON LAND.
The jurisdiction of the admiralty over marine torts depends upon locality,—the high seas or other navigable waters within admiralty cognizance; and, being so dependent upon locality, the jurisdiction is limited to the sea, or navigable waters not extending beyond high-water mark; and where a building erected on land near a navigable river is injured by collision, caused by the negligent management of a vessel which has been floated against it by reason of a flood raising the waters of said river above the banks thereof, and carrying said vessel beyond said banks, this does not constitute a tort within the jurisdiction of a court of admiralty.

In Admiralty.

This is a proceeding *in rem*. The defendant steamer was libeled for an alleged marine tort, to the damage of the plaintiff's property.

The libelants allege that they are the owners of a depot for the reception and storage of oil upon the levee of the city of Keokuk, *near* the Mississippi river; that on or about the twenty-fourth day of April, 1882, by reason of an unusual and extraordinary flood of said river, the water extended up to and around the libelant's said property; that, in consequence of the careless, negligent, and unskillful manner in which said steamer was managed and navigated, she was floated and propelled upon and against the libelant's said property, whereby a tank containing a large quantity of oil was crushed and broken, and the oil destroyed, etc., to the damage of the libelant in the sum of $600, etc. To this libel the intervening claimants except, upon the ground that the tort complained of, as stated in the libel, is not of admiralty jurisdiction.

Anderson Bros. & Davis, for libelant.

Hagerman, McCrary & Hagerman, for claimant.

LOVE, J. Locality is the test of admiralty jurisdiction over marine torts. When, before the decision in *The Genesee Chief*, 12 How. 443, it was settled that there was no jurisdiction in admiralty above tide-water, it was also settled that a marine tort committed above tide-water was not within the cognizance of the admiralty. When, in that case, the supreme court decided that navigability, and not the flux of the tides, is the true test of this jurisdiction, the Amer.

ican courts of admiralty took cognizance of maritime contracts and torts upon our navigable rivers above as well as below tide-water; and, locality being the test of jurisdiction over marine torts, the only question in the present case is whether the trespass was committed upon land or upon navigable water.

The exceptions to the present libel raise this important question: What is the true *limit* of admiralty jurisdiction in questions of tort upon our great navigable rivers? Locality being the test of admiralty jurisdiction in such cases, have we any test as to locality itself upon those great rivers which, flowing ordinarily in well-defined channels, not unfrequently rise high above their banks, and cover with their floods extensive regions of country, from bluff to bluff, with a depth of water sufficient to float vessels of considerable size and burden? This precise question could not have arisen prior to the case of *The Genesee Chief*. When the test of admiralty jurisdiction was the flux and reflux of the tides, the flow of the tide then marked the utmost limit of admiralty jurisdiction, and it ordinarily defined a sufficiently certain boundary. Wherever the tides prevailed there was navigation and maritime commerce, and, by consequence, admiralty jurisdiction. Hence, when a marine tort was committed, there could have been little difficulty in determining by its locality whether it was within the admiralty jurisdiction or not. But the test of admiralty jurisdiction now, being, not the tide flood but navigability, and such rivers as the Missouri and Mississippi being subject to extraordinary and capricious fluctuations, it often becomes a difficult question to determine whether or not a tort committed upon their waters is within the admiralty jurisdiction.

I understand libelant's counsel in this case to contend that it is a question of actual navigation in each case, and that the jurisdiction of the admiralty is co-extensive with the navigation of the vessel. A marine tort, therefore, may be committed within the jurisdiction at any place where the vessel floats upon the waters of a navigable river, whether within its ordinary banks or elsewhere. I am not myself prepared to accept this doctrine. Suppose a vessel floating far from the ordinary banks of the river, over widely-extended bottom lands, should, by the negligence of the navigator, strike and injure some man's fences, houses, or barns; could the tort be brought within the cognizance of the admiralty? Again, suppose some individual should negligently, or without authority or warrant of law, place an obstruction or erection of any kind, not in the navigable channel of the river, but upon some wide bottom land, and a vessel floating over the same during an overflow should run upon the obstruction and receive injury; could the owners of the vessel sue the party creating the obstruction *in personam* in a court of admiralty? It seems to me that to these questions a negative answer must be given. Yet it is very certain that a case of tort arising from the collision of a vessel with

a structure of the same kind, placed without license or authority in the bed of the river and in navigable water, would be within the admiralty jurisdiction. *Atlee* v. *Packet Co.* 21 Wall. 389; *Railroad Co.* v. *Steam-tow Co.* 23 How. 209.

What, then, it may be asked, is the criterion of jurisdiction as to place or locality upon these great, ever-changing navigable rivers? When is the locality or place where a tort is committed within admiralty cognizance and when not? I do not myself feel called upon to answer this general question. Though highly desirable, it would no doubt be extremely difficult to lay down any general rule or criterion by which the jurisdiction could be tested in all cases. For the decision of the present case suffice it to say that there is a clear distinction running through the cases between torts arising from the collision of boats with structures placed in the navigable bed of the river, and torts resulting from collision of boats and vessels with structures on land, whether immediately along the shore or not. Torts of the former class are within the admiralty jurisdiction; torts of the latter class are of common-law cognizance. The solution of the question of jurisdiction does not depend, in my judgment, upon the fact of the structure being solid or floating, realty or personalty, firmly affixed to the bed of the river or otherwise. It is a question of place, and of the rightfulness of the structure. Is the structure in the navigable bed of the river, and is it there by lawful authority or not? If the structure is placed in the navigable bed of the river without rightful license or authority, and a vessel is injured by it, the party creating the obstruction may be sued for the injury in an action *in personam* in a proper court of admiralty. This is manifest from the cases of *Atlee* v. *Packet Co.* and *Railroad Co.* v. *Steam-tow Co.*, cited above.

The owners of the boat cannot, of course, in such case proceed *in rem* against the solid structure, whatever it may be,—whether a bridge, a pier, boom, or signal-post,—because there can be no maritime lien upon such a structure to be enforced in the admiralty by its seizure and sale. Such is the doctrine in the case of *The Rock Island Bridge*, 6 Wall. 213.

But suppose, on the other hand, the structure, whether bridge, boom, pier, or light-house, be a lawful one; suppose it to be placed in the navigable bed of the river by lawful authority; and suppose some reckless mariner should carelessly run his vessel upon it and injure it; can it be doubted that the tort thus committed would be within the admiralty jurisdiction? Can it be doubted that in such case the owner of the structure might proceed against the owners of the boat *in personam*, or against the boat itself *in rem*? The tort itself would be a marine tort; it would be, as to place, within the admiralty jurisdiction. The owner of the structure would have a right to proceed *in rem* against the boat, because, from its nature, a maritime lien could attach to the boat. The owner of the structure would, in this respect, have a certain

advantage over the owner of the boat, since the latter, if injured, would be restricted to the remedy *in personam*. And this is exactly as it should be, since the boat is a moving, transitory thing, and if no maritime lien attached to it, and no remedy existed in admiralty to enforce the lien, the boat might take its departure into distant states or foreign jurisdictions, leaving the owner of the structure without any effectual remedy. Indeed, the admiralty jurisdiction owes its existence chiefly to the fact that the common-law tribunals, by reason of their modes of procedure, and their doctrine that possession is indispensable to a lien upon movables, are wholly inadequate to give relief against ships and vessels afloat upon the high seas and other navigable waters of the earth.

There is, therefore, good reason why the maritime lien and the admiralty jurisdiction should obtain in favor of the owner of a lawful structure, injured by the negligent navigation of a colliding vessel. The common law could give him no adequate relief. But this reason does not apply reciprocally in favor of the owner of the vessel as against the solid structure, which cannot move off and leave the owner of the vessel without remedy. Hence, there is no necessity for establishing a lien upon such a structure, or enforcing the plaintiff's claim by a proceeding *in rem*. And since it is settled beyond question, by *The Atlee* and *Tow-boat Cases*, that the owners of the boat would have a right to proceed *in personam*, in admiralty, against the owners of the structure, why should the reciprocal right of the owners of the structure to a remedy in admiralty against the boat be denied?

So much respecting the jurisdiction of the admiralty over torts arising from the collision of vessels with structures erected within the navigable waters of a river.

Let us now consider the question of jurisdiction with respect to the collision of boats and vessels with structures upon land, whether along the banks and shores of the river, or in towns and cities situated upon it. Does the admiralty jurisdiction extend to such torts? I am quite clear that it does not. The reason is obvious. Such torts are not marine. They are committed upon land; not upon or within the navigable waters of the river. The test of admiralty jurisdiction over torts is locality, and locality is against the admiralty jurisdiction where the tort is committed upon land. I know of no case in all the books, and the industry of counsel seems to have found none, in which it has been held that the court of admiralty has jurisdiction of any tort committed or *consummated* upon land. There is, of course, a remedy for such torts, but the remedy is in the common-law courts. There must have been in this country collisions without number of vessels with such structures upon land as wharves, quays, piers, business houses, light-houses, upon the shore, etc. Why, then, has no case been produced in which the admiralty has taken jurisdiction of injuries resulting from such collisions? I cannot account for this except by the assumption that such cases have

been, by common consent, regarded as not within the jurisdiction of the admiralty.

Several cases have been decided in the district courts of the United States holding that the jurisdiction in admiralty does not extend to injuries caused by boats and vessels to wharves, piers, and bridges. Thus, in *The Neil Cochran*, 1 Brown, Adm. 162, the court held that "an action will not lie in admiralty against a vessel to recover for damages done to her by a bridge thrown over a navigable stream." In *The Ottawa*, Id. 356, the court decided that "an action will not lie in admiralty against a vessel to recover damage done by her to a wharf projecting into a navigable river." See, also, *The Mary Stewart*, 10 FED. REP. 137. And the supreme court of Michigan, in *The City of Erie* v. *Canfield*, 27 Mich. 479, in an opinion by Judge COOLEY, held that "a boom being a structure pertaining to the adjacent land as much as a wharf or building thereon, assuming that it extends no further out than the land-owner might properly, with due regard to navigation, extend it, a wrongful injury to it would not be a maritime injury, and could not be redressed in a court of admiralty."

It seems to me that the doctrine announced by the supreme court of the United States in the case of *The Plymouth*, 3 Wall. 20, is conclusive of the present question. It is true that this case is not exactly analogous to that of the Plymouth in its circumstances, but we must be guided by the principle upon which that case was decided. In that case, the vessel lying at a wharf in the Chicago river, which was subject to admiralty jurisdiction, took fire, which spreading to certain store-houses on the wharf, consumed them and their stores. It was held not to be a case of admiralty jurisdiction. What was the leading principle of the decision? "It is well observed," says the court, "that the entire damage complained of by the libelants as proceeding from the negligence of the master and crew, and for which the owners of the vessel are sought to be charged, occurred, not on the water, but on the land. The origin of the wrong was on the water, but the substance and consummation of the injury on land." "It is admitted by all the authorities that the jurisdiction of the admiralty over marine torts depends upon locality,—the high seas, or the other navigable waters within admiralty cognizance; and, being so dependent upon locality, the jurisdiction is limited to the sea or navigable waters not extending beyond high-water mark."

Again, the court says the simple fact that the injury originated on the Chicago river, the whole damage having been done upon land, the cause of action, not being therefore complete on the navigable river, could afford no ground for the exercise of admiralty jurisdiction.

From the doctrine thus laid down by the supreme court of the United States in *The Plymouth*, it is apparent that the true question in the case now before us is whether the trespass or tort complained of was committed on land or on navigable water. If it was a trespass upon land, it is not within the admiralty jurisdiction.

It seems by the allegations of the libel that the oil depot where the injury occurred was not on, but near the river, upon the levee of the city of Keokuk; that in an extraordinary and unusual freshet or flood the water rose up to and flowed round the depot; and that, in consequence of unskillful and negligent navigation, the defendant steamboat was propelled and floated with violence against the libelant's property, doing the injury complained of. The plaintiff's property was unquestionably situated upon land, and not upon the water or within the river. It would be doing violence to language to say that the oil depot in question was not upon land. Can we, then, say that because the river, in an extraordinary and unusual flood, rose up to and around the oil depot, and floated the steamer upon the plaintiff's property, the tort complained of was not upon land? Can we say that an injury to property situated undeniably upon land, was, under the circumstances, a tort upon water? If so, all cases of collision by steamboats and other water-craft with wharfs, bridges, quays, depot buildings, business houses, piers, light-houses, etc., are torts committed upon water and not upon land, and therefore within the admiralty jurisdiction; for it is evident that in every such case the water must be sufficient to reach the structure exposed to the collision, and carry the boat or vessel against it. Nay, more: it would follow from the libelant's position that if the boat or vessel should be lifted by a flood over the banks of our great rivers, and carried for many miles over their vast bottoms, to some man's farm, burning his hay-stacks, or destroying his stables, barns, and their contents, the injury thus inflicted would be upon water and not upon land, and the remedy would be in admiralty. Thus the citizen would be deprived of his action at common law and his right of trial by jury, and compelled to accept such redress as a court of admiralty could give him in common with other claimants.

It was settled by the supreme court of the United States in *The Moses Taylor*, 4 Wall. 411, and *The Adam Hine*, Id. 555, that the admiralty jurisdiction of the federal courts is exclusive, and therefore, when we consider the vast extent of lands sometimes flooded by these rivers with a navigable depth of water, we are somewhat startled at the idea that the common-law jurisdiction over torts may be temporarily excluded. And it would appear somewhat anomalous to us that the admiralty jurisdiction should come and go with the rise and subsidence of the river, to be succeeded in its turn by that of the common law, subject to the same accidents.

It seems to me, therefore, that the tort complained of in this case was not upon navigable water, but, in a true and proper sense, upon land. The water was a means or agent by which the boat was floated upon a land structure, but the injury was essentially to an erection upon land, and therefore it may be properly said that the tort was committed, or at least consummated, upon land. Exceptions sustained.

The City of Alexandria.

(*District Court, S. D. New York.* July 3, 1883.)

1. Admiralty—Seamen—Personal Injuries—Maritime Law.
   A claim by a seaman to recover damages for personal injuries from a fall on board ship upon the high seas, through the negligence of others of the ship's company, is governed by the rules of the maritime law, rather than of the municipal law, and the analogies of the latter are not necessarily applicable to the former.
2. Same—Navigation of Ship.
   The navigation of a ship constitutes one common employment, for which all the ship's company are employed. Neither the vessel nor her owners, therefore, would be liable, according to the principles of the municipal law, for injuries happening to a seaman through the negligence of any of his associates in the performance of their ordinary duties.
3. Same—Ship Liable for Expense of Nursing and Medical Attendance.
   By the maritime law, ancient and modern, a seaman, in case of any accident received in the service of the ship, is entitled to medical care, nursing, and attendance, and to cure, so far as cure is possible, at the expense of the ship, and to wages to the end of the voyage, and no more.
4. Same—Effect of Negligence.
   This right of the seaman is without reference to any question of ordinary negligence of himself or his associates, and is neither increased nor diminished by the one or the other.
5. Same—Gross Misconduct.
   The only qualification arises from the willful and gross misconduct of himself or associates, in which case the expense may be charged against the wages of the wrong-doer.
6. Same—Consequential Injuries.
   If after the seaman is wounded the officers of the vessel neglect to furnish proper treatment, *semble*, the vessel may be held for consequential injuries.
7. Same—Claim of Excessive Damages—Libel Dismissed.
   Where the libelant, the cook, went down the fore hatch in the morning before light, by the direction of the steward, and was not sufficiently notified of the half-open hatch below, and in consequence fell through and was injured, and was subsequently treated and cared for at the ship's expense, and received his wages to the end of the voyage, and thereafter filed this libel to recover $10,000 for permanent injuries, *held*, that the libel should be dismissed.

In Admiralty.

James Flynn, for libelant.

A. O. Salter and *R. D. Benedict*, for claimants.

Brown, J. The libel in this case was filed to recover $10,000 damages for personal injuries received on board the steam-ship City of Alexandria in falling through the fore hatch between-decks into the hold, on the twenty-fourth of November, 1879. The libelant was the chief cook on the steamer, on a voyage from New York to Vera Cruz by way of Havana. One of the persons on board having died, the cook was told, on the evening of November 23d, to go to the ice closets on the following morning and superintend the packing of the body in ice. On the 24th he was called, a little after 4 A. M., by the steward, and told that the men were waiting for him below. He was ordered by the steward to go down by way of the fore hatch, which was open. A permanent perpendicular ladder ran from the

forepart of the hatch to the forepart of the hatch opening immediately below it. As the libelant went down this ladder, as directed, the steward testifies that he told him "to look out," or "to look out for the hatch;" he is not quite certain which. Two men had previously gone down in the same way, and had a light between-decks; but the light, at the time the libelant went down the ladder, had been placed behind a skid having a solid bottom, so that the hatch was in the shadow. The libelant testified that it was dark, and that he could not see as he went down. After reaching the foot of the ladder he carefully felt at the bottom with his feet, and finding good footing started to go towards the starboard side of the ship, and immediately fell through the hatch into the hold below, and received considerable personal injury. He was cared for at the expense of the ship, and his wages paid to the end of the voyage. He now sues for additional compensation for his permanent injuries and consequential damages, on the ground of the negligence of the officers of the ship in leaving the hatch open through which he fell, as well as for negligence in sending him below in the darkness without proper notice of the open hatch beneath.

The claimants contend—*First*, that there was no negligence on the part of the officers or the steward of the ship; and, *second*, that if there was, neither the ship nor her owners are responsible for consequential damages, either by the maritime law or by the common law, as the negligence, if any, arose from the acts of co-employes in the same employment or undertaking.

1. The evidence in regard to the notice or caution given to the libelant as he went down the ladder is conflicting. The libelant denies that any caution whatever was given to him, or any light offered. As chief cook he had charge of the ice-house, and was the proper person to superintend the packing of the body in ice. He was accustomed to go to the ice-house through the forecastle, and not through the fore hatch, which, at sea, was usually closed. On the day previous the steamer had touched at an intermediate port, and landed some cargo through the hatches; and on the day following she was expected to arrive at her port of discharge. In the fore hatch between-decks a piece of machinery was left sticking up, and the cover of the hatch, it appears, was placed over the port side of the hatch up to the projecting piece of machinery, and covered the part of the hatch at the foot of the ladder, but left an open space on the starboard side, through which the libelant fell. The cook had ordinarily nothing to do with the hatches, and was not aware that the hatch below was partly uncovered. The men who had descended before were cautioned, and also had a light with them, as above stated. Considering the emphatic testimony of the libelant, that he received no notice whatever, in connection with his fall, I think it probable that the steward is mistaken as respects his caution to the libelant, confounding it, perhaps, with the notice previously given to the other

men, or at least that his caution to the libelant was not sufficiently explicit to apprise him of the danger from the half-open hatch below; such as ought to have been given to one who was not accustomed to go down to the ice-closets in that manner.

2. Assuming, therefore, that there was negligence in the steward in ordering the libelant to go through the hatch without suitable notice of the danger below, the negligence was, nevertheless, that of an employe or fellow-workman in the same general undertaking or employment, for which, upon the well-settled principles of the municipal law, neither the vessel nor her owners would be liable. Whatever negligence there was,—whether in leaving the hatches uncovered, or in not notifying the libelant as he went down,—was negligence on the part of those on board the ship, and in no way traceable to the owners themselves. It was neglect of the officers or men aboard in the performance of their ordinary duties; a neglect against which the owners could not possibly guard. Those who engage in a common employment take upon themselves all the natural and ordinary risks and perils incident to the performance of their duties. Among these are the perils arising from the carelessness or negligence of others who are engaged in the same employment; and it constitutes no exception to the rule that the several persons employed are not in equal station or authority, or that one servant is injured through the negligence of another, who is his superior in station, to whom he owes obedience. *Hough* v. *Ry. Co.* 100 U. S. 213; *Wilson* v. *Merry*, L. R. 1 Sc. & Div. App. 326; *Allen* v. *New Gas Co.* 1 Exch. Div. 251; *Malone* v. *Hathaway*, 64 N. Y. 5, 9; *Fuller* v. *Jewett*, 80 N. Y. 46.

The navigation of a ship from one port to another constitutes one common undertaking or employment, for which all the ship's company in their several stations are alike employed. Each is in some way essential to the other, in furtherance of the common object, viz., the prosecution of the voyage. Each one, therefore, upon the principles laid down in the common-law courts, takes the risk of any negligence in the performance of his duties by any of his associates in the common employment; and on common-law principles, therefore, the libelant's claim could not be sustained.

3. This claim, however, is brought in a court of admiralty by a libel *in rem* against the vessel; and in such a case the question is not properly whether the analogies of the municipal law would or would not sustain such an action, but whether by the maritime law a lien exists upon the vessel for such a claim. The libelant's employment was a maritime contract; the injury for which compensation is claimed arose upon the high seas. The true question, therefore, is, whether the negligence through which the accident happened entitles the libelant, by any recognized principles of maritime law, to compensation from the ship or her owners beyond that which he has already received. The facts do not present the question, to what extent the owners might be liable in damages for any actual negligence of their

own, or of others in their employ, in the proper outfit or equipment of the vessel, or for her unseaworthy condition when sent out of port; for no negligence or insufficiency in these respects appears. The question here relates exclusively to their responsibility for injuries through the alleged remissness of some of the ship's company in the performance of their respective duties on board, and in the course of their ordinary employment.

The liability of seamen to injuries of this kind is as old as navigation, and multitudes of essentially similar cases must have occurred almost every year from time immemorial. It would seem to be incredible, therefore, that the sea-laws, ancient and modern, should not have indicated the extent of the liability of the vessel or her owners for such injuries. The obligations of the vessel and her owners have, in fact, been defined in nearly the same language in both the ancient and modern authorities. By article 6 of the Laws of Oleron it is provided: "If by the master's orders and commands any of the ship's company be in the service of the ship, and thereby happen to be wounded or otherwise hurt, in that case they shall be cured and provided for at the costs and charges of the said ship." Similar is section 18 of the Laws of Wisbuy; and by article 39 of the Laws of the Hanse Towns it is provided: "If any seaman is wounded in the ship's service, he shall be cured at the charge of the ship; but not if he is wounded otherwise."

In Curt. Rights & Duties of Seamen, 109, 110, it is said:

"The seaman is entitled to be cured of all sickness or injuries occurring while in the ship's service." "All that the rule requires is that the sickness or injury should not be occasioned by his own fault." "The rule is limited to the cure of the sickness or injuries, and does not include any compensation or allowance for the effects of the injury."

In none of the sea laws, or in the recognized authorities on maritime law, is there any indication of liability of the ship or her owners for such hurts or injuries beyond the expenses of the care, attendance, and cure of the seaman.

In *Reed* v. *Canfield*, 1 Sumn. 195, 202, the limit of the ship's liability in such cases was considered by STORY, J., in which he says:

"The law embodies in its very formulary the limits of the liability. The seaman is to be cured, at the expense of the ship, of the sickness or injury sustained in the ship's service. It must be sustained by the party while in the ship's service, and he is not to receive any compensation or allowance for the effects of the injury. But so far, and so far only, as expenses are incurred in the cure, whether they are of a medical or other nature, for diet, lodging, nursing, or other assistance, they are a charge on, and to be borne by, the ship. The sickness or other injury may occasion a temporary or permanent disability; but that is not a ground for indemnity from the owners. They are liable only for expenses necessarily incurred for the cure, and when the cure is completed—at least, so far as the ordinary medical means extend—the owners are freed from all further liability."

In the case of *The Atlantic*, Abb. Adm. 451, where a sailor had been hurt by a fall from the main topsail yard, the limit of the ship's liability again came under the careful consideration of BETTS, J. The general rule is there stated by him that the mariner is entitled to be cured of sickness and wounds received in the service of the ship. The word "cured," he says, is not to be taken in an absolute sense:

"That would involve impossibilities. Diseases and injuries so incurred are frequently in their nature, and in their direct consequences, incurable. An exposure to unusual labor or privations on the voyage may induce maladies permanent or irremediable in their character. Thus broken limbs or bodily debility, resulting from services in the ship, are very often the sailor's heritage for the residue of his life."

He refers to the discussion of the subject by STORY, J., in the case of *Reed* v. *Canfield*, *supra*, and concurs therewith so far as it goes, adding that the case did not determine whether the cure required during the voyage is to be continued after its termination. After referring to the provisions of various codes, he says:

"The term 'cure' was probably employed originally in the sense of *taking charge* or *care of* the disabled seamen, and not in that of positive *healing*. The obligation of the ship to the mariner would then be co-extensive in duration with that of the mariner to the ship. Natural reason would seem to point to that limitation, it being the one consonant to the relation in which the law places the parties to each other, and by which it measures their privileges and liabilities under a shipping contract.

"This rule may undoubtedly be subject to variations. When a course of medical treatment, necessary and appropriate to the cure of the seaman, has been commenced, and is in a course of favorable termination, there would be an impressive propriety in holding the ship chargeable with its completion; at least, for a reasonable time after the voyage is ended or the mariner is at home. So, also, in case due attention to his necessities has been unjustly omitted by the ship abroad, or his case has been improperly treated, the courts may properly enforce against the ship this great duty towards disabled mariners, even after her contracts are terminated, upon the ground of a failure to perform towards them the obligation in the shipping contract. See *Brown* v. *Overton*, 1 Spr. 462. These particulars, however, are not stated as ingredients in the present case, but are referred to in illustration of the doctrine involved in some of the authorities, and to show they are not inconsistent with the general principle that a seaman has no claim upon the ship or her owner for the cure of his sickness or disabilities after his contract has terminated, and he is returned to his port of shipment or discharge, or has been furnished with means to do so."

Two years previously the same general subject had come before Judge BETTS in the case of *Nevitt* v. *Clarke*, Olc. 316, where he examined, with his accustomed learning, the question of the continuance of the liability of the ship in case the injured seaman's cure was incomplete at the end of the voyage, and held that the ship's responsibility ended with the voyage.

In the case of *The Ben Flint*, 1 Abb. (U. S.) 126, the same subject is reviewed by Mr. Justice MILLER, and the conclusion arrived

at that, in the absence of misconduct or neglect on the part of the officers, the obligation of the vessel ends with the voyage.

In the cases above cited, it is true, the claim was only for expenses of sickness or cure, or claims for wages during the period of illness, and not directly a claim for compensation for injuries resulting from the negligence of others on board the ship; but the provisions of the various codes, ancient and modern, and the decisions in the reported cases, obviously proceed without reference to the question whether the hurts received by the seamen were received by what might be called mere accident, or through any remissness or ordinary negligence, either of himself or of any others of the ship's company, in the performance of their accustomed duties. The only recognized qualification of the seamen's right of recovery is where the injuries have arisen from his own gross and willful misconduct, (*The Neptune*, 1 Pet. Adm. 142; *The Ben Flint, supra,*) in which case, and also if the injury arose from the willful wrong of another, the expenses to which the ship is put may be deducted from the wrong-doer. Laws of Oleron, § 6; Wisbuy, § 18; 1 Malloy, 351.

Misconduct or neglect by the officers in the treatment of the seaman, after he has been wounded in the service of the ship, becomes a different and additional cause of action against the ship, because a legal obligation to him then arises to afford suitable care and nursing; and if this be neglected the ship may be held to consequential damages. *Brown* v. *Overton*, 1 Spr. 462; *Croucher* v. *Oakman*, 3 Allen, 185; *Mosely* v. *Scott*, 14 Amer. Law Reg. 599. Beyond this I find no authority in the ancient or modern codes, in the recognized textbooks, or the decisions on maritime law, for the allowance of consequential damages resulting from wounds or hurts received on board ship, whether arising from ordinary negligence of the seaman himself, or of others of the ship's company. Considering the frequency of such accidents, and the lasting injuries arising from them in so many cases, the absence of any authority holding the vessel liable, beyond what has been stated, is evidence of the strongest character that no further liability under the maritime law exists.

The law pertaining to seamen is, in many respects, essentially different from that relating to employment on land. This has arisen necessarily from the peculiar circumstances of service at sea, and rests partly upon the ancient customary law, and partly upon numerous statutory provisions. Together they constitute a body of maritime law, according to the recognized authority of which the liability of ship-owners must be judged. On this subject, in the case of *Reed* v. *Canfield*, *supra*, Judge STORY remarks:

"It has been suggested that a seaman at home cannot be entitled to any claim against the owners of the ship for injuries received in the ship's service, any more than a mechanic or manufacturer at home for like injuries in the service of his employer. If the maritime law were the same in all respects with the common law, and if the rights and duties of seamen were

measured in the same manner as those of mechanics and manufacturers at home, doubtless the cases would furnish a strong analogy. But the truth is that the maritime law furnishes entirely different doctrines upon this, as well as many other subjects, from the common law. Seamen are in some sort co-adventurers upon the voyage, and lose their wages upon casualties which do not affect artisans at home. They share the fate of the ship in cases of shipwreck and capture. They are liable to different rules of discipline and sufferings from landsmen. The policy of the maritime law, for great and wise and benevolent purposes, has built up peculiar rights, privileges, duties, and liabilities in the sea service which do not belong to home pursuits. The law of the ocean may be said in some sort to be a universal law, gathering up and binding together what is deemed most useful for the general intercourse and navigation and trade of all nations. Whoever heard of salvage being allowed for saving property on land? Whoever heard of any civilized nation which denied it for salvage services at sea, or on the sea-coast? It is impossible, therefore, with any degree of security to reason from the doctrines of the mere municipal code in relation to purely home pursuits, to those more enlarged principles which guide and control the administration of the maritime law."

In cases of accidents like the present, the provisions of the maritime law applicable to the rights of the parties, are altogether different from those of the municipal law in regard to similar accidents on land. By the latter, the person injured, if chargeable with contributory negligence, would recover nothing; he would not be entitled to wages while disabled, nor to be nursed and tended at his employer's charge. By the maritime law, the mere ordinary negligence of the seaman, though that be the sole cause of the accident, makes no difference in his right to be cured at the ship's expense, and to his wages to the end of the voyage. And as his own negligence does not debar him from these rights by the maritime law, so, conversely, these rights are in no way extended, though his hurts have arisen by the negligent acts of others of the ship's company. In effect, the maritime law makes no account of mere ordinary negligence in such cases. More or less negligence is in fact to be expected, and the rules long established, as regards the relief to be afforded, are irrespective of such negligence, whether by the seaman or others. When the owners perform all that can be reasonably done on their part by the proper equipment of the vessel for the voyage, and the selection of competent officers and a sufficient crew, no reason exists in natural justice for holding them or their vessel answerable for the accidents to seamen which happen during the voyage, beyond the limits which the maritime law has established. In this case there is no charge of any remissness on the part of the owners, and the injury arose from causes in no way under their control. There is no ground in reason, therefore, for holding them or the vessel liable; and the maritime law affords no sanction for any claim to compensation beyond that already received by the libelant, in due medical care and treatment, and wages to the end of the voyage.

The cases of *The Chandos*, 4 FED. REP. 645, 651; *The Marcella*, 1

Woods, 302; *The D. S. Cage*, Id. 401; *Thompson* v. *Hermann*, 47 Wis. 602, [S. C. 3 N. W. Rep. 579,] cited by the libelant's counsel, though containing some expressions based upon the municipal law apparently favorable to the libelant's claim, are in no way in conflict with the conclusion to which I have arrived upon the facts in the present case.

The libel is dismissed, with costs.

THE BERMUDA.

(District Court, S. D. New York. June 9, 1883.)

1. COLLISION—FIFTH SITUATION—SECTION 4233—RULES 19, 22, 23.
   Where the steam-tug E. B., having two large ballast logs in tow, lashed to her side, was proceeding from Jersey City to Brooklyn, and the steamer B. was following her astern and somewhat to the eastward, and their courses converged by an angle of about two points, the steam-tug being on the starboard bow of the B., and the latter ran over and sank the tug, the tug having kept her course, *held*, that the situation was either that of an overtaking vessel, or the fifth situation in the Inspector's Rules, and in either view by rules 19 and 22 of section 4233 of the Revised Statutes the steamer was bound to keep out of the way, and that the collision was wholly the fault of the latter.
2. SAME—WANT OF LOOKOUT—FAULT.
   Though the tug had no proper lookout, *held*, on the facts, that this fault in no way contributed to the collision, and therefore was insufficient to charge the tug with half the loss.

In Admiralty.

W. R. Beebe and *W. W. Goodrich*, for libelants.

Butler, Stillman & Hubbard, for claimants.

BROWN, J. This action was brought to recover damages to the steam-tug Edith Beard, which was sunk through a collision with the Bermuda, on the tenth of September, 1880, at a point between Ellis island and Castle William. The tug had left the Pavonia ferry with two large ballast logs in tow, lashed upon her port side, and described as 80-ton logs, bound for Merchants' Stores, Brooklyn. The Bermuda is a large steam-ship, which had left her wharf at 4 P. M., and was proceeding down the middle of the Hudson river out to sea, and was somewhat to the eastward and astern of the tug. The course of the tug was about two points further to the eastward than the course of the steam-ship. According to the evidence of the latter, when they were about two lengths apart two whistles were given, to which no answer was made by the tug. The wheel of the steamer was starboarded, but not in time to avoid the tug, which was struck upon her port quarter and sunk immediately.

The courses of the two vessels were converging by an angle of about two points; if the situation is to be considered as the fifth situation,

as the tug was upon the starboard side of the Bermuda, it was the duty of the latter, under rule 19, to keep out of the way; or, if considered simply as an overtaking vessel,—*The Franconia*, L. R. 2 Adm. 8; 35 Law T. (N. S.) 721,—the same duty was imposed on her by rule 22, while the duty of the tug, by rule 23, was to keep her course. The tug was seen from the Bermuda when half a mile distant, and there was nothing to prevent the latter from keeping out of the way by going on either side of the tug. By rule 11 of the supervising inspectors, p. 37, (fifth situation,) the Bermuda was required to sound one whistle, and pass to the right, or astern, of the tug. *The Grand Republic*, 16 FED. REP. 424. The tug, I am satisfied, did not change her course, nor embarrass the Bermuda in any way; and the Bermuda is, therefore, necessarily chargeable with fault in not having avoided the tug, as the burden of doing so lay upon her, and there was nothing in the way to prevent.

The tug was at the time in charge of her captain, who acted as pilot, and there was no other lookout either forward or aft. No whistles from the Bermuda were heard; nor were those on board aware even that the Bermuda was approaching until she was close upon them; and the captain, after seeing the Bermuda, had barely time to escape from the pilot-house, and went down with the vessel. There was plainly gross negligence on the tug in regard to keeping any proper lookout for other vessels; and upon this ground the tug must have been held jointly liable for the loss, were I not satisfied from the evidence that there was nothing which the tug ought to have done, or could properly have done, to avoid the collision had a lookout been properly kept and the motions of the Bermuda promptly reported. If the course of the Bermuda had been closely watched from the first, the tug would still have been bound to keep her course precisely as she did. She was bound to keep her course and not to change it, either to the right or to the left, whereby the measures which the Bermuda might take, and was bound to take, to avoid her might be thwarted. As the Bermuda was approaching the tug's port quarter at an angle of only about two points, it was impossible to tell, until the Bermuda was near at hand, whether the steamer would pass to the right or left. The first intimation was that given by her two whistles, assuming that they were given, as testified to by those on board the Bermuda; but these whistles were not given until about 10 seconds, it is estimated, before the collision, or at one or two lengths distance. Until this indication of the intention of the Bermuda as to which course she intended to take in passing the tug, the latter could not anticipate on which side she would go, and would have no right to change her course, lest that should embarrass the steam-ship in performing her duty to avoid her. When these whistles were given the only thing the tug could have done was to stop, or to port; and I am satisfied that the collision was then so imminent that neither stopping nor porting would have made any difference in

the result, and that it was then impossible for the tug, by any change of her own, to have escaped. The heavy logs lashed to her sides necessarily prevented any rapid maneuvering. Though the want of a proper lookout was reprehensible, I am satisfied that in this case it in no way contributed to the collision.

The tug was moving at about half the rate of the Bermuda. Had she been unembarrassed by anything lashed to her side, she undoubtedly could have been quickly handled, and might have got out of the way. It is probable that those on board the Bermuda did not see the heavy logs which embarrassed her motions until they had nearly reached her, and that they supposed she would, therefore, get out of the way at the last moment, by a rapid maneuver, which small tugs are easily able to make, and that there was no need of observing the strict rules of navigation. As the tug was, however, incumbered by the logs in tow, so as to be almost as unwieldy as the steamer herself, the latter must bear the consequences of her mistake, if that was the mistake, in assuming that the rules might be neglected with impunity.

Decree for libelants, with costs.

THE FLAVILLA.[1]

GILL *v.* PACKARD.[1]

(Circuit Court, E. D. Louisiana. June, 1883.)

ADMIRALTY—DESTRUCTION OF PROPERTY WHILE IN CUSTODY.

Where a *res* is seized by judicial process in admiralty for a debt, which carries with it a *jus in re*, as between debtor and creditor, the destruction of the seized property, without fault of the debtor, works a payment of the debt to the extent of its value. The destruction of the debtor's property under such circumstances operates as a payment up to its value, precisely as would its sale and the application of its proceeds. Unless there was a residuum of value over and above the valid claims rightfully interposed against the *res*, its destruction worked no injury and gave the owner no right of action.

The defendant, S. B. Packard, when United States marshal of the then district of Louisiana, seized the steam-boat Flavilla under an admiralty warrant issued by the district court. In the admiralty action, in due time, a default was entered, and thereupon a decree condemning the vessel for a number of claims, aggregating more than her value. A writ of *venditioni exponas* was issued to the marshal, and pending proceedings thereunder the vessel sank and became a wreck, which was sold under the writ for a trifling amount. This suit was brought against the marshal by the owners of the Flavilla for her value, and

[1] Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

a peremptory exception of no cause of action was filed for the defendant.

In Admiralty.

Wm. F. Mellen, for plaintiff.

J. R. Beckwith, for defendant.

BILLINGS, J. This cause having been heretofore submitted upon the peremptory exception to the petition and amended petition, and the same having been duly considered by the court, the court declares—

1. That it appears that the vessel, which is alleged to have been the property of the plaintiff, for the destruction of which damages are sought to be recovered, had been seized under a proceeding *in rem*, and that the claims of the libelants and the intervenors in said proceeding, which were asserted in and upon said vessel, were largely in excess of the value of said vessel as stated by the petitioner; and that it is not stated in said petition that there was any value to said vessel above the amount of said claims so made and binding; nor is it denied that all of said claims were valid.

2. That where a *res* is seized by a judicial process for a debt, which carries with it a *jus in re*, as between debtor and creditor, the maxim *domino periit res* means that the destruction of the seized property, without fault of the debtor, works a payment of the debt to the extent of its value. Where third parties voluntarily join the seizing creditor in his proceeding, and unite, so to speak, in the seizure, also asserting claims which carry with them liens, the destruction of the property without fault of the debtor works a payment of their respective claims to the extent of the value of the property destroyed in the order of the priority of their claims; that the destruction of the debtor's property, under such circumstances, operates as a payment up to its value precisely as would its sale and the application of its proceeds.

3. And, consequently, that unless there was a residuum of value over and above the valid claims rightfully interposed against the *res* it perished for the owners of them, and its destruction worked no injury and gave no right of action to the plaintiff.

It is, therefore, ordered, adjudged, and decreed that the said peremptory exception is good and valid in law; that it be maintained; and that the petition herein be dismissed at the cost of the plaintiff.

MYERS and another v. REED and another.

(Circuit Court, D. Oregon. August 8, 1883.)

1. CONVEYANCE TO HUSBAND AND WIFE.
   At the common law a conveyance to husband and wife, as such, made them tenants by entirety, and neither could dispose of the estate thus conveyed without the consent of the other; but upon the death of either, the survivor was the sole owner of it.
2. SAME.
   Prior to June, 1863, if then, or even since, this common-law rule was not changed or modified in Oregon.
3. LAW OF THE STATE.
   The common and statute law of the state, as expounded by the settled decision of its highest court, furnish the rules that govern the descent and alienation of real property therein, and the effect and construction to be given to conveyances thereof.
4. QUITCLAIM, OR DEED OF BARGAIN AND SALE.
   A quitclaim, or deed of bargain and sale, by an occupant of the public land in Oregon before he became a settler thereon under the donation act, passed only the possession, and does not affect an after-acquired estate in the same premises under the donation act or otherwise.
5. PURCHASE OF ADVERSE TITLE BY CO-TENANT.
   In the case of a co-tenancy arising by descent, devise, or one conveyance, the purchase of an adverse title by one of the co-tenants will generally inure to the benefit of the other tenants; but in the case of a mere tenancy in common, this depends upon the circumstances of the case, as that the co-tenant used the co-tenancy, or the title, right, or claim under which it exists, or is claimed to exist, to acquire such adverse title.
6. SAME—BY TENANT FOR LIFE.
   A purchase by a tenant for life of an adverse title will inure to the benefit of the remainder-man.

Suit in Equity to Declare a Trust in Real Property.

William B. Gilbert, for plaintiffs.

Thomas N. Strong, for defendants.

DEADY, J. The plaintiffs, citizen of New York and Connecticut, respectively, bring this suit against the defendants, citizens of Oregon, to obtain a conveyance to them of the undivided four-ninths of the north half of lot 4 in block 10 of Couch's addition to Portland, alleging that the same is worth "at least $5,000." The case was heard upon a demurrer to the bill. From the latter it appears that on February 16, 1860, William Baker, Robert Pittock, and Tobias Myers were in the possession of the premises, claiming each to be the owner of an undivided third thereof, under and by virtue of a conveyance from John H. Couch and Caroline, his wife, in 1850, to George Flanders, and sundry mesne conveyances thereunder; that at the date of such conveyance said Couch and wife were occupants of a tract of the public land, including the premises in question; that in 1871 the widow and heirs of said John H. "made final proof of his settlement" upon said tract as a donation claim, and on November 13, 1871, a patent issued to them for the same, whereby the south half thereof,

including said block 10, was set apart to said Caroline; that on February 16, 1860, said Baker conveyed his interest in the premises to said Pittock, and Tobias Myers, and M. M. Myers, his wife, and on October 27, 1862, said Pittock conveyed his interest therein to said Myers and wife, who together occupied the same until the death of the former, on March 26, 1863; that said Myers by his last will devised all his interest in the premises to his wife for her life, and the remainder in equal parts to his three nephews, the plaintiffs, and George T. Myers; that said M. M. Myers continued in the sole occupation of the premises from the death of her husband until March 13, 1874, when she and said George T. Myers conveyed their several interests therein to the defendant Simeon G. Reed; that on March 26, 1874, said Caroline Couch quitclaimed the premises to said Reed for the nominal consideration of five dollars, but in fact for the purpose of confirming to said Reed the right claimed under the prior conveyance of her husband, and, as is alleged, upon the erroneous impression that said Reed had acquired all right to the premises under said deed, and was then the equitable owner of the same; and that in March, 1882, said M. M. Myers died, and the plaintiffs, as the devisees of said Tobias Myers, became and are entitled to the undivided four-ninths of the premises. Upon the argument it was insisted by counsel for the defendants that the conveyances by Baker and Pittock to Myers and his wife vested in them an estate as tenants by entirety of the undivided two-thirds of the premises, which neither could dispose of without the assent of the other, and which upon the death of Myers remained in his wife absolutely.

That such was the legal effect of these conveyances at common law there is no doubt; the rule being that as the husband and wife are one in law, they cannot take and hold an estate by moieties, and are therefore seized as tenants by entirety. 2 Black, 182; 1 Washb. Real Prop. 424; 2 Kent, 132; 1 Bish. Mar. Wom. § 613; *Den* v. *Hardenberg*, 18 Amer. Dec. 371, (5 Hall. 42;) *Hoffman* v. *Stigers*, 28 Iowa, 305.

Admitting this proposition, counsel for the defendant contend that the common law has been changed in this state by the operation of certain provisions in the constitution and statutes thereof. These are section 5 of article 15 of the constitution, which provides that "the property and pecuniary rights of every married woman, at the time of marriage, or afterwards acquired by gift, devise, or inheritance, shall not be subject to the debts or contracts of the husband; and laws shall be passed for the registration of the wife's separate property." But this provision has no application to property acquired, not by the wife alone, but jointly with her husband. And as property so acquired was not, at common law, subject to the debts or contracts of the husband during the life of the wife, or at all, if she survived him, there was no reason why it should be included therein. Neither does the clause relating to the registration of the wife's sep-

arate property bear upon the question in any way; for if the husband and wife even took as tenants in common, her interest would not be her separate property, unless it was so declared in the conveyance or other source of title.

Sections 9 of the act of January 13, 1854, relating to conveyances, (Or. Laws, 516,) and 1 of the act of October 18, 1862, relating to estates, (Id. 589,) are the statutes which are relied on as modifying this common-law rule. But the second one is too late for this case; it did not take effect until June 1, 1863, and on March 26 of the same year the husband died, leaving the wife the sole owner of the interest in the property conveyed to them during the marriage.

When this act took effect, Tobias Myers and M. M. Myers were, if ever, no longer "persons having an undivided interest" in the two-thirds of this property conveyed to them by Baker and Pittock. On the contrary, the husband's interest ceased with his life, and thereafter the wife held the estate alone. Nor do I think the result would have been different if the statute had taken effect during the life of the husband; for although Myers and wife were two natural persons, yet in contemplation of law they were but one, and on the death of either, that legal personage was represented by the survivor, who was entitled to hold the estate as before. In my judgment the legislature had not the power to divest the survivor of this right in the property without her consent; and it would not be presumed that such was the intention in passing the act, so long as it admits of any other construction. Nor does the act of 1854 help the case of the plaintiffs. As the law then stood, the conveyances from Baker and Pittock to Myers and wife were not "made to two or more persons," but to Tobias and M. M. Myers as one person,—husband and wife,—which gave them and the survivor of them an indivisible estate in the premises.

I do not understand that it is claimed by counsel that any of these provisions of the constitution or statutes, in words or even in legal effect, comprehend this case, but that, taken collectively, they manifest an intention on the part of the legislature to disregard or do away with the common-law rule that regarded husband and wife, for this and other purposes, as one person in law, and therefore the court ought to treat it as superseded or abolished. But in this matter the province of the court is to await the action of the legislature, and not to anticipate or endeavor to outstrip it, in the pursuit of a new notion. See *Stubblefield* v. *Menzies*, 8 Sawy. 41; [S. C. 11 FED. REP. 268.]

Counsel for the plaintiffs also cites cases from five states of the Union (*Hoffman* v. *Stigers*, 28 Iowa, 302; *Meeker* v. *Wright*, 76 N. Y. 262; *Cooper* v. *Cooper*, 76 Ill. 57; *Clark* v. *Clark*, 56 N. H. 105; *Walthall* v. *Goree*, 36 Ala. 728,) in which it is held that this common-law rule is no longer in force there, because inconsistent with statutes providing, in effect, that the property which comes to a married woman shall, notwithstanding the marriage, be her separate property,

and not subject to the control or interference of her husband, or liable for his debts.

But whatever may be claimed for the acts of October 21, 1878, (S. L. 94,) and October 21, 1880, (S. L. 6,) concerning the *status* and rights of married women, certainly there was no such statute as these in force in Oregon up to the death of Tobias Myers, when at least Mrs. Myers' right to the whole of this two-thirds interest in this property became vested beyond legislative control.

It also appears that in the case of *Noblett* v. *Beebe* the supreme court of this state, at the October term, 1882, held that, under a conveyance in fee to husband and wife in 1866, they took as tenants by entirety, and not in common, and that upon the death of one of them the whole estate continued in the survivor. The manuscript opinion that has been furnished me merely states the conclusion of the court, with the authorities relied on. But it is an authoritative declaration of the law of this state concerning the effect of a conveyance to husband and wife of real property, and, as such, is binding upon this court. Nor can it be presumed, as suggested by counsel, to have been made without reference to the provisions of the constitution and statutes of the state which might affect the question.

In *McGoon* v. *Scales*, 9 Wall. 27, Mr. Justice MILLER, in delivering the opinion of the court, says: "It is a principle too firmly established to admit of dispute at this day, that to the law of the state where land is situated must we look for the rules which govern its descent, alienation, and transfer, and for *the effect and construction of conveyances.*" See, also, *Brine* v. *Ins. Co.* 96 U. S. 635.

And the settled decisions of the highest court of the state, as to the law of real property therein, whether grounded upon the construction of a statute or the unwritten law, are also followed by the national courts as the law of the state. *Jackson* v. *Chew*, 12 Wheat. 162; *Williamson* v. *Suydam*, 6 Wall. 738; *Canal Co.* v. *Clark*, 13 Wall. 311.

The case of the *Town of Venice* v. *Murdock*, 92 U. S. 494, cited by counsel for the plaintiff to the contrary of this proposition, is not in point. The case turned upon the validity of certain bonds issued by the town in aid of a railway, and in no way involved an inquiry into the local law of real property, nor, in the opinion of a majority of the court, even into the construction of the statute under which the bonds issued, but rather the application of general principles to the rights of a *bona fide* holder of the same.

This conclusion disposes of the plaintiffs' claim to two-ninths of the property. Their right to the other two-ninths turns upon the effect to be given to the deed from Couch to Flanders, under which Tobias Myers claimed one-third of the premises prior to and independent of the conveyances to him and his wife by Baker and Pittock of the other two-thirds, in conjunction with the subsequent conveyance of the whole premises by Mrs. Couch to Reed.

For the defendants it is contended that this first conveyance, as

against the deed from Mrs. Couch to Reed, is without effect, because at the date of his conveyance he had no interest in the premises, and never afterwards acquired any; that block 10 is a part of Mrs. Couch's half of the Couch donation; and that her deed to Reed gave him the legal title to the whole of the premises in question. Substantially, this proposition is admitted by counsel for plaintiff; but he contends, further, that Reed being a co-tenant with the plaintiffs at the time he took the conveyance from Mrs. Couch, he will be held in equity to have acquired their devisor's third in trust for them. From the uncertainty of the allegations in the bill concerning the nature and date of this conveyance by Couch to Flanders, it is not readily seen what is admitted in this respect by the demurrer.

The bill alleges that a tract of the public land, including block 10, was laid off in blocks and lots by Couch and wife prior to 1850, and by them conveyed to Flanders on the ——— day of ———, 185–. Now, if this means anything as to time, it means that the conveyance was made some time in the "fifties,"—between 1850 and 1860,—and, under the well-known rule that an uncertain or ambiguous allegation must be construed against the pleader, it must be taken to mean 1850. And as it does not appear whether it was before or after September 27, 1850,—the date of the donation act,—it must for the same reason be taken to signify that the conveyance was made in the year 1850, but prior to September 27th. Besides, as it is not alleged that there were any covenants in the conveyance, it must be taken for granted that it was a mere deed of quitclaim, or bargain and sale, the only effect of which was to pass to the grantee therein the right of possession,—the only right which the grantors then had any claim to. *Lownsdale* v. *Portland*, 1 Deady, 7, 10, 43; *Chapman* v. *School-dist.* Id. 149; *Fields* v. *Squires*, Id. 379. Afterwards, it appears that Couch became a settler under the donation act on 640 acres of the public land, including the tract quitclaimed to Flanders, in pursuance of which Mrs. Couch, as his wife, received from the United States a grant of one-half thereof, including the premises in controversy, which she afterwards conveyed to Reed. No one else ever appears to have had any legal or equitable interest in the premises—the Myers having nothing but the bare possession under conveyances from persons who had no title or right to the land.

Furthermore, it is a fact so well known in the history of Portland that I am inclined to think the court may take judicial notice of it, particularly as it is not disputed by counsel that Capt. Couch's family did not remove from the east to Portland until 1852, and therefore it is not a fact that she was a party to the conveyance to Flanders. But be this as it may, her quitclaim deed, made prior to the passage of the donation act, does not affect the subsequent grant of the same premises to her by the United States. *Lownsdale* v. *Portland*, 1 Deady, 15, 47; *Chapman* v. *School-dist.* Id. 149; *McCroekin*

v. *Wright*, 14 Johns. 193; *Harden* v. *Cullins*, 8 Nev. 51; *Gee* v. *Moore*, 14 Cal. 472; *Quivey* v. *Baker*, 37 Cal. 470. And, if she afterwards chose for any reason, as out of any regard for her husband's conveyance of 1850, to convey the property to Reed, the plaintiffs had no right to complain of her action. She was under no legal obligation to convey it to either of them, and might have disposed of it to a third person.

But is Reed, under the circumstances, under any obligation to the plaintiffs to convey them the two-ninths interest which they claimed under this conveyance from Couch? The rule is admitted that if a co-tenant, and particularly a joint tenant, by descent, devise, or the same conveyance, purchase a title adverse or paramount to the one under which such tenant holds or claims, it will inure to the benefit of his co-tenants according to their respective interests in the common property. *Van Horne* v. *Fonda*, 5 Johns. Ch. 407; *Rothwell* v. *Dewees*, 2 Black, 617; *Wright* v. *Sperry*, 21 Wis. 341; *Frentz* v. *Klotsch*, 28 Wis. 317; Freem. Co-tenancy, § 154; *Flag* v. *Mann*, 2 Sumn. 520. But the application of this rule to mere tenants in common is not general, and depends on the circumstances of the case. Their only unity is possession, and the relation between them is necessarily less intimate than that of joint tenants. Their interests, though held under the same ultimate title, may accrue at different times by different means and from different persons. Under such circumstances, either of the tenants, provided he does not take advantage of his co-tenants, and particularly if they are not in possession, may acquire for himself an outstanding or paramount title to the premises.

But it is said (Freem. Co-tenancy, § 155) that when a tenant in common makes use of the co-tenancy, or title, right, or claim under which it exists or is claimed to exist, to acquire such outstanding title, that upon this ground alone he will be held to have acquired it in trust for his co-tenants; and this proposition appears to me both reasonable and just. Now, according to the allegations of the bill, this is what occurred in this case. Reed obtained the legal title from Mrs. Couch, and she conveyed it to him, not for a valuable consideration, but in consideration of the prior deed of her husband, under which he and the plaintiffs then claimed the premises. And upon this ground the plaintiffs insist that Reed acquired two-ninths of the estate of Mrs. Couch in trust for them. But upon reflection it does not appear that the parties were tenants in common when Reed obtained the conveyance from Mrs. Couch. Under the deed from Couch, and as between themselves, Reed was tenant in fee of an undivided seven-ninths of the property, and tenant, for the life of Mrs. Myers, of the other two-ninths of the same, while the plaintiffs were the tenants in remainder of said two-ninths. They were not in possession or entitled to be during the continuance of such life estate. Upon this view of the case, this was not a purchase of an adverse title by one of several tenants in common. And still, under the circum-

stances, it may be that upon the death of Mrs. Myers, and as soon as the parties became tenants in common, that the plaintiffs were entitled to claim the benefit of this purchase from Mrs. Couch. The trust would arise and might be enforced as soon as the relation of co-tenant was established by the termination of the estate for the life of Mrs. Myers. But, be this as it may, I find that the law regards the purchase of an incumbrance or outstanding title by the tenant for life as being made for the joint benefit of himself and the remainder-man or reversioner, and that he *cannot* acquire it for his exclusive benefit. *Daviess* v. *Myers*, 13 B. Mon. 513; *Varney* v. *Stevens*, 22 Me. 333; Perry, Trusts, §§ 116, 540. And in Co. Lit. §§ 453–267*b*, it is laid down that "a release of a right made to a particular tenant for life, or in tail, shall aid or benefit him or them in the remainder."

My conclusion upon the whole case is that Reed obtained the conveyance from Mrs. Couch for the benefit of himself and the plaintiffs, according to their respective interests in the premises under the deed from John H. Couch, and that, therefore, he took two-ninths of the estate derived from Mrs. Couch in trust for the plaintiffs, and should convey it to them.

The demurrer is overruled.

LINN *v.* GREEN.

(*Circuit Court, D. Colorado.* June 23, 1883.)

1. EQUITY—BILL CHARGING FRAUD—INJURY RESULTING.
   The rule in equity is that it is not sufficient to charge a fraud simply, but the bill must charge also some injury as the result of the fraud; but this rule does not require any considerable damage, and a slight injury as the result of a fraud will give the party injured the right to bring his action and cancel the contract.
2. SAME—FALSE REPRESENTATIONS AS TO INCUMBRANCE ON REAL ESTATE.
   Where a man represents that a piece of real estate is free and clear of incumbrance, when in fact it is subject to incumbrance, and induces another to take it upon the belief that his representations are true, there is an injury, and a bill so charging is sufficient on demurrer.
3. SAME—EXAMINATION OF RECORDS.
   In such a case the purchaser has a right to rely upon the representations of the grantor, and is not bound to search the records to find whether they are true or not.

MCCRARY, J., (*orally.*) This is a bill in chancery, filed to cancel and set aside a contract and conveyance whereby the defendant sold to the complainant an interest in a mine. The bill avers that the defendant falsely and fraudulently represented to the complainant that this property was free and clear of incumbrance, and that he was induced by these representations to purchase it, and to pay for it the sum of $1,500; that he afterwards discovered that the represen-

tations were false; that the property was not free from incumbrance, but was subject to a judgment lien of some $700 against the defendant. Thereupon, immediately, as the bill avers, he tendered back a conveyance of the property, and demanded a return of the consideration money. There are various objections to the form of the bill, and some of them, perhaps, may be good, in strictness, if we were to consider them with very great nicety and technicality; but the only matter of substance is the question, whether there is an allegation of injury or damage here which is sufficient to give the complainant a right to relief in equity. He avers, as will be observed, that there was an incumbrance upon this property; that the representation was that it was free and clear from incumbrance. There is no allegation that the incumbrance has been enforced, or that complainant has been obliged to pay it in order to maintain his possession, or anything of that sort. The rule in equity is that it is not sufficient to charge a fraud simply, but you must charge also some injury as the result of the fraud. I think, however, that there is an injury charged here. The rule does not require any considerable damage. A slight injury as the result of a fraud will give the party injured the right to bring his action and cancel the contract; and I think it may be said that where a man represents that a piece of real estate is free and clear of incumbrance, when in fact it is subject to incumbrance, and induces another to take it upon the belief that his representations are true, there is an injury. Real estate is not worth so much when it is incumbered as it is when it is not incumbered. The party who buys real estate upon the belief that it is free and clear from incumbrance, finding afterwards that he has been cheated in that respect, is not bound to keep it. He may return it. It is also insisted that the records were sufficient to give notice to the purchaser of the judgment liens complained of. But the rule in regard to matters of this sort is that the purchaser has a right to rely upon the representations of the grantor, and is not bound to search the records to find whether they are true or not. The demurrer to this bill will be overruled, and the defendant will answer in 60 days.

NICKERSON and others, Trustees, *v.* ATCHISON, T. & S. F. R. Co.

(*Circuit Court, D. Kansas.* November, 1881.)

1. TRUST—EXPENSES OF EXECUTING—DEED CONSTRUED.

Where a large body of land is conveyed to trustees to secure the payment of the principal and interest of a great number of railroad bonds, which have a long time to run before maturity, and the grantor, the railroad company, in the trust deed reserves the right to sell the lands and pay the proceeds of the sales thereof to the trustee, after deducting expenses incurred in executing the trust, it may retain the proper amount for expenses in making the sales, and may also pay the taxes out of the proceeds thereof.

2. CONTRACT—CONSTRUCTION ADOPTED BY PARTIES TO.
Where the meaning of a contract is doubtful, the fact that the parties thereto at once adopted a particular construction, and for many years acquiesced in and acted upon it, should lead a court without hesitation to adopt that construction as the proper one.

In Equity.

Ross Burns, J. G. Waters, A. A. Hurd, and *S. O. Thacher,* for complainants.

Geo. R. Peck, for respondent.

MCCRARY, J. The sole question to be decided upon this demurrer is whether the expenses attending the sale of the lands by the railroad company are properly to be classed as "expenses of executing the trust;" in other words, we are to determine, from an inspection of the whole instrument, whether the parties intended that the railroad company should make sales of the lands and pay over the gross proceeds to the trustees, deducting nothing for expenses. It is very clear, we think, that the sale of the lands was regarded by the parties as a part, and a very important part, of the execution of the trust.

The debt secured was very large, and the bonds are not to mature until October 1, 1900. The evident intention of the parties was that the land should be sold as rapidly as possible, and the proceeds applied, after paying expenses of sale, to the discharge of interest as it accrued, and the creation of a sinking fund for the payment of the principal. By the terms of the mortgage the railroad company was to retain possession and control of the land, with power to dispose of the same for cash, or partly for cash and partly on credit, on reasonable terms. In effect the railroad company was constituted the agent of the trustees and bondholders to sell the land, and pay over the proceeds, "after deducting the expenses of executing this trust," to the trustees, to be applied upon the payment of the mortgage debt. The proceeds of the sales, "after deducting the expenses of executing" the trust, were pledged for the payment of the bonds and interest, and, of course, only the moneys so pledged were to be paid over to the trustees. It is true that certain duties were devolved upon the trustees, and their expenses, including sums paid to clerks, agents, and attorneys, were to be paid; but we cannot assent to the proposition that these were the only expenses to be deducted from the proceed of the sales. The parties saw fit to so frame the contract as to devolve upon the railroad company many important duties in connection with the execution of the trust, and we must presume that the large expenditures on the part of the company, made necessary by the contract, were in the intention of the parties to be included in the expenses of carrying out the agreement.

The mortgage abounds in provisions regulating the sale of the lands and the application of the proceeds thereof. This feature of the contract set forth in the mortgage is so prominent as to make it very

apparent that its execution must be regarded as part and parcel of the execution of the trust expressed therein.

We are, therefore, of the opinion that the railroad company was authorized to retain out of the proceeds of the sale of the lands embraced in the mortgage its reasonable expenditures incurred in making such sales. The bill does not aver that the expenditures of the railroad company were unnecessary or unreasonable, and it must, therefore, be considered as only raising the question whether the railroad company was entitled to make any charge for selling the land, and to deduct the same from the proceeds of the sales.

The bill further alleges that a large sum has been paid by the company, out of the proceeds of sales of land, for taxes upon the same. As legal taxes were liens upon the land prior and paramount to any claim under the mortgage, it is difficult to see upon what ground their payment can be regarded as an expenditure outside of the trust.

The railroad company, by the terms of the mortgage, was to be suffered and permitted to possess, manage, use, and enjoy the lands in the same manner and with the same effect as if the deed of trust and mortgage had not been made, except as in the instrument otherwise provided; and it was, as we have already seen, to be allowed to manage the matter of selling the lands. The control, management, and sale of the lands by the railroad company was, therefore, provided for as part of the contract and of the trust. The payment of the taxes accruing from year to year was plainly a part of the proper management of the estate. If it had been neglected, the whole property would have been lost, and the bondholders would have been the chief sufferers.

If the land had been sold subject to the taxes, the price received for it would have been correspondingly less, and therefore no damage has resulted to any of the parties interested by reason of their payment. We are, therefore, clearly of the opinion that the payment of the taxes was properly within the duties devolved upon the company in the management and sale of the lands.

If we were in doubt as to either of the questions raised by the demurrer, the fact that the parties themselves who made the contract at once adopted the construction above suggested, and have for many years acquiesced in and acted upon it, would lead us, without hesitation, to resolve our doubts against the claims of the complainants.

The trustees, acting upon the theory that the company was entitled to retain the expenses in question, including sums paid for taxes, have from time to time received the net proceeds of sales ascertained upon that basis, and have voluntarily executed releases in accordance with the terms of the mortgage. It is not necessary to determine whether such action, continued for so long a period, is an absolute estoppel, which deprives them of the privilege of now being heard to assert that this construction was erroneous. It is enough to say

that the construction which the parties themselves placed upon their own contract, and upon which they have so long acted, is the one which the court ought to adopt.

The demurrer to the bill is sustained.

FOSTER, J., concurs.

LUNT and others v. BOSTON MARINE INS. CO.

(*Circuit Court, S. D. New York.* June 20, 1883.)

MARINE INSURANCE—REPRESENTATIONS—REPAIRS TO VESSEL—SEAWORTHINESS—BURDEN OF PROOF.

Where a vessel had put into Shelburne, Nova Scotia, leaking and in distress, and repairs were recommended after a survey, and the vessel sailed for Yarmouth for repairs, and a memorandum of insurance was effected upon the cargo before her arrival at Yarmouth, the application for the insurance containing a statement that the vessel was to be repaired at Yarmouth, *held*, in an action on the contract of insurance, that the requirement was only that such repairs as were necessary should be made, and if none were necessary none need be made; and that, although in ordinary cases the burden of proof in cases of defense of unseaworthiness of the vessel rests upon the defendant, in this case, with the statement that the vessel was to be repaired at Yarmouth, in the application, the burden rested upon the plaintiff.

Lunt v. *Boston Marine Ins. Co.* 6 FED. REP. 562, followed.

Motion for New Trial.

Welcome R. Beebe, for plaintiffs.

Robert D. Benedict and *Enos N. Taft*, for defendant.

WHEELER, J. This suit is brought upon a contract of marine insurance on a cargo of potatoes on board the schooner Lacon from Yarmouth, Nova Scotia, to New York. It was tried, and there was a verdict for the plaintiffs, which was set aside on motion of the defendant. 6 FED. REP. 562. It has now been again tried with a like result, and been heard upon a similar motion. The vessel had put into Shelburne, Nova Scotia, leaking and in distress. The master had made a protest against her to the consular agent, stating her condition and asking for a survey, which was had, recommending repairs. She sailed to Yarmouth for repairs. The insurance was effected before her arrival there, on an application by the owners, signed by and on behalf of them, in due form. A short memorandum of the insurance was made and delivered to the insured, and no policy was written out. The application was produced on the trial, and contained the statement that the vessel was to be repaired at Yarmouth. The plaintiffs' evidence tended to show that this statement was not in the application when made, but was inserted afterwards, without their knowledge or consent; and that the vessel was examined at Yarmouth and was not leaking, and did not need any

repairs. Among other testimony to that effect was that of the master. The defendant's evidence tended to show that the owner effecting the insurance, in negotiating with the agents, stated that the vessel was to be repaired at Liverpool, afterwards changed to Yarmouth; that the agent would not take the risk without, and that the statement about repairs was inserted there before the application was signed; that the vessel was in fact unseaworthy; and that she was not taken out of the water or unloaded for examination at Yarmouth, nor any repairs made. The court held that the plaintiffs were not bound by any statement in respect to repairs to be thereafter made not inserted in the application; that, if the statement as to repairs to be made was in the application, the plaintiffs were not entitled to recover without showing that the vessel was in as good condition as if the defects contemplated had existed and been repaired, so that she was tight, stanch, and strong, and seaworthy in fact; that, if the statement was not in, the plaintiffs would be entitled to recover unless the defendant showed that she was unseaworthy; and that the statements of the master in the protest to the consular agent were not evidence that the facts were as there stated, but were impeaching of his testimony to the contrary. The principal questions made arise upon these rulings, and instructions accordingly to the jury.

There is no claim that there were any fraudulent representations as to then existing facts. The representation that the vessel was to be repaired at Yarmouth was in the nature of an undertaking that she should be so repaired. All the undertakings of the plaintiffs in this behalf were assumed to be in the application. The undertakings of the defendants which would have appeared in the policy were not in the memorandum, nor assumed to be. Parol evidence would undoubtedly be admissible to supply what was so left out. Such evidence would not add to a written contract, for the contract was not written, nor understood to be written. It was largely left in parol, with full knowledge that it was so left. Not so with the application. That was understood to be complete. The paper signed contained all that the parties intended to be put in, and it was signed as a completed thing. To admit evidence of other undertakings by the parties executing it, made before it was executed, to the same end, would be directly contrary to the rule that written contracts cannot be added to or altered by contemporaneous oral contracts. *Pawson* v. *Watson*, Cowp. 785.

The question as to where the burden of proof rests in cases of defense for unseaworthiness was fully and carefully considered when this case was up before, and the conclusion reached that in ordinary cases it rests upon the defendant; but that in this case, with the statement that the vessel was to be repaired at Yarmouth in the application, the burden rested upon the plaintiffs. *Lunt* v. *Boston Marine Ins. Co.* 6 FED. REP. 562. Nothing more than to refer to the decis-

ion then made seems to be now necessary. That reasoning and result are fully concurred in. The burden was shifted and placed fully upon the plaintiffs at this trial. The defendant insists, however, that this was not all that was necessary; that as no repairs were made a verdict for the defendant should have been directed. More was put upon the plaintiff than the proof of mere seaworthiness. The undertaking as to repairs was required and given in view of a supposed defect. If the defect did not exist, the supposition was without foundation, and what was agreed should be done was already done. There was a mutual mistake as to the object of the undertaking, which made it nugatory and prevented its fulfillment; if there was no defect there was nothing to repair. The end sought was accomplished without making the repairs. This view was also considered before, and with reference to it Judge WALLACE said:

"In the present case it is to be assumed the jury found that, after an examination at Yarmouth, it was evident no repairs were needed, and that the vessel was in a fit condition to proceed on her voyage. This being so, it would seem too plain to doubt that neither the interests of the insurer nor the fair purport of the promise required that to be done by the plaintiffs which would have been superfluous and futile."

It is now argued, however, that there was no sufficient evidence to warrant the finding that there was no defect to be repaired; that this could not be told without taking the vessel out of the water, and that the repairs contemplated were such that they could not be made without taking her out; and that, in effect, the finding of the jury has been substituted for the fact of repairs which the defendant took the risk upon. The question as to whether the tightness of the vessel could be ascertained without taking her out, was one of fact for the jury, and not of law for the court; and one of which the defendant had the full benefit in a faithful presentation in argument to the jury. The extent or kind of repairs to be made was not specified. It was not required that the vessel should be taken out of the water and examined to see what repairs were necessary, and that such as were so found to be necessary should be repaired. The simple requirement was, to be repaired at Yarmouth. This would seem to require only that such repairs as were necessary should be made, and to mean that, if none were necessary, none need be made. Whether any were necessary, and what would be sufficient proof that none were necessary, would be always questions of fact for the jury, so long as there was any evidence fairly and legally tending to show that none were necessary. There was testimony of surveyors and other experts to making examinations, and to finding the vessel sound; such that it is not claimed to be insufficient, otherwise than as it is claimed that nothing short of taking her out of the water would be sufficient. As argued, the agent probably would not have taken the risk on an undertaking that the vessel should be found by a jury to need no repairs; but that does not answer the case of the plaintiffs. Parties do

not ordinarly stipulate upon the verdicts of juries; but when they enter into contracts which cannot be solved without settling facts, it becomes necessary that they should be bound by the findings of juries. The verdicts do not make new contracts for the parties, but settle disputes about those which the parties make for themselves.

In making the protest to the consular agent about the condition of the vessel, the master was not acting in any sense as the agent of the plaintiffs about the matter now in controversy. This insurance had not then been effected, was not being effected, nor was anything being done about it. In fact, he was not making the protest for them, but rather against them, in laying foundation for proceedings against their property to pay expenses of repairs. His statements in making the protest were, it seems clearly, not so made for them in the course of their business now involved as to bind them.

As the case is now understood and considered, the motion must be overruled.

Motion for new trial overruled, judgment for plaintiffs on the verdict, and stay of proceedings vacated.

NEW YORK, L. E. & W. R. Co. *v.* MCHENRY.

(*Circuit Court, S. D. New York.* 1883.)

1. SUIT BY ASSIGNEE—FOREIGN JUDGMENT—ACTION ON ORIGINAL DEBT—PLEADING—EVIDENCE—BILL OF PARTICULARS.
   Where a plaintiff is assignee of the original cause of action, such transfer to him is one of the facts constituting the cause of action, and should be properly alleged in the pleadings; but where a judgment has been obtained in a foreign court, and the action is brought on the original debt and not on the judgment, and defendant has been fully advised by a bill of particulars of the nature of plaintiff's claim, the court, on motion for new trial, may allow the pleadings to be amended *nunc pro tunc*, so as to render admissible the testimony showing the transfer or assignment of the claim to plaintiff offered on the trial.
2. SAME—FOREIGN JUDGMENT—MERGER OF ORIGINAL DEBT.
   As the original debt is not merged in a judgment rendered in a foreign court, a certified copy of such judgment may be used as evidence by either party, in a suit on the original cause of action, without a formal allegation in the pleadings; and if it settles the whole controversy between the parties it ought to be held conclusive.
3. DOMESTIC JUDGMENTS—FOREIGN JUDGMENTS—EFFECT.
   The authoritative character of a domestic judgment is founded, among other reasons, on the constitutional provision which guaranties full faith and credit to the records and judicial proceedings of every state, while the rule as to foreign judgments rests upon considerations of comity; and though they are treated by the courts, in respect to their conclusiveness, as entitled to the same weight as domestic judgments, they do not, to the same extent as a domestic judgment, extinguish the original contract debt.

At Law.

W. W. MacFarland and *Wm. G. Choate*, for plaintiff.

Stephen P. Nash and *B. F. Dunning*, for defendant.

COXE, J. This action was tried in New York at the last April circuit, and resulted in the direction of a verdict in favor of the plaintiff for $1,496,823.96. The defendant now moves for a new trial. The complaint is in the following words:

"The plaintiff in the above-entitled action, complaining of the defendant, alleges that the defendant is indebted to the plaintiff in the sum of $1,307,289.17, with interest thereon from the eighth day of July, 1879, in respect of so much money before that time had and received by the defendant to and for the use of the plaintiff, and the plaintiff demands judgment for the sum aforesaid, with interest from the date aforesaid, besides costs."

Subsequently, and before the answer was received, the plaintiff served a bill of particulars, which, after setting out in detail the items of the claim, contained a note or memorandum stating that the figures were taken from an account rendered in an action pending in the high court of justice, chancery division, in England, brought by the Erie Railway Company and Hugh J. Jewett, as receiver, against the defendant; and that the plaintiff was afterwards admitted as a party plaintiff to the English suit. It then proceeds as follows:

"In the said action, * * * after a full accounting, the defendant was, on the eighth day of July, 1879, found to be indebted, on account of such receipts, in a balance amounting to £268,989 10s. 10d., for which interlocutory judgment was rendered against said defendant on said day, and to recover which balance this action is brought."

The defendant, by his answer, denies that he is indebted to the plaintiff in the sum stated in the complaint, or in any sum whatever. He alleges that from May, 1872, to December, 1875, he had various dealings and transactions with the Erie Railway Company, and on the first day of January, 1876, the said company was and still is indebted to him for services, and for money expended by him on its behalf, over and above all credits, in the sum of $850,000; that the plaintiff has no right or interest in the claims sought to be recovered, except by assignment from the Erie Company; and he insists upon his right to recoup, so far as may be necessary, his claim against said company.

The plaintiff's proof consisted—*First*, of a certified copy of the English judgment before referred to; and, *second*, of evidence, documentary and oral, showing a transfer to the plaintiff of the demand established by the judgment. The evidence was received under numerous objections and exceptions taken by the defendant. It was urged at the trial, and it is urged now, that the complaint does not state facts sufficient to constitute a cause of action, but simply a conclusion of law; that no transfer to the plaintiff being alleged, none can be proved; that the plaintiff should not have declared on the debt, but on the judgment; that the judgment is not a final, enrolled decree, but interlocutory simply; that the record is incomplete and the certificate insufficient.

The questions then to be considered are: *First.* Are the averments of the complaint sufficient? If not, are the defects of such a character as to require a new trial to correct them? *Second.* Should the English record have been received, and is it conclusive evidence of the facts therein adjudicated?

The cause of action accrued, not to the plaintiff, but to the Erie Railway Company; the plaintiff obtained it by purchase. The title having been originally in another, the transfer was one of the facts constituting the cause of action, and should have been alleged. It was necessary to aver and prove that the plaintiff was the real party in interest. The transfer was a traversable fact; unless it was proved, no cause of action was established. The defendant was entitled to be informed by the pleadings of the facts upon which the demand against him rested. *Russell* v. *Clapp*, 7 Barb. 482; *O'Neill* v. *Railroad Co.* 60 N. Y. 138, 143; *Scofield* v. *Whitelegge*, 49 N. Y. 259; *Horner* v. *Wood*, 15 Barb. 371; *Sheridan* v. *Jackson*, 72 N. Y. 170; *Prindle* v. *Caruthers*, 15 N. Y. 425; *Martin* v. *Kanouse*, 9 Abb. Pr. 330; *Thomas* v. *Desmond*, 12 How. Pr. 321; *White* v. *Brown*, 14 How. Pr. 282; *Parker* v. *Totten*, 10 How. Pr. 233; *Adams* v. *Holley*, 12 How. Pr. 330. Nor is this objection obviated by the suggestion that the decree in the English suit —this plaintiff having been admitted as a party—is an adjudication that the defendant is indebted to it. This would be cogent reasoning if the action had been upon the judgment and not on the original debt,—a debt due to the Erie Railway Company and not to this plaintiff.

It was deemed necessary at the trial to present proof of the transfer. If the proof was essential, as it undoubtedly was, then a suitable allegation was required to support it. It is thought, however, that this omission can be supplied by amendment; that for a reason so inconsiderable the court would hardly be justified in sending the plaintiff back for a new trial. The defendant was not surprised; he knew precisely what the cause of action was; the bill of particulars, which may be regarded as a part of the complaint, duly apprised him of the exact nature of the plaintiff's claim. His answer shows that he was not ignorant of it, Indeed, it was stated at the trial that defendant's motion for a commission was opposed solely on the ground that the English judgment was conclusive, and no evidence could be given by the defendant to dispute it. The case is still before the trial court, the cause of action will not be changed by the proposed amendment, and it would seem very clear that it is the duty of the court to permit the plaintiff to conform the pleadings to the proof, rather than to pursue a course which will only tend to prolong the litigation without change of result.

Sections 539, 540, 721–4, of the Code of Civil Procedure, seem to afford ample authority for such relief as is here contemplated. To quote the language of Judge FOLGER in *Reeder* v. *Sayre*, 70 N. Y. 180, 190:

"The power of amendment of the pleadings is great under the Code. The real limitation to it seems to be, that the amendment shall not bring in a new cause of action. An amendment, in this case at trial, allowing the plaintiffs to aver their character as surviving partners, instead of tenants in common, would not change the cause of action. That remained the same, and required no different proof and no additional parties. It needed only that the character, or right in which the plaintiffs sued, should be differently averred. This could have been done at trial. It does not appear that it was done; but as it might have been done, it may be done now, *nunc pro tunc*."

See, also, *Thomas* v. *Nelson*, 69 N. Y. 118; *Knickerbocker Ins. Co.* v. *Nelson*, 78 N. Y. 137; *Abbott* v. *Jewett*, 25 Hun, 603; *O'Niell* v. *Railroad, supra; Harris* v. *Tumbridge*, 83 N. Y. 92.

The questions arising upon and having reference to the judgment record remain now to be considered. In the spring of 1876, the Erie Railway and Hugh J. Jewett, as receiver, commenced an action in the high court of justice of England—chancery division—against this defendant. The judgment demanded was—*First*, for £285,870 for bonds sold and delivered by the Erie Company to the defendant; and, *second*, that an account of all dealings and transactions between the parties be taken, and the defendant directed to pay over the amount found to be due. The account was taken, with great care and attention to detail, and on the seventeenth day of April, 1879, the official referee made his report. On Tuesday July 8, 1879, the report was presented to the court; it was altered and amended in various particulars, and, as so varied, was adopted. The order of the court contained, *inter alia*, the following direction: "That the defendant, James McHenry, do, on or before the eighth of August, 1879, pay to the plaintiffs, the Erie Railway Company, the sum of £268,989 10s. 10d." Subsequently,—on Tuesday, June 25, 1881,—upon motion, by way of appeal, this order was affirmed, subject to certain variations, which apparently do not affect the defendant's obligation to pay the sum above mentioned. The record is certified by Mr. Jenkins and other masters of the court, whose signatures are attested by the lord high chancellor, with the great seal of England attached, and his signature is, in turn, proved by the American consul general at London.

It is said that the decree is not final. This is, perhaps, true as to some of its provisions, but as to the item sued on there seems to be nothing left for future consideration. No inquiry as to any matter of law or fact is reserved. The sum stated is found to be due, and the defendant is directed to pay. No other or further decree is necessary to give this direction force, and make it operative. It is also contended that the judgment is either conclusive evidence or it is not; if conclusive, the original cause of action is merged, and the suit should have been upon the judgment; if not conclusive, the court was in error in excluding evidence disputing it. The law as laid down in the *Duchess of Kingston's Case* seems to be the law to-day: that a judgment of a court of competent jurisdiction directly upon the point

involved is, as a plea, a bar; as evidence, conclusive. The rule which gives to domestic judgments their authoritative character is founded, among other reasons, upon that provision of the organic law which guaranties full faith and credit to the records and judicial proceedings of every state. The rule as to foreign judgments rests upon considerations of comity, and though treated by our courts, in respect to their conclusiveness, as entitled to the same weight as judgments of our own country, (*Lazier* v. *Westcott*, 26 N. Y. 146,) yet no authority has been furnished holding that a foreign judgment, to the same extent as a domestic judgment, extinguishes the original contract debt. On the other hand, it has been decided, in a number of well-considered adjudications, that the original debt is not merged, and that the judgment may be used as evidence either by plaintiff or defendant, without a formal allegation in the pleadings. To adopt the language of Judge CURTIS: "There is some uncertainty concerning some of the effects of a foreign judgment. * * * But there is none as to this particular. It does not operate as a merger of the original cause of action. The fact that *assumpsit* lies on a foreign judgment is decisive that the demand has not passed into a security of a higher nature, so as to operate as a technical merger." *Lyman* v. *Brown*, 2 Curt. C. C. 559, and cases cited. See, also, as bearing on the questions involved: Freeman, Judgm. § 220; *Welsh* v. *Lindo*, 1 Cranch, C. C. 508; *Ridgway* v. *Ghequier*, 1 Cranch, C. C. 87; Big. Estop. (3d Ed.) 246–252; *French* v. *Neal*, 24 Pick. 55; *Offutt* v. *John*, 8 Mo. 120; *Smith* v. *Nicolls*, 7 Scott, 147; *Doty* v. *Brown*, 4 N. Y. 71; *Calkins* v. *Allerton*, 3 Barb. 171.

If the judgment is admissible as evidence, what reasen can there be for saying that its effect and weight must depend upon the form of the pleadings? If the judgment settles the whole controversy, it ought to be held conclusive.

I have examined with care the other objections argued, but do not consider any of them well taken. It is doubtless true that the plaintiff, by the adoption of an unusually laconic style of pleading, has been subjected to criticism and been brought into dangerous proximity to serious obstacles, which, had another course been taken, might quite likely have been avoided. Though the questions involved in this motion are by no means free from doubt, it is thought that no sufficient reason has been advanced to justify the court in setting aside the verdict. If injustice to the defendant is attempted on the execution, a case for the further consideration of the court, by motion or otherwise, may be presented. It is not improbable that in arriving at these conclusions the court has been somewhat influenced by the fact —a fact conceded by the learned counsel for the defendant—that the objections interposed are of a formal and technical character. When such objections are urged to defeat an unconscionable claim or prevent injustice, they are entitled to vastly greater weight than when directed to the accomplishment of no such advantageous result. In

the case at bar, there is visible, through all these technicalities and perplexities, the fundamental and indisputable fact, that, after years of arduous litigation, a court of the defendant's own domicile has adjudged him indebted to the plaintiff's predecessor in the sum demanded in the complaint.

The motion is denied.

DULUTH LUMBER CO. *v.* ST. LOUIS BOOM & IMPROVEMENT CO.

(Circuit Court, D. Minnesota. 1883.)

1. ST. LOUIS BOOM & IMPROVEMENT COMPANY — ACT OF 1872 OF MINNESOTA — RIGHT TO COMPENSATION.
   The act of the legislature of Minnesota, of February 24, 1872, relating to the Knife Falls Boom Corporation, authorizes the St. Louis River Boom Company to receive, control, scale, deliver, and to take charge of all loose logs coming down the river within townships Nos. 49 and 50,—in fact, makes them bailees of such logs, with certain duties to perform in regard thereto; and the owners of such logs, whether they have requested the services or duties to be performed or not, are bound to compensate the company therefor.
2. SAME—CONSTITUTIONALITY OF SUCH ACT.
   Such an act of the legislature is not unconstitutional.
3. NAVIGABLE STREAMS—STATE LAWS.
   Statutes passed by the states for their own uses, declaring small streams navigable, do not make them so within the meaning of any constitutional provision, treaty, or ordinance of the United States.
4. NORTH-WESTERN TERRITORY — ORIGINAL ACT — EFFECT OF ADMISSION OF STATE.
   The original ordinance concerning the north-western territory ceased to be of any force when congress, and a state organized out of such territory, chose to organize and admit such state into the Union.

At Law.

Before MILLER and NELSON, JJ.

MILLER, Justice. We have arrived at a satisfactory conclusion in regard to the case of the Duluth Lumber Company against the St. Louis Boom & Improvement Company, submitted to us without a jury a few days ago. The case made by the plaintiff is that it is the owner of a considerable lot of logs which came into the possession of the defendant, the boom company, and that they are entitled to the present possession of them, and have made a demand, which was refused. The facts seem to be that the Duluth Lumber Company had logs above the location of the boom company, which were run down singly and irregularly, and came within the limits of the boom company's corporate territory, and were taken possession of by that company, and certain acts performed with regard to them, such as scaling them, helping them over the rocky places within the limits of the boom company's domain, and finally delivering all of them to the lumber company, except some that they retained on account of a lien for the services to the whole of them. This lien on the logs that

they retained is the subject-matter of controversy. It is denied by the plaintiff, the lumber company, that any statute exists authorizing the boom company to take these logs without the consent of the owner, and to do anything about them without such consent. It is denied that the statute confers any such authority, and it is denied that if the statute intended to confer any such authority, that it is in that respect warranted by constitutional law.

The first question, then, to be considered is whether the statute confers any such authority. The statute which governs the matter is "An act relating to the Knife Falls Boom Corporation," in Carlton county, which is found in the Laws of Minnesota, *c.* 106, p. 454, and of the date of February 29, 1872. The statute is a long one, and I do not deem it necessary to read much of it. It creates the corporation, in the first place, and describes the geographical limits within which it shall exercise its powers. These are in townships 49 and 50, range 17, in Carlton county. It recognizes their public character, authorizes them to take the land that may be necessary for the purposes of their organization, by condemnation under the power of eminent domain, and almost two-thirds of the act is devoted to the manner in which this land shall be condemned, and its value ascertained and paid for. The second section of the act is the one which confers the power, and before I read it I wish to state that the argument is that where this section says that the company shall take and receive all logs coming within those two townships, it does not mean that, but it means all such logs as the owner shall desire them to boom, and to receive and take charge of. That is the argument; and, as re-enforcing that argument, it is said that no statute of the kind has ever been held to include *all* logs, but that all statutes in regard to boomage provide that a way shall be kept open for parts of logs, for boats, for navigation,—where the stream is navigable,—for rafts, and other things of the kind, and therefore it cannot mean *all* logs, but that a way shall be kept open for all that the owners do not desire shall go into the boom.

Now, in view of that argument, there is an important proviso to this section, which shows what exceptions the legislature intended to make to the phrase "all logs" coming into that boom:

Sec. 2. "That said corporation is authorized and required to construct, maintain, and keep in reasonable repair, such booms in and upon the St. Louis river, within said towns 49 and 50, of range 17, aforesaid, at such points as it may deem advisable and sufficient to secure, receive, scale, and deliver all logs that may from time to time come or be driven within the limits of the town aforesaid, and the said corporation is hereby authorized and required to receive and take the entire control and possession of all logs and timber which may be run, come, or be driven within the limits aforesaid, and boom, scale, and deliver the same as hereafter provided; that all logs and timber which shall be floated or run down the St. Louis river or the tributaries thereof, from points above said town, be in the possession of, and under the control of, said corporation, for the purpose of securing, scaling, and delivering the same as in its acts provided."

Now, it would be very difficult to make this more comprehensive: "all the logs that come from above and in any manner come into the boom of the defendants within those townships;" but to show that it did mean all logs not expressly excepted, there is this proviso:

"That all vessels or crafts navigating said river St. Louis, and all rafts of logs or timber made up at points above the limits of town 50, aforesaid, and destined for points south of town 49, aforesaid, shall be allowed free passage upon said river, and the said corporation shall not be allowed to obstruct the channel of said river so as to interfere with the free navigation thereof as aforesaid."

Now, that is so plain that it astonishes me that there should be any controversy about it; that all loose logs set afloat in the river, coming down into that township and caught in these booms, are within the meaning of this act. All logs that are rafted up above, and all steam-boats or any kind of vessel navigating the river, are not to be taken, but the boom men are to provide a free way for them to go through. There is no argument about it. They use language as clear as possible for a human being, in the use of language, to say that all the loose logs that come into this boom are to be received and cared for, and under their control; *all rafts* and *vessels*, and everything of the kind, shall go free; and the boom men shall provide a way for them to do it.

In opposition to this view of the subject, some language of Judge FIELD, in delivering the opinion of the supreme court of the United States in the case of Patterson against the boom company, is adduced. The language itself does not necessarily imply anything contrary to the views here suggested, but what he was saying was so remote, he was so little called upon to determine that question in the construction of that statute, that it could have but little weight even if that was his meaning. He was there considering a question of the value of a certain piece of land, which was condemned under a similar statute to this, for boom purposes, by a boom company, and he went on to say or argue that the owner of that land would have a right to make a boom himself, and therefore, although it was of no value for anything else but a boom, that that value must be considered as one of the elements of the damages sustained, and this question, of what the legislature meant by this statute, could have so very little to do with it, that, as a construction of the statute, it could have no binding force on anybody.

A decision in the supreme court of the state of Maine is also presented. I only got the sense of it as it was read by counsel in the argument, but it was so clear that that statute itself, from the argument of the court, did provide for a free way for everybody that did not want their logs boomed, that it cannot have any application to this case.

I am of the opinion, therefore, that the statute of Minnesota does authorize this St. Louis River Boom Company to receive, control,

scale, deliver,—to take charge of all loose logs coming down the river within those two towns, 49 and 50. Another part of the statute, that shows that that is so, makes them liable, or implies their liability as bailees. The fact is that they are created bailees of these logs for specific purposes, and, as such bailees, they would be liable for the loss of the logs, or for an injury to them, as for their being burned up, (if we can suppose such a thing to happen to logs in a boom,) and for the unjust detention of them for a longer time than was necessary to perform the functions that they are authorized to perform. And that such is the view of it is evidenced by the proviso to section 3: "That when the water in said river shall be so low that logs cannot be turned out of said booms, or rafted in consequence of such low stage of water, the said corporation shall not be required or held accountable for the non-delivery of any logs that may, during such time, be in such booms, or either of them, until there shall be sufficient water to enable said company to raft,"—that is one of the things they are authorized to do,—which it is their duty to do,—"to raft, turn out, or deliver the same; and provided also, the said company shall not be liable for any damage caused by any extraordinary rise of water or freshets." They are bailees, with the absolute control of these loose logs, with certain duties to perform. And this proviso relieves them from the legal obligation of bailees, in certain contingencies.

Now, is that law unconstitutional, or is it void because the consent of the owners is neither given by express words nor by implication to the turning of their logs into this boom, or into the possession which the boom-owners take of them? I am not referred to any provision of the constitution of Minnesota providing for the invalidity of such an act. Therefore I shall presume that there is no such provision.

It is hardly asserted—(although the argument goes mainly to that) —it is hardly asserted that the statute, if construed as I construe it, is void, although it is said so in the argument; and I do not see any solid foundation for such a proposition to rest upon. Here is a stream of a very peculiar character, whose only value, as a means of transportation, is that it can carry logs and lumber from above down to its mouth. That value, however, is a very great one, because there is a vast lumbering region on that river above these booms, and the natural and only reasonable outlet for those logs to get to a place where they can be rafted, and thence propelled in safe water, is through this river and through these booms. It may be supposed—it *must* be supposed—that the legislature had some information of the nature and character of the river, its obstructions, (if there were any,) its difficulties within these two townships,—because they point out these two townships specifically, and describe them; and it is only within these limits that the defendant's operations can be carried on. There are hundreds of persons interested in the business of lumbering

above these two townships on that river; there are millions of feet of lumber to be cut and carried down there, and the only practical way is that they shall be floated on the waters of that river through these boom limits, and out into that part of the St. Louis bay or St. Louis river which is safe water. These persons have no community of action. They cut when they please, how much they please, and in such order as may suit themselves. They cannot carry these logs, and they cannot raft them above, because, as I understand, no raft can go over these obstructions; they must go down through these booms singly, or at least not fastened together in rafts. If they cannot be rafted, they are marked, by the provision of the statute in its express terms. It is, then, these loose logs that are set afloat by everybody, with no other mode of recognizing the property than by some artificial mark put upon them, with many owners' logs running together, and all going into this particular place,—going into a place where, as the testimony shows, it was necessary, in many instances, for somebody to turn them off of the rocks which obstructed them; to start them afloat when they were stopped by those natural obstructions; to see that they did not collect in great bodies, as they do in some of the lower rivers, and make miles and miles of obstructions that are of no use to anybody; to gather them together; to take care of them in this perilous part of their transit down this river. Now, for the legislature to say that you shall make a boom that will catch all these logs, that will enable you to perform a necessary duty about all these logs, and that you must do your duty with regard to all of these logs, (because the owner is not sending somebody down with every log that floats;) for the legislature to say that you must be careful that you touch nobody's logs that has not employed you to do it; that you shall gather together in that boom and take care of and scale and deliver to the owner no other logs than those of which the owner has requested you to do,—is to simply enjoin an impossibility. It is simply to say that no such boom shall be made. It is to say that it shall not be used, because no boom-owner can do that. But the legislature has assumed that all these log-owners have a common interest,—that is, that their logs should get safely through that place; that they should be identified and marked; that they should be scaled there, and that they might be, if needed, rafted there; and that they might and must be, by these boom-owners, delivered to their proper owners. Now, for that service the legislature has a right to require compensation (whether the owner requests it or not) in the exercise of the duty of these boomers towards everybody that has that common interest. It has a right to say that, whether you want to pay for it or not, whether you want your logs so handled or not, since you put them into this common way, this common stream, this common mode of conveyance, and mix them, without other people's consent, with other people's logs, run them in together, without consulting anybody's interest but your own, you

shall pay your reasonable share for this duty performed by the boom company.

The principle is not an uncommon nor an unusual one. It has been asserted in many cases, and no better instance can be suggested (that has often been before the courts) than the one suggested, on the argument, of the case of a pilot. In the sea ports of this country, and the sea ports of all nations, it has been found necessary that a body of men skilled in piloting the narrow and tortuous channels which lead to ports or harbors should exist. It is for the good of all concerned in commerce that such a body should exist. They must be paid also by the vessels or the parties who need their services, and who use them, and it has been the custom and the law, from time immemorial, that this body of men shall be taken, in the order in which they present themselves to the ship. A pilot is always found outside of the entrance to a harbor. He stays there, and it is his duty to be there, and his right. It is his right to be taken by that ship and paid by that ship, and if the ship refuses to take him, choosing to use a pilot of her own, the laws make her pay either whole pilotage or half pilotage, just the same as though he had performed the service, and the reason of the rule has never been disputed. It cannot be disputed, because, in the pursuit of a common interest, for the benefit of a whole community, the parties who might have the use of the pilot, the parties for whom the service is provided, are to pay for it whether used or not.

Something is said in this case about the organic law admitting the state into the Union; about the old act for the government of the north-western territory. We have long ago decided that the original act concerning the north-western territory ceased to be of any force when congress and the state chose to organize and admit the state into the Union. That ordinance, then, is of no force in such a state. Nor do I think it worth while, myself, to notice the argument about the provision in the law admitting Minnesota into the Union; about all navigable streams being preserved for the use of the citizens of the different states free of toll. This is no toll for navigation, in the ordinary sense. The word "navigation," in all the statutes of the United States, and in the constitutions and all the treaties, does not mean the running of saw-logs down a river; and that is about all that is necessary to say.

We are of the opinion that the action in this case is not sustainable, and judgment will be rendered for the defendant.

It is proper to say that many statutes of many states, for the very purpose of preserving these small streams for the use of saw-logs and various kinds of smaller water-craft, declare such streams navigable. There is hardly a stream in the western country that can float a log that has not, by statute of the state, been declared to be navigable, to prevent people from putting dams across it; but that has nothing to do with the great point of the navigability of streams of the United States

concerning interstate navigation or international navigation. Those are statutes made by the states for their own uses, and they can declare, and often do declare, that a little branch is a navigable stream. That does not make it so, within the meaning of any constitutional provision, treaty, or ordinance of the United States.

MANVILLE *v.* BELDEN MINING CO.

(*Circuit Court, D. Colorado.* June 28, 1883.)

CORPORATION—ACTION FOR MONEY HAD AND RECEIVED—CHARTER.

A corporation, like a natural person, may be compelled to account for the benefits received from a transaction, even if it be one not enforceable by reason of the fact that its agents have no right to make it, unless it be in its nature illegal or immoral; and if the agreement under which the corporation has received and appropriated money or property cannot be enforced, it cannot be heard to refuse to account on the ground that it had no power under its charter to take it, and action may be sustained, without reference to the agreement, to recover whatever money may be justly due for the value received.

On Demurrer to Answer.

Mr. Branson, for plaintiff.

Henry T. Rogers, for defendant.

MCCRARY, J., (*orally.*) The plaintiff declares, first, upon a promissory note executed in the name of the defendant corporation by an agent, and as a further and separate cause of action he avers, in paragraph 3 of the complaint, that, during the year 1881 and 1882, this plaintiff, at the special instance of the defendant, advanced to said defendant, and for its use and benefit, at different times, various sums of money, amounting in the aggregate to the sum of $3,166, no part of which has ever been paid, or the interest accrued thereon, except the sum of $275.

To this defendant answers, among other things, that it is a corporation, and that one of its by-laws is as follows: "No debt shall be contracted for or in the name of the company, except by order of the board of directors, and then not in excess of the funds actually in the treasury."

It is averred that the debt set out in the said third paragraph of the complaint was not contracted by order of the board of directors, and that at the time it purports to have been contracted there was no money in the treasury of the company. To this portion of the answer the plaintiff demurs. I consider the third paragraph of the complaint as a claim for money had and received by the defendant from the plaintiff. It avers that the plaintiff advanced money to the amount of $3,166 to said defendant, at its special instance and request, and for its use and benefit. Under this allegation it will be competent for the plaintiff to prove that he furnished, advanced,

or loaned money to the defendant, which the defendant received and used; and if this proof is made, it will be no answer to show the limitation of the powers of the defendant, contained in the by-laws above quoted. It is insisted that under some peculiar provisions of the statute of Maine, under which this corporation was organized, its by-laws have the force and effect of charter provisions; that all persons must take notice of them. I do not inquire into the soundness of this claim, as, even if it be admitted, if the third paragraph of the complaint is true the defendant is liable. A corporation, like a natural person, may be compelled to account for the benefits received from a transaction, even if it be one not enforceable by reason of the fact that its agents have no right to make it unless it be in its nature illegal or immoral. If the agreement under which the corporation has received money or property cannot be enforced, an action may be sustained without reference to the agreement to recover whatever money be justly due for the value received. A corporation that has received money or property from another, and appropriated it, cannot be heard to refuse to account for it on the ground that it had no power under its charter to take it. See rule 14, p. 121, Mor. Priv. Corp. and cases cited.

The demurer to so much of the answer as sets up the defendant's want of power, as a defense to so much of the answer as is contained in the third paragraph, is sustained.

RHODES and others *v.* CLEVELAND ROLLING-MILL Co.

(*Circuit Court N. D. Illinois.* July 28, 1883.)

1. PAROL EVIDENCE—TO EXPLAIN WRITTEN CONTRACT.
   While parol evidence is not admissible to vary or change the terms of a written contract, it is frequently admissible for the purpose of ascertaining what was the intention of the parties, or the meaning which they intended to attach to the expressions used in the contract.
2. SAME—CONTRACT TO DELIVER PIG-IRON—BREACH.
   The contract in this case, claimed to have been broken by defendant, construed, and *held* that there was nothing to justify defendant in claiming that under said contract the whole amount of pig-iron to be delivered by plaintiffs to them was to be delivered before the end of the year, but that defendant must be held to have known of the capacity of the mill from which the iron was to be produced, and that its refusal to receive the iron after the close of the year was a breach of its contract with plaintiff, and that plaintiffs were entitled to damages therefor.
3. SAME—MEASURE OF DAMAGES.
   Ordinarily, the measure of damages for a breach of a contract of sale is the difference between the price which defendant, by the contract, agreed to pay, and the market value of the property at the time he refused to perform the contract.
4. SAME—NOTICE OF REFUSAL TO ACCEPT PROPERTY—TENDER.
   Where, however, defendant notifies plaintiff that no more of the property will be received after a date specified, and after such notice plaintiff tenders

the balance of the property under the contract, if the price of the property has advanced between the time of such notification and the date of the tender, so as to make less difference between the contract price and the market price, the difference between the market price and the contract price at the time of the tender would be the measure of damages.

At Law.

Emery A. Storrs, for plaintiffs.

Lawrence, Campbell & Lawrence, for defendant.

BLODGETT, J. This is a suit to recover damages for the breach of an agreement in writing made between the plaintiffs and the defendant, on the sixteenth day of February, 1880, whereby plaintiffs sold to defendant the entire product of 14,000 tons of iron ore, which was to be manufactured into pig-iron with charcoal by the Leland Furnace Company, of Leland, Michigan, which was to be shipped in vessel cargoes as rapidly as possible to the defendant at Cleveland, Ohio, during the season of navigation of 1880, and such portion of the product of said ore as should be made after the close of navigation for the season of 1880, was to be shipped by vessel to Cleveland on the opening of navigation for the season of 1881, or as near the opening as possible, and for which iron the defendant agreed to pay plaintiffs $45 cash per ton of 2,240 pounds as rapidly as the same was delivered on the arrival of the vessel at Cleveland. The plaintiffs caused to be manufactured and delivered by the Leland Iron Company to defendant, in pursuance of this contract, before the close of navigation of 1880, 3,421 tons and 480 pounds of pig-iron from the ore mentioned in the contract.

On the twenty-third of February, 1881, defendant notified the plaintiffs that it did not recognize any contracts with plaintiffs for pig-iron made after December 31, 1880, claiming that the contract had expired at that time; and on the first of March, 1881, defendant reiterated this notice to plaintiffs by telegraph in the following words: "Your contract to manufacture pig-metal for us gives you no authority to do so after December, 1880." And the substance of this telegram was repeated in a letter from the president of the defendant company to plaintiffs under date of March 3d. Afterwards, and about May 13, 1881, defendant offered to take the quantity of iron made prior to the first of January, and which had not been shipped, and which amounted to about 1,500 tons, with the understanding that they should be released from the obligations to receive any more iron under said contract. This offer was rejected by plaintiffs. Between the ninth of May and the second of July, 1881, the Leland Iron Company, for plaintiffs, shipped from Leland, Michigan, to the defendant the remainder of the iron manufactured out of said ore, and tendered the same to defendant at Cleveland, in conformity with the terms of plaintiff's contract with defendant; the amount so shipped in 1881 being 4,653 tons and 390 pounds, which defendant refused to receive. This suit is now brought to recover damages for this alleged breach of defendant's contract.

The facts which seem to me material to the decision of this case are briefly these:

Prior to January 14, 1880, the plaintiffs had made contracts with the Cleveland Mining Company for the purchase of 6,000 tons of iron ore, to be mined from the mine of said company, and with the Menominee Mining Company for the purchase of 5,000 tons of iron ore, to be mined from what was known as the "Norway mine," owned by said Menominee Mining Company; and with the Rolling-mill Mine Company for the purchase of 1,500 tons of ore, to be mined from the mine of said company; and with the Lumberman's Mining Company for the purchase of 1,500 tons of ore, to be mined from the "Stevenson" mine, owned by said company,—all said ores to be delivered by said mining companies to plaintiffs before the first of October, 1880; and on the fourteenth of January plaintiffs entered into an agreement in writing with the Leland Iron Company, who was the owner and manager of a furnace located at Leland, Michigan, by which plaintiffs sold to said Leland Iron Company the said 6,000 tons of "Cleveland ore," 5,000 tons of "Norway ore," 1,500 tons "Rolling-mill ore," and 1,500 tons "Stevenson ore," and agreed to purchase the entire product of the pig-iron to be made with charcoal from the said ores, for which plaintiffs were to pay the said Leland Iron Company at the rate of $40 per ton, delivered over the rail at Chicago, or $40.25 per ton, delivered in the same way at Cleveland, Ohio, at the option of plaintiffs,—the plaintiffs to provide proper dock facilities for the prompt unloading of vessels; and the Leland Iron Company agreed to manufacture pig-iron from the said ores, as nearly as practicable, of the "grade which the plaintiffs might desire, and to ship the same in cargo lots, as rapidly as possible after manufacture, during the season of navigation, to said plaintiffs, to Chicago or Cleveland, as aforesaid;" the plaintiffs agreeing that said ores should be delivered to the Leland Iron Company, 1,500 tons in May, 1880, and 2,500 tons each month thereafter, as nearly as may be; all to be delivered to vessels before November 1, 1880, and in suitable quantities of each for the mixture desired by said plaintiffs. There is no doubt, from the proof, that plaintiffs commenced the shipment of ore to the Leland Iron Company as early in the season of 1880 as navigation permitted, and that between the opening of navigation, 1880, and the first day of November of that year, there was delivered by the plaintiffs to the Leland Iron Company ore in pursuance of said contract as follows:

Cleveland ore,	5,980 tons.
Norway ore,	4,405 "
Rolling-mill ore,	1,478 "
Stevenson ore,	2,305 "
Making a total of	14,168 tons.

The Leland Iron Company, in pursuance of their contract with the plaintiffs, immediately on the receipt of said ore commenced the manufacture of pig-iron therefrom, as called for by their contract, and continued to manufacture and ship said iron, so that the quantity before named, of 3,421 tons and 450 pounds, was manufactured and duly delivered before the close of navigation, 1880, and defendant accepted and paid for the same; that the furnace of the Leland Iron Company was run to its full capacity, and there was no delay in the manufacture of iron by the furnace, save an unavoidable delay of about six days by reason of the breaking of an elevator; and that at the time of the last shipment there was nearly a cargo of iron ready for shipment, which it was intended in good faith to ship that fall, but the vessel was prevented from getting to the pier at Leland by reason of the unusually early closing of navigation that season. After the close of navigation for the season of 1880, the furnace continued the manufacture of said ore into pig-iron during the winter and

ensuing spring, and on the eighth of May, 1881, and from that time on until the second of July, 1881, shipments were made in cargo lots to the amount of 4,653 tons and 350 pounds of iron, made from said ore so sold by plaintiffs to the iron company. The proof shows clearly that the Leland Iron Company resumed the shipment of pig-iron, made from this ore, in cargo lots as soon as possible after the opening of navigation in the spring of 1881, and continued such shipment until the whole lot was shipped. It also shows that at the time of the opening of navigation the whole of the ore had not yet been manufactured, but what remained unworked at the opening of navigation was manufactured and ready for shipment as soon as the same could be readily shipped from Leland in the due course of business, after the shipment of that on hand, at the opening of navigation.

In the contract between plaintiffs and defendant it was provided "that in case of accident or strikes at the Leland furnace, resulting in the stoppage of said furnace, then the plaintiffs are not to be held responsible for the delivery of pig-iron under this contract beyond the responsibility of the Leland Iron Company to them under the contract between plaintiffs and the Leland Iron Company;" and the contracts between the plaintiffs and the mining companies of whom they had purchased the ore, and the contract of the plaintiffs with the Leland Iron Company for the sale of said ore and its manufacture into pig-iron, and the purchase thereof by plaintiffs from the Leland Company, were made a part of the contract between the plaintiffs and defendant. The defendant now contends that the legal construction of the contract with the plaintiffs requires that all this pig-iron was to be manufactured during the year 1880, and it is upon this construction of the contract that defendant insists that it had the right to refuse to receive any iron manufactured after December 31, 1880. This construction is contended for by defendant mainly upon the last clause in the contract between the plaintiffs and the Leland Iron Company, in which the latter agrees to manufacture pig-iron from said ores, "and to ship same in cargo lots as rapidly as possible after manufacturing, during season of navigation, to said Rhodes & Bradley, to Chicago or Cleveland."

While it is undoubtedly true that parol evidence is not admissible to vary or change the terms of a written contract, it is frequently admissible for the purpose of ascertaining what was the intention of the parties, or the meaning which they intended to attach to the expressions used in the contract. *Doyle* v. *Teas*, 4 Scam. 226. The proof in this case shows that while the negotiations were in progress between the plaintiffs and the defendant which resulted in the contract now in question, the defendant was informed that the capacity of the Leland Iron Company's furnace was from 20 to 25 tons per day. The proof also shows that at the time this contract was made this furnace had never exceeded an average product of 17½ tons per day during any year after it was built, which was in 1869. The defendant was certainly chargeable with notice as to the geographical location of Leland, Michigan, where this furnace was situated; with knowledge of the fact that it was upon the eastern shore or coast of Lake Michigan, a short distance south of the entrance to Grand Traverse bay, and in a place comparatively difficult of access for vessels; that it had no natural or artificial harbor, but depended upon piers built out into the lake in an open roadstead. Knowing that this iron was to be manufactured at this furnace, defendant, in my estimation,

was chargeable with notice of the capacity of this furnace, or had at least sufficient notice to put it on inquiry, and that from this known capacity it was impossible for the furnace to manufacture 14,000 tons of iron ore into pig iron between the opening and the close of navigation for the year 1880. And so, also, before the furnace started in the spring, but after the contract between the parties was made, the defendant was notified by letter from the plaintiffs that the managers of the furnace hoped the product would be from 25 to 30 tons per day. The language of this letter is: "We think the furnace ought to make from 25 to 30 tons per day, perhaps more; cannot tell until she gets well under way. We make 50 tons at Bangor. The Leland may come up to that, as Henry Ford, who used to be at Bangor, is at Leland now." To this information as to the probable product of the furnace, defendant took no exception, and made no objection, and the furnace, as the proof shows, from the time it started until the close of navigation, made an average of about 22½ tons of pig-iron per day. After the close of navigation there was at one time a suspension of about two weeks for want of charcoal; and at another occasion it ran for a time under check for want of a sufficient supply of charcoal. The proof does not show by whose fault this suspension and delay occurred, but assuming that it was the fault of the Leland Company, it cuts so unimportant a figure in the rights of the parties, that I think very little consequence should be attached to it. If there was some slight delay it could have been corporated in damages to defendant, but there is no proof that defendant sustained any damage by such delay, and, in my estimation, it furnished no valid reason why defendant should be allowed to rescind the contract. Reading the contract between the plaintiffs and the Leland Iron Company in the light of the facts, as to where this furnace was situated and its capacity, no sane man would have a right to expect that this 14,000 tons of ore would be fully manufactured into pig-iron between the middle of May and the thirty-first of December, 1880. The total product of this ore in round numbers was 8,000 tons, which, at 25 tons per day, would take 320 full working days, and it could hardly be expected that a run of that extent could be kept up for 320 consecutive working days. Allowance must be made for accidents, delays, and the failure of human calculation to some extent, of which business men making contracts for performance in the future must take some notice. And therefore I hold that it must have been in the contemplation of these parties, at the time of making this contract, that this iron could not and would not be made by or before the end of the year 1880. The words "shipped as rapidly as possible after manufacture, during season of navigation," in the contract between plaintiffs and the Leland Company, do not, in my estimation, imply of themselves that the shipment was to be made during the season of navigation of the year 1880. But inasmuch as the Leland Iron Company was to transport this iron in vessel cargoes to Chicago or Cleve-

land, where the same was to be delivered to the plaintiffs, they had the right to suspend such transportation during the suspension of navigation, so that what was not manufactured and shipped during the season of navigation of 1880 was to be manufactured afterwards and shipped during the season of navigation of the next year or years.

This contract between plaintiffs and defendant provided in express terms for delays by accidents or strikes at the Leland furnace, resulting in the stoppage of said furnace and at the mines, and it may be readily imagined that a contract of this magnitude might not have been executed by reason of contingencies thus anticipated, even beyond the season of 1881. I am, therefore, of opinion that nothing in the contract between the plaintiffs and the Leland Iron Company justifies the assumption that this iron was to be all manufactured before the first of January, 1881. The terms of the contract between the plaintiffs and defendant certainly seem to have contemplated that all the iron would not be manufactured during the year of 1880. The provision is that the iron is to be shipped in vessel cargoes to the defendant at Cleveland during the season of navigation of 1880, and such portion of the product of said ore as is made after the close of navigation of 1880 is to be shipped by vessel to Cleveland on the opening of navigation of 1881, or as near the opening as possible. Certainly this language is so used as to clearly convey the idea that the parties intended and expected that a portion of this ore would not be manufactured into pig iron during the year 1880, and that the manufacture of what was not made and shipped before the close of navigation of 1880 was to go on and be completed, and the shipments made as rapidly as possible on the opening of navigation for the season of 1881. The words "as soon as possible," here used, are equivalent in their legal effect and meaning to the words "with all reasonable diligence," or "without unreasonable delay;" and there is nothing in the proof in this case to show that there was any unreasonable delay; and yet, as early as January 1, 1881, the defendant, by telegram to the plaintiffs, intimates that it wishes to know the amount of iron on hand manufactured up to December 31, 1880, and the later communications from the defendant to the plaintiffs show that this information was for the purpose of enabling the defendant to take the position that it would only receive so much of such iron as was manufactured up to and including the said thirty-first day of December.

There is nothing in the terms of the contract which fixes any certain or definite time within which the manufacture and delivery of this iron is to be fully accomplished. It was to be made with all reasonable dispatch by the use of the means at the command of the parties. Neither plaintiffs nor the Leland Company were bound to erect a new furnace or build vessels for the purpose of this contract. When the defendant notified the plaintiffs, the last of February or first of March, that it would receive no iron made after the first of

January, and in May gave notice that it would receive what was made up to and including December 1st, on condition of being discharged from further obligation under the contract, I have no doubt that a legal breach of this contract occurred, and the plaintiffs would have the right to treat the contract as repudiated by the defendant at that time; and plaintiffs were under no obligation to make the tender which they subsequently made of the iron. The plaintiffs, however, by their contract with the Leland Iron Company, were bound to receive this iron at Cleveland or Chicago, at the price fixed in their contract, and, I suppose, the plaintiffs were subjected to no special inconvenience or cost in making a tender of these cargoes, as the Leland Iron Company shipped them during the months of May, June, and July, 1881. The only legal effect of this tender, after the defendant's repudiation of the contract, it seems to me, was to keep the contract alive, so far as to enable the defendant to recede from its repudiation and accept the iron when tendered, and, perhaps, to give the defendant the benefit of any advance in the price; that is to say, if the defendant, after having given notice that it would not accept this iron, had, when these cargoes were tendered it from time to time, seen fit to accept it, it would have been a good performance on both sides, and have fully condoned the breach which was committed by the defendant at an earlier day, by their notice that they would not accept the iron.

Defendant also insists that the ore was not delivered by the plaintiffs to the furnace company in the proportions called for by the contract; defendant assuming that the ores were to be mixed for the purposes of making this pig-iron in the proportions of the quantities from the several mines, while the proof shows that there were 20 tons less "Cleveland ore" delivered than called for by the contract; 595 tons less "Norway," 22 tons less "Rolling mill," and 805 tons more "Stevenson" than was called for by the contract. But the proof shows that the quality of the Norway and Stevenson ores was the same; that the two mines were on the same vein, and close together, so that their workings ran into each other; as one witness says, the ores of the two mines were identical in quality and value, and these two ores cost plaintiffs the same price per ton, delivered on board vessel at Escanaba. It is true that the witness Emmerton, the chemist of the Joliet Iron & Steel Company, testified that he analyzed a single sample of Stevenson ore, which showed 97-1000 phosphorus, and 10 per cent. of silica; that he also analyzed two samples of Norway ore for phosphorus, one of which showed 21-1000 phosphorus, and 22½ per cent. silica, and the other showed 53-1000 phosphorus. The large amount of phosphorus shown in this single sample of Stevenson ore is, in my opinion, no criterion of the average amount of phosphorus in the bulk of the ore from that mine. The large difference in the quantity of phosphorus in the two samples of Norway ore examined by this witness is a sufficient illustration of the fallacy of re-

lying upon the analysis of a single specimen as a test of the average result of the whole product of a mine. The testimony of this witness, therefore, does not, in my estimation, establish an appreciable difference between the ores of the two mines; at least, it does not overcome the affirmative testimony that the ores are essentially alike.

By the contract with the Leland Company, these ores were to be mixed as directed by plaintiffs. No evidence of any direction by plaintiffs or defendant as to the mixing of the ores is put into the case. The defendant accepted the entire quantity of ore shipped during the season of 1880, without any complaint as to the quality of the iron, and even offered to take all that had been made up to the first of January, 1881, and no objection was raised as to the quality of their iron. I therefore conclude that these slight shortages in the quantities of Cleveland and Rolling-mill ore are in no sense material, and, indeed, the quantities are as close as can usually be practically arrived at in the transportation by vessel cargoes of so large volumes of any commodity, and that the excess of Stevenson ore over the Norway has in no perceptible way affected the character of the product of these masses of ores, and that these facts furnish no excuse for the breach of the contract by defendant. Undoubtedly, if plaintiffs, after the notice from defendant that it would not accept any more iron on the contract, saw fit to proceed and complete the contract and tender the iron, they were bound to a substantial compliance with the terms of their contract. But I see nothing in the proof showing that they did not substantially perform their contract.

Finding, as I do, from the proof in the case, that defendant has been guilty of a breach in its contract, the only question remaining is the measure of the plaintiffs' damages. This being a contract of sale, the obvious and natural rule of damages is the difference between the price which the defendant, by its contract, agreed to pay for this iron, and the market value of the iron at the time defendant refused to perform its contract. I do not think that plaintiffs can increase or enhance the damages by the tender of performance, after the notice by defendant, on or near the first of March, that it would not accept any more iron on the contract. This was a breach by defendant which fixed the measure of its liability. The defendant knew at the time this notice was given that plaintiffs had bought this iron from the Leland Iron Company, were bound to accept and pay for it on the terms of their contract with that company, and knew, therefore, that plaintiffs would have the iron on their hands, and be compelled to dispose of it on the best terms they could if the defendant did not accept it.

The rights of complainant, therefore, seem to me the same, as to the measure of compensation, as if plaintiffs had had the iron on hand and ready to deliver, and had tendered a delivery on the first

or third of March. If, however, this iron had advanced in price between the first of March and the time the plaintiff tendered it to the defendant, so as to make less difference between the contract price and the market price, the difference between the market price and the contract price at the time of the tender would be the measure of damages. But I find from the proof there was very little difference in the price of Lake Superior iron between March and the first week in July, either in the Cleveland or Chicago markets. This iron was not a well-known brand, having a quotable market value; it was made on contract from certain ores, and had no established reputation. It may have been said to have been made for the defendant, and the defendant only, to be used in and about the defendant's business. The proof shows that plaintiffs did not put this iron on the market and attempt to sell it until about November, 1881, and that since that time they have been diligently endeavoring to sell it, but had up to the time of the trial only succeeded in disposing of about 1,000 tons, in comparatively small lots, at prices averaging about $30 per ton; but from this must be deducted expenses, such as storage, commissions for selling, etc. I do not consider these sales made by plaintiffs as any standard or criterion of the value of this iron in the spring or summer of 1881. I conclude, however, that the preponderance of proof justifies me in finding that this iron could not have been sold in any of the markets for pig-iron between the first of March and the first of August, 1881, for more than a net price of $27 per ton, which, deducted from the contract price of $45 per ton, gives the difference of $18 a ton, making a total of $82,422 as the difference between the market price of the iron and the contract price on the 4,579 tons; that is to say, I assume that the product of the 14,000 tons of ore would be, in round numbers, 8,000 tons of pig iron. Three thousand four hundred and twenty-one tons, in round numbers, were delivered in the fall of 1880, and it left 4,579 tons due on the contract after the opening of navigation in the spring of 1881. It will be remembered that there was delivered by the plaintiffs to the Leland rolling-mill the gross quantity of 14,168 tons, and the total amount of iron manufactured was 8,074; the 74 tons being manufactured, as I assume by the proof, from the excess of ore delivered by the plaintiff to the rolling-mill company, which, of course, the defendant is not chargeable with.

UNITED STATES v. STARN.

(District Court, D. New Jersey. July 24, 1883.)

1. EXCESSIVE FEE IN PENSION CASE—INDICTMENT.
   Section 31 of the act of March 3, 1873, declared—*First*, that no agent, attorney, or other person should receive as a fee in any pension case any greater compensation than might be allowed by the commissioner of pensions, not exceeding $25; and, *secondly*, prescribed the punishment for so doing. The first part of the act was made section 4785 of the Revised Statutes, and the second part, section 5485. By act of June 20, 1878, congress expressly repealed Rev. St. § 4785, and limited the fee in all cases to $10; but left Rev. St. § 5485, prescribing the penalty, still in force. On March 3, 1881, congress enacted that the provisions of Rev. St. § 5485, should be applicable to any person who should violate the provisions of the act of June 20, 1878. *Held*, that there was no statute in force during the period between June 20, 1878, when Rev. St. § 4785, was repealed, and March 3, 1881, on which the penalty prescribed by Rev. St. § 5485, could operate, and an indictment charging an offense in receiving a greater fee than allowed by the title of the Revised Statutes relating to pensions, during such period, could not be sustained.
2. PENAL STATUTES—CONSTRUCTION.
   It is a fundamental rule in the administration of criminal law that penal statutes are to be construed strictly, and that cases within the like mischief are not to be drawn within a clause imposing a forfeiture or a penalty, unless the words clearly comprehend the case.
3. SAME—PUBLIC MISCHIEF TO BE SUPPRESSED.
   In construing a statute the court should look at the public mischiefs which are sought to be suppressed, as well as the obvious object and intent of the legislature in enacting it; and in doubtful cases these have great influence on the judgment in arriving at its meaning; but where the law-making power distinctly states its design, no place is left for construction.

Motion to Quash Indictment.

A. Q. Keasbey, U. S. Dist. Atty., for the United States.

S. H. Grey and *Thos. B. Harned*, for defendant.

NIXON, J. The defendant is indicted under section 5485 of the Revised Statutes. The first count of the indictment charges that, being the agent of one Benjamin Barnes in procuring his pension, he demanded and received from the said Benjamin a compensation for his services, in prosecuting said claim, greater than was provided in the title of the Revised Statutes of the United States pertaining to pensions. The motion is to quash the said count, on the ground that when the alleged offense was committed, to-wit, on May 1, 1880, there was no provision in the title of the Revised Statutes pertaining to pensions, limiting the fee which an agent or attorney might lawfully demand and receive for his services in a pension case.

On the third of March, 1873, the congress of the United States passed an act to revise, consolidate, and amend the laws relating to pensions. 17 St. at Large, 566. By the thirty-first section it was enacted in substance: (1) That no agent or attorney, or other person, instrumental in prosecuting any claim for pension, shall demand or receive any other compensation for his services, in prosecuting a claim for pension, than such as the commissioner of pensions shall

direct to be paid to him, not exceeding $25; (2) that any such person who shall directly or indirectly contract for, demand, or receive any greater compensation for his services than is hereinbefore provided, or who shall wrongfully withhold from a pensioner the whole or any part of the pension allowed and due such pensioner, 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; (3) and if any guardian, having the charge and custody of the pension of his ward, shall embezzle the same, or fraudulently convert it to his own use, he shall be punished by fine not exceeding $2,000, or imprisonment at hard labor for a term not exceeding five years, or both, at the discretion of the court. When the commissioners appointed to revise and consolidate the statute laws of the United States (see 14 St. 74) came to this section they thought proper to subdivide it into three sections, and to place them in different parts of the Revision. The first part thereof appears under the title pertaining to pensions, and is section 4785 of the Revised Statutes. The second division was set in the sixth chapter of the title relating to crimes, and is section 5485; and the third is printed under both these titles, being numbered in the one, section 4783, and in the other, section 5486.

The commissioners were authorized, in the second section of the law appointing them, in the performance of their duties, to make such alterations as they deemed necessary to amend the imperfections of the original text. They hence inserted in section 5485, in lieu of the words of the former law, "than is hereinbefore provided," the phrase, "than is provided in the title pertaining to pensions;" referring, doubtless, to section 4785.

The law thus stood until June 20, 1878, when a new act was passed, entitled "An act relating to claim agents and attorneys in pension cases," (20 St. 243,) by the provisions of which it was made unlawful for any one to demand or receive for his services in a pension case a greater sum than $10; the second section expressly repealing section 4785 of the Revised Statutes. This enactment and repeal, upon its face, seems to have rendered it unlawful, under the provisions of the Statutes at Large, to demand or receive more than $10 for services in procuring a pension; to have removed all limits to charges in such cases from the sections of the title pertaining to pensions; and to have left standing a penalty for the violation of a section which was no longer in force. On March 3, 1881, (1 Supp. Rev. St. 602,) the congress enacted that "the provisions of section 5485 of the Revised Statutes shall be applicable to any person who shall violate the provisions of an act entitled 'An act relating to claim agents and attorneys in pension cases,' approved June 20, 1878." The offense charged in the indictment is conceded to have been committed, if at all, on the first of May, 1880,—a period of time

between the repeal of section 4785 and the passage of the last-recited law, which was intended to make the provisions of section 5485 applicable to the act of June 20, 1878.

Was there any statute then in force on which the penalty of section 5485 could operate? The question is not without difficulty, and is one respecting which able judges have differed. It was before the circuit judge of the sixth circuit (BAXTER) in the case of *U. S.* v. *Mason*, 8 FED. REP. 412, who held that the only provision in the title of the Revised Statutes pertaining to pensions, limiting the fee which might be lawfully demanded or received for the prosecution of a pension claim, was found in section 4785, and that said section having been repealed by the act of June 20, 1878, no indictment under section 5485 for receiving a greater compensation than is provided for in the title pertaining to pensions could be maintained. The late judge of the district court of the United States for the district of Indiana, (GRESHAM,) in a subsequent case, (*U. S.* v. *Dowdell*, 8 FED. REP. 881,) after considering the opinion of Judge BAXTER, reached a different conclusion, and, on a motion to quash, held that the provisions of section 5485 of the Revised Statutes were applicable to violations of the act of June 20, 1878. The question arose before me on the trial of the indictment of *U. S.* v. *Hewitt*, (11 FED. REP. 243,) where I was requested to charge the jury that the first count was bad because the alleged offense was shown to have been committed between June 20, 1878, and December 3, 1881. Not being able, in the hurry of the trial, to give the point more than a cursory examination, and conceiving, from the facts of the case, that the substantial ends of justice would be subserved by allowing the jury to pass only upon the subsequent counts of the indictment, I directed them to give the defendant the benefit of a doubt which was entertained respecting its validity; to disregard the count, and render their verdict only upon the other counts. A careful examination of the opinions of the learned judges, BAXTER and GRESHAM, plainly reveals why they differed in their conclusions. It is quite clear that the acts and intentions of congress were not the same. The former judge simply considered what congress *did*, and the latter what it *intended* to do. How far the court is allowed to control acts of congress by its apparent intents is the delicate inquiry which I am now called upon to make and decide.

It is a fundamental rule in the administration of criminal law that penal statutes are to be construed strictly, and that cases within the like mischief are not to be drawn within a clause imposing a forfeiture or a penalty, unless the words clearly comprehend the case. *The Schooner Harriet*, 1 Story, 255. In construing a statute we ought undoubtedly to look at the public mischiefs which are sought to be suppressed, as well as the obvious object and intent of the legislature in enacting it; and in doubtful cases these have great influence on the judgment in arriving at its meaning. But where the law-making power distinctly states its design, no place is left for construction.

Congress unequivocally declared that certain penalties should be inflicted upon a class of persons who violated the provisions of a section in the title of the Revised Statutes pertaining to pensions. It afterwards repealed the section to which reference was made, but left the penalties standing, and enacted a new law, without making them applicable to its provisions. I am asked to judicially supply the omission, and to do what congress omitted to do until June 20, 1881, on the ground that it was not the legislative intention to have no law upon the statute-book to which these penalties might be applied. I fear this would be judicial legislation, and I reply to the request in the apt words of the late Judge BALLARD, in the case of *U. S.* v. *Marks*, 2 Abb. (U. S.) 540:

"I have no means of ascertaining the intention of congress except from what they have said. I have no right, upon any conjectures of policy which I may entertain, to supply an intention which cannot be derived from the language employed. I am obliged to take the statute just as it is written, and to adopt that construction which its language plainly imports. I cannot stretch it to cases obviously not embraced by its terms, because such cases seem to me to be included in the policy."

The motion to quash is sustained.

UNITED STATES *v.* GAYLORD.

(*Circuit Court, S. D. Illinois.* July, 1883.)

1. POSTAL LAWS—REV. ST. § 3893—MAILING OBSCENE BOOK OR WRITING.
   Section 3893 of the Revised Statutes of the United States, as amended by the act of July 12, 1876, declares that every obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication, of an indecent character, shall be non-mailable matter, and shall not be conveyed in the mails, nor delivered from any post-office, nor by any letter-carrier, and that any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything therein declared to be non-mailable matter, shall be subject to fine or imprisonment, or both.
2. SAME—INDICTMENT.
   The indictment alleged that the defendant did unlawfully and knowingly deposit in a post-office, for mailing and delivery, (naming the time,) a certain obscene, lewd, and lascivious writing, purporting to be a letter, and inclosed in a letter-envelope, addressed to a female person at another post-office, (the post-offices and persons being named,) the said writing being so obscene it could not be set forth in the indictment. *Held*, that the writing described in the indictment was within the terms of the statute, and was non-mailable matter.

Motion to Quash Indictment.

Mr. Connolly, Dist. Atty., for the United States.

Palmers, Robinson & Shutt, for defendant.

DRUMMOND, J. At the last January term of the district court the defendant was indicted for a violation of section 3893 of the Revised Statutes, as amended by the act of July 12, 1876. A motion was

made by the defendant to quash the indictment, which was overruled; and, being arraigned before the court, he pleaded guilty; whereupon a motion was made in arrest of sentence, which, being denied by the court, the defendant was sentenced to imprisonment in one of the penitentiaries of the state. The defendant now makes an application to this court for a writ of error under the act of 1879.

There can be no doubt that it is a proper case for a writ of error to issue; but, by agreement between the counsel of the parties, the only question in controversy has been submitted to the court, and it is understood that, if the court shall be of opinion that the order of the district court as to the sufficiency of the indictment was correct, the writ of error need not issue, but otherwise that it may issue, and the necessary order be made for another trial of the case, or for the discharge of the defendant from imprisonment upon the ground that he had been wrongfully convicted. The indictment contains three counts. There is an allegation that the defendant did unlawfully and knowingly deposit, (stating the time,) for mailing and delivering in the post-office, (naming it,) a certain obscene, lewd, and lascivious writing addressed to a female person, (naming her,) at a certain other post-office, (naming it.) In all the counts what was thus deposited and addressed is described as "an obscene, lewd, and lascivious writing, purporting to be a letter, * * * and which said writing was then and there inclosed in a letter envelope."

The only objection taken to the indictment on the motion to quash, and also in arrest of the sentence of the court, was that what is thus described is not named in the statute, and does not come within the terms of the law as non-mailable matter. The language of the statute is: "Every obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character is hereby declared to be non-mailable matter, * * * and shall not be conveyed in the mails, nor delivered from any post-office, nor by any letter-carrier." And the statute adds that every person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything thus declared to be non-mailable matter, shall be deemed guilty of a misdemeanor, and subject to a fine or imprisonment, or both.

Is the offense described in the indictment within any one of the terms named in the statute; in other words, was it a book, pamphlet, picture, paper, writing, print, or other publication of an indecent character. The indictment states that the writing, purporting to be a letter, was so obscene in its character that the contents could not be set forth in the indictment. The only question, consequently, is whether it comes within the meaning of the statute.

The principal argument by the defendant is that, in the part of the section to which we must look for a description of the offense described in the indictment, the word "letter" is not used, and it is insisted that what was put in the post-office by the defendant was a letter; and as, in

another part of the section, the word "letter" is named, in speaking of what shall not be put upon the envelope of a letter, congress could not have intended by the language used to prevent an obscene letter from being carried in the mail. The word "writing," now in the statute, was placed there by the amendment of 1876, not being in the previous statutes upon the subject. The statute had previously declared non-mailable, any obscene, lewd, or lascivious book, pamphlet, picture, print, or other publication of an indecent character, and any letter upon the envelope of which, or postal card upon which, indecent or scurrilous epithets were written or printed. The indictment describes it as a writing, purporting to be a letter, and perhaps it is a fair inference from the language used that it comes within the ordinary description of a letter, which we understand to be something written or printed, as a communication or an epistle, and sent by one person to another, with the address of the person to whom it is sent thereon. The indictment does not state that the letter was sealed, and that was not necessary in order to constitute it a letter. That is just as much a letter, if written and sent in an envelope from one person to another unsealed, as if sealed. It is a matter of daily observation that in our large cities letters are constantly posted without being sealed. They are still letters.

It is claimed on the part of the defense that this must have been "a publication," because the language of the statute is, "or other publications;" so that, whether a book, pamphlet, picture, paper, writing, or print, in order to be within the meaning of the statute, it must be published; and it would follow, if a person should make an obscene picture on a piece of paper and send it in a letter through the mail to another person, no one knowing anything about the picture but the person making it and the person to whom it was addressed, that would not be within the meaning of the statute, not being "published." When we speak of a book, perhaps the ordinary understanding of that word would be that it was something published; and yet a book may be written or printed without publication; and pamphlets are often printed and not published. Indecent and obscene pictures are very frequently circulated privately, so that it might be doubtful whether they could in such case be considered as published.

On the assumption that when congress inserted, by the amendment of 1876, the word "writing" in the statute it was intended that it should be a publication and be so limited, it is difficult to understand what would be a writing in that view of the subject. As has been said, a book or pamphlet is not necessarily something published, and a mere writing, as such, may be said never to be published. It certainly would be difficult to distinctly define what is a public writing. Slanderous words spoken by one person to another are, in a sense, published. Libelous matter put in a letter and sent by one person to another and received, is also, in a certain sense,

published; and so if this necessarily means a writing published, if sent by one person to another and received through the post-office, it may be said to become public.

If the book, pamphlet, picture, paper, or writing referred to in the section, as amended, must necessarily be a publication, this last word qualifies all the other words, the result of which would be that the clause would read, "every obscene, lewd, or lascivious, * * * other publication of an indecent character," which would render the last additional words superfluous.

"Paper" is a word of very extensive meaning. It may comprehend anything that has on it what is obscence, lewd, or lascivious.

A letter is certainly a writing. If addressed by one person to another, while we may call it a letter, it is also a writing, whether the characters are made with a pen, or by type, or in any other similar manner. A very common practice in writing letters at the present day is the use of the "type-writer," as it is termed. That would certainly be a writing, although the letters and words are marked by a machine upon the paper; and so if the words were printed with a pen, instead of being made in a running or flowing hand. The mere fact that they were not written with a pen and ink of the ordinary kind would not prevent it from being a letter; neither would any of these forms prevent it from being a writing, within the meaning of the statute.

It is claimed in the argument that the word "writing" cannot mean letter, because the latter word is used in the same section in which is declared non-mailable, "every letter upon the envelope of which, or postal card upon which, indecent, lewd, obscene, or lascivious delineations, epithets, terms, or language may be written or printed." Now, if in construing this part of the statute we are limited to the technical meaning of the word "letter," then, if a person should inclose in an envelope addressed to another a harmless picture, or even the "sermon on the mount," or should inclose nothing in the envelope, and cover it with obscene pictures or language, and deposit it in the post-office to be transported in the mail, he would not be guilty of a violation of this clause of the statute, because it would not be a letter inclosed in an envelope; and yet it would be difficult to state why that is not within the meaning and intent of the law, and so would subject the person to the penalty thereby imposed. Suppose a letter is written, and it is not inclosed in any envelope, but is folded up and addressed on the very paper upon which the letter is written, as was generally the case many years ago, when postage on a single letter was 25 cents; now, in the case supposed, there is no envelope, such as that literally described in the statute, but if the writer or any one else should cover the outside of that letter, thus written and folded, with obscene pictures or language, and deposit it in the post-office to be carried in the mail, would any one pretend that was not a viola-

tion of the statute, simply because it was not a letter inclosed literally within an envelope? Would not the letter itself constitute an envelope?

Again, the fact that the thing described may be sealed up and subject to letter postage does not prevent it from coming within the terms of the statute. An obscene book may be sealed up, the wrapper in which it is inclosed may be sealed, and it may be subject to letter postage: that does not prevent it from being non-mailable matter. The statute does not discriminate between what is sealed and unsealed, for in whatever way it may be sent, if obscene, it is non-mailable. If an obscene writing, purporting to be a letter, is deposited in a post-office in an envelope unsealed, if that is non-mailable matter it does not become mailable simply by sealing it, and thereby preventing the employes of the post-office from examining what it is. Suppose an obscene published, printed pamphlet or picture is inclosed in an envelope, sealed, posted, mailed, and subject to letter postage and prepaid;—is that a *letter* within the meaning of that part of the section which declares upon the envelope of which there shall not be any indecent, lewd, obscene delineations, epithets, terms, or language written or printed? If we are to "stick in the bark" in relation to every word used in the statute, then that would not be a letter and within its terms. If, upon the sealed envelope of a pamphlet or picture, there should be what the statute says shall not be upon the envelope of a letter,—if that is to be the construction of the statute,—it makes no difference what obscene language or delineations may be put upon the envelope of the pamphlet or picture thus described, because it is sealed up and subject to letter postage, and because it is not a letter such as is described in the statute, nor is it a postal card. According to the construction claimed by the counsel of the defendant in this case, the post-office authorities would be obliged to send through the mail books, pamphlets, pictures, papers, writings, and prints which had been published, and which were inclosed in sealed envelopes, and upon which last there were words or pictures contrary to the terms of the statute as to letters and postal cards. It is not possible that this distinction can be maintained.

In carrying out the object had in view as described in the statute, it may be admitted that the post-office authorities have not the right, of their own motion, to break open any packages sealed up and subject to letter postage. The supreme court of the United States says, in *Ex parte Jackson*, 96 U. S. 727:

"While regulations excluding matter from the mail cannot be enforced in a way which would require or permit an examination into letters or sealed packages subject to letter postage without warrant issued upon oath or affirmation in the search for prohibited matter, they may be enforced upon competent evidence of their violation obtained in other ways, as from the parties receiving the letters or packages, or from agents depositing them in the post-office, or others cognizant of the facts; and as to objectional printed mat-

ter, which is open to examination, the regulations may be enforced in a similar way by the imposition of penalties for their violation through the courts, and, in some cases, by the direct action of the officers of the postal service. In many instances those officers can act upon their own inspection, and, from the nature of the case, must act without other proof, as where the postage is not prepaid, or where there is an excess of weight over the amount prescribed, or where the object is exposed and shows unmistakably that it is prohibited, as in the case of an obscene picture or print. In such cases no difficulty arises, and no principle is violated in excluding the prohibited articles or refusing to forward them. The evidence respecting them is seen by every one, and is, in its nature, conclusive."

S. C. 14 Blatchf. C. C. 245; and see *U. S.* v. *Foote*, 13 Blatchf. C. C. 418.

In order to arrive at the true meaning of some of the words in one part of the section, it is proper to examine different words in another part, so that we can see the result which would follow from the same narrow construction of that part of the section in controversy here, if applied to other parts of the same section, and therefore it is that we have cited from other parts of the section and used the illustrations mentioned. It is true that a criminal or penal statute should receive a strict construction; but it must be a reasonable construction, in reaching which must be considered the object the legislature had in view in the words used. Here it is manifest that congress intended to purge the mails, to prevent anything of the character described from being deposited in a post-office for mailing or delivery, or to be carried in the mails, and it would seem immaterial whether the thing prohibited is inside or outside of an envelope, and it would therefore appear to be unreasonable to hold that congress intended not to allow a decent writing to be put in an obscene envelope, but at the same time to permit an obscene writing to be put in a decent envelope. Each would clearly appear to be within the meaning of congress, and the very thing which the statute intended to prevent.

I have examined the case of *U. S.* v. *Williams*, 3 FED. REP. 484, in which it is stated, at the close of the opinion of the commissioner, that the case was not given to the grand jury, from which, perhaps, the inference is that it was not so given for the reasons stated; and also the case of *U. S.* v. *Loftis*, 12 FED. REP. 671, where a different view is taken of the statute from that now expressed; but I think the construction given to the statute in each of those cases is too narrow, and, if sustained, would tend in a great measure to prevent the object which congress had in view in the amendment of 1876.

It follows, from what has been said, that I am of the opinion the conviction in this case was right; and the defendant having admitted the allegations of the indictment to be true; that the language used in the indictment brings the case within the statute. As there has been a different view taken of the statute from that here given, this opinion has been submitted to Mr. Justice HARLAN, and he concurs

with me in the conclusion that the writing described in the indictment comes within the terms of the statute, and that it was non-mailable matter.

UNITED STATES *v.* HANOVER..

(*S. D. Ohio.* August, 1883.)

This case was submitted several weeks ago. One of the questions involved presented much difficulty, which was increased by the conflict in the decisions thereon. After I had examined the matter with much care, I learned that the question was before Judge DRUMMOND on error. I have had the benefit of the able briefs of counsel in that case, and being advised by Judge DRUMMOND that he would shortly announce his decision, I thought it best to hold this case until that time. Having received his opinion[1] a few days ago, I am now ready to dispose of this case.

The defendant is charged with depositing in the Cincinnati post-office, for mailing and delivery, an obscene, lewd, and lascivious writing, to-wit, a letter, addressed to one Mrs. Kate Walker, in said city, which said writing was of an indecent character. The prosecution is brought under section 3893, Rev. St., as amended by the act of July 12, 1876, which provides that "every obscene, lewd, or lascivious book, pamphlet, picture, paper, *writing*, print, or other publication of an indecent character, * * * is hereby declared to be non-mailable matter, * * * and a person who shall knowingly deposit, * * * for mailing or delivery, anything declared by this section to be non-mailable matter," shall be punished, etc. Testimony was introduced by the government showing that the defendant wrote and deposited the letter as charged. It also appeared that the letter was inclosed in a sealed envelope. Upon the conclusion of the government's testimony in chief, counsel for defendant moved for the discharge of the accused, and upon that motion finally submitted the case.

Counsel urged that the motion should be granted:

(1) Because the letter is not obscene, lewd, lascivious, or of an indecent character. While it may be that all the words used in the letter, taken by themselves, would be entirely harmless, yet viewed as a whole the letter is grossly lascivious and indecent. The words should not be passed upon separately, but in the connection and association in which the defendant has placed them. And without going into the matter more fully, it is sufficient to say that I am satisfied this objection is not well taken.

(2) Because the statute does not embrace a sealed letter. It is insisted that a comparison of the present with cognate provisions of the statute, shows that congress did not intend to exercise any censorship over the contents of sealed letters; that congress meant to protect the post-office employes and others in whose hands indecent articles might come, rather than the person to whom the prohibited articles might be sent, and that to come within the statute the article must be a "publication."

Judge DEADY, in *U. S.* v. *Loftis*, 12 FED. REP. 671, and U. S. Com'r HILL, in *U. S.* v. *Williams*, 3 FED. REP. 484, had held, substantially, that such was the correct construction of the statute. Opposed to that view was the decision of Judge SAMUEL H. TREAT, of the southern district of Illinois, in *U. S.* v. *Gaylord*, notes of his oral opinion having been furnished me. Thus stood the decisions when this case was submitted. At first I was strongly inclined

[1] *U. S.* v. *Gaylord*, *ante*, 438.

to the former view and to discharge the prisoner; but a fuller examination has satisfied me that such is not the true construction of the statute. Some of the reasons may be briefly stated.

I think congress designed to prevent the use of the mail for carrying obscene matter, in whatever form it might be, and thus incidentally to protect the receiver of a letter; that it intended more than merely preventing such material going into the mail exposed to the view of those into whose hands the packages might pass. As was said by Judge BENEDICT in *U. S.* v. *Foote*, 13 Blatchf. 418, 420,—a prosecution under the clause of section 3893, punishing the sending of articles to prevent conception, etc.,—"The object of the statute is not to protect the morals of post-office employes, but to prevent the mails of the United States from being the effectual aid of persons engaged in a nefarious business, by being used to distribute their obscene wares. To exclude from the statute all letters which, to the outward appearance, are harmless, would destroy its efficacy, for everything then would take the form of a sealed letter. It is not the form in which the matter is mailed, but the character of the matter itself, which fixes the criminality of the act."

The statute upon the subject of obscene matter, prior to the amendment of 1876, included only "books, pamphlets, pictures, papers, prints, or other publications," but by the amendment "*writing*" was added to the enumeration. That is a very comprehensive term. A written letter is certainly a writing. See Webst. Dict. "Letter," "Writing." Congress undoubtedly had a purpose in making the amendment. Can it be that it was intended to apply only to the limited instances in which writings are sent through the mails unsealed, or only to such writings as are not, in any sense of the term, letters? I think not.

It can hardly be questioned that a "book, pamphlet, picture, paper, or print" would still be unmailable, although inclosed in a sealed package. In *U. S.* v. *Foote*, *supra*, a sealed letter was held to be within the clause of section 3893, prohibiting the mailing of articles to prevent conception, etc. In *Re Jackson*, 14 Blatchf. 245, Judge BLATCHFORD held that section 3894, punishing the use of the mails for transmitting letters or circulars concerning lotteries, embraced a sealed letter relating thereto. Why should a "writing" be taken out of the statute merely by sealing the envelope?

To give the effect claimed to the phrase "or other publication," is to take away, by general words, that which is given in particular. That is opposed to a recognized canon of statutory construction. "It is a rule of right reason that general words may be qualified by particular clauses of a statute, but that, on the other hand, a thing which is given in particular, shall not be taken away by general words." Sedgw. St. & Const. Law, 423. But beyond this, grant that there must be a "publication" of the article, yet the sending of a letter to the person to whom it is addressed, although in a sealed envelope, is a publication. "Every communication of language, by one to another, is a publication." Townsh. Sland. & Lib. (3d Ed.) p. 146, § 95. And the sending of slanderous matter merely to the person slandered, is a publication within the law of criminal libel. 3 Greenl. Ev. p. 183, § 169.

The security of private correspondence is in no way endangered by this construction of the statute. No right of search is possessed by the postal authorities, except by obtaining the proper warrant. *Ex parte Jackson*, 96 U. S. 727. But persons outraged by being made the recipients of the obscenity some miscreant has sent them, should be able to effectually punish any one using the mails for such purpose.

Undoubtedly the defendant is entitled to the benefit of doubt as to the proper construction of the statute. But courts are not established to seek out some loop-hole through which criminals may escape. If the language used by the legislature fairly includes the evil complained of, it should be so construed.

But I will not extend this further. The learned and elaborate opinion of Judge DRUMMOND (concurred in by Justice HARLAN) affirming the judgment in *U. S.* v. *Gaylord*, *supra*, (see Chi. Leg. News, Aug. 11, 1883, p. 392,) fully sustains the conclusion I have reached.

The defendant will be held to answer to the grand jury.

J. C. HARPER, U. S. Com'r.

Congress has power, under the constitution, to provide what shall be mailable matter, and to prescribe punishment for mailing prohibited matter.[1] It is not necessary that an indictment under section 3893, in respect to a book, should set forth *in hæc verba* the alleged obscene book, or the alleged obscene passages in it, if the indictment state that such book is so indecent that it would be offensive to the court, and improper to be placed on its records, and that, therefore, the same is not set forth in the indictment, and if the book is sufficiently identified to apprise the defendant what book is intended.[2] An indictment for introducing obscene pictures into a school need not particularly describe the pictures.[3] An indictment for depositing for mailing a notice of where an article for the prevention of conception may be obtained should set out the notice, unless it cannot be copied without great inconvenience, or is so obscene as to be unfit to go upon the public records.[4] Where there is any reason for a failure to set out the notice, apparent upon the face of the papers or indictment, the court will consider it.[5] But where there has been a failure, without excuse, to set out the instrument in the indictment, it will not be admissible in evidence.[6] An indictment that sets out the obscene publication according to its purport and effect, and not *in hæc verba*, is fatally defective.[7] The court of appeal of England, in the celebrated *Bradlaugh and Besant Case*, held that in an indictment at common law for publishing an obscene book, where there was no reason alleged in the indictment for omitting to set it out, that it is not sufficient to describe the book by its title.[8] *U. S.* v. *Bennett*[9] passes upon a variety of questions of practice under section 3893, Rev. St.

The test of obscenity is whether the tendency of the matter is to deprave and corrupt the morals of those into whose hands a publication of that sort may fall.[10] The term "indecent" in section 3893, in connection with the offense defined in said section, taken with the history of the legislation upon the subject, means immodest, impure; and language which is coarse, or unbecoming, or even profane, is not within the inhibition of the act.[11]

The act of July 12, 1876, in respect to mailing matter giving notice as to the prevention of conception, etc., construed, and *held* not to extend to a sealed letter written by the defendant to a person who had no existence, in answer to a decoy letter by a detective, and which on its face gives no information of the prohibited character.[12] Knowingly depositing in the mail, by the publisher, a newspaper containing a quack medical advertisement giving information how and where articles for the production of abortion and prevention of conception could be obtained, *held*, to be a violation of section 3893.[13]

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1 Ex parte Jackson, 97 U. S. 727; U. S. v. Bennett, 16 Blatchf. 338.

2 U. S. v. Bennett, 16 Blatchf. 338.

3 State v. Pennington, 5 Lea, (Tenn.) 506. See, also, Com. v. Holmes, 17 Mass. 336; Com. v. Sharpless, 2 Serg. & R. 91; People v. Girardin, 1 Mich. 91; State v. Brown, 1 Williams, (Vt.) 619.

4 U. S. v. Kaltmeyer, 16 Fed. Rep. 760.

5 Id.

6 Id.

7 Com. v. Tarbox, 1 Cush. 66.

8 Bradlaugh v. The Queen, L. R. 3 Q. B. Div. 607. See, also, Knowles v. State, 3 Day, 103; State v. Hanson, 23 Tex. 232; People v. Hollenbeck, 52 How. Pr. 502.

9 16 Blatchf. 338.

10 U. S. v. Bennett, 16 Blatchf. 333.

11 U. S. v. Smith, 11 Fed. Rep. 663.

12 U. S. v. Whittier, 5 Dill. 35. Also see *quære* of Judge MCCRARY upon this question in U. S. v. Kaltmeyer, 16 Fed. Rep. 760.

13 U. S. v. Kelly, 3 Sawy. 566.

IVES v. SARGENT.

(*Circuit Court, D. Connecticut.* July 23, 1883.)

1. PATENTS FOR INVENTIONS—REISSUE INVALID.
Reissued letters patent dated October 18, 1881, granted to Hobart B. Ives, as assignee of Frank Davis, for an improvement in door-bolts, *held* invalid by reason of the laches of the plaintiff in not promptly applying to the patent-office to remedy the error claimed to have been made in the original application for the patent.

2. SAME—LACHES, WHEN RENDER REISSUE INVALID.
The right to have a mistake in a patent corrected when the mistake is plain and forthwith discernible, and improperly narrows the claim, must be speedily exercised, and such right will necessarily be abandoned and lost by unreasonable delay. It is not merely a question as to what information respecting their rights parties actually obtain, but as to what information they might have obtained had they used the means and opportunities at their command.

In Equity.

Henry T. Blake, for plaintiff.

John S. Beach, for defendant.

SHIPMAN, J. This is a bill in equity to restrain the defendant from the alleged infringement of reissued letters patent, dated October 18, 1881, to the plaintiff, as assignee of Frank Davis, for an improvement in door-bolts. The original patent was granted to Davis, as inventor, on April 9, 1878, and the application for a reissue was filed April 1, 1881. The specification of the reissue says that the invention consisted "in combining a cylindrical outer case with an inner case, constructed and recessed as hereinafter described, said cases combining to inclose the operating mechanism, and to form a fulcrum and guide therefor; in combining with said cases a bolt, pitman, and crank; and in a pitman or connecting-rod performing the functions of both pitman and spring, as the above are hereinafter more fully set forth and claimed." The pitman, which performed the functions of both pitman and spring, was, in fact, the essence of the invention, and is claimed alone, and in combination with the bolt and crank to hold the bolt, in the third and fourth claims of the reissue as follows:

"(3) The combination of the bolt, c, provided with the lug, *c*, pitman, E, operating as a pitman and spring, and crank, D, to hold the bolt, substantially as set forth. (4) In a cylindrical door-bolt, the pitman, E, arranged and adapted to operate as a pitman and spring, substantially as set forth."

In the original specification the patentee was made to say that his invention consisted "chiefly in combining a cylindrical outer casing, constructed and recessed as hereinafter described, said casings combining to inclose the operating mechanism, and to form a fulcrum and guide therefor; and in combining with said casings a bolt, pitman, and hub, so constructed and arranged as to operate in the same

without pivot pins or any additional devices, all as hereinafter more fully described and claimed."

The second of the three claims of the original patent, and the only one which mentioned the pitman, was as follows:

"(2) The combination of casing, A, having opposite holes, *a*, *a*, with inner casing, B, having transverse groove, b^6, and slot, b^7, flat hub, D, having crank arm, D^1, and the bolt and pitman, substantially as set forth."

It is manifest that the draughtsman had no idea that the pitman spring, uncombined with the two casings, was to be claimed or was regarded as a distinctive part of the invention.

The defendant, as president and head of the manufacturing business of the corporation known as "Sargent & Co.," is infringing the third and fourth claims only of the reissue, but has not infringed either claim of the original patent. The defense is that the third and fourth claims of the reissue are not for the invention described or claimed in the original patent, and are therefore void. The inventor, a carpenter by trade and not an educated man, invented the device in November, 1877, and applied in January, 1878, to Mr. Terry, a patent solicitor in New Haven, to procure him a patent, specifying, as the invention to be patented, the pitman which, in connection with the crank, held the bolt and answered the double purpose of pitman and spring. Terry, being in ill health and therefore not then doing business, sent the case to his agent in Washington, with Davis' instructions. In due time the papers were returned to Terry, and were signed by Davis, who read them and supposed that the application "covered the spring which" he "intended to be patented." Terry did not read the application. The patent was received by Davis in April, 1878. It does not appear whether it was then examined or not. The plaintiff did not see the patent until after it was assigned to him on May 28, 1879. Whether he then read it or not he does not know; but in the latter part of 1880, after the defendant had begun to infringe, he did read it, and supposed from the drawings that the pitman spring, as a separate invention, was secured by the patent, until he was undeceived by Mr. Terry. In the spring of 1878 the plaintiff received from Davis a license to use the pitman spring upon another than the patented bolt.

In September, 1880, Sargent & Co. commenced work upon the patterns for the infringing bolt, and made the first bolts December 1, 1880. The plaintiff insists that the invention of the pitman acting also as a spring, independent of its connection with the casings, is shown in the specification of the original patent, and that, therefore, the correction of the mistake by the introduction of a proper claim was not new matter. The defendant claims that there is no hint in the original patent that the pitman was to have the function of a spring. But if there had been a full description of it, yet as there was no suggestion that the pitman spring could accomplish a beneficial

result disconnected from the two casings, the reissue contained a different invention from any which was suggested in the original specification, and therefore the invention of the third and fourth claims is new matter. It seems to me that it is useless to discuss this question, because, if the alleged mistake could have been safely and permanently corrected by seasonable application to the patent-office, the patentee and assignee had, at the time of the application for a reissue, lost their rights by their own laches.

The supreme court, in *Miller* v. *Brass Co.* 104 U. S. 350, declared that the right to have a mistake in a patent corrected, when the mistake was plain and forthwith discernible, and improperly narrowed the claim, must be speedily exercised, and that the right would be necessarily abandoned and lost by unreasonable delay. The court said: "In reference to reissues made for the purpose of enlarging the scope of the patent, the rule of laches should be strictly applied; and no one should be relieved who has slept upon his rights and has thus led the public to rely on the implied disclaimer involved in the terms of the original patent." This doctrine of the loss, through laches, of the right which a patentee would otherwise have had to correct mistakes, has been favorably referred to by the supreme court in at least four cases since the decision of *Miller* v. *Brass Co.*

In this case the mistake which is claimed to have occurred in consequence of the draughtsman's failure to know the nature of the invention was one which a person conversant with the invention and with the subject of patents would have seen upon the first inspection of the application or of the patent. The inventor read the application, but, reading with unintelligent eyes, did not perceive that his invention was not attempted to be secured. He made no inquiries of the intelligent solicitor who witnessed his signature to the application, but returned the paper to Washington. The assignee took a license or permission to use the pitman spring in the spring of 1878, and afterwards bought the patent without ever having read it, and cannot say positively that he examined it until after the infringement

The patent was issued April 9, 1878, and on December 1, 1880, two years and seven months afterwards, the defendant, who probably had read it, commenced to make non-infringing bolts.

It would be useless to suggest that the plaintiff moved with alacrity after he knew of the defect in his patent, and that the patentee's ignorance was an excuse for his inefficiency; for the palpable negligence of the one in buying a patent without knowing or reading its contents, and the ignorance of the other, when knowledge was at hand, do not bar the consequences of delay. Quoting the language of the supreme court in regard to laches respecting claims or rights which did not pertain to patents, "it is not merely a question as to what information respecting their rights parties do actually obtain, but as to what information they might have obtained had they used

the means and opportunities directly at their command." *Hoyt* v. *Sprague*, 103 U. S. 613. It is obvious that the present case is one of hardship to an honest purchaser of a patent, but the supreme court, after having repeatedly declared, in substance, that reissues with enlarged claims are to be the exception and not the rule, in the recent cases say that the "rule of laches should be strictly applied," and that it is too late for the inventor to regain an exclusive right in his invention, when, after a delay which is unreasonable, if men are to be required in the matter of their patents to act with ordinary prudence and promptness, the thing invented has gone into public use, and individuals are expending money in its manufacture.

The bill is dismissed.

COWELL *v.* SESSIONS and another.

(*Circuit Court, D. Connecticut.* July 25, 1883.)

1. PATENTS FOR INVENTIONS—TRUNK FASTENINGS—TAYLOR PATENTS—INFRINGEMENT—SEMPLE AND LOCKE REISSUES.

   Reissued letters patent, dated December 10, 1878, issued to John J. Cowell, as assignee of Edward Semple, and reissued letters patent, dated December 10, 1878, issued to John J. Cowell, as assignee of John C. Locke, relating to trunk fastenings or catches, compared with the Taylor patents, issued July 9, 1872, and February 18, 1878, and *held*, that the original Semple and Locke patents were not infringed by the Taylor patents, but that the claims in the Semple reissue, and the first and second claims in the Locke reissue, were infringed thereby; but that, as the claims in the reissue unduly expanded the original patents, they were void, and the bill should be dismissed as to them.

2. SAME—RICE PATENT.

   Letters patent issued to Eliakim Rice, dated March 27, 1877, for an improvement in trunk fastenings, *held*, not to be infringed by the Taylor patent of September 21, 1880, which is upon a different principle from the Taylor invention of 1872 and 1878.

In Equity.

Albert H. Walker, for plaintiff.

Charles E. Mitchell and *Benj. F. Thurston*, for defendants.

SHIPMAN, J. This is a bill in equity to restrain the alleged infringement by the defendants of reissued letters patent, dated December 10, 1878, to the plaintiff, as assignee of Edward Semple; also of reissued letters patent, dated December 10, 1878, to the plaintiff as assignee of John C. Locke; also of letters patent to Eliakim Rice, dated March 27, 1877,—all relating to the trunk fastenings or trunk catches. The original Semple patent was dated February 16, 1868, and the original Locke patent was dated March 21, 1871. The bill also included allegations in regard to the infringement of letters patent to E. A. G. Roulstone, dated October 30, 1866, for an improvement in traveling bags; but, on the hearing, it was conceded that the plaintiff had not such a title to this patent as to enable him to main-

tain a suit for infringement. The original Semple specification says that his invention consisted "in providing the corners of the cover and of the box of trunks with metallic plates, so arranged that when the trunk is closed the plates hold the cover and the box together, preventing any lateral motion of the cover, and stiffening the entire frame of the trunk, each plate being provided with a suitable locking device." A metallic angle-plate was riveted to each front corner of the trunk-box, the side halves of these plates being provided with loops. Another metallic angle-plate was riveted to each front corner of the trunk-cover, the side halves of these plates being provided with lugs or dowels, for the purpose of entering the loops when the trunk is closed, and thus preventing lateral motion of the cover. The front halves of both angle-plates are provided with any suitable device for locking the trunk by means of an independent key. The claim was:

"The angle-pieces, A, provided with the loops, *a*, in combination with the angle-pieces, C, provided with the lugs, *b*, when arranged for operation, in connection with a trunk or similar article, substantially as described."

The first of the two claims of the reissue is as follows:

"(1) In a trunk-cover, a device independent of the trunk-lock, consisting of a plate constructed with a projector substantially parallel with the vertical plane of the plate, combined with a second plate, constructed with a socket to receive said projector, and the said two parts constructed to be applied, one plate to the cover and the other to the body of the trunk, substantially as described."

The second claim is for the same combination, but required that the two plates should be provided with a locking device "to secure said two parts together in their closed condition." The Locke device was constructed as follows, the quotations being from the original specification: There were two straps of hoop-iron, or other metal which would yield readily. Each strap was pivoted to the valance of the trunk, and its upper end rested loosely in the cap or escutcheon, "so as to have a slight degree of lateral play, the object of which was to enable the straps to catch and lock with the catches if the cover becomes racked." The lower ends of the straps were formed dovetailed. The catches were attached to the body of the trunk. The upper part of each was formed with two lugs, which are of the same dovetailed or wedging form as the ends of the straps.

"These lugs start imperceptibly at the top and gradually increase in projection as they go downward, till they pass the extent of the passage of the strap, when they continue around the whole circle of the bottom, but in an oblong form, leaving thereby an open space, *f*, under the end of the strap, for the insertion of the finger to raise the strap to disengage the parts. * * * The operation is as follows: When the cover shuts down, the wide lower end of the strap rides over the wedging lugs, *d*, *d*, of the catches till the cover is fully closed, when the inclines of the straps and the lugs coincide, and the straps then drop into place and remain locked."

The first claim of the original patent related to the spring straps, and was as follows:

"1. The spring straps, D, D, in combination with the catches, G, G, all constructed substantially as described, for the purpose specified."

The first and second claims of the reissue related to the catching devices. The first was as follows:

"(1) A trunk fastening consisting of a catch and of a plate provided with a spring catching device, one to be applied to the cover, and the other to the body of the trunk, independent of the trunk lock, and adapted to automatically engage with each other in closing the trunk."

The second claim added to the first, "said catch constructed with a cavity for the insertion of the finger to disengage said catching device, substantially as described." The defendants' trunk-fasteners, except Exhibit O, are made under patents to Charles A. Taylor, of July 9, 1872, and February 18, 1878. The 1878 patent is a modification of the method of manufacture of the 1872 device, and is made so as to give the fastener the appearance of a strap and buckle. The 1872 device consisted of two plates attached to the trunk-cover, which locked into corresponding catches attached to the front of the trunk-box. Each catch consisted of a metallic socket, provided with a hinged latch or hook, and with a flat spring, which bore against the lower end of the latch and kept its upper end pressed inward against the socket. The upper end of the latch was provided with a prong, which extended through into the socket. When the trunk-cover was pressed down, the plates or keepers, which were provided with beveled ends and with holes, slid down into the sockets, and the prongs latched into the holes so that the lid was held firmly. In the 1878 patent the latch made in the form of a loop snaps over a projection on the dowel or keeper. The defendants infringed the literal terms of the claims of the Semple reissue, and of the first and second claims of the Locke reissue, but did not infringe either original patent.

The Taylor invention was a trunk-fastener, not a lock; but a fastener to keep the lid in place in case of accidents, and to take part of the strain which would otherwise come upon the lock. It is a combination of dowel or keeper upon the trunk-cover and socket upon the trunk-box, which socket is provided with a hinged, non-elastic latch or catch, which is pressed upon by a spring and snaps into firm engagement with the keeper, the hinged latch being acted upon by the spring to hold it either open or shut. The Semple invention was not a trunk-fastener. It was an angle-plate upon the trunk-cover, provided with a dowel, in combination with an angle-plate upon the trunk-box, provided with a loop into which the dowel entered. The whole arrangement was for the purpose of stiffening the frame, making the upper corners durable, and preventing lateral motion of the cover. The Locke invention was a strap made of some metal which yields readily, and resting loosely in its cap so as to have a slight degree of lateral play, and dovetailed at its lower end, which engages with a peculiarly constructed catch upon the body of the

trunk. The lower end of the strap rides over the dovetailed lugs of the catch till the cover is closed, when the inclines of the straps and the lugs coincide. While this device is a fastener, it bears no substantial resemblance to the rigid keeper of the Taylor invention, which slides into a socket, and engages with a non-elastic hinged latch, actuated by a spring to hold it either open or shut, the latch snapping into firm engagement with the keeper. Each reissue was a similar futile attempt to expand a narrow patent into a comprehensive one, and was intended to cover subsequent inventions which neither Semple nor Locke made or conceived. Unless construed in strict conformity to the actual inventions as described in the specifications, the Semple reissue, and the first and second claims of the Locke reissue, are void, because they are undue expansions of the respective originals, but not by reason of any laches in obtaining a reissue.

Exhibit O was made under the Taylor patent of September 21, 1880, and is upon a different principle from that of the Taylor inventions of 1872 and 1878. It has no spring latch or hinged latch. It consists of two rigid parts—one to be attached firmly to and above the valance of the trunk, the lower end of the piece being in the shape of a flatted dowel pin with a square opening. Quoting now from the description given by Mr. Shepard, the defendants' expert:

"The part to be applied to the body of the trunk consists of two pieces: one piece is a sort of frame, having holes for attaching it to the trunk's body, and in the middle, on the front of its upper end, there is a stud, or projection, beveled on its upper side, which stud is for engaging the hole in the part which is applied to the trunk-cover. By the sides of this stud there are two flanges for engaging the edges of the rigid piece on the trunk-cover and causing it to come into proper position for engagement with the beveled lug. * * * When the cover comes down, the rounded end of the dowel strikes the flanges on the lower member of the fastener, and thereby brings the cover into the proper position laterally, and as the cover comes down, the dowel rides over the beveled face of the lug, and as soon as the opening in the dowel is directly in front of the lug, it snaps into engagement. * * * In order to disengage the fastener, the lever (a lever mounted on a vertical axis and pivoted within the frame) is swung forward to pry the piece which is hung to the cover of the trunk forward, far enough to disengage it."

This fastener was not a success, because there was no spring; and as the keeper or dowel depended upon its position upon the valance, if the valance was out of position, the keeper failed to spring over the face of the lug. It is manifestly unlike the Semple invention, and is, in its construction, upon a different principle from that of the spring dovetailed strap of Locke, which rides into engagement with the wedging faces of the lugs upon the catch.

The Rice invention, the patentee says in his specification, consisted "of a trunk-catch made of three castings, provided with a spring, and capable of being put together without special fitting. It is so constructed that two dowels cast on the portion attached to the cover enter sockets formed in the part attached to the body of the trunk."

In view of the Taylor patent of 1872, and the John Arnold patent of July 1, 1873, it is a narrow patent, and consists in the fact that the parts are assembled without special fitting or riveting, but by sliding the spring into place. It has a spring and hinged latch, and is therefore unlike Exhibit O. The other exhibits which are said to infringe have four castings and a spring, and are not so arranged that they can be held in place without riveting. In the Rice fastener, the latch is so held in place by the spring that, if it was broken, the latch would be liable to drop out of its bearings. This is not true of the defendants' fasteners. In the Rice patent, both fasteners must be held out of engagement by the hand when the lid is lifted. Under the Taylor patent of 1872, and in the defendants' fasteners, the spring holds the latch out of engagement when the lid is to be lifted. There is no infringement of the Rice patent.

The bill is dismissed.

SLESSINGER *v.* BUCKINGHAM and others.[1]

(Circuit Court, D. California. January 29, 1883.)

1. PROOF OF INFRINGEMENT BEFORE BILL FILED.
   An infringement must be shown to have taken place either by making, selling, or using the article patented, before the filing of the bill, or there can be no recovery.
2. ANSWER TO BILL UNDER OATH.
   Where the complainant does not waive an answer to the bill under oath, the answer, distinctly denying the material matters alleged, not only makes an issue, but proves it; so that it will require the evidence of two witnesses, or of one witness, and other circumstances equivalent to a second, to overthrow the answer.
3. WAIVING ANSWER UNDER OATH.
   The great advantage to complainant, in many cases under the present rules relating to the competency of witnesses of waiving an answer under oath, pointed out.

In Equity.

John L. Boone, for complainant.

M. A. Wheaton, for defendants.

SAWYER, J., (*orally.*) In this case I am compelled to decide that the evidence is insufficient to show an infringement before the filing of this bill; or, indeed, an infringement at any time. The evidence is very slight upon those points. There are two points made by defendants, both of which, I think, are well taken. One is that if it is conceded that the articles charged to have been made are an infringement of the patent, it does not appear that those articles were sold or made prior to the filing of the bill. The defendants make that point and rely upon it. The only testimony is, taking it in its aspect

[1] From 8th Sawyer.

most favorable to the complainant, that there was a pair of boots purchased from the defendants, some time before the taking of the witness' testimony, and that it was somewhere within the last two or three months before that date. The testimony was taken about three months after the filing of the bill. There is nothing to show that the purchase was before the filing of the bill. It may have been, so far as anything to the contrary appears, a month, or two months, after the filing of the bill; and the affirmative of the issue is upon the complainant.

There is, then, no testimony, even if we concede that those boots were made and sold by the firm—no evidence to show that they were sold, or made, before the filing of the bill.

The answer denies, categorically and distinctly, that the defendants have infringed the patent, or made the boots, as alleged to have been made in the bill, or otherwise. We have, then, the testimony of one witness only against that of another, and the testimony of that one witness does not show that the pair of boots was sold, or even made, before the filing of the bill. Again, there is no *positive* testimony that these boots were made, or sold, by the defendants at all. The one witness on the point testifies that he sold the boots to the complainant in this case, and *he thinks* it is a pair of boots that his own firm purchased of the defendants. He does not know it, but *thinks* so. That is all there is of that.

The other circumstance relied on is that there is a mark on the boots, which purports to be the mark of the defendant; but there is no testimony that it is the mark of the defendant, or when or by whom it was put on the boots. Defendants are required to answer under oath, or, what is the same thing in substance, an answer under oath is not waived in the bill, and they deny, under oath, categorically and directly, that they made the boots alleged in the bill to have been made, "prior to the filing of the bill, *or otherwise*." They deny the infringement alleged, and it requires positive testimony to overthrow that answer. The answer, so far as responsive to the bill, directly denying the matters alleged, not only makes an issue, but it is testimony in the case called for by complainant, proving the issue for defendants; and it must be overthrown by the testimony of two witnesses, or the testimony of one witness, and circumstances equivalent to another, or, at least, sufficient to make a preponderance of testimony in favor of complainant. Solicitors, generally, in this circuit, seem to overlook the great disadvantages under which they often labor, in not waiving an answer under oath in equity cases, now that the complainant and defendant are themselves both competent witnesses, and can be *orally* examined under equity rule 67, where the complainant can get the evidence of his opponent, fresh from him in person, under a sharp and pressing examination, instead of having it deliberately shaped by, and cautiously arranged and shaded for him, by his solicitor, at his leisure, in his office. Besides, when examined

orally as a witness, the defendant counts *but one;* and the complainant may offer himself in opposition as to matters within his knowledge, if he swerves in the least particular from the truth; while, if called upon to answer a bill of discovery under oath, the defendant's answer, if responsive to the allegations of the bill, must be overthrown by the evidence of two witnesses, or of one witness, and other circumstances equivalent to a second. Besides, if complainant has other evidence sufficient to overthrow defendant's answer under oath, he has no occasion for a discovery. It would seem that a discovery by answer under oath may now be advantageously waived by the complainant in at least a great majority of cases. No *such* discovery is needed when the proofs can be otherwise made, and when it cannot be thus made, the evidence can be brought out, ordinarily, much more advantageously to the complainant, and less effectively for the defendant, by a skillful, sharp oral examination of the defendant as a witness. Since I have occupied a seat on the circuit court bench, I have been surprised to see how carelessly, if not recklessly or ignorantly, solicitors for complainants often, not to say generally, throw away the advantages of their position by not waiving an answer to a bill in equity under oath. In this case there was no positive testimony that defendants made, or sold, the boots. Only one witness testified that he thought his firm bought the boots of defendants. I am compelled to say that this testimony is insufficient to overthrow the positive denials of the answer, or to establish an infringement. The burden was on the complainant to show that fact by affirmative evidence. It is not necessary to investigate the other points. The bill is dismissed on the grounds alone of an insufficiency of the evidence to show an infringement, and failure, also, to show an infringement before the filing of the bill.

The E. B. Ward, Jr.[1]

Carlsdotter and others *v.* The E. B. Ward, Jr.[1]

(*Circuit Court, E. D. Louisiana.* June, 1883.)

1. Admiralty Jurisprudence—Action for Loss of Life on High Seas.
   An action for damages for the loss of a human life, caused by a maritime tort, survives in admiralty.
2. Same—Statute of State.
   Where the statute of a state gives a right of action for loss of human life, and such loss occurs by reason of the tort of a vessel upon the high seas, whose owners reside in that state, and whose home port is in that state, such vessel was a part of the territory of that state, and its courts would entertain an action under the statute against the owners for the wrongful conduct of their agents on the high seas which resulted in loss of human life. A court of admiralty can enforce such right of action in a proceeding *in rem.*

[1] Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

Admiralty Appeal. S. C. 16 FED. REP. 255, reversed.

This suit was brought by Christina Carlsdotter, widow of Carl P. Peterson; John S. Jonsson and his wife, Charlotta J. Jonsson, father and mother of Gustaf L. Jonsson, and Ulrika B. Hohn, mother of Eva M. Hohn, sister of Erick A. Hohn, for the recovery of damages suffered by them through the death of said Carl P. Peterson, Gustaf L. Jonsson, and Erick A. Hohn, and also for the recovery of the value of certain personal effects belonging to said alleged decedents. The libel avers that said decedents, who were seamen on board of the Swedish bark Henrick, were killed in consequence of a collision between the said bark and the said steam-ship E. B. Ward, Jr., which collision occurred upon the high seas. The libelants alege that they are the legal heirs of said decedents, and claim (1) $3,000 for the damages suffered by each of said decedents,—a right of action for which damages, it is claimed, survives in favor of the said libelants under the Civil Code of Louisiana; (2) $3,000 for damages suffered by said libelants by reason of the deprivation of the services, society, and support of said decedents; (3) $184 damages for the loss of personal effects of each of said decedents. The claimants excepted to the said libel upon the ground, among others, that the right of action for the recovery of said items of damages perished with the said decedents, and did not survive in admiralty in favor of said libelants, the alleged heirs of said decedents.

John D. Rouse and *Wm. Grant*, for libelants.

W. S. Benedict and *Andrew J. Murphy*, for claimants.

PARDEE, J. The question made in this case is whether an action for damages for the loss of a human life caused by a maritime tort survives in admiralty. Whenever this question has been before the supreme court it has not been necessary to decide it, and, while commenting on it as an open question, the court has clearly left it for decision hereafter when the proper case should be made. See *Steamboat Co.* v. *Chase*, 16 Wall. 532; *Ex parte Gordon*, 104 U. S. 515. The chief justice, in deciding the latter case, states the real position of the question as follows:

"The court of admiralty has jurisdiction of the vessel and the subject-matter of the action, to-wit, the collision. It is competent to try the facts, and, as we think, to determine whether, since the common-law courts in England and to a large extent in the United States are permitted to estimate the damages which a particular person has sustained by the wrongful killing of another, the courts of admiralty may not do the same thing."

In the several circuit and district courts in this country, sitting in admiralty, many opinions have been rendered going over the entire ground, and apparently exhausting the subject, so far as discussion is concerned. These decisions are to the following effect: (1) That the action does survive; (2) that it does not survive; (3) that when the tort resulting in death was committed on navigable waters within the body of a country where the prevailing state law gave a right of

action, the admiralty court would allow the action and enforce the remedy by a proceeding *in rem*.

First. That the cause of action does survive in admiralty has been hinted and doubted for 50 years. See *Plummer* v. *Webb*, 1 Ware, 75. But the first perpendicular decision was rendered by Chief Justice CHASE on the circuit in the case of *The Sea Gull*, Chase, Dec. 145. The collision in that case may have been within the body of a country, but the report does not show it, nor does that fact cut any figure in the case. In that case the chief justice held that "the rule that personal actions die with the person is peculiar to the common law, traceable to the feudal system and its forfeitures, and does not obtain in admiralty;" and that "a husband can recover by a proceeding *in rem* against the vessel which caused the death of his wife for the injury suffered by him thereby." This decision has been cited and followed in the following cases, which I have examined: *The Highland Light*, Chase, Dec. 150; *The Towanda*, 23 Int. Rev. Rec. 384; *The Garland*, 5 FED. REP. 924; *The Harrisburg*, 15 FED. REP. 610; *The Charles Morgan*, 18 Law Reg. 624. See, also, *Holmes* v. *O. & C. Ry. Co.* 5 FED. REP. 75; *In re Long Island Transp. Co.* Id. 599.

Second. That the action does not survive has been held expressly in *The Sylvan Glen*, 9 FED. REP. 335, and this present case, (16 FED REP. 255,) which are the only late cases to this effect I have found.

Third. It seems to have been held uniformly that where the tort was committed within the territory of a state which by its laws gave a right of action for the wrongful killing of a person, the admiralty courts would take jurisdiction, and by proceedings *in rem* enforce a lien on the offending vessel. This has been the practice in the courts of this district and circuit. The only case that I have found that takes the contrary view is *The Sylvan Glen, supra.* Without doubting the correctness of this practice, it does seem that unless the action survives in admiralty, the courts have resurrected a lien in order to furnish a complete remedy. No state statute that I have found gives any lien for the wrongful killing of a person, and it would seem clear that if the admiralty right of action dies with the person injured, the maritime lien dies with it; and how can the court resurrect the one and not the other?

2. The general tone of the many judges who have passed upon this question shows that in the opinion of enlightened jurists the admiralty courts of the country should allow the action and enforce the remedy. "Natural equity and the general principles of law are in favor of it." Judge SPRAGUE, in *Cutting* v. *Seaburg*, 1 Spr. 522. "It better becomes the humane and liberal character of proceedings in admiralty to give than withhold the remedy." Chief Justice CHASE, *The Sea Gull.* "The common-law rule seems to be consonant with neither reason nor justice." Judge BROWN, *The Garland, supra.* To the same purport see Judge MCKENNON'S remarks in *The To-*

wanda, supra; Judge DILLON'S opinion in *Sullivan* v. *U. P. R. Co.* 3 Dill. 337. And in *The City of Houston*, not reported, decided in this court in 1877, by Mr. Justice WOODS, then circuit judge, that eminent jurist, in his oral opinion, is said to have held "that to hold that a court of admiralty cannot redress such a wrong would be a blot on our civilization and a reproach to the admiralty law."

Upon the whole case, considering the natural equity and reason of the matter, and the weight of authority as determined by late adjudicated cases in the admiralty courts of the United States, I am inclined to hold that the ancient common-law rule, "*actiones personales moritur cum persona,*" if it ever prevailed in the admiralty law of this country, has been so modified by the statutory enactments of the various states and the progress of the age, that now the admiralty courts "are permitted to estimate the damages which a particular person has sustained by the wrongful killing of another," and enforce an adequate remedy.

At all events, as the question is an open one, it is best to resolve the doubts in favor of what all the judges concede to be "natural equity and justice."

3. The learned proctor for libelants suggests in his brief another view of this case, which, if correct, would maintain his libel as within the conceded practice and jurisdiction of the court.

The record shows that the offending steamer, the E. B. Ward, Jr., was wholly owned by citizens of Louisiana, and the port of New Orleans was her home port. Article 2315, Rev. Civil Code La., reads:

"Every act whatever of man that causes damage to another, obliges him, by whose fault it happened, to repair it. The right of this action shall survive, in case of death, in favor of the minor children and widow of deceased, or either of them, and in default of these in favor of the surviving father and mother, or either of them, for the space of one year from the death."

From which it would seem that these libelants might maintain their action in the state courts of Louisiana without question; and I believe this is conceded as true if the collision had occurred in the navigable waters within the state; and, in this latter case, I believe it is also conceded that the admiralty court could give a remedy against the ship.

"A vessel at sea is considered a part of the territory to which it belongs when at home. It carries with it the local legal rights and legal jurisdiction of such locality. All on board are endowed, and subject accordingly. * * * The jurisdiction of the local sovereign over a vessel, and over those belonging to her in the home port and aboard on the sea, is, according to the law of nations, the same." *Wilson* v. *McNamee*, 102 U. S. 572, and text-books there cited. See, also, *Crapo* v. *Kelly*, 16 Wall. 610.

Why, then, if the E. B. Ward, Jr., when on the Gulf of Mexico, was a part of the territory of Louisiana, so far as legal rights and legal jurisdiction was concerned, should not the state courts of Louisiana entertain an action at law for damages against the owners

for the wrongful conduct of their agents in bringing on the collision which resulted in the death of libelant's husband, father, and son? And, if the state laws give such action, why should not this court hold (following the conceded practice) "that the cause of action, therefore, existed by force of the territorial statute, and since it constituted a tort, and was upon navigable waters, and occurred in a case of collision, the court of admiralty could enforce it in a proceeding *in rem*." The exceptions filed in this case are overruled, with costs.

THE COUNT DE LESSEPS.[1]

(*District Court, E. D. Pennsylvania.* July 3, 1883.)

1. ADMIRALTY—MARITIME CONTRACT—ORIGINAL CONSTRUCTION OF VESSEL—LIEN FOR LABOR AND MATERIALS USED IN.
   Materials and machinery furnished and work done, in the original construction of a vessel, do not give rise to a maritime contract, and a recovery therefor cannot be enforced by a libel *in rem*.
2. SAME—WHEN VESSEL LIABLE TO ATTACHMENT.
   A floating scow having been constructed in New Jersey and towed to Pennsylvania, where machinery and material were furnished upon contract with the building contractors, who had undertaken to construct the scow with such machinery, *held*, that the machinery and material were furnished in the original construction of the vessel.

Hearing on libel, answer, and testimony. Libel by the I. P. Morris Company against the Count De Lesseps, for labor and materials, consisting of a derrick, buckets, and other dredging machinery, furnished at Philadelphia after the vessel had been towed from New Jersey, where she had been built, to fit out the vessel for an intended voyage to Panama.

The respondents claimed that the libelants were subcontractors, having furnished the work and material to Doughty & Kappella, who were the builders employed by the owners; that the same were furnished in the original construction of the Count De Lesseps, which was not a vessel, but was a floating scow, or a patented mechanical appliance, constructed for and applicable only to the purpose of canal dredging. The libelants contended that they had contracted with the agent for the owners, and denied that the work and material were furnished in the original construction, and asserted that the Count De Lesseps was a vessel capable of carrying any cargo, and prior to the work was towed from New Jersey to Pennsylvania, having a completed outfit and machinery, and that when it appeared that further machinery was desirable, the contract was made with libelants to furnish machinery not contemplated by the original design.

Edward F. Pugh and *John W. Patton*, for libelants.

A maritime contract may have for its subject: A canal-boat, (*Hip-*

[1] Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.

ple v. *The Fashion*, 3 Grant, 40;) a pile-driver, (*Kearney* v. *Pile-driver*, 3 FED. REP. 246;) a scow, (*Endner* v. *Greco*, 3 FED. REP. 411;) a floating elevator placed on a canal-boat, (*The Hezekiah Baldwin*, 8 Ben. 556;) a floating derrick, (*Maltby* v. *A Steam Derrick-boat*, 3 Hughes, 477;) where the *res* is or has been afloat, (*Gregg* v. *Sloop Clarissa Ann*, 2 Hughes, 89.)

And, as to the question whether the work and materials were furnished in the original construction, or in the repairing or outfitting, cited: *The Eliza Ladd*, 3 Sawy. 519; *The Revenue Cutter No. 2*, 4 Sawy. 152; *The Stephen Allen*, Bl. & How. 181; *The Cynthia*, 2 FED. Rep. 112.

Charles Gibbons, Jr., and *M. P. Henry*, for respondent.

The floating scow, or patented mechanical appliance, the Count De Lesseps, is not a vessel, and not subject to a maritime lien. *The Vallette Dry-dock*, 10 FED. REP. 142; *The Salvor Dredging Co.* v. *The Dry-dock*, 3 Cent. Law J. 640.

The work and material were furnished in the original construction, and therefore not a maritime contract. *People's Ferry Co.* v. *Beers*, 20 How. 393; *Roach* v. *Chapman*, 22 How. 129; *Morewood* v. *Enequist*, 23 How. 494; *The Pacific*, 9 FED. REP. 120; *Edwards* v. *Elliott*, 21 Wall. 532; *The Ship Norway*, 3 Ben. 163.

BUTLER, J. No discussion of either the law or facts is necessary. It is conceded by libelants' counsel that if the materials furnished and work done were furnished and done in the construction of the vessel, (if the structure be a vessel,) the claim is not founded upon a maritime contract, and the libel must be dismissed. There is no question about the facts. All the materials and work were contemplated as necessary to complete the structure from the beginning, and the principal part of it was embraced in the original contract for construction, entered into by Doughty & Kappella. The libelants were subcontractors under these builders, and furnished an estimate in advance for the materials and work, principally, and subsequently did what forms the subject of their claim in pursuance of this estimate. The question for the court is one of construction, about which the testimony of the libelants' experts affords no assistance. Although there is some inconsistency in the decisions of the lower courts, I cannot doubt that what the libelants did should be held to have been done in the original construction of the vessel—if, as before suggested, this structure should be so denominated. The question involved has been so fully considered, in cases undistinguishable from this, that further discussion would serve no useful purpose. See *Ferry Co.* v. *Beers*, 20 How. 393; *Roach* v. *Chapman*, 22 How. 129; *Edwards* v. *Elliott*, 21 Wall. 532; *The Ship Norway*, 3 Ben. 163; *Scull* v. *Shakespear*, 25 P. F. Smith, 297; *Morewood* v. *Enequist*, 23 How. 494; *The Pacific*, 9 FED. REP. 120.

Judgment for respondent.

THE CERVIN.

(*District Court, D. Maryland.* June 15, 1883.)

SHIPPING—ACCEPTING PIER—DISCHARGING CARGO IN PORT—INJURY FROM EXPOSURE—LIABILITY OF VESSEL.

A steam-ship having accepted a pier on the East river, New York, as a suitable pier designated by the owners of the majority of the cargo for discharging, is in fault in leaving the pier with part of the cargo on board, and going to a pier in Brooklyn and there discharging the balance; and where the cargo discharged in Brooklyn is injured by exposure to the sun on an unsheltered pier, the ship will be liable.

Measure of damage discussed.

In Admiralty.

Marshall & Hall, for libelants.

A. Sterling, Jr., for respondents.

MORRIS, J. The steam-ship, having accepted pier No. 47, East river, as a suitable place in the port of New York, selected by the owners of the majority of cargo, for the discharge of that portion of the cargo which consisted of prunes, and having there discharged 725 hogsheads of the prunes, has not in any way justified her action in leaving that pier, with the remaining 333 hogsheads on board, and going across the harbor to Brooklyn. It appears that when the libelants complained of the removal of the steam-ship her agents promised to have the remaining prunes lightered across to pier No. 47, when discharged from the ship. This they did not promptly do, and although they were notified by libelants that if the prunes were left uncovered on the Brooklyn pier, exposed to the midsummer sun, they would be damaged, no precautions whatever were taken, and they remained exposed on the pier six days in June.

The respondents contend that as the libelants knew the prunes were lying thus exposed they should have themselves protected them. This contention cannot be maintained. The libelants had declined to accept delivery in Brooklyn, and the ship's agent had agreed to lighter them to the New York pier. The goods were, therefore, in the custody to the carrier, and there was no delivery until they were put on the New York pier, and it would have been altogether improper for the libelants to interfere with them. They performed their whole duty, in my judgment, when they notified the ship's agents of the probable consequences of the goods being exposed to the sun on the Brooklyn pier.

The testimony taken is voluminous, and is addressed principally to the question whether in consequence of the exposure the goods were really damaged, and if so, to what amount. I take it that all the testimony on this question has been put in, and that I am to decide on the amount of damage without further reference to a master.

The libelants claim and they contend that the testimony they have produced proves that the effect of exposing the 333 hogsheads of prunes

for six days unprotected on the pier, and lightering them over to New York, was that they became so soft that the juice escaped, deteriorating the fruit and staining the hogsheads; that fermentation, sourness, and mould ensued, and bugs were germinated. That this was a result to be expected from such exposure is also shown, and that the agents of the ship were warned of the danger of it. But on the question of what amount of pecuniary damage did result to this portion of the prunes there is the widest divergence in the testimony. The libelant's whole consignment consisted of 1,058 hogsheads. Of these, 725 hogsheads were discharged at pier No. 47, and immediately put into Driggs' stores without any exposure, and the remaining 333 hogsheads, which were exposed in Brooklyn, were put into Coe's stores. So that there was fair opportunity for observing the condition of the lots in these two distinct places of storage, and the difference between them. An examination was made of the fruit at Coe's stores about the twenty-second of June, 1880, on behalf of libelants, by two professional appraisers experienced in such goods, who had been employed to examine if the fruit had received any damage on the voyage of importation justifying a claim for reduction of customs duties. One of these two examiners has testified very positively that the prunes in Coe's stores were greatly damaged by exposure to the sun, and were markedly inferior to those in Driggs' stores, and he estimates that deterioration over and above the sea damage at 15 per cent. on the whole 333 hogsheads. This percentage, calculated on what is taken as the sound value, would amount to $4,183.30. An examination was also made by two expert appraisers, on the behalf of the respondents, about October 16th, some four months after the goods were all stored. They examined both lots, and testify that they could see no appreciable difference between them, —no difference which was capable of appraisement,—and that examining critically the numerous consignments which made the whole shipment, and which were each distinguishable by their several numbers, they found that those consignments which appeared in bad order in Coe's stores appeared in equally bad order when any hogsheads of the same serial numbers were to be found in Driggs' stores.

In this case the measure of damage should be the difference between the market price in New York of the goods which were delivered at Driggs' stores without any exposure, and those which were delivered at Coe's stores after the exposure in Brooklyn. The report of the libelant's appraiser, whose estimate puts the damage at such a large sum, is not, he concedes, based upon any knowledge of any actual difference of market prices. He bases his estimate on the difference, he says, which he found between the two lots of prunes, having himself first called attention to the exposed situation of those in Brooklyn. He then fixes this difference at a certain per centum of deterioration, and then assumes that this deterioration would affect the market price in the same ratio. In the direct conflict between

the appraisers employed by each party it would have been satisfactory to have had the testimony of merchants having actual knowledge of market prices, and proof of what effect on the market price had been caused by the damage complained of. The appraiser confesses that he knows nothing about prices, but only about the quality of the goods. It is shown that nearly all of the whole shipment was more or less damaged on the voyage of importation; that the cause was sea-water and heat of hold of vessel, and the effect produced was mustiness, mould, and fermentation in the fruit. For this unsoundness the libelants obtained, upon the survey and report of the custom-house appraisers, a reduction of duties based on an average damage of 9.97 per cent. It is not for speculative loss which the libelants are entitled to charge the ship, but for any actual loss; and they cannot recover in respect to any change in the condition of the prunes or the appearance of the packages which did not, in fact, affect their market value. It appears quite possible that the exposure complained of, while it did produce a change in the condition and appearance of the prunes when first put in store, may have but slightly affected their market price, as they were already an unsound and damaged shipment. In this connection the failure of the libelants to prove any actual difference in price is significant.

The evidence is very positive that prunes in casks are deteriorated by exposure to the heat of the sun, and that the six days' exposure which these hogsheads suffered in Brooklyn, by the default of the claimants, might reasonably be expected to affect them seriously, and that the effect was quite noticeable immediately after they were stored. At the survey, had some four months afterwards, the testimony of the witnesses is very conflicting as to how observable it was then. This goes to show that the ultimate consequences of the exposure were not so serious as was at first supposed. I cannot, however, escape the conviction that some deterioration did result, and some loss of market value. With the proof in the case, the nearest approximation to the amount of that loss which I am able to reach is this: By the second examination of the 333 hogsheads in Coe's stores, in October, it is pretty clearly shown that 163 casks did not then exhibit any appreciable damage. There is evidence that the remaining 170 hogsheads did exhibit a deterioration averaging 15 per cent.; but I am not convinced that this 15 per cent. was exclusive of the damage on the voyage of importation. I therefore deduct the sea damage at 10 per cent., leaving 5 per cent. as the damage from the exposure on the pier. As $6\frac{1}{4}$ cents per pound appears to be assumed as the sound value of the prunes, the 170 hogsheads, at that rate, would amount to $14,257, and 5 per cent. damage would amount to $711.85. For this amount of $711.85 I will sign a decree in favor of libelants.

The claim for extra cooperage is not supported by proof, and there is no proof of any actual loss of weight.

MILLIGAN v. LALANCE & GROSJEAN MANUF'G CO.

(*Circuit Court, S. D. New York.* July 17, 1883.)

REMOVAL OF CAUSE—PENDING MOTION—RESETTLEMENT OF ORDER OF AFFIRMANCE ON APPEAL.

On the removal of a cause from a state court to the circuit, this court may dispose of a motion pending before a general term of the state court, at the time of removal, for a resettlement of the form of an order on affirmance, and insert such reasonable provisions in the order of affirmance as it would have been competent and proper for the general term to have done had not the cause been removed.

Motion for Resettlement of Order for Inspection of Books.

Robertsons, Harmon & Cuppia, for plaintiff.

A. N. Weller and *Abram Wakeman,* for defendant.

BROWN, J. This was an action at law, brought in the state court of common pleas, to recover damages upon an alleged breach of contract by the defendant in not paying certain royalties which the plaintiff alleges the defendant agreed to pay him upon all metal vessels, for culinary purposes, manufactured and sold by it under certain letters patent issued on an improvement invented by the plaintiff. The defendant denies any such contract, and any obligation to pay any royalty. A summons, without complaint, having been served on the defendant on September 14, 1882, the plaintiff applied to the court of common pleas, on petition for an inspection of defendant's books of account from 1877 to 1882, for the sole alleged purpose of enabling him to state in his complaint how many of such vessels defendant had sold; *i. e.*, in order to fix the amount of damages to be claimed in his complaint. By section 803 of the Code, and rule 16 of the state courts, an inspection or the delivery of sworn copies of the books may in proper cases be ordered. The special term made an alternative order for an inspection, unless a stipulation were given by the defendant to produce the books on a reference to be ordered after the trial and determination of the main question in dispute, as to the defendant's liability to pay any royalty, and its rate, if on the trial that question were determined against the defendant. The order gave the defendants no alternative to furnish sworn copies of the books. On appeal to the general term the order was affirmed, after striking out the alternative in reference to the stipulation. A further appeal to the court of appeals was dismissed for want of jurisdiction, the order being held discretionary in the court below. Thereupon the defendant applied to the general term of the common pleas, upon an order returnable before it, granted April 16, 1883, by the chief judge, to show cause why the order of affirmance should not be modified by allowing an alternative delivery of sworn copies. On the return-day the submission of the matter was postponed by order of the general

term, and before the adjourned day the cause was properly removed to this court.

When a case is removed here from a state court, all prior orders stand as adjudications in the cause. This court does not sit as an appellate court upon such orders, and no further hearings can be had on such matters except as the ordinary practice of this court may warrant. *Duncan* v. *Gegan*, 101 U. S. 810; *Fisk* v. *Union Pac. R. Co.* 6 Blatchf. 362; *Brooks* v. *Farwell*, 4 FED. REP. 166; *Harrison, etc.*, v. *Wheeler*, 11 FED. REP. 206; *Werthein* v. *Cont. Ry. & T. Co.* Id. 689.

The merits of the original application, therefore, cannot be here reviewed; and if this motion were in the nature of an appeal, or even of a motion for rehearing or reargument, as the plaintiff contends, it must have been denied. But it cannot be so considered. At the time the cause was removed a motion for a modification of the order had been entertained by the general term, and was then pending and unheard. That application must be disposed of by this court. It is brought before it by means of this motion, and in disposing of it this court must necessarily act as the general term, and may and should make any proper order consistent with the prior general term decision, which, upon that motion, it was competent for the general term to make. That motion, as I view it, was in effect only a motion for a resettlement of the form of the order of affirmance; not for a reargument of the appeal, or of any question presented upon the appeal. The appeal was from the whole order, on the ground that no case for such an order was made in the petition. In settling, or in resettling, the form of the order of affirmance, it was competent for the general term to insert any reasonable provisions having reference to the circumstances of the case. If this court should not entertain and dispose of pending motions when a cause was removed, such as for the resettlement of the forms of orders, great injustice might at times arise, and an open door be presented for great abuses, through the sudden removal of causes at a particular juncture. The form of order now asked for is that made at special term, with a slight modification, to which there can be no reasonable objection, or the delivery of sworn copies, as the rule itself allows.

The motion should, therefore, be granted.

AUSTIN and others *v.* RUTLAND R. Co. and others.

(*Circuit Court, D. Vermont.* June 19, 1883.)

CIRCUIT COURT—JURISDICTION—PARTITION IN EQUITY—CITIZENSHIP—PROPERTY TAKEN BY RAILROAD—COMPENSATION.

A. owned a life interest in one undivided half of a water lot, and defendant corporation acquired by virtue of its charter the other half of the lot and the interest of A., and laid its tracks across, and took possession of, and used for railroad purposes, the whole lot. By contract with the railroad company, and in

pursuance of a statute of the state, D. erected and occupied a dock along the front of the lot. No effort was made to acquire title to the remainder. The state law provided that in every case where a railroad company had entered upon and taken possession of land for its road, and had not paid the owner therefor, nor, within two years from entry thereon, had the damages appraised by commissioners, and an award made and delivered, the ordinary courts of law should have jurisdiction thereof, and that a justification under the act of incorporation should not bar the suit; and the supreme court of the state had held that under this statute the complainants in this case could not maintain ejectment for this lot until the expiration of two years from the time when their right accrued. A. having died, her heirs, and the administrator of a deceased heir, whose heirs were minors, and citizens of another state, filed a bill in equity in the circuit court for a partition of said lot. *Held* that, notwithstanding the language of the state statute, the remedy was not at law only, as claimed by defendant, but that a bill in equity for a partition was maintainable, the requisite citizenship existing; and that as complainant had never received compensation for the taking of the interest by the defendants, and they would have been entitled to a partition of the lot, which was not possible without disproportionate damage to defendant, owing to the dock and improvements placed thereon by them, complainants were entitled to a decree for the payment to them of the value of their interest in the land and dock, to be ascertained by commissioners, upon conveying to defendants their interest therein.

In Equity.

William G. Shaw and *Edward J. Phelps*, for orators.

Daniel Roberts, for defendants.

WHEELER, J. This bill is brought for a partition of water lot No. 10 in the city of Burlington, which is ten rods long and two rods wide of water front on Lake Champlain, and of a dock extending therefrom into the waters of the lake. Nelly Austin had an estate for life in an undivided half of this lot, with remainder to her heirs. The rights of the several owners have been adjudicated at law. *Austin* v. *Rutland R. Co.* 45 Vt. 215. The legislature of the state provided that any person owning lands adjoining the lake might erect any wharf or store-house, and extend the same from the land of such person in a direct course into the lake between the lands of such person and the channel of the lake, but not far enough to impede ordinary navigation in passing up and down the same; and that persons erecting such wharves or store-houses, their heirs or assigns, should have the exclusive right to the use, benefit, and control of them forever. Gen. St. p. 447, §§ 5, 6, 7; Rev. Laws, §§ 1919, 1920. The Champlain & Connecticut River Railroad Company—afterwards called the Rutland & Burlington Railroad Company, and to whose rights the Rutland Railroad Company has succeeded—acquired the right to the other undivided half of this lot, and the life estate of Nelly Austin in it, by virtue of its charter, and entered upon it, and laid tracks across it, and filled into the waters of the lake in front of it, and occupied the whole for the purpose of operating its railroad. By contract with the Rutland Company the dock in front of it was erected, extending in front of other lands of the company, and is now held by the defendant Dodge. The Central Vermont Railroad Company is the lessee of the railroad and operates it. Nelly Austin died in 1870. The orators are her heirs, and one of them is the adminis-

trator of the estate of a deceased heir, whose heirs are minors and reside in Pennsylvania, and are not otherwise made parties. No measures have ever been taken by either railroad company to acquire the right to this remainder.

The statutes of the state provided that in every case where a railroad company had entered upon and taken possession of land for the construction and accommodation of its railroad, and had not paid the owner therefor, nor within two years after such entry had the damages appraised by commissioners, and an award made and delivered, the ordinary courts of law should have jurisdiction thereof, and that a justification under the act of incorporation should not bar the suit. Gen. St. p. 221, § 26; Rev. Laws, § 3371. Under this statute it was held that the orators could not maintain ejectment until after two years from the time when their right accrued. *Austin* v. *Rutland R. Co.* 45 Vt. 215. It is now claimed on behalf of the defendants that under this statute the orators are not entitled to the possession of the property, but have only a right to recover damages for its taking, and that, therefore, this proceeding cannot be maintained; that there is a fatal defect of parties, because the heirs of the deceased heir of Nelly Austin are not personally made parties; and that the orators have not any right whatever to the dock. Much reliance is placed upon the case of *Austin* v. *Rutland R. Co.* 45 Vt. 215, for support to these claims in respect to the right to the property. Some of the remarks of the learned judge who delivered the opinion of the court, considered abstractly, do give them countenance; but, when considered with reference to the precise question and state of the property about which they were made, they are consistent with other views, and not determinative of the question now presented. The question whether the ejectment could be maintained within the two years was a controlling one there, and when that was decided in the negative the case was disposed of. Most of the remarks about the right to the dock had reference to the rights of the ancestor of Nelly Austin, who died before the statute giving the right to the wharf was passed. The cases referred to under that head arose in the absence of such legislation.

If this statute in relation to the rights of owners whose property has been taken without payment for railroads, was, in a case like this, to be construed as leaving to the owner a mere right to recover damages, it would be clearly contrary to the constitution of the state. The right to take private property for a railroad can, of course, be justified, because only that it is taken for public use. The constitution of this state provides that "whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money." Chapter 1, art. 2. A right to recover money is not money. The owner would have the right to recover damages for taking the property without recourse to the constitution. This part of the constitution was not made in vain, but seems to have

been a guaranty, beyond the power of the legislature, that the owner should have the right, even against the public, to have his property, or its value in money for it. The provision in the statute that, after the time limited, the ordinary courts of law should have jurisdiction, and that the charter should not be a bar, seems to take away the protection from suit which an appraisal and offer of payment of damages would give, and to leave the railroad company, and those claiming under it, liable to suit as wrong-doers. The cases cited to the contrary are where the entry was made and the road built with the consent of the owner bringing suit. *McAuley* v. *Western Vt. R. Co.* 33 Vt. 311; *Knapp* v. *McAuley*, 39 Vt. 275; *Troy & Boston R. Co.* v. *Potter*, 42 Vt. 265. This entry and continuance in possession was wholly without the consent of these owners.

It is argued, however, that this suit in equity cannot be maintained in this court because the remedy, if any, is at law. The expression "ordinary courts of law," in the statute, does not appear to mean courts only where legal, as distinguished from equitable, remedies are administered, but seems to include courts of equity, which are, in a general sense, courts of law, when the owner needs or is entitled to equitable relief. This view is not much controverted in behalf of the defendants; but it is contended that there is no ground here for equitable relief. The remedy by writ of partition at common law was very limited. Co. Lit. 167*a*. Consequently, courts of equity in very early times took jurisdiction, and have always maintained it. 1 Story, Eq. tit. "Partition;" *Miller* v. *Warmington*, 1 Jac. & W. 484; *Earl of Clarendon* v. *Hornby*, 1 P. Wms. 446; *Gay* v. *Parpart*, 106 U. S. 679; [S. C. 1 Sup. Ct. Rep. 456.] The statutes of the state make ample provision for partition, but the proceedings are sessions proceedings, which can only be carried on in the state courts, and not civil suits at common law, of which this court has concurrent jurisdiction with the state courts. Rev. St. § 629. If this court has jurisdiction of partition at law at all, it is only of the writ of partition at common law, upon which nothing could be done but to divide the lands, without power to assign to one and decree or adjudge compensation to another. Lit. § 248; Nat. Brev. 19.

In that case, according to the claim of the defendants, such power may be very necessary, and relief, which can only be had in equity, be very appropriate. The orators, being non-residents, had the right to come into this court and institute such proceedings as this court has jurisdiction of appropriate to their case, which is a suit in equity.

The jurisdiction in equity depends upon the power to decree conveyances largely, and the parties who may be required to make conveyances should all be before the court. *Gay* v. *Parpart*, 106 U. S. 679; [S. C. 1 Sup. Ct. Rep. 456.] When they are infants or under other disability, and cannot be made parties, the partition proceeds, but in such manner as to save their rights until their arrival at full age or the disability is removed. 1 Story, Eq. "Partition." By the statutes of the

state, administrators may be authorized to sell lands of their intestates belonging to heirs residing out of the state, the proceeds to be assigned to those entitled to the lands. Rev. Laws, §§ 2170, 2171. Should such authorization be produced there would be nothing in the way of a decree assigning the whole to the defendants, requiring conveyances on making payment. Should it not be, the partition can proceed as to others, saving the rights of these minors until full age. The land is not partible without disproportionate injury to the defendants, and should be all assigned to them on making just compensation to the orators. It has apparently been made indivisible by the erections and constructions of the defendants, with which the orators, and their ancestors from whom they derive title, have had nothing to do. The orators cannot have their full rights under the constitution unless payment is actually made before assignment and conveyance. They will be entitled to have the land, as it would be without what the defendants have placed upon it, divided, and to be put in possession of their share, unless such payment is made within some reasonable time to be fixed.

The state and the riparian owners together had, certainly, the right to erect wharves on this front of navigable water; at least, to any extent that would not interfere with the public use of the waters. *Martin* v. *Waddell*, 16 Pet. 367; *Dew* v. *Jersey Co.* 15 How. 426; *Yates* v. *Milwaukee*, 10 Wall. 497; *Ry. Co.* v. *Renwick*, 102 U. S. 180. The act of the state legislature in passing the statute giving the riparian propietors the right to build and own docks or wharves, (Rev. Laws, §§ 1919, 1920,) was a grant of such rights in that direction as the state had, and after that the riparian owners were vested with the full right to make such erections in the waters of the lake and own them. *Crocker* v. *New York*, 15 FED. REP. 405. This right was appurtenant to this land, and when the railroad company entered they entered upon this right to this common land, and when the wharf in front of this common land was built under the Rutland Railroad Company it was built upon the right acquired of Nelly Austin, one of the tenants in common, as well as upon the rights acquired of the owners of the other half of the land. When the estate for her life ceased, her share passed to the orators, and this accretion to it passed with it. *Washburn* v. *Sproat*, 16 Mass. 449. They are tenants in common with the defendants of so much of the wharf as is in front of this land, as a part of the estate in the land. They may not, however, be entitled to share in the wharf without bearing, in some form, a just share of the expense of this improvement. 1 Story, Eq. § 655.

An objection is taken by the defendant the Central Vermont Railroad Company that it is a receiver of other railroads, and a lessee of this by leave and order of the court by which it was appointed, and accountable there for its doings under the lease, and not else-

where. It was not, however, appointed receiver of this land, nor of anything in controversy in this suit, and this objection cannot prevail.

According to these views, there must be a decree for the payment to the orators of the value of their interest in the land and dock, to be ascertained by commissioners, upon making valid conveyances of their rights, within some reasonable time to be fixed, and for a partition of the land and dock, and possession of their share, in case of failure to make payment. In order to ascertain fully the rights of the parties, the report of the commissioners should show the value of the land and dock in front of it, with the railroad tracks off from it; the cost of that part of the dock, and the depreciation to the time of the accruing of the orators' title; the value of the lot, with its right to erect a wharf without the wharf now there; the value of the rents and profits since the accruing of the orators' title; and a just division of the lot, and of the lot and dock, in case payment be not made.

An interlocutory decree for the orators for the appointment of commissioners is to be entered accordingly.

Ex parte GANS.[1]

(*District Court, E. D. Missouri.* July 7, 1883.)

REVENUE LAW—ASCERTAINMENT OF INFORMER'S FEES AFTER CASE IS DISPOSED OF—ACT JUNE 22, 1874—JURISDICTION.

Where, after a final decree had been made in a smuggling case, and executed by paying a fine imposed into the United States Treasury, a petition was filed in the court which had made the decree, by a party claiming to be the original informer in said case, praying for a certificate from the court as to the value of his services, for the information of the secretary of the treasury, *held*, that the court had no jurisdiction.

Breck Jones, for petitioner.

TREAT, J. On the fourteenth of June last a petition was filed by said Gans, alleging that he gave the original information in a smuggling case, theretofore finally disposed of in this court, in which the proceeds of the property were paid into the United States treasury pursuant to the decree rendered. The prayer of the petition is in these words:

"Wherefore he respectfully claims the compensation allowed under section 4, act June 22, 1874, and prays for a certificate as is provided for in section 6 of said act."

When the attention of the court was first called to the petition, it was suggested that serious propositions were involved, especially whether,

[1] Reported by B. F. Rex, Esq., of the St. Louis bar.

after final decree, the court or judge could interfere with the discretion of the secretary of the treasury, prescribed by section 4 of the act, and whether any executive duty could be devolved on the court or judge with respect thereto. As section 4 gives to the secretary of the treasury the sole discretion as to the sum to be awarded to an informer, it is obvious that no judicial action can properly be had with respect thereto; for when a judicial decision is had, it must be final, unless reversed or modified by the appropriate court having appellate or revisory jurisdiction. There is no appeal from a decree of the court to any executive officer, nor can there be consistently with the elementary principles on which the government rests. The coordinate authority of the executive, legislative, and judicial departments must be observed; each of which departments is confined in its action to the sphere assigned to it. That proposition is familiar to all. But section 6 says:

"That no payment, where judicial proceedings shall have been instituted, shall be made to the informer until the compensation shall have been established to the satisfaction of the court or judge having cognizance of such proceedings, and the value of his services been duly certified by said court or judge for the information of the secretary of the treasury; but no certificate of the value of such services shall be conclusive of the amount thereof."

Section 2 of the act made a sweeping repeal of all former acts as to the payment of shares of fines, etc., to informers and others, and requires the entire sum recovered to be paid into the treasury. Previously the courts ascertained, as essential to their decree, what portion of the sum recovered was to be paid to the United States, and what to the informer, for their respective uses. That practice compelled an alleged informer to intervene in the suit, to which he thus became a party contestant. It happened not infrequently that several persons claimed to be the original informer, and the United States disputed all their demands. Thus there was before the court, in a "suit" pending, matters essential to a right decree. The litigation proceeded in due form, and the judgment of the court was formally had. What is contemplated by section 6 is indefinite. When, in "a case wherein judicial proceedings shall have been instituted," an alleged informer intervenes, the court must dispose of his demand in some way; and, having done so, its decree is judicial, not executive, and consequently should be reviewed or overturned only in due course of further judicial proceedings.

The section devolves on the court or judge the determination of two questions: *First*, is the intervenor the original informer? and, *second*, if so, what is his just compensation? But the section adds that "no certificate [by the court] of the value of such services shall be conclusive of the amount thereof."

What, then, is the supposed function of the court? If to be reviewed by the secretary of the treasury, its action is not judicial; and only judicial functions can be devolved on its constitutionality. The

persons who happen to be judges may be named for other than judicial duties *eis nominibus* or *ex officiis;* but it will then be for them to determine, each for himself, whether he will accept the new office or position. The United States supreme court, as early as 1794, passed upon this general subject, and its early decisions were reviewed and affirmed in *U. S.* v. *Ferreira*, 13 How. 40.

The act of 1874 presents several anomalies in this respect. If the decision as to informers is committed solely to the discretion of the secretary, the duty to decide is purely executive, and the information upon which he is to act should come from executive sources. Section 6 provides that where no judicial proceedings are had, the secretary shall require satisfactory proofs; but where such proceedings shall have been instituted, he must, before payment, have the certificate of the court, by which, however, he is not bound as to compensation awarded. This provision may be intended as a check on the secretary, but what function does the court perform? These suggestions are made for the purpose of directing attention to the anomaly of confounding or confusing judicial and executive functions. Whether the decree of a court as to an informer's rights, when made in a pending case, could or could not be enforced, need not be decided.

As to the matter now before the court a distinct question arises, viz., whether a court can, after decree rendered, and executed by payment of the entire fund into the treasury, take cognizance of any claim as to that fund which should have been made pending the litigation. The "case" has disappeared from the docket, and this court has no further control of it. Shall it now, when no one is in court connected with the case, undertake to proceed *ex parte*, and decide that of the amount paid under the former decree a part should be taken from the treasury and paid over to petitioner. It may be that other persons than petitioner are legal informers, and would, if fairly before the court, contest his demand. When this case was pending they could have intervened, and the proceeding *in rem* would have concluded all by the decree as made; so far, at any rate, as the court is concerned. Should any other rule obtain, what limit is there to proceedings like those contemplated, either as to time or number? Is it not the wiser and truer interpretation of the statute to hold that the jurisdictional authority of the court and judge necessarily ceased when the final decree was executed? Any other ruling must necessarily involve strange conflicts of jurisdiction between the different departments of government, and stranger anomalies in jurisprudence. This court cannot usurp jurisdiction, nor enter upon other than judicial duties. The original suit has been finally determined, and the power of this court in the premises is at an end. If a new suit is instituted to vacate the original decree, by means of which every one who has a supposed interest can intervene, the primal difficulty would remain, viz., that no suit can be brought here against the United States which would be essential to vacate a judgment in its favor.

Whatever view may be taken of the subject, there are so many anomalies connected with this application that the court must decline to entertain and act upon the petition presented. If the petitioner seeks a review of the order of this court, dismissing the petition for want of jurisdiction, a direct and practical test will occur, viz., whether the appellate court has jurisdiction, or whether, on the other hand, the application is non-judicial, and consequently not cognizable by the court as such.

An order will be entered dismissing the petition for want of jurisdiction.

BISBEE *v.* EVANS and others.[1]

(Circuit Court, D. Kentucky. June 19, 1883.)

1. STATUTE OF LIMITATIONS.
   United States courts of equity do not apply the state statute of limitations in obedience to the statute, but by analogy.
2. SAME.
   The statute ceases to run in favor of a defendant who is a non-inhabitant of the district, when complainant has obtained process against him, or done all that is necessary to obtain process, and not before.
3. SAME.
   Section 8 of the judiciary act of March 3, 1875, does not fix the time when suit is commenced against non-inhabitant defendants so as to stop the running of the statute.

In Equity. On demurrer.

Wharton & Ray, for complainant.

James S. Pirtle, for defendants.

BARR, J. This case is submitted on demurrer to defendant Evans' plea, setting up the Kentucky statute of 15 years in bar of the action. The bill was filed May 11, 1881, and seeks to enforce a vendor's lien on a lot in this city for purchase money, evidenced by a note due February 4, 1867. The bill made Hegan Bros. defendants with Evans, but they were in no way liable for the note sued on, and were alleged to have been the owners of another vendor's note, which the bill alleged had been paid. Hegan Bros. answered, July, 1881, insisting they had not been paid. The bill alleged that Evans was not an inhabitant of the district, and could not be found in it, and prayed for an order of court requiring him to appear and plead to complainant's bill. The bill was not sworn to, and the necessary affidavit for such an order was not filed until April 12, 1883, when a warning order was entered. The question is when the action commenced as against Evans.

[1] Reported by Geo. Du Relle, Asst. U. S. Atty.

The Kentucky statute provides that "an action shall be deemed to have commenced at the date of the summons or process issued in good faith from the court or tribunal having jurisdiction of the cause of action." This, however, does not control this court. Courts of equity in the state allow the bar of the statute of limitations in obedience to the statute, but United States equity courts apply the statute by analogy, and not in obedience to it. The equity rules of the supreme court authorize, as of course, the issuing of a subpœna by the clerk after the filing of the bill, upon the application of the complainant, but the warning order against a defendant, not an inhabitant, must be made by order of court.

The plea of defendant is upon the theory that this suit was not commenced, as to Evans, until at least this warning order was made by the court. The complainant insists that under the provisions of the eighth section of the judiciary act, approved March 3, 1875, the suit is commenced at the time of the filing of the bill in the office, and that the warning order cannot, by the terms of this section, be made until the suit has already commenced. The language is:

"When, in any suit commenced in any circuit court of the United States, to enforce any legal or equitable lien upon * * * real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, * * * it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, * * * by a day certain, to be designated, * * * and in case such absent defendant shall not appear, plead, * * * and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district."

The subsequent part of this section provides that this service shall not give the court jurisdiction to render a personal judgment, but that the adjudication shall only affect the property. This, however, is not pertinent to the question under consideration. In construing this section we must look to the scope and object of the enactment. It is true, the suit is *commenced* upon the filing of the bill, for the purpose of taking the necessary steps to bring the defendant, who is a non-inhabitant, before the court. This is true in a suit against an inhabitant, and the court may make orders necessary or proper to bring the defendant before the court as soon as the bill is filed. But does it follow that congress declared in this section a suit *commenced* against a non-inhabitant of the district upon the mere filing of the bill, so as to stop the running of the statute of limitations?

If we are to look alone to the language of the section, is it not rather when and only when "it shall be lawful for the court to entertain jurisdiction" that the suit is *commenced* against the non-inhabitant defendant. It seems to me that congress did not intend and has not determined when a suit is commenced against a defendant

so as to stop the running of the statute of limitations, and that this court must determine the question in the absence of a statute.

Whenever a complainant has in good faith obtained process, or, it may be, whenever he has done *all* that is necessary for him to do to obtain process to bring a defendant before the court, then his suit is commenced as to that defendant, and then the running of the statute ceases, and not before.

In this case it was the duty of the complainant to obtain process under the provisions of this section, or at least to have filed an affidavit and moved for the proper order, and as he did not do this until after the expiration of the 15 years, the demurrer to the plea should be overruled. This view is sustained by *Pindell* v. *Maydwell*, 7 B. Mon. 314; *Lyle* v. *Bradford*, 7 Mon. 111; *Hayden* v. *Bucklin*, 9 Paige, 513; *Fitch* v. *Smith*, 10 Paige, 9; *Webb* v. *Pell*, 1 Paige, 564; *Ross* v. *Luther*, (4 Cow. 158,) 15 Amer. Dec. 341, and note.

PATRICK *v.* LEACH and others.

(*Circuit Court, D. Nebraska.* May, 1881.)

1. ATTORNEY LIEN FOR FEES—JUDGMENT—LACHES.
   Where an attorney at law has obtained a judgment for his client, on which he is entitled by law to a lien for his fees, and has perfected his lien in accordance with the provisions of the law, he may enforce it, notwithstanding a compromise and settlement made by his client with the other party, although he has not made himself a party to the record.
2. SAME—ATTORNEY INTERVENING.
   Where it is necessary, in a suit to set aside such a judgment, to protect the attorney's lien, that he be made a party to the suit, the court will allow him to intervene therein.

In Equity.

J. M. Woolworth, for plaintiff.

Cowin and *Howe, pro se.*

MCCRARY, J. These petitioners are the attorneys for the respondent Leach, and were his attorneys in the state court in which the judgment was rendered against complainant, which is sought to be enjoined. They claim a lien upon that judgment for attorney's fees. They filed their lien in the state court, but whether they gave the notice required by law is a matter of dispute; petitioners asserting that they did, and Patrick that they did not.

The petitioners say that they relied upon their lien, and did not anticipate that their client would undertake to settle and satisfy the judgment without their consent, and that, therefore, they did not deem it necessary for the protection of their rights to make themselves parties. Their client, Leach, did, however, prior to the announcement of a decision by the court in this case, enter into an agreement

of compromise and settlement with Patrick, whereby the judgment was to be satisfied and canceled. The case was subsequently decided by this court upon the merits, and without reference to the settlement in favor of Patrick, and a decree was prepared enjoining the collection of said judgment.

On the twenty-ninth of April last the petitioners presented the present application. The decree in this case had been previously prepared and approved by the judge; but, in view of the filing of this application, the decree, though signed on the first of April, was not filed, but held by the judge until a hearing upon this application could be had. The case is, therefore, not yet finally disposed of, and it is within the power of the court to modify or cancel altogether the decree which has been signed, but not filed or recorded. The court has not, up to the present moment, lost control of the case. The record has not been finally made up. The application may, therefore, be considered upon its merits. We conclude:

1. That petitioners were not guilty of laches in not making this application sooner. They were not bound to anticipate a settlement and cancellation of the judgment. They had a right to presume that their rights would be regarded by their client, and that it would not be necessary for them, as against him, to be made parties to this suit in order to preserve any right they had by virtue of their claim of lien upon the judgment.

2. That, under the peculiar circumstances, injustice may be done the petitioners if they are not made parties. If, for example, an appeal from the decree of this court shall be prosecuted in the name of the defendant Leach alone, it would probably be dismissed by the supreme court on the ground of the settlement. To this he could not object; but the petitioners, if parties, could, upon the ground that they are not bound by the settlement. If parties, the petitioners could appear and have a hearing in the supreme court upon the merits; and if, upon the merits, the decree of this court should be reversed, they would be entitled to the enforcement of their lien, if it shall prove to be valid, notwithstanding the settlement may be held binding upon Leach. On the other hand, if the present application be denied, and Leach's appeal should be dismissed on the ground of the settlement, the result would be that the petitioners would be concluded upon the question of their lien, and at the same time deprived of the benefit of an appeal; in other words, the decree of this court would be rendered, as to them, final.

3. As to the question whether Patrick had notice of the lien of petitioners, upon the present showing there is a conflict of testimony. The petitioners charge notice; Patrick denies it. There is an issue of fact, and a fair question to be litigated. We do not decide it either way at present, but hold that if the decree of this court upon the merits should be reversed, they ought upon a rehearing to be heard upon it.

4. As this court holds the judgment ought to be canceled and satisfied, it follows that we must also hold that the petitionérs have no right under their claim of lien; but before rendering final decree we will make them parties in order to give them the benefit of an appeal. There need be no delay.

Let the petitioners be made defendants, and file their bill of intervention at the present term within a time certain to be fixed. They can only be heard upon the record as it stands. They cannot, because of the misconduct of their client, be permitted to reopen the case for taking further testimony. Final decree will, therefore, be entered at this term, and an appeal allowed.

HIBERNIA INS. CO. *v.* ST. LOUIS & NEW ORLEANS TRANSPORTATION CO. and others.[1]

(Circuit Court, E. D. Missouri. July 3, 1883.)

1. COMMON CARRIER—BILL OF LADING—EXCEPTED PERILS—"DANGERS OF THE RIVER."

   The phrase "dangers of the river," as used in bills of lading, includes dangers arising from unknown reefs which have suddenly formed in the channel, and are not discoverable by care and skill.

2. TOWAGE CONTRACT—EXCEPTED PERILS.

   Where the owner of a tow-boat agrees to tow a barge containing a cargo from St. Louis to New Orleans, and to deliver the barge and cargo to a consignee at the latter place, "the dangers of navigation and other known or unknown obstacles excepted," and said tow-boat ran said barge against a tree, which had recently fallen into the channel, and was entirely submerged and hidden from view, and the presence of which in the channel was unknown, and not discoverable by care and skill on the pilot's part, and said barge and cargo were greatly damaged, *held*, that the accident arose from an excepted peril, and that the owner of the tow-boat was not liable.

In Equity.

The Babbage Transportation Company, a corporation doing business as common carrier on the Mississippi, and also engaged in towing barges for hire, contracted to transport a large amount of wheat, insured by plaintiff, from St. Louis to New Orleans,—"the dangers of the river, fire, and collision excepted." The wheat was loaded for transportation upon said company's barge, the Sallie Pearce. The Babbage Transportation Company also contracted to tow the barge Colossal and cargo from St. Louis to New Orleans, and deliver them to a consignee at the latter place,—"the dangers of navigation and the dangers of * * * collision, * * * and other known or unknown obstacles, excepted." Said barge and cargo were also insured by plaintiff. The steamer Means, belonging to said company, took the Sallie Pearce and several other barges in tow and proceeded down the

[1] Reported by B. F. Rex, Esq., of the St. Louis bar.

river, but before reaching her destination she ran, together with her two starboard barges, upon a hidden reef or lump of sand in the channel with such force as to cause them to stick fast. The sudden checking of the steamer caused the lines of the starboard barges to part, and caused the Sallie Pearce to break away from the steamer, though fastened in the proper manner and with lines of usual strength. After breaking away the barge was carried by the rapid current violently against the guards of a steam-boat laid up at the Missouri shore, a short distance below the reef, and her cargo box was broken in and a large part of her cargo lost. Evidence was introduced by defendants, at the trial, tending to prove that the reef upon which the Means struck was in the channel; that it had been formed suddenly; that the pilot had no reason to suppose it was there; and that the boat was being handled with care and skill when the accident occurred.

The Colossal appears to have been unseaworthy at the time she started. She was taken in tow by a steamer belonging to the Babbage Transportation Company, which started down the river with her and some other barges, but on her way down, as she was nearing the mouth of the St. Francis river, and while said steamer and barges were in a very narrow channel, not over 100 yards wide, and while floating and flanking down through said channel in the safest and most prudent manner, the steamer and her tow occupying the width of the channel, the pilot saw that there was an unusual current setting in towards the Missouri shore just at the mouth of said St. Francis river, and that he would run very near the shore unless he backed said boat, and he immediately backed said boat, and would have passed in safety through this narrow place, but just below the mouth of said river the bank had shortly before caved in, of which no one coming down the river could have had any knowledge, and a large tree upon the land had fallen into the river, and, in passing, the stem of said barge Colossal struck the tree, which was hidden in the water from view of the pilot, and which by no act of his, or prudence or precaution on the part of the steamer, or those in charge of her, could have been avoided, and the Colossal was broken loose from the tow-boat and floated down about a mile before said boat could overtake her and make her fast again, and when said barge was reached she had been so much damaged and injured by her stroke against said tree, in her weak and unseaworthy condition, that she was almost full of water, and it was impossible to pump her out or do more than land her and make her fast to shore, which was done without loss of time, and all of her cargo saved that could be saved, but a large portion of it was unavoidably damaged and rendered worthless. Plaintiff paid the losses and became subrogated to the owners' rights against said transportation company.

Said company has since been absorbed by the St. Louis & New Orleans Transportation Company, which has succeeded to its liabilities.

O. B. Sansum and *George H. Shields*, for plaintiff.

Given Campbell and *Thomas J. Portis*, for defendant.

TREAT, J. As to the structure of the bill and the principles involved, the views of this court were heretofore expressed;[1] following *Case* v. *Beauregard*, 99 U. S. 119, and S. C. 101 U. S. 688. As to the shipment on the Sallie Pearce, the contract was that of a common carrier. As to the Colossal there has been some testimony offered in order to determine whether the contract was simply that of towage or that of a common carrier. The court holds that it was simply a towage contract, which is apparent, not only from the face of the written contracts themselves, but also from the facts as developed that said barge and cargo belonged to the shipper. Whether this be so or not is of no moment, in the view the court takes of the case. There were two accidents; one as to the Sallie Pearce, and the other as to the Colossal. As usual in such cases there is a great conflict of testimony. Hence, the court has sought to reach a correct conclusion by examining the physical facts and circumstances connected with each disaster. The conclusion reached is that each disaster was caused by an inevitable accident, falling within the excepted perils of the river.

The bill will be dismissed, with costs.

RUTTEN *v.* UNION PAC. RY. CO. and another.

(*Circuit Court, S. D. New York.* July 25, 1883.)

RAILROAD BONDS—CONSOLIDATION OF RAILROAD COMPANIES—BILL TO ENFORCE LIEN.

The holder of the bonds of a railroad and telegraph company payable to bearer, with interest semi-annually, secured on the income from the sale of its land, and the operation of its road and line, which have passed by consolidation to another railroad company, is a creditor having a specific lien upon the income of the property which has gone from his debtor into the hands of the other company, and he may file a bill in equity to enforce such lien after default in payment of the principal of such bonds, and interest according to the terms thereof.

In Equity.

Simon Sterne, for orator.

Artemas H. Holmes, for defendant.

WHEELER, J. This case is not like *Walser* v. *Seligman*, 13 FED. REP. 415, and *Jones* v. *Green*, 1 Wall. 330, and that class of cases, which are mere creditors' bills, seeking a decree against the holder of the debtor's property solely because it is the debtor's property and the defendant has it; nor like *Whipple* v. *Union Pac. Ry. Co.* Sup. Ct. Kan., where a personal judgment was sought for personal injuries

[1] See 10 FED. REP. 596, and 13 FED. REP. 516.

on the road of one of the constituent companies of the defendant before consolidation; nor like *Hayward* v. *Andrews*, 106 U. S. 672, [S. C. 1 Sup. Ct. Rep. 544,] and *New York Guaranty & Indemnity Co.* v. *Memphis Water Co.* 2 Sup. Ct. Rep. 279, (Sup. Ct. U. S., Oct. Term, 1882,) where the equitable assignee of a purely legal right of action was seeking relief in equity,—the principles of all of which have been invoked in support of this demurrer by the defendant the Union Pacific Railway Company. According to the allegations of the bill the orator is the bearer of the bonds of the defendant the Denver Pacific Railway & Telegraph Company, payable to bearer, with interest semi-annually, secured on the income from the sale of its lands, and the operation of its road and line, which have passed by the consolidation to the other defendant. He is not an assignee merely of the bonds, but is, as bearer, an original payee, to whom the promise runs directly. *White* v. *Vermont & M. R. Co.* 21 How. 575.

The orator is not seeking to enforce any personal liability of the Union Pacific Railway Company, as founded upon its own undertaking or wrongful act; and does not claim that that defendant is liable for the undertakings or acts of the other. The grounds of relief upon which he stands rest entirely upon his relation to the property of the latter in the hands of the former. This relation is not that of a creditor at large merely, as mentioned by Judge WALLACE in *Walser* v. *Seligman, supra;* it is that of a creditor having a specific lien upon the income of property which has gone from his debtor into the hands of the other defendant. Perhaps the debtor corporation is, by the consolidation agreement, so far left in existence that he could maintain an action at law against it, and have execution, and by it reach any specific property that was the property of the debtor at the time of consolidation, if there is any such; and as to the general property of the debtor, upon which he has no lien, he would be obliged to exhaust that remedy, as shown in the cases mentioned on that subject, before proceeding against others on account of such property; but he has a lien upon this income, which he has a right to pursue, independently of any proceeding at law, to reach other property, or any foreclosure of specifically mortgaged property. He has the clear right to avail himself of any one of all his securities by pursuing any one of the appropriate remedies for that purpose. This income, in the hands of the Union Pacific Company, never was the property of the Denver Pacific, and could not be reached by judgment against that company, and the orator can have no judgment against the Union Pacific Company. This lien can be enforced only in equity, and this bill seems to be appropriate to enforce it. The interest coupons for several years are due, and this income is alleged to be sufficient to meet them. By the terms of the bonds, default of interest for 60 days after demand made the principal "subject to become due and payable;" which is understood to mean, subject to be-

come so at the option of the holder; and this bill shows no election of the orator to have these bonds become due.

As the case stands, the orator has this debt, equal to the amount of the coupons, secured upon this income large enough to meet it in the hands of the Union Pacific, which he can reach only in equity, and which this bill is appropriate to reach. Unless this is changed by the answer he seems entitled to the relief asked.

The demurrer is overruled; the defendants to answer over by the September rule-day.

MILNE *v.* DOUGLASS.[1]

(*Circuit Court E. D. Missouri.* July 3, 1883.)

1. PLEADING—DEFECT IN ALLEGATION SUPPLIED BY EVIDENCE—PARTNERSHIP.
   Where, after the dissolution of a firm, one of the partners brought suit in his own name for damages suffered by the firm from a breach of a contract made with it, and the allegations of his petition as to his right to sue in his own name were vague, but it was proved at the trial of the case that the firm had been dissolved by an agreement between the partners, and that the plaintiff, as continuing partner, succeeded by the terms of the agreement to all the rights of the firm, *held*, that the evidence supplied the defect in the petition.
2. COMMON CARRIER—UNNECESSARY DELAY—DAMAGES.
   Where there is unnecessary delay on the part of a common carrier in the delivery of goods which he has undertaken to transport, and the market price of such goods at the place of delivery is lower at the time of delivery than at the time when the delivery should have taken place, the carrier is liable in damages for the difference between the value of the goods at the former and their value at the latter date, at market prices.

This is a suit by John Milne against John M. Douglas, receiver of the Ohio & Mississippi Railway Company, the New York, Pennsylvania & Ohio Railway Company, the New York, Lake Erie & Western Railway Company, and the Red Cross Line of steam-ships.

The plaintiff states in his petition "that he is the successor in business to the copartnership formerly existing and doing business as produce commission merchants at Dundee, Scotland, where he resides, under the firm name of Milne & Berry; that he receives payment of accounts due to, and discharges the obligations of, the said firm; that he carries on the business for his own account at old premises," etc. It appeared from the evidence that the firm of Milne & Berry had been dissolved by an agreement of the partners prior to the institution of this suit, and that by the terms of the agreement Mr. Milne succeeded to all the firm's rights and assumed all their obligations.

George M. Stewart and *Paul Bakewell*, for plaintiff.

Garland & Pollard, for defendant.

[1] Reported by B. F. Rex, Esq., of the St. Louis bar.

TREAT, J. The views of the court heretofore expressed[1] control as to the law. The action is for damages sustained in consequence of unnecessary delay by a common carrier in the delivery of goods. The court has been largely aided by counsel, through tabulation of many dates pertaining to the injury, but has still been left to ascertain values at Dundee, Scotland, at two dates, as best it could, through a mass of papers which are vague and uncertain. The first point presented is as to the right of the plaintiff to recover in his own name. The allegation is indistinct; but the defect, if any, may be considered as supplied by the proofs, viz., the right of the surviving partner to sue. An analysis as to the various shipments, and as to the times when the property shipped should respectively have reached Dundee under the circumstances, and also as to the prices at the time when the flour should have arrived and when it did actually arrive, shows that there were only six car-loads which arrived at Dundee on February 18th, instead of February 4th. From February 4th to February 18th there was no change in prices. There were two car-loads which should have arrived on February 4th, but did not arrive until March 26th or March 30th. There was a fall in the prices between those dates of one shilling per sack, making a loss of £20, which, at United States rates, amount to $97.32, for which judgment will be entered.

UNITED STATES *ex rel.* MYRA CLARK GAINES *v.* CITY OF NEW ORLEANS.[2]

(*Circuit Court, E. D. Louisiana.* June, 1883.)

1. MANDAMUS.

Where it appears, upon the return to a writ of execution against a municipal corporation, that, in reply to a demand made upon him, the mayor stated that the defendant had no property to satisfy the writ; that numerous similar writs had within a few months and within a few days been issued against defendant and returned unsatisfied, and in the return to the rule for the *mandamus* the defendant sets up that there are judgments against the defendant prior to that of relator wholly unsatisfied,—nothing could more fully establish the right of the relator to have a *mandamus* to cause the levy of a tax to pay her judgment.

2. MUNICIPAL CORPORATION.

Where a muncipal corporation, by the authority of a statute, contracted a liability, in the absence of any other provision of the law for payment, she necessarily had power to bind herself, and did bind herself, to pay, by the exercise of those "powers incident to municipal corporations" with which she was endowed by the statute, *i. e.*, by levying a tax.

3. SAME—DAMAGES FOR A TORT—LA. CIVIL CODE, 2315.

"Every act whatever of man that causes damage to another, *obliges* him through whose fault it happened to repair it." La. Civil Code, 2315. The meaning of this is that under Louisiana law the wrong done by one human

[1] 13 FED REP. 37.

[2] Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

being to another, or to his estate, creates an obligation; *i. e.*, brings at once into existence the relation of debtor and creditor between the wrong-doer and the injured party. This provision includes municipal corporations as among those who are subject to this obligation.

4. SAME—DEBTOR'S PROPERTY PLEDGED TO CREDITORS—LA. CIVIL CODE, 3183.
"The property of the debtor is the common pledge of his creditors." La. Civil Code, 3183. The meaning of this is that the property of the debtor is pledged so that it might be subjected to that process of the creditor which may be suitable to the case; the property of an individual debtor may be reached by seizure under a writ of *fieri facias;* the property of a debtor which is a municipal corporation may be reached by taxation.

5. SAME—RETROACTIVE LAWS—LA. CIVIL CODE, 8.
"A law can prescribe only for the future; it can have no retrospective operation." La. Civil Code, 8. This article has the paramount force of a constitutional provision; it is a regulation of the power of all subsequent laws, whether they be found in future constitutions or future statutes; it is a statutory declaration and covenant on the part of the state incapacitating subsequent laws from disturbing any obligations.
When these three provisions are put together, it results that the state placed the wrong-doer under an obligation; for the fulfillment of that obligation subjected all his present and future property to a pledge; and contracted that the law-making power should pass no law which should affect that obligation or that pledge. It follows, then, that at whatever time the obligation of the defendant to the relator was incurred, at that time there was, by operation of the statute, an inviolable pledge created, which should operate as well upon the future as upon the present, and should give her payment by taxation.

6. CONDITIONAL OBLIGATIONS.
The jurisprudence of Louisiana is settled that in conditional obligations the law which exists at the time the obligation was contracted, and not that which exists when the condition takes place, governs the rights of the parties.

7. LA. CONSTITUTION, ART. 209; ACT 93 OF LA. OF 1856, P. 68.
The article 209 of the present constitution of Louisiana, and the act No. 93 of 1856, p. 68, had no reference to already existing obligations of any sort.

8. LA. CONSTITUTION, ART. 11.
"All courts shall be open, and every person, for injury done him in his rights, lands, goods, person, or reputation, shall have adequate remedy by due process of law, and justice administered without denial or unreasonable delay." La. Const. art. 11. This provision is applicable to the redress for all wrongs done to person or property, and to that extent gives, for the redress for wrongs, a remedy completely adequate; *i. e.*, a satisfaction limited only by the property of the debtor.

Application for *Mandamus*.

W. R. Mills, A. Goldthwaite, and *J. Ward Gurley, Jr.*, for the relator.

Charles F. Buck, City Atty., for the respondent.

BILLINGS, J. This cause is submitted upon an application for a *mandamus* to compel the levy of a tax to pay a judgment rendered in this court. There are two preliminary objections: (1) That there has been issued no alternative writ of *mandamus*. The answer to this objection is that the proceedings in this cause—namely, the petition, which, together with an order to show cause, has been served upon the persons against whom the writ is sought—are such as have been invariably followed in this court in the hundreds of causes where similar writs have been allowed, and constitute precisely the mode of procedure pointed out by the Code of Practice. That an alternative writ is not a prerequisite for this process, see *Com'rs* v. *Aspinwall*,

24 How. 385. (2) That no return of *nulla bona* upon the writ of *fieri facias* has been made. The *mandamus* is asked for the amount of the judgment, less $40,000, the amount covered by a seizure under the writ of execution. The return of no property would be only very strong evidence that the *mandamus* was necessary for the recovery or collection of the judgment. The proof is that the mayor, when demand was made to point out property, stated to the marshal that the defendant had none wherewith to satisfy the writ, either wholly or in part; that numerous similar writs have, within the past few months and within a few days, been issued against the defendant and returned unsatisfied; and in the defendant's return the ground is set up that there are judgments against the defendant prior to the relator's, and wholly unsatisfied, amounting to $700,000, or thereabouts. No return in this case could more fully establish than does this evidence that the relator must have the levy of a tax to pay her judgment, or that it will remain unpaid. The evidence shows, and, indeed, the return of the defendant admits this, and pleads a statute which would dispense with a *fieri facias*. Under such proofs, and with such a return, the return of the execution is immaterial. High, Ex. Rem. § 377.

The real question, then, comes to be considered, has the relator shown herself to be entitled to a tax? This means, has the law-making power authorized and bound the city of New Orleans to assess and levy and collect a tax to pay relator's judgment?

The relator's demand, which is represented by this judgment, is for taking possession of her land and preventing her recovery of it from the year 1837 to the year 1877. The various charters of the city of New Orleans show that prior to and since the year 1836 the city has had "all such rights, powers, and capacities as are incident to municipal corporations," and also the capacity of "acquiring, enjoying, and alienating all kinds of property, real, personal, and mixed." Acts 1805, p. 46, § 1, and p. 56, § 6; Acts 1836, p. 31, § 4; Acts 1852, p. 48, § 22; Acts 1856, p. 136, § 1; and Acts 1870, Ex. Sess. p. 30, § 2.

The record shows that the debt or obligation merged in the judgment sprang out of the acquisition, enjoyment, and alienation of real property, and was, therefore, incurred in the exercise of the powers specially granted. This is conclusively settled by the judgment itself in this case, as well as by that in the case of *Gaines* v. *New Orleans*, 6 Wall. 716, and 15 Wall. 624.

In *Rabassa* v. *Orleans Navigation Co.* 5 La. 463, 464, the court state the question submitted to be whether a corporation is responsible for an injurious act in relation to a matter within the scope of its corporate objects. They answer the question in the affirmative, and say:

"If they [the corporation] rented a house and committed waste during the lease, or made themselves responsible by the non-performance of any obliga-

tion which the law imposes on the lessee, it can hardly be questioned that they would be bound to make good the loss. If it be objected that, in the case last put, the responsibility grew out of a contract, we can hardly see how their liability would be varied, if, without a contract, they entered upon the property of another and used it for corporate purposes."

Since the corporation, by the authority of the statute, contracted the liability, in the absence of any other provision of the law for payment, she necessarily had power to bind herself, and did bind herself, to pay by the exercise of those "powers incident to municipal corporations" with which she was also endowed by the statute, *i. e.*, by levying a tax. This reasoning is adopted and this conclusion is maintained by the supreme court of the United States with reference to a debt evidenced by a bond; but the conclusion is just as unavoidable with respect to all debts which originate in the exercise of granted powers.

The facts which beyond doubt authorize the conclusion that the power to tax exists are these: That the obligation is contracted or springs up inside of the granted powers; that there is no other mode of performance; that the power to tax is one of the usual powers incident to cities, and is therefore granted; and the conclusion is established with equal certainty whether the obligation be written or verbal, express or implied, resulting from a contract or tort, provided the act creating the obligation is within the delegated corporate faculties. In the language of the supreme court in *Rabassa* v. *New Orleans Nav. Co.*, *supra*, "We cannot see how the liability would be varied if, without a contract, they [the corporation] entered upon the property of another and used it for corporate purposes."

The supreme court of the United States, in *U. S.* v. *New Orleans*, 98 U. S. 393, says: "When such a corporation is created, the power of taxation is vested in it as an essential attribute, for all the purposes of its existence, unless its exercise be, in express terms, prohibited." Again, at page 397, the court say: "As already said, the power of taxation is a power incident to such a corporation, and may be exercised for all the purposes authorized by its charter or subsequent legislation."

I think it is established beyond successful controversy that the city of New Orleans has the power, and may be compelled, to levy this tax, unless, as is urged by the defendant, the power of taxation, with reference to this indebtedness, is qualified and controlled by the statute of 1856, and by article 209 of the constitution of 1879.

The act of 1856, No. 93, p. 68, provides that "the power to tax is limited to 1½ per cent. of the assessed value of real estate and slaves, provided that such an amount shall be raised thereby as shall be sufficient to pay the interest of the present city debts, together with the gradual reduction of the capital of the consolidated debt, as required by the laws now in force."

The article 209 of our present constitution is as follows: "And no

parish or municipal tax for all purposes whatsoever shall exceed 10 mills on the dollar of valuation;" provided that by a vote of the inhabitants further taxation for certain improvements is allowable. It is to be observed that if this statute and constitutional provision affect this obligation, it cannot be denied that they would practically take away all remedy for the relator.

I shall, in this connection, and for the purpose of testing the argument urged by the defendant, assume, what I think is not the fact, that the act of 1856 and article 209, above set forth, were intended to affect pre-existing obligations. If they were such limitations they would be utterly void, as impairing a contract entered into on the part of the state of Louisiana itself.

There are three provisions of the statute, found in three articles of our Civil Code, each having been adopted many years prior to 1836, which require to be considered collectively in order to see just what the state has done, and has obligated itself not to do.

(1) Civil Code, art. 2315, (old 2294:) "Every act whatever of man that causes damage to another, *obliges* him through whose fault it happened to repair it." The meaning of this is that, under our law, the wrong done by one human being to another, or to his estate, creates an obligation; *i. e.*, brings at once into existence the relation of debtor and creditor between the wrong-doer and the injured party. This provision includes municipal corporations as among those who are subjected to this obligation. *McGary* v. *City of Lafayette*, 12 Rob. 668; S. C. 4 La. Ann. 440; *Rabassa* v. *Navigation Co.* 5 La. 463, 464; *Wilde* v. *City of New Orleans*, 12 La. Ann. 15; and *Gaines* v. *New Orleans*, 6 Wall. 716.

(2) Civil Code, art. 3183, (old 3150:) "The property of the debtor is the common pledge of his creditors." The preceding article subjects to the common pledge all the debtor's present and future property. The meaning of this is that the property of the debtor is pledged, so that it might be subjected to that process of the creditor which may be suitable to the case; the property of an individual debtor may be reached by seizure under a writ of *fieri facias;* the property of a debtor which is a municipal corporation may be reached by taxation.

(3) Civil Code, art. 8: "A law can prescribe only for the future; it can have no retrospective operation." This article has the paramount force of a constitutional provision. It is a regulation of the power of all subsequent laws, whether they be found in future constitutions or future statutes. It is a statutory declaration and convenant on the part of the state incapacitating subsequent laws from disturbing any obligations. Having been in operation from 1808 to the present time, it attached to all obligations in this case as they sprang into existence, and controls and protects them.

When the three provisions are put together, it results that the state placed the wrong-doer under an obligation, for its fulfillment sub-

jected all his present and future property to a pledge, and contracted that the law-making power should pass no law which should affect that obligation or that pledge.

It is of no avail, then, to urge that the indebtedness of the defendant springs out of a wrong; for, under the statutory enactments above recited, the obligation to repair an injury inflicted by a tort is made to differ from that existing under the laws of any other state. It is immediately clothed with the properties of an indebtedness, and made the basis of a pledge, indestructible, upon present and future acquired property. Nor does it avail to urge that the relator, for all these years, had but a chose in action, a litigious right, and that the limitation affected the remedy alone. Hers was a right of action inhering in an obligation created by the statute, which, through the form of a remedy, was secured by the pledge of the debtor's entire property through taxation, under a covenant on the part of the state that it should not be lessened nor impaired by future legislation. The subsequent legislation, if applicable and valid, would utterly destroy this created and guarantied right, for it would take away all possible remedy. "A right," say our supreme court, in *Sabatier* v. *Creditors*, 6 Martin, N. S. 590, "without a legal remedy, ceases to be a legal right." And again, at page 591, the court say: "On the implied obligation of the property being liable for the engagements of the debtor, the legislature cannot deprive the creditor of recourse on it." In *Com'rs* v. *Bean*, 3 Rob. 415, the court say: "The legislature cannot constitutionally, by any act subsequent to the creation of a debt, interfere to change or disturb the relation between debtor and creditor."

It is the express contract on the part of the state which has been violated, if these limitations are set up between the creditor and his remedy, that contract being to the effect that there should be a pledge of the present and future property of the defendant, and that no future law should disturb that pledge. In a case certainly no stronger the supreme court of the United States say: "The state and the corporation are, in such cases, equally bound." *Von Hoffman* v. *Quincy*, 4 Wall. 535.

This, in substance, is the question which was determined in *Green* v. *Biddle*, 8 Wheat. 1. There a compact entered into by the state of Kentucky; and incorporated into its constitution, had declared that all private rights and interests in land within a district should be determined by the laws existing in Virginia at the date of the cession of that district. A subsequent act of the legislature of Kentucky sought to relieve the occupants of land within the ceded district from damages for its wrongful detention before action brought. This act, though affecting only the remedy, and that in case of torts, since the continuance of that remedy had been promised by the state, was held to be void.

That case is conclusive upon the relators. In that case there had been an undertaking on the part of the state that the laws existing

at a certain time should regulate the recovery for mesne profits; in the relator's case there had been an undertaking on the part of the state that the laws in force when the right to recover originated should not be changed. In that case the undertaking was sought to be disregarded by a withdrawal of the right to recover; in the relator's case, by a withholding perpetually by limitation the guarantied remedy, and, practically, all remedy, for the right. Both these cases are protected. *Wolff* v. *New Orleans*, 103 U. S. 367.

It follows, then, that at whatever time the obligation of the defendant to the relator was incurred, at that time there was by operation of the statute an inviolable pledge created, which should operate as well upon the future as upon the present, and should give her payment by taxation according to the power of taxation with which the defendant was then invested. When was this obligation incurred?

The defendant had in bad faith gone into possession of relator's land, had sold the same and conveyed it with warranty, and by various devices kept the relator from recovering possession for a period of 41 years, and until the year 1877. The obligation of the defendant, since the city was vendor and warrantor and constructive possessor, all in bad faith, was to restore to her vendee the price, and acquit the vendee; that is, restore, for the vendee, the fruits to the owner, the relator. The obligation to restore the fruits originated at the same time with the obligation to restore the thing out of which the fruits issued—the land; *i. e.*, at the time of the sale and warranty in 1836. The condition upon which the obligation could be enforced, *i. e.*, the recovery of possession, did not take place till 1877. Civil Code, arts. 498–502. Our jurisprudence is settled that, in conditional obligations, the law which exists at the time the obligation was contracted, and not that which exists when the condition takes place, governs the rights of the parties. *Town* v. *Syndics of Morgan*, 2 La. 112. The measure, therefore, of relator's right to a tax must be determined by the law in force in 1836, and at that time there was no limit, neither in the constitution nor the statute. At that time, whatever debts the corporation incurred in the exercise of her corporate powers, which had been conferred by the legislature, whether by contract or by tort, she could be compelled to levy a tax to pay.

I have thus far considered the question upon the hypothesis that the act of 1856 and the article 209 of the present constitution were intended to apply to antecedent indebtedness. But, in my opinion, it is manifest that this statute and this article had no reference to already existing obligations of any sort. The very terms of the act of 1856 show that the limitation was to be operative only provided the tax thus afforded should be sufficient to pay the interest and the maturing principal. The care taken to make provision for all outstanding obligations is manifest.

The portion of the act of 1876 which withdraws the power of taxation has been declared void so far as concerns antecedent contract

obligations. This would for the same reason be true with regard to antecedent obligations not contract in their origin, but protected by a statutory contract which attached to them at their inception and adhered to them ever afterward.

The article 209 of our constitution was designed and ordained as a limit upon the expenditures of the parishes and cities—as a rule of rigid economy in the administration of their affairs. To that extent it may be invoked. It has no force nor application to obligations already completely incurred. Those who contend that it was intended to work a rejection, or, what is the same, an indefinite paralysis, of pre-existing obligations, must treat the provision as really stating that in order to secure moderate taxation all outstanding obligations are to be set aside and disregarded. The statement of such a construction should be its refutation.

The supreme court of this state has refused to observe this as a limit, so far as concerns indebtedness antecedently incurred springing from contracts. This case cannot in principle be distinguished from that. Under our law an obligation, the *vinculum juris*, which, in case of torts, in the other states, creates a definite hold upon the property of the debtor only after judgment and process issued, is made to attach to the property of the debtor by as indissoluble a tie from the moment of the commission of the act which is its source in case of an act of wrong as of an act of contract. In this state, when one takes or detains another's property, the state has promised the same compensation, and has connected that promise by a direct and present tie with the estate of the author of the act, as irrevocably as when one makes and delivers a promissory note.

If, therefore, as all concede, the obligation springing from a pre-existing contract does not fall within or is not controlled by this constitutional limitation, for the reason that it cannot be impaired, it must follow that, under our law, so far as concerns the resort to the property of the obligor, the antecedent obligation springing from a wrongful act is equally excluded, for the reason that that resort is by a statute which entered into the obligation secured, and future withdrawal or modification is by another statute, also forming a part of the obligation guarantied against.

The limitations urged by the defendant, if intended to reach this obligation, would have been ineffectual, because void. But they were not so intended. They applied only to the future. The provisions of our present constitution specifically deal with the redress for wrongs, and to the honor and credit of the state be it said, in case of damages arising from wrongs, it has torn aside and destroyed all exemptions and limitations which could be held to operate upon the right to resort to the property of the wrong-doer. Article 11 provides that "all courts shall be open, and every person, for injury done him in his rights, lands, goods, person, or reputation, shall have adequate remedy by due process of law, and justice adminis-

tered without denial or unreasonable delay." I understand this provision to be applicable to the redress for all wrongs done to person or property, and to that extent to give to the redress for wrongs a co-equal if not paramount security to that guarantied for the enforcement of contracts. I understand this provision to ordain, in behalf of those who, like the relator, are seeking reparation for injury done to themselves or their estate, not only that the courts shall be always open, not only that the courts shall have jurisdiction, not only that the suitors shall have a speedy and just trial, not only that there shall be awarded due process, but in addition to all there is solemnly ordained and guarantied *a remedy entirely adequate*. This remedy is distinct from due process, for it is to be *by* due process. The words "adequate remedy" mean complete satisfaction of the judgment without restriction. The process will vary with the nature of the recovery and the character of the debtor. If the judgment decree the recovery of money, and the debtor be a natural person, it would be a writ of *fieri facias*. If the debtor be a municipal corporation, the process would be a writ of *mandamus* compelling the levy of a tax; for it is settled that the process for compelling satisfaction of a money judgment against a municipal corporation is a *fieri facias* or a *mandamus* for a tax. Both are declared to be process in execution. *Riggs* v. *Johnson Co.* 6 Wall. 198, and *Memphis* v. *Brown*, 97 U. S. 300.

The conclusion is that the relator has a right to the tax prayed for; that she acquired this right before there was any limitation upon the power of the city to tax, except that springing from its statutory capacities as a corporation; that if the statute of 1856 and article 209 of the constitution were intended to include this case, they would be void as impairing the obligation of a contract, the state having contracted that relator's right should be unaffected by subsequent laws; that these limitations were not intended to apply to pre-existing obligations where the right of the creditor, through a tort or a contract upon the property of the debtor, was fixed by an irrepealable law; that these limitations were established with as complete an absence of purpose as there was of power to cast off or repudiate antecedent indebtedness, but were ordained as wholesome checks upon future expenditures and the creation of subsequent debts; that with reference to that class of indebtedness to which belongs the one upon which the relator recovered her judgment, the present constitution of the state not only imposes no restriction upon the right to satisfaction by the levy of a tax, but, on the contrary, has placed that right beyond the reach of legislative action, and by its own force has given due process and complete remedy; that in this case that process is a *mandamus*, and that remedy is the assessment and levy and collection of a tax.

The case of *Wolff* v. *New Orleans*, 103 U. S. 358, was in principle like this case. There, as here, the judgment had been registered, and

no provision made for its payment in the annual budget, and the supreme court, after dealing with all the questions involved in the acts of 1870 and 1876, in their mandate prescribe the form and terms of the writ and the time of the levy of the tax. That mandate will be followed in this case.

So far as this proceeding is concerned, the defendant must be credited with the amount seized under the *fieri facias*, namely, the sum of $40,000. For the balance of the judgment, with interest, the relator is entitled to a writ of *mandamus* as prayed for.

PRYZBYLOWICZ *v.* MISSOURI RIVER R. Co.

(*Circuit Court, D. Kansas.* November, 1881.)

1. CONSTITUTIONAL LAW — COMPENSATION FOR PRIVATE PROPERTY TAKEN FOR PUBLIC USE.

   The payment of compensation to the owner of private property taken for a public use is a condition precedent to any right divesting the owner of his possession, and a judgment in his favor for the value of the land, unpaid and unsecured, is not compensation made, and does not justify the dispossessing the owner of his property.

2. SAME—ESTOPPEL—ACQUIESCENCE OF OWNER.

   The owner of land may, by his own act, estop himself from demanding actual payment of compensation as a condition precedent to the taking for public uses, and if he expressly consents, or, with full knowledge of the taking, makes no objection, but permits a public corporation to enter upon his land and expend money, and carry into operation the purposes for which it is taken, he may not then be permitted to eject the parties from possession for want of payment of the compensation.

3. SAME—RAILROAD TAKING LAND.

   Where the owner of land has knowledge that a railroad company has taken possession of his land and makes no objection, but permits the company to build its road and operate its trains over the land, and exercises all the rights appertaining to a right of way for public uses for a period of 10 or 12 years, he or his grantee cannot be permitted to eject the company from the land.

Motion for New Trial.

FOSTER, J. The constitution of the United States provides that private property shall not be taken for public use without just compensation, etc. The constitution of this state contains the wise and salutary provision that right of way shall not be taken by any corporation without full compensation therefor be first made, etc. And the supreme court of this state, and the courts of other states having a like provision, hold that the payment of this compensation is a condition precedent to any right divesting the owner of his possession; that a judgment in his favor for the value of the land, unpaid and unsecured, is not compensation made, and does not justify the dispossessing the owner of his property. With this rule of law we are in full accord, and regard it as based upon the highest and most sacred principles of justice.

But going hand in hand with this doctrine is another rule of law, which is also well grounded in justice and right, and which is recognized and enforced by the courts, and that is that the owner of the land may, by his own act, estop himself from demanding actual payment of the compensation as a condition precedent to the taking for public uses. If the owner gives license, either express or fairly implied; if he expressly consents, or, with full knowledge of the taking, makes no objection, but permits the public corporation to enter upon and expend money and carry into operation the purposes for which it is taken,—he may not then be permitted to eject the parties from the possession for want of payment of the compensation.

The plaintiff in this case has no higher or greater rights in law or equity than Mrs. Mills, his grantor, would have if she was the plaintiff in this action. And if his grantor would have been estopped, then this plaintiff is estopped.

If Mrs. Mills had knowledge that this railroad company had taken possession of this land, and made no objection, but permitted the company to build its road and operate its trains over this land, and exercise all the rights appertaining to a right of way for public uses for a period of 10 or 12 years, she cannot now be permitted to eject the company from the land.

I have found, from all the evidence in this case, that Mrs. Mills did have this knowledge, and did acquiesce in the possession of the railroad company. It is true, there was no direct and positive evidence as to whether she did or did not have such knowledge and make such acquiescence, but, in the absence of any evidence on this point, it would not be a rash presumption to hold that an open, palpable, and notorious possession by the railroad company for a period of so many years would not likely occur without knowledge of the owner, living much of the time in the vicinity of the land. But in addition to this, in the condemnation proceedings this land is mentioned as a part of the right of way of the said road. Mr. Mills, her husband, gave his written consent that the road might pass through his land, (presumably this land of his wife.)

Mrs. Mills had relatives living in Leavenworth, and visited there herself. She also had an agent there who looked after her land and paid taxes on it, as I remember the evidence, and she probably had traveled over this road in going to or from Leavenworth. From all these facts and circumstances, it requires greater credulity than I am possessed of to believe she had no knowledge of the possession of the railroad company.

On these facts, and the law applicable thereto, this plaintiff cannot recover, and the motion for a new trial must be overruled.

NICHOLS, SHEPHERD & CO. *v.* KNOWLES.

(*Circuit Court, D. Minnesota.* June, 1881.)

1. APPLICATION OF VOLUNTARY PAYMENTS.
The rule as to voluntary payments is that the debtor may direct the application of such payments upon one of several debts due from him to the creditor.
2. VOLUNTARY PAYMENT DEFINED.
A voluntary payment, within the meaning of this rule, is one made by the debtor on his own motion, and without any compulsory process. A payment made upon execution does not fall within the rule.
3. CHATTEL MORTGAGE FORECLOSURE—STATUTE OF MINNESOTA.
When, under the statute of Minnesota, a chattel mortgage is placed in the hands of the sheriff, with orders to seize and sell the mortgaged property for the purpose of paying the mortgage debt, the sale is made by virtue of legal proceedings, and the proceeds of the sale are in no sense voluntary payments, the application of which the debtor is authorized to direct.
4. SAME—APPLICATION OF PROCEEDS.
Where the mortgage foreclosed does not direct how the proceeds of the sale of the mortgaged property shall be applied, and there are no circumstances from which it can be inferred that a *pro rata* application was intended by the parties, and some of the notes are secured by the indorsement of a third party as well as by the chattel mortgage, from which it would be inferred that the parties intended to apply the proceeds of the sale of the mortgaged property first to the notes not otherwise secured, so as to give the creditor the full benefit of all of his security, the creditor will have the right to apply the proceeds to the payment of any of the debts secured by the mortgage.

Action on Promissory Notes.

John W. Willis, for plaintiff.

C. D. O'Brien and *J. C. M. Searles*, for defendant.

MCCRARY, J. The rule as to voluntary payments is that the debtor may direct the application of such payments upon one of several debts due from him to the creditor. *Tayloe* v. *Sandiford*, 7 Wheat. 13. Does this rule apply to the present case? A voluntary payment, within the meaning of this rule, is one made by the debtor on his own motion, and without any compulsory process. A payment made upon execution does not fall within the rule. When, under the statute of Minnesota, a chattel mortgage is placed in the hands of the sheriff, with orders to seize and sell the mortgaged property for the purpose of paying the mortgage debt, the sale is made by virtue of legal proceedings, and the proceeds of the sale are in no sense voluntary payments, the application of which the debtor is authorized to direct.

If the debtor could not direct the application of the payments, could the creditor? It is strongly urged by counsel for defendant that neither party could direct a particular application, and that the law will apply the proceeds of the sale *pro rata* upon all the notes. Inasmuch, however, as the mortgage does not direct how the proceeds of the sale of the mortgaged property shall be applied, and since there are no circumstances from which it can be inferred that

a *pro rata* application was intended by the parties, I hold that the creditor had the right to apply the proceeds to the payment of any of the debts secured by the mortgage. *Gaston* v. *Barney*, 11 Ohio St. 506. This view is much strengthened by the fact that some of the notes were secured by the indorsement of a third party as well as by the chattel mortgage, from which it may be inferred that the parties intended to apply the proceeds of the sale of mortgaged property first to the notes not otherwise secured, so as to give the creditor the full benefit of all his security. *Stamford Bank* v. *Benedict*, 15 Conn. 437; *Martin* v. *Pope*, 6 Ala. 532; *Mathews* v. *Switzler*, 46 Mo. 301; *Field* v. *Holland*, 6 Cranch, 8; *Schuelenburg* v. *Martin*, 1 McCrary, 348; [S. C. 2 FED. REP. 747.]

Judgment for plaintiff.

The rule as to the application of voluntary payments is that the debtor or party paying the money may, if he chooses, direct its appropriation; if he fail, the right devolves upon the creditor; if he fail, the law will make the application according to its own notions of justice.[1] It is generally conceded that this doctrine has been borrowed from the civil law;[2] but this has been denied;[3] and, without doubt, in its application to particular cases by the courts in England and this country, the rules of the civil law have been much relaxed.[4]

The direction by the debtor as to how the payment shall be applied, need not be express, but may be inferred from circumstances;[5] but if he does not exercise his right to direct the application of the payment, and it is not fairly inferred from the circumstances under which the payment was made, the money paid becomes the absolute property of the creditor, and he may apply it as he chooses,[6] provided he does not, without the debtor's consent, appropriate the payment to an illegal or invalid claim,[7] such as a claim for usurious interest,[8] or liquor sold in violation of law,[9] or a note made without consideration to hinder and defraud creditors.[10] If, however, the debtor consent to the appropriation of the payment to an illegal item, he cannot revoke such consent;[11] nor will a court of equity, under such circumstances, withdraw a payment so

1 U. S. v. Kirkpatrick, 9 Wheat. 720; U. S. v. January, 7 Cranch, 572; Field v. Holland, 6 Cranch, 8; U. S. v. Eckford, 1 How. 250; Jones v. U. S. 7 How. 684; Gordon v. Hobart, 2 Story, C. C. 243; Cremer v. Higginson, 1 Mason, 338; Mayor, etc., Alexandria v. Patten, 4 Cranch, 317; Nat. Bank v. Merchants' Nat. Bank, 94 U. S. 439; Stone v. Seymour, 15 Wend. 19; Pickering v. Day, 2 Del. Ch. 333; Youmans v. Heartt, 34 Mich. 401; Nat. Bank v. Bigler, 83 N. Y. 53; Baker v. Stackpoole, 9 Cow. 420; Chester v. Wheelright, 15 Conn. 562; Washington Bank v. Presscott, 20 Pick. 343; Whitaker v. Groover, 54 Ga. 174; Jones v. Williams, 39 Wis. 300; Lee v. Early, 44 Md. 84; Bell v. Radcliff, 32 Ark. 645; Moore v. Kiff, 78 Pa. St. 97; Stewart v. Hopkins, 30 Ohio St. 502; Meggott v. Mills, 1 Ld. Raymond, 286; Simson v. Ingham, 2 Barn. & C. 65; Clayton's Case, 1 Mer. 536-610; Brooke v. Enderby, 2 Brod. & B. 70. See, generally, 2 Pars. Cont. 629-635; 2 Whart. Cont. §§ 923-934.

2 Pattison v. Hull, (note,) 9 Cow. 773; STORY, J., in Gass v. Stinson, 3 Sumn. 110; Milliken v. Tufts, 31 Me. 500. See, also, 3 Amer. Law Reg. 705; 1 Amer. Law Mag. 31.

3 1 Amer. Lead. Cas. *294-295.

4 Moss v. Adams, 4 Ired. Eq. 42. Consult 1 Domat, B. 4, tit. 1, § 8; 1 Evans' Pothier, (3d Amer. Ed.) 422-429; Wood, Civil Law, 293; 2 Bell's Com. 535.

5 Tayloe v. Sandiford, 7 Wheat. 13; Mayor, etc., v. Patten, 4 Cranch, 317; Sawyer v. Tappan, 14 N. H. 356; Fowke v. Bowie, 4 Har. & J. 566; Stone v. Seymour, 15 Wend. 19; Hanson v. Rounsavell, 74 Ill. 238.

6 Nat. Bank v. Bigler, 83 N. Y. 53; Cremer v. Higginson, 1 Mason, 323; 1 Amer. Lead. Cas. *294.

7 Caldwell v. Wentworth, 14 N. H. 431; Ayer v. Hawkins, 19 Vt. 26; Bancroft v. Dumas, 21 Vt. 456; Rohan v. Hanson, 11 Cush. 44; Parchman v. McKinney, 12 Smedes & M. 631.

8 Pickett v. Merchants' Nat. Bank, 32 Ark. 346.

9 Phillips v. Moses, 65 Me. 70.

10 McCausland v. Ralston, 12 Nev. 195.

11 Brown v. Burns, 67 Me. 535.

made and actually applied.[1] After the right of appropriation has passed to the creditor, because of a failure on the part of the debtor to direct the appropriation to any specific account, the creditor need not obtain the consent of the debtor in appropriating it to any valid claim;[2] and he may even so apply it as to prevent some of the debts or items from being barred by the statute of limitations;[3] but he cannot apply it to a debt not due in preference to a debt actually due.[4] Where a creditor holds two claims—one in a representative capacity, as trustee or executor, and one in his individual capacity—he cannot apply a payment made by the debtor, without designating upon which account he pays it, to his individual claim in preference to the claim due him in his representative character.[5] Whether the creditor has actually made an appropriation of a payment to a particular account, and when, may be inferred from all the circumstances of the case;[6] and he may reserve his right to appropriate a payment to one of several accounts, until called upon by the debtor to make such appropriation; but, so far as the interests of third persons may be affected, he must act within a reasonable time.[7] Where, however, a creditor has made an appropriation of a payment to a particular debt, and so informed the debtor, he cannot afterwards change such appropriation, and apply it in satisfaction of another claim;[8] and neither of the parties can make the appropriation after a controversy upon the subject has arisen between them; and, *a fortiori*, not at the trial.[9]

Where neither debtor nor creditor makes the application, the law will make it, "according to its own notion of the intrinsic equity and justice of the case,"[10] and, as this depends so much upon the circumstances of each case, it is impossible to lay down any general rule; but the following propositions are settled: (1) The payment will be applied in satisfaction of the debt whose security is most precarious.[11] (2) To a debt secured by mortgage rather than to a simple account.[12] (3) In extinguishment of a certain rather than a contingent liability.[13] (4) To extinguish debts prior in time.[14] (5) To extinguish an existing debt, rather than one to become due.[15]

St. Paul, Minn., August 28, 1883. ROBERTSON HOWARD.

1 Feldman v. Gamble, 26 N. J. Eq. 494.

2 McLendon v. Frost, 57 Ga. 448.

3 Jackson v. Burke, 1 Dill. 311; Williams v. Griffith, 5 Mees. & W. 300; Waugh v. Cope, 6 Mees. & W. 824; Ashby v. James, 11 Mees. & W. 542; Murphy v. Webber, 61 Me. 478; Bancroft v. Dumas, 21 Vt. 456; Mills v. Fowkes, 5 Bing. N. C. 455; Brown v. Burns, 67 Me. 535; Pond v. Williams, 1 Gray, 630; Ramsay v. Warner, 97 Mass. 8. Compare Moniteau Bank v. Miller, 73 Mo. 187; Wood v. Wylds, 6 Eng. (Ark.) 754; Burn v. Boulton, 2 C. B. 476.

4 Bobe's Heirs v. Stickney, 36 Ala. 495; Kidder v. Norris, 18 N. H. 534.

5 Cole v. Trull, 9 Pick. 325; Scott v. Ray, 18 Pick. 361. See Fowke v. Bowie, 4 Har. & J. 566.

6 Shaw v. Picton, 4 Barn. & C. 716; Frazer v. Bunn, 8 Car. & P. 704; Williams v. Griffith, 5 Mees. & W. 300; Allen v. Culver, 3 Denio, 284; Brady's Adm'r v. Hill, 1 Mo. 315; Starrett v. Barber, 20 Me. 457.

7 Simson v. Ingham, 2 Barn. & C. 65; Seymour v. Marvin, 11 Barb. 80; Dorsey v. Wayman, 6 Gill, 59; Bosanquet v. Wray, 6 Taunt. 597; Mayor, etc., v. Patten, 4 Cranch, 317; and see Emery v. Tichout, 13 Vt. 15; Smith v. Loyd, 11 Leigh, 517; Stamford Bank v. Benedict, 15 Conn. 438; Heilbron v. Bissell, 1 Bail. Eq. 435.

8 Offutt v. King, 1 McArthur, 312; Page v. Patton, 5 Pet. 304; Cremer v. Higginson, 1 Mason, 337; Hilton v. Burley, 2 N. H. 193; McMaster v. Merrick, 41 Mich. 505; Seymour v. Marvin, 11 Barb. 80.

9 U. S. v. Kirkpatrick, 9 Wheat. 720; Nat. Bank v. Mechanics' Nat. Bank, 94 U. S. 437.

10 Cremer v. Higginson, 1 Mason, 338; Pickering v. Day, 2 Del. Ch. 333; Nat. Bank v. Nat. Mechanics' Bank, 94 U. S. 437.

11 Field v. Holland, 6 Cranch, 8; Stamford Bank v. Benedict, 15 Conn. 437.

12 Pattison v. Hull, 9 Cow. 747; Gwinn v. Whitaker, 1 Har. & J. 754; Neal v. Allison, 50 Miss. 175.

13 Bank v. Rosevelt, 9 Cow. 409; Portland Bank v. Brown, 22 Me. 295.

14 Smith v. Loyd, 11 Leigh, 512; Pierce v. Knight, 31 Vt. 701; Fairchild v. Holly, 10 Conn. 175; Pickering v. Day, 2 Del. Ch. 333; Truscott v. King, 6 N. Y. 147; Jones v. Kilgore, 2 Rich, Eq. (S. C.) 66 Jones v. U. S. 7 How. 692; Emery v. Tichout, 13 Vt. 29; Leef v. Goodwin, Taney, 462; U. S. v. Kirkpatrick, 9 Wheat. 720.

15 New Orleans v. Pigniolo, 29 La. Ann. 835; Thomas v. Kelsey, 30 Barb. 273; Baker v. Stackpoole, 9 Cow. 420.

UNITED STATES v. REID and others.

(*Circuit Court, S. D. New York.* August 2, 1883.)

1. DISTRICT COURT—JUDGMENT AFFIRMED—REV. ST. § 636.
When a judgment of the district court is affirmed in the circuit court, the judgment does not remain in the district court as the judgment of that court, to be enforced by its process, but becomes the judgment of the circuit court.
2. SAME—EXECUTION AGAINST BODIES OF DEFENDANTS—CODE CIVIL PROC. (N. Y.) § 549.
An action of debt for the value of merchandise forfeited for entry by means of false and fraudulent practices and appliances, under section 2864 of the Revised Statutes of the United States, is not an action "to recover a fine or penalty," or "an action upon contract, express or implied," within the meaning of section 549 of the Code of Civil Procedure of the state of New York, and consequently an execution against the bodies of the defendant cannot be issued out of a circuit court of the United States in that state for damages and costs.

Motion to Set Aside Execution.

Edwin B. Smith, for defendants.

Elihu Root, U. S. Atty., for plaintiff.

WHEELER, J. This was an action of debt, for the value of merchandise forfeited for entry by means of false and fraudulent practices and appliances under section 1 of chapter 76, Act 1863, (12 St. at Large, 737; Rev. St. § 2864.) The plaintiff recovered judgment in the district court at March term, 1873. On writ of error brought by the defendants the judgment was affirmed in this court at April term, 1879. An execution against the bodies of the defendants has been issued out of this court for the damages and costs of both courts. The defendants have moved to have the judgment of this court made to be for costs in this court only, and to set aside the execution because it runs against the bodies of the defendants. The judgment of this court appears to have been entirely correct. When the judgment of the district court was affirmed in this court, the judgment did not remain in the district court as the judgment of that court, to be enforced by its process, but became the judgment of this court. Rev. St. § 636. If this were not so, and the form of entering the judgment was clerically wrong, proceedings to correct the record should be taken before the justice who directed the entry. This part of the motion must be denied.

Whether the execution could properly issue in such a case is to be determined by the laws of the state. Rev. St. §§ 990, 991; *Low* v. *Durfee*, 5 FED. REP. 256. The law of the state directly applicable is found in the Code of Civil Procedure, § 549. That section allows process to issue against the body in actions; (1) to recover a fine or penalty; * * * (4) in an action upon contract, express or implied, other than a promise to marry, where it is alleged in the complaint that the defendant was guilty of a fraud in contracting or incurring the liability; and in no other cases claimed to be appli-

cable. The object of the government is not to prevent imports, but to collect its revenue. The statutes which work this forfeiture are remedial to that end. This is the mode of obtaining the duties when the goods are so proceeded with as to become forfeited. The value of the goods forfeited, when recovered, is no more a penalty than the duties would be if paid. *Stockwell* v. *U. S.* 13 Wall. 531; *In re Vetterlein*, 13 Blatchf. 44. The execution cannot be upheld on the ground that the recovery was of a penalty.

As to the other ground, this can hardly be said to be an action upon contract, either express or implied. Certainly there was no express contract. By force of the law the property ceased to be the property of the defendants, and became the property of the government, if the government should choose to take it; and the government became entitled to the value of it, in lieu of the property, if it should choose to take that. The government became so entitled by force of the law, and not by virtue of any contract. The action of debt could be maintained because of the title or right created by the law, and not by virtue of any obligation to pay entered into by the defendants, or to be implied from their acts, beyond what rests upon everybody to obey the law and to yield to all its requirements.

The liability to be incurred, within the meaning of this part of the Code, seems to be a liability upon contract between party and party, and not the general compact between each member of society and all the others to support the laws, implied from living under them. These views are well supported by the reasoning of CHOATE, J., in *U. S.* v. *Moller*, 10 Ben. 189.

Motion to set aside execution granted.

HEDGER *v.* UNION INS. CO.[1]

(Circuit Court, D. Kentucky. August 14, 1883.)

1. INSURANCE POLICY—A CONTRACT OF INDEMNITY.
   An insurance policy is a contract of indemnity, and in the absence of anything to the contrary in the contract, or in the course of dealing between the parties, covers the entire proprietary interest of the assured.
2. SAME—POLICY ON WHISKY IN BOND.
   A policy upon whisky in bond, without reference to the government tax, entitles the assured to include the tax in his recovery, in case of loss, if the assured is liable for the tax.
3. GOVERNMENT LIEN FOR TAX.
   The lien of the government for its tax, and its possession by a store-keeper, is not a proprietary right.
   Sections 3221-3223, Rev. St., construed.

At Law. On demurrer to petition.

[1] Reported by Geo. Du Relle, Asst. Dist. Atty.

Lockhart, O'Hara & Bryan, for plaintiff.
J. F. & C. H. Fisk, for defendant.

BARR, J. The general demurrer to this petition raises the question whether, under the policy given by the defendant, the plaintiff can include, in his recovery of the value of the whisky destroyed, the tax of 90 cents per gallon which had been assessed, but not paid. The petition as amended alleges that the plaintiff was at the time of the insurance a distiller, and that the whisky insured was made by him, and that he is still liable for the tax, notwithstanding the destruction of it by fire. If this allegation be true,—and the demurrer admits its truth,—I see no reason why plaintiff should not include the entire value of the whisky in his recovery. The lien of the United States and its possession through a store-keeper is merely a mode of protecting the government and enforcing the tax, and is not a proprietary right. The policy sued on is an indemnity to plaintiff against loss or damage by fire to an amount not exceeding $4,500, and it provides that it is to cover 65½ barrels of whisky, (being 2,500 gallons,) and that the value of the whisky, in case of loss, is not to exceed three dollars per gallon. These provisions would indicate that the parties intended the contract of indemnity to include the tax.

It is true that in the printing on the back of the policy, under the head of "The method of adjustment of loss and payment thereof," it is provided, among other things, that it shall be optional with the company to replace or restore the property lost or damaged. But if plaintiff, as the maker of this whisky, is liable for the tax on it, the only way to indemnify him would be to replace the whisky destroyed by other of equal grade and value, upon which the tax had been paid, and it would not be an indemnity to deliver bonded whisky upon which the tax was unpaid. This provision, however, is a general one, and has, I think, no application to the case under consideration.

The extent of the indemnity given by a policy of insurance depends, of course, upon its terms; but, if the contrary does not appear, the presumption should be that the indemnity covers the entire interest of the assured, whatever that may be. The policy in this case limits the amount to be recovered in any event to $4,500, and upon this sum the premium was charged; but there is no limit or reservation as to the interest covered, and for which the assured was to be indemnified in the event of loss. The interest which the assured (plaintiff) had in this whisky was the entire proprietary right and ownership, subject to the lien for the tax, but for which it is alleged he was and is liable.

The law provides that if whisky is destroyed by accidental fire or other casualty, without the fraud, collusion, or negligence of the owner, and the tax is not covered by a valid insurance, the secretary of the treasury shall abate the tax. Sections 3221-3223, Rev. St. But this law does not change the rule of construction applicable to

these contracts of indemnity. The inquiry is, what is covered by the policy according to its terms? This law contemplates there may be a valid insurance covering the entire interest of the assured, including the tax, and in that event there is to be no remission of the tax, (section 3223;) and it seems to me that the proper construction of these contracts of indemnity is to make them include the entire interest of the assured in the property, unless there is something in the contract, or, it may be, in the course of dealing between the parties, which excludes the interest represented by the tax.

In the case of *Security Ins. Co.* v. *Farrell*, decided in 1872, and reported in 2 Ins. Law J. 302–335, the supreme court of Illinois arrived at a different conclusion than herein indicated, but the court placed its decision upon the erroneous assumption that the assured was not liable under the then law for the tax. This was a mistaken construction of the law, and hence that case is not an authority against the conclusion to which I have arrived.

The supreme court, in the case of *Farrell* v. *U. S.*, decided that a distiller was liable under his bond for the tax on whisky made by him, although it had been destroyed by fire while in the distillery warehouse. 99 U. S. 221. This is still the law, although there is some difference between the language used in the act approved May, 27, 1872, and that used in the act approved March 1, 1879.

The demurrer is overruled.

MUSER *v.* ROBERTSON.

TIFFANY *v.* SAME.

PRICKHARDT *v.* SAME.

(Circuit Court, S. D. New York. July 6, 1883.)

1. DEMURRER—COLLECTOR'S SUITS—NEW YORK CODE—STATEMENT OF FACTS.
   Under the New York Code, which requires the complaint to state the facts constituting the cause of action, *held*, that only the ultimate facts need be pleaded, and not the subsidiary facts, which, in connection with the principles of law applicable thereto, go to make up the ultimate facts.
2. SAME—ACTION TO RECOVER EXCESS OF DUTIES.
   In actions to recover alleged excess of duties exacted by the collector on importations of goods, *held*, that an averment that a certain sum of money in excess of the legal duty was exacted of the plaintiff, and paid by him under compulsion in order to obtain the goods, was an averment of fact, sufficient under the Code as at common law, and not a statement of a conclusion of law merely; so, also, of averments that the legal duty on certain goods was a certain specific sum, and that a certain other specific sum was exacted by the collector.
3. SAME—STATEMENT OF FACTS.
   A statement is not to be deemed any the less a statement of fact because its ascertainment may depend upon some principles of law applicable to various other facts and circumstances.

4. SAME—INDEBITATUS ASSUMPSIT.
At common law the ordinary form of complaint in such actions was that of *indebitatus assumpsit* for money had and received, and under the Code this form of action has been repeatedly upheld as sufficient.
5. SAME—MOTION TO MAKE MORE CERTAIN.
Where more particular information is needed as to the question actually to be tried, the remedy is by motion to make the complaint more definite and certain; not by demurrer.
6. SAME—PROTEST AND APPEAL—BILL OF PARTICULARS—REV. ST. §§ 2931, 3012.
The protest and appeal, and bill of particulars, required by Rev. St. §§ 2931, 3012, ordinarily furnish all such necessary information.
7. SAME—PAYMENT "UNDER PROTEST."
Where the complaint states that the plaintiff paid "under protest," and a bill of particulars is also served according to section 3012, which shows that the protest and appeal were in writing and in time, *held*, a sufficient pleading of these preliminary conditions under the first clause of section 3011.

Demurrers to Complaints. Fifteen cases.

S. G. Clarke, *Mr. Hartley*, *C. Bainbridge Smith*, and others, for plaintiffs.

Elihu Root, U. S. Atty, and *Mr. Clarke*, Asst. Dist. Atty., for defendants.

BROWN, J. That part of the complaint in these cases which sets forth the illegal exaction of duties is in general terms, stating the amount exacted, the amount which was the legal duty, and the payment to the defendant of the excess by compulsion, in order to obtain the goods. A bill of particulars is annexed to the complaint, stating the classification of the goods on each importation, and all the other particulars required in such cases by section 3012. The complaint does not, however, state the rate of duty claimed by the plaintiff to be applicable, nor the rate exacted by the collector, nor the classification of the goods by the collector. The precise point of the controversy does not, therefore, appear from the complaint. The demurrer in this case, and in numerous others of a similar character, has been interposed on the ground that the complaint does not state facts sufficient to constitute a cause of action, with the object of obtaining in future, if the court sustains the demurrer, a more intelligible statement in the complaint of the precise point in controversy. It is urged that this is necessary, because, in the long time which often elapses before trial and the accumulation of thousands of such cases, it often happens that there is no record or paper in the district attorney's office showing the points in controversy, and no person there, or at the custom-house, able to give needed information to prepare for trial.

The protest and appeal which, by sections 2931, 3011, must precede suits of this character, are required to give precisely the information, as to the points in dispute, which the learned district attorney now seeks to obtain. If the contents of the protests were embodied in the complaint, nothing more could be asked for. The complaint states that the plaintiff "filed with said defendant due and timely protests in writing upon each entry of said goods against his (the de-

fendant's) decision exacting such duty, setting forth distinctly and specifically the grounds of objection thereto." By demurring, the defendant admits that such protests were filed. As these protests are the basis of the secretary's examination and decision upon the appeal to him before suit, and designed to enable him to correct any error without suit, the courts are very strict in exacting a careful compliance by the importer with the requirements of sections 2931, 3011, that the protest shall "state specifically and distinctly the grounds of objection" to the duties exacted; and no suit can be maintained without such a previous protest, and no claim can be heard that is not distinctly set forth in it. *Thomson* v. *Maxwell*, 2 Blatchf. 385, 391; *Durand* v. *Lawrence*, Id. 396; *Pierson* v. *Lawrence*, Id. 495, 499. This protest, moreover, must be served on the collector at or before payment of the duties, and within 10 days after liquidation thereof, and appeal must be taken within 30 days therefrom, and suit must be brought, if at all, within 90 days after the secretary's decision; so that not only has the defendant precise information of the points in controversy in the written protest filed with him, but it must have been filed within so recent a period before suit as to be readily accessible to him, and while the controversy itself is presumably fresh in the memory of all the officers whose decision is brought in question by the suit. The bill of particulars, moreover, in all these cases, states the date of filing these protests, as well as the date of the appeal to the secretary. The defendant has full information, therefore, of the precise points in controversy, and, so far as he is concerned, no practical good would be accomplished by a repetition in the complaint of the details stated in the protests. If the office of the district attorney is not possessed of this information in these or in prior suits, it is because the defendant did not communicate to his attorney the information which he possessed, as he might easily have done, and as is ordinarily practiced between attorney and client. The present regulation of the secretary of the treasury, requiring such communication at the time issue is joined, will, if observed, supply the district attorney with such information in future.

The only question, then, is whether the complaints, all of which are in substance as above stated, contain what is technically a sufficient statement of a cause of action. The sufficiency of the pleadings is to be determined by the New York Code of Procedure. This requires a "plain and concise statement of the facts constituting a cause of action." Section 481. But the rule of pleading at common law was the same, viz., that facts, not mere conclusions of law, were to be stated. 1 Chit. Pl. 214; *Allen* v. *Patterson*, 7 N. Y. 478.

The facts essential to be pleaded are, however, the ultimate facts constituting the cause of action, not those other subsidiary matters of fact or law which go to make up the ultimate facts, and are evidences of the latter. There is often considerable doubt whether certain facts shall be taken to be essential parts of the very cause of

action itself, or only evidence of it. To resolve this doubt, recourse is often had to the former rules of pleading, which, by their approved forms, show what are regarded as the ultimate facts constituting the cause of action. On this demurrer it was claimed that the complaint does not state facts, but only conclusions of law. This clearly is not accurate. The complaint in the Muser case, which is a sample of most of the fifteen complaints, states that the true duty by law on the goods imported was $2,483.25; that the collector exacted as duties $3,049, which the plaintiff was compelled to pay to get his goods, being $565.25 in excess of the legal duties, which excess he now seeks to recover. The statement of the amount exacted and paid is certainly a statement of pure fact; the only question that can be made is whether the statement that "by law the true duty on said goods was $2,483.25," is a statement of a conclusion of law merely, or a statement of fact. In my opinion, it should be considered as a statement of one of the ultimate facts in the case, as distinguished from the mere evidences of such fact. What the true duty is depends on a great variety of circumstances. There is no dispute about the letter of the law, but upon the application of different sections of the law; and this may depend upon many circumstances to be given in evidence, such as the kind of goods, their quality, fineness, weight, mode of manufacture, component materials, the relative proportions or value of different component materials, their commercial designation, and numerous other circumstances which may be involved in the determination of the true duty. If the "true amount of duty" is not an ultimate fact to be ascertained, then every circumstance about the goods, which may affect the rate of duty and upon which the determination of the duty depends, must be deemed the ultimate facts necessary to be pleaded; and the result would be a requirement to plead a minute description of the goods in all particulars which might affect the rate of duty. No such pleading has ever heretofore been required or practiced. To require that would be to require, as it seems to me, mere evidence of the one ultimate fact which constitutes the cause of action.

On the rule contended for it would not be sufficient to designate the goods even by their statutory classification, or to allege that they were dutiable at a certain rate, since this classification, or rate, is often the only subject of controversy, and depends on various other circumstances of fact and principles of law. In the Muser case the goods are designated as "thread laces,"—a statutory classification; but suppose they are in fact black silk laces, and, except in color and material, are precisely the same as white linen thread laces, and are dealt in by the name of thread laces, or black thread lace, while the statute imposes a higher duty on silk laces, or other manufactures of silk. The question of the proper classification would then involve the law of commercial designation and statutory construction, as well, probably, as numerous controverted matters of fact. See *Smith*

v. *Field*, 105 U. S. 52. But no one would, I think, contend that all these details should be pleaded, or that a simple statement, as one of the ultimate facts in the case, that the goods were "thread laces," was not a statement of fact, but a conclusion of law. So, when the rate of duty is affected by the number of threads to the square inch, or the weight, surely these need not be pleaded.

In general, I think, it may be said that a statement is not to be deemed any the less a statement of fact, because its ascertainment may depend upon some principles of law applicable to various other facts and circumstances. Thus a plea of payment is a plea of fact of the simplest form; yet it may involve very nice questions of law and fact, arising from the legal rules concerning the application of payments upon the particular circumstances of fact that may be proved in the case. So a statement that A. sold and delivered goods to B. is plainly a statement of fact for the purposes of pleading, although on the trial the issue turns out to be one of law, whether, under the particular facts proved, the transaction was a sale, or a mortgage, or a bailment, or a loan. *Norton* v. *Woodruff*, 2 N. Y. 153; 4 N. Y. 76.

The chief ultimate facts which in this class of cases constitute the cause of action are that the true, or legal, or lawful duty—it is immaterial in which form stated—was a certain sum, and that the collector exacted a certain larger sum; or, in a single phrase, that the collector on a certain importation exacted a certain sum of money in excess of the legal duty. How that legal duty is arrived at, *i. e.*, the methods and rules of law and various circumstances of fact by which that legal duty is ascertained and determined, are all subordinate questions, and are only evidence leading to the one ultimate fact of the illegal exaction of a given sum of money.

This view is sustained by the form of action sanctioned by long usage in such cases. At common law, and under the statutes of this country, it has been held that an ordinary count in *indebitatus assumpsit* for money had and received, is an appropriate mode of declaration to recover back an excess of duties exacted on the importation of goods. *City of Philadelphia* v. *Collector*, 5 Wall. 720, 726, 731; *State Tonnage Tax Cases*, 12 Wall. 204, 209; *Elliott* v. *Swartwout*, 10 Pet. 137; 2 Greenl. Ev. § 121. The exaction of money beyond the legal rate, whether for duties, tolls, or taxes, is the one ultimate fact which in law constitutes the receipt of the money to the use of the person illegally compelled to pay it. All the other facts and circumstances of the case, and any principles of law applicable to them, and determining their effect or construction, are only subsidiary, and evidences of the one ultimate fact to be proved, viz., the unauthorized exaction of a certain sum of money.

Under the Code, the court of appeals has repeatedly held that the common count in *indebitatus assumpsit* for goods sold and delivered, or for money had and received, is sufficient now as formerly. *Allen* v. *Patterson*, 7 N. Y. 476; *Moffet* v. *Sackett*, 18 N. Y. 522, 525; *Hos-*

ley v. *Black*, 28 N. Y. 438, 443; *Farron* v. *Sherwood*, 17 N. Y. 227; *Hurst* v. *Litchfield*, 39 N. Y. 377, 380; *Adams* v. *Holley*, 12 How. (N. Y.) 326, 327, 329; *Cudlipp* v. *Whipple*, 4 Duer, 610. In the case of *Platt* v. *Stout*, 14 Abb. Pr. 178, the general term of the supreme court in this district, in a suit to recover fees illegally detained by the defendant as pretended chamberlain, held, upon demurrer, to the complaint, which was in form substantially identical with the present in stating that the defendant wrongfully and unlawfully usurped the functions of the office of chamberlain and received the fees thereof, that those were statements of fact, and that the complaint was sufficient. To the same effect, see *People* v. *Ryder*, 12 N. Y. 433; *People* v. *Carpenter*, 24 N. Y. 86.

Where a statement of fact, though in form allowable, is so general as not to afford sufficient knowledge of the particular question to be tried, the complaint may be required to be made more definite and certain, (Code, § 546,) and that would seem to be the proper remedy where the defendant is really without means of information of the real points in controversy. But congress has by law already so carefully provided for full information to the collector on all points in dispute as to the payment of duties, through the requirement of protest and appeal before suit, and a bill of particulars to be served afterwards, (section 3012,) that occasions must be rare in which full information is not already in the defendant's possession before answer.

In the case of Prickhardt, the complaint in regard to the protests merely states that the plaintiff paid "under protest." This alone is clearly not equivalent to a statement of having made a protest in writing, nor of having filed it within 10 days after liquidation. At first, the complaint in that case seemed to me defective in this respect; but section 3011 says: "Any person who shall have made payment *under protest*, etc., may maintain his action," etc. This complaint states exactly these words, and exactly conforms, therefore, to this clause of the statute, and it is doubtful whether that is not sufficient pleading under this section, leaving it to be shown by proof that the terms and time of the protest were such as to entitle the plaintiff to a recovery; and the bill of particulars served with the complaint does show that the protests must have been in writing and duly filed. Under section 519 of the Code, providing that pleadings are to be "liberally construed, with a view to subtantial justice," I think the complaint and bill of particulars should together be held sufficient.

In the other cases, the statement that due and timely protests, etc., in writing were filed, is clearly a sufficient plea of such precedent conditions, (Code, § 533,) and is sustained by analogous decisions. *People* v. *Walker*, 23 Barb. 305; *Woodbury* v. *Sackrider*, 2 Abb. Pr. 402; *Farmers' Bank* v. *Empire, etc., Co.* 5 Bosw. 275; *French* v. *Willett*, 10 Abb. Pr. 102. The demurrers must, therefore, be overruled, with liberty to withdraw them, and answer, if desired, within 20 days; the orders to be settled on notice.

PRICE, Receiver, *v.* ABBOTT.

SAME *v.* COLSON.

(Circuit Court, D. Massachusetts. June 22, 1883.)

1. RECEIVERS OF NATIONAL BANKS—APPOINTMENT.
   Appointments of receivers of national banks, made by the comptroller of the currency as provided by law, are to be presumed to be made with the concurrence or approval of the secretary of the treasury, and are made by the head of a department, within the meaning of section 2 of article 2 of the constitution of the United States.
2. SAME—SUIT BY—JURISDICTION OF CIRCUIT COURT—AMOUNT.
   A receiver of a national bank, being appointed pursuant to an act of congress to execute duties prescribed by that act, is in the execution of those duties an agent and officer of the United States, and actions brought by him to recover assessments duly laid upon stockholders, and necessary to provide for the payment of the debts of the bank, are suits at common law, brought by an officer of the United States, under the authority of an act of congress, of which the circuit court has concurrent jurisdiction with the district court, without regard to the amount sued for. Rev. St. § 629, cl. 3; § 563, cl. 4.
3. SAME—ACT OF 1875—PURPOSE OF.
   The act of 1875 was intended to define the jurisdiction of the circuit courts, as between them and the courts of the states; not to alter the distribution of jurisdiction, as between the circuit court and the district court, of cases which, by reason of their subject-matter, have been committed by congress to the determination of the federal courts; nor to repeal the special provisions of former laws conferring on the circuit and districts courts jurisdiction of such cases, without regard to the amount in dispute.
4. SAME—ACT OF 1882, *c.* 290, § 4.
   The only subject to which the proviso in the act of 1882, *c.* 290, § 4, relates, is the jurisdiction of suits brought by or against national banks, and its purpose is to leave such suits, "except suits between them and the United States, or its officers and agents," to the jurisdiction of the state courts, unless the domicile of the parties is such as to give the federal courts jurisdiction.
5. SAME—SUITS BY RECEIVER OF NATIONAL BANK.
   Suits brought against private persons after a national bank has been found to be insolvent, and for the exclusive benefit of its creditors, by a receiver, in whom its whole property has been vested by operation of law, do not come within the letter or the reason of this proviso.

At Law.

S. B. Ives, Jr., for defendants.

A. A. Ranney, for plaintiff.

Before GRAY and NELSON, JJ.

GRAY, Justice. These are two of a large number of actions brought, by direction of the comptroller of the currency, by the plaintiff, (a citizen of New Jersey,) as the receiver of the Pacific National Bank of Boston, (a corporation organized under the act of congress of June 3, 1864, *c.* 106, and having its banking-house at Boston,) appointed under the act of congress of June 30, 1876, *c.* 156, by the comptroller of the currency, upon being satisfied of the insolvency of the bank, against sundry citizens of Massachusetts, stockholders in the bank, to recover their shares of an assessment, to the amount of 100 per centum on the par value of the shares, made by the comptroller of

the currency to provide the money necessary to pay the debts and liabilities of the bank, under section 5151 of the Revised Statutes. The amount of the assessment sued for in the first action is $2,000; and in the second action, $300. Each of the defendants has moved to dismiss for want of jurisdiction: *First*, because the plaintiff sues only in the capacity of receiver of a national bank, organized under the laws of the United States, and heretofore doing business within the commonwealth and district of Massachusetts; *second*, because the plaintiff brings the action, as receiver for and in behalf of the bank, to enforce an alleged liability of the defendant to the bank, and has no personal or individual interest in the action, or in the cause of action; *third*, because the action is by the bank, and is not a suit by or between the bank and the United States, or any of its officers or agents; and, by force of the act of congress of July 12, 1882, *c.* 290, § 4, the jurisdiction of the action is confined to the courts of the commonwealth of Massachusetts.

We are of opinion that the motions cannot be supported upon either of the grounds assigned. The congress of the United States is authorized by the constitution to vest the appointment of such inferior officers as it may think proper in the president alone, in the courts of law, or in the heads of departments. Article 2, § 2. By the statutes of the United States the secretary of the treasury is the head of the department of the treasury, and the comptroller of the currency is the chief officer of a bureau in that department, charged with the execution of all laws passed by congress relating to the issue and regulation of a national currency secured by United States bonds, and he performs his duties under the general direction of the secretary of the treasury. Rev. St. §§ 233, 324. Appointments of receivers of national banks, made by the comptroller of the currency, as provided by those laws, are to be presumed to be made with the concurrence or approval of the secretary of the treasury, and are made by the head of a department, within the meaning of the constitution.

By those laws a receiver of a national bank is required, under the direction of the comptroller of the currency, to take possession of all the property, books, and records of the bank, and to collect all debts due to it; is authorized, upon the order of a court of record of competent jurisdiction, to sell or compound bad or doubtful debts, and to sell all the real and personal property of the bank, "and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders;" and he is required to "pay over all money so made to the treasurer of the United States, subject to the order of the comptroller," and to make report of all his doings to the comptroller, by whom the money is to be divided among the creditors of the bank. Rev. St. §§ 5234, 5236.

The receiver, indeed, in one aspect represents the bank, its stockholders, and its creditors; and neither he nor the comptroller of the

currency represents the government, so far as to have authority to waive its exemption from liability to suit. *Case* v. *Terrell*, 11 Wall. 199. But being appointed pursuant to an act of congress to execute duties prescribed by that act, he is, in the execution of those duties, an agent and officer of the United States; and actions brought by him to recover assessments duly laid upon stockholders, and necessary to provide for the payment of the debts of the bank, are suits at common law brought by an officer of the United States suing under the authority of an act of congress, of which this court has concurrent jurisdiction with the district court, without regard to the amount sued for. Rev. St. § 629, cl. 3; § 563, cl. 4.

This view of the case is supported by the direct adjudications of Judge BENEDICT in *Platt* v. *Beach*, 2 Ben. 303, and of Judge BLATCHFORD in *Stanton* v. *Wilkeson*, 8 Ben. 357; and by the opinions of the supreme court in *Kennedy* v. *Gibson*, 8 Wall. 498, in *Bank* v. *Kennedy*, 17 Wall. 19, and in *U. S.* v. *Hartwell*, 6 Wall. 385.

The defendants contend that the jurisdiction of this court, at least over the second action, in which less than $500 is sued for, has been taken away by the act of March 3, 1875, *c.* 137, § 1, by which it is enacted "that the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states," etc.

But the purpose of the act of 1875 is to define the jurisdiction of the circuit courts, as between them and the courts of the states; not to alter the distribution of jurisdiction, as between the circuit court and the district court, of cases which, by reason of their subject-matter, have been committed by congress to the determination of the federal courts; nor to repeal the special provisions of former laws conferring on the circuit and district courts jurisdiction of such cases without regard to the amount in dispute. The construction contended for would, as has been observed by Judge LOWELL, deprive the federal courts of jurisdiction of suits upon patents and copyrights, and of a great variety of other cases arising under the laws of the United States, whenever the matter in dispute does not exceed $500. *U. S.* v. *Mooney*, 11 FED. REP. 476.

The defendants further contend that this court has no jurisdiction of these actions, since congress has provided by the act of July 12, 1882, *c.* 290, § 4, that—

"The jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, 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; and all laws and parts of laws of the United States inconsistent with this proviso be and the same are hereby repealed."

But the actions before us do not come within the letter or the reason of this proviso. They are not suits brought by or against a national bank doing business in this state and district; but they are suits brought against private persons, after the bank has been found to be insolvent, and for the exclusive benefit of its creditors, by a receiver in whom its whole property has been vested by operation of law.

The only subject to which the proviso relates is the jurisdiction of suits brought by or against national banks; and its purpose is to leave such suits, "except suits between them and the United States, or its officers and agents," to the jurisdiction of the state courts, unless the domicile of the parties is such as to give the federal courts concurrent jurisdiction. No intention can be implied to oust the federal courts of jurisdiction of suits brought by an officer of the United States, under the authority of the laws of the United States, to recover of the stockholders of an insolvent national bank money which, when recovered, the plaintiff is required to pay over to the treasurer of the United States for the benefit of the creditors of the bank.

Motions to dismiss overruled.

MEAD, Ex'x *v.* PLATT, Assignee.

(Circuit Court, S. D. New York. August 2, 1883.)

BANKRUPTCY—APPEAL FROM DISTRICT COURT—NOTICE TO ASSIGNEE—REV. ST. §§ 4980, 4981, 4984, 5081.

The failure to give notice of an appeal from the disallowance by the district court of a claim against an estate in bankruptcy to the assignee is fatal to it, and good ground for moving to dismiss it; for in such case the assignee is the "adverse party," in the sense of Rev. St. § 4981

In Bankruptcy.

William W. Ladd, Jr., for plaintiff.

Coleridge A. Hart, for assignee.

WHEELER, J. This is an appeal by the plaintiff from the disallowance by the district court, held by Judge BROWN, of her claim against the estate in bankruptcy of which the defendant is assignee. The claim was examined on application of Mary E. Travis, a creditor, and contested by her. Notice of the appeal was given to her within ten days from the entry of the decision, but not to the as-

signee. The assignee has moved to dismiss the appeal for this cause, among others; and the motion has been heard by consent of parties, which was required before hearing, although this case is not within the terms of the statute in relation to hearing appeals from a district court by a district judge. Rev. St. § 614.

The failure to give notice of the appeal to the adverse party, as required by section 4981, Rev. St., is fatal to it, and good ground for moving to dismiss it. *Wood* v. *Bailey*, 21 Wall. 640. Unless the moving creditor in the district court is the adverse party, within the meaning of section 4981, this appeal must, on the authority of that case, be dismissed. The provisions of that section must be read with the others on the same subject for a correct understanding of them. The preceding section allows appeals in equity, and writs of error at law, when the debt or damages claimed amount to more than $500, and gives an appeal to "any supposed creditor whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim." This section requires the notice to be given "to the assignee or creditor, as the case may be." The assignee represents the estate, and is the adverse party to all claimants against the estate. He is the party who, by section 4984, must plead or answer to the declaration of the claimant, and against whom, by section 4985, costs are to be taxed as "the adverse party," if the claimant prevails. A creditor applying for and procuring the examination of a claim does no more than the court may do of its own notion, and does not become a party to that particular claim. Section 5081. Such creditor merely sets the machinery in motion to have the claim adjudicated by the court; the defense of the claim must always be in the name and behalf of the assignee. There are no provisions for making such moving creditor any otherwise a party. The words "assignee or creditor, as the case may be," must mean assignee when the creditor appeals, and creditor when the assignee appeals. When the creditor appeals, the assignee is the one who must plead and make defense, and the one who needs notice of the appeal to act upon. He is the adverse party, in the sense of section 4981.

Motion granted and appeal dismissed.

UNITED STATES *v.* SMITH.

(Circuit Court, D. Massachusetts. August 8, 1883.)

1. VERIFICATION OF SUMMARY COMPLAINT FOR OFFENSE ON HIGH SEAS—NOTARY PUBLIC.

In case of a summary complaint for an offense on the high seas the oath must be taken before the court or judge, or clerk of court, or some commissioner, who, in the absence of the judge, may be applied to for a warrant or summons; and

an affidavit taken before a deputy clerk, acting not as clerk, but as a notary public, is not sufficient.

2. SAME—MOTION IN ARREST OF JUDGMENT.

Such summary proceedings are put by the statute substantially on the footing of civil cases, and it seems that the want of due verification of the complaint is waived by the voluntary appearance of the accused. At any rate the error is amendable, and cannot be urged for the first time in arrest of judgment.

On Writ of Error.

Chas. Almy, Jr., Asst. U. S. Dist. Atty., for the United States.

E. W. Burdett, for Smith.

LOWELL, J. The defendant, who was the second mate of the American bark Fantie, was charged with an assault upon one of the crew of the same vessel, upon the high seas. The charge was made in the form of a summary complaint, presented to the district court, under section 4301 of the Revised Statutes. Upon a trial by jury the defendant was convicted, and moved, in arrest of judgment, that the complaint was not duly "verified by oath in writing," as required by the section cited. The complainant's oath was taken before a notary public. This motion was denied, and the defendant was sentenced to imprisonment for two months, and duly prosecuted his writ of error.

Two questions have been argued: *First*, whether a notary public has power to administer and certify the oath; *second*, whether the objection can be taken for the first time in arrest of judgment.

1. The first point appears to be well taken by the defendant. Counsel have examined the statutes with diligence, and none has been found which gives a general authority to any officer to take affidavits in criminal cases. The law of August 23, 1842, § 1, (5 St. 516,) makes a distinction between civil and criminal business, giving commissioners of the circuit courts authority to take bail, affidavits, and depositions in civil causes; while, in criminal proceedings, they are to have the powers of justices of the peace, and other magistrates, in arresting, imprisoning, and bailing offenders. This distinction is preserved in the Revised Statutes. Notaries are put on the footing of commissioners, in respect to depositions and affidavits, by St. 1876, *c.* 304, (19 St. 206;) but this is in civil causes, because commissioners have no general powers in respect to depositions and affidavits in criminal proceedings. Their power is to hold to bail, etc., according to the course of practice in the several states, (Rev. St. § 1014;) and, as incidental to that power, they can, of course, take the requisite evidence. In Massachusetts, the same magistrate who takes the oath to the complaint must issue the warrant, or summons, as the case may be. Pub. St. *c.* 212, § 15. One magistrate cannot commit upon an affidavit taken before another.

In the case, therefore, of a summary complaint for an offense on the high seas, it would seem that the oath must be taken before the court or judge, or, perhaps, the clerk, or before some commissioner, who, in the absence of the judge, may be applied to for a warrant or a

summons. The affidavit here was taken before the deputy clerk, acting not as clerk, but as notary.

2. The second point must be decided for the government. These summary proceedings are put by the statute substantially on the footing of civil cases. It is provided that the defendant may plead, or answer, or make a counter-statement; and that the district attorney may amend his complaint at any time before verdict, if in the opinion of the court the amendment will work no injustice to the accused; and, if necessary, an adjournment shall be made to enable the accused to meet the amended complaint. Rev. St. §§ 4301, 4302. All this is as far removed as possible from ordinary criminal pleadings and proceedings; and the statute is found to be as favorable to defendants as to the United States, in the saving of time and expense. The district judges in this district have thought that it goes even beyond the powers of congress in permitting the accused to waive a trial by jury, and have never consented to try the facts by the court; but, so desirous are the accused to have the benefit of a speedy determination, even when it must be against them, that they will often plead guilty, or *nolo contendere*, to complaints for small offenses, to which they profess to have a defense, rather than be put to the expense of awaiting the action of the next grand jury.

It is not usual to issue warrants of arrest, or, indeed, any process in these cases. The complaint is filed and the accused appears, and the case proceeds. In this case there is no record of any summons or warrant. The fourth amendment to the constitution, therefore, which requires an oath to support a warrant, has no application. Under these circumstances, I am much disposed to believe that the want of due verification of the complaint is waived by the defendant's appearance; for the oath is required, I think, to meet the fourth amendment of the fundamental law, in case a warrant should be called for. I have no doubt that the mistake could have been amended at any time before verdict, because the statute contemplates amendments of substance as well as of form, if the defendant is not to be injured thereby; and even if he is called on to meet a new case, he may be required to do so after a reasonable adjournment. This oath is scarcely a matter of substance, for it may be taken by any one having information and belief, and is almost always taken by the district-attorney, or one of his assistants.

Under these circumstances, and with pleadings as liberal as are provided for civil cases, the modern and reasonable rule of civil pleading should be adopted: that an amendable error is insufficient in arrest of judgment. *Haverhill Loan, etc., Ass'n* v. *Cronin*, 4 Allen, 141. Nor is there anything in this liberality of pleading which is repugnant to the constitution. Even in Massachusetts, whose constitution provides that a crime shall be not only fully, plainly, and substantially, but "formally," set forth, a statute has been upheld which requires formal defects to be taken advantage of before verdict. *Com.*

v. *Walton*, 11 Allen, 238. Our constitution merely requires that the accused shall be informed of the nature and cause of the accusation. Amendment 6.

For these reasons, I am of opinion that the judgment below was right, and should be affirmed.

FIFIELD *v.* WHITTEMORE.

(Circuit Court, D. Massachusetts. August 8, 1883.)

PATENTS FOR INVENTIONS—LETTERS PATENT NO. 150,305 SUSTAINED.

Letters patent No. 150,305, issued to J. Wesley Dodge, February 28, 1874, for an improvement in tools for finishing the edges of soles of boots and shoes, are valid; and the fourth and fifth claims of said patent are not void for want of novelty, or by reason of being anticipated by the Hodges patents, Nos. 117,287 and 129,825, and the Addy patent, No. 142,756, as claimed.

In Equity.

James E. Maynadier, for complainants.

Thomas W. Porter, for defendant.

LOWELL, J. The plaintiff owns the patent, No. 150,305, issued to J. Wesley Dodge, February 28, 1874, for an improvement in tools for finishing the edges of soles of boots and shoes. The specification describes a balanced tilting frame hung over head, to which a steel rod is attached by a ball and socket-joint, and at the other end the rod is fastened to the burnishing tool by a similar joint. This arrangement gives in a simple and efficient manner a great freedom of movement to the burnishing tool, to enable it to follow the curves of the edge of a shoe sole. The tool is driven by a belt, which passes round the upper frame near the rod, and comes down through the hollow handle of the tool. The patentee says, in his specification, that an inferior tool may be made with a belt running outside the handle, instead of through the hollow or tubular handle. In practice it is found that when the belt runs through the handle, at the great speed necessary for the best and quickest work, it heats the handle, and the belt itself is quickly worn out. The patentee discovered that he could make a better and not an "inferior" tool by putting the belt outside the handle; and 400 machines, in the new form, have been made and sold by the plaintiff. But in order to carry the belt outside, it was found necessary, or, at least, advisable, to add a supplemental rod, with a spiral spring, which keeps the belt in position when the tool is tipped in various directions to follow the curve of the sole. The improvement was made by Dodge himself, but not patented, and is supposed by the plaintiff to be covered by the original patent, as it certainly is by claims 4 and 5, if they are valid.

Machines, such as are now made by the plaintiff, have been copied and sold by the defendant, at first under the belief that he was the equitable owner of the Dodge patent, but now under the claim that the patent is void. His claim of equitable right depended upon an agreement made by Dodge with the shoe machinery company, of whom the defendant has since bought all their tools, rights, etc., to assign to them all patents which Dodge should take out for inventions made while he was in their employ, as this invention was. The claim was disputed by Dodge, and a settlement was made, before this suit was brought, by which this equitable claim was abandoned; and it forms no part of this case.

The second defense is that the fourth and fifth claims of the patent are void, because no working machine is described in the patent, and for want of invention, because of two preceding patents of Hodges, Nos. 117,287 and 129,825, and one of Addy, No. 142,756, which are in the case. The claims are:

"(4) In combination with the tool-stock, the connector rod, *r*, jointed to the handle or stock by the ball and socket-joint, *s*, substantially as shown and described. (5) A pendent swinging-tool frame, jointed to a swinging-tool frame by a ball and socket-joint, or its equivalent, the combination of the two frames thus jointed giving to the tool a capability of motion in any and every direction; the pendent frame having the burnisher wheel shaft journaled in it, and a pulley on said shaft for connection with the pulley upon the shaft from which the frame is suspended, substantially as shown and described."

The first three claims are made to cover the form of tool shown in the drawings, with a hollow handle, and the two above quoted, to cover the other form.

The two objections, as I have said, are:

First. That no practical machine is described. The patentee and the plaintiff both testify that the machine would and did work in the form in which it appears in the patent; a witness for the defendant testifies that its working was not satisfactory. It is doubtful how far the machine would have been a commercial success, if at all, in that form. But that it was a working machine has not been disproved. The patent itself throws the burden of proof on the defendant, and he has complained that the plaintiff has produced in court no working model; but that was for the defendant to do, if he thought it would sustain his contention. As the case stands, I find the patent to be valid in this particular; and, being valid, it sustains the fourth and fifth claims. If it required further invention to make the machine in its present form, as to which the evidence is conflicting, it would still be subordinate to the patent, because the devices mentioned in those claims appear to be legitimate sub-combinations of the machine patented.

Second. I cannot agree that it required no invention to make the plaintiff's tool, after the Hodges and Addy patents were published.

It is, undoubtedly, an improvement upon both of them, in the sense of the patent law; that is, a change from them, and, I think, a valuable one. It may be regarded, perhaps, as a combination of the merits of both those machines; but, tried by all usual tests,—of convenience, simplicity, and cheapness,—the change is, in my judgment, a patentable one.

Decree for the complainant.

HENDY v. GOLDEN STATE & MINERS' IRON WORKS.[1]

(Circuit Court, D. California. January 29, 1883.)

1. REISSUED PATENT.
   The specifications for the reissue of a patent may be amended by the model deposited in the patent-office, as well as by the drawings.
2. SPECIFICATIONS AMENDED BY MODEL.
   Where the original specifications and drawings do not show whether or not the machine patented embraced a feature claimed in the reissued patent, the court cannot say, from a comparison of the original and reissued patents alone, whether the reissue embraces a feature not indicated in the machine as first patented, without an inspection of the original model deposited in the patent-office.

In Equity.

Boone & Miller, for complainant.

M. A. Wheaton, for defendant.

SAWYER, J., *(orally.)*. This is a demurrer to a bill in equity for the infringement of a patent for an ore-crushing machine. The original patent and the reissue are both set out; and the point is that the reissue is broader than the original patent, and takes in an element not indicated in the original specifications and drawings. This new feature of the patent is the extension of the rear board of the hopper downwards, so as to operate as a scraper on a vibrating tray, for the purpose of forcing the ore to pass off. There is nothing stated in the specifications of the original patent in regard to this construction of the hopper-board at the rear; and it does not appear whether it was so formed, by the drawings in the original patent. Nor does it appear that it was not there. It may have been, and probably was, in the original machine and model. In the drawings of the reissue there is a part of the side cut away on the hopper, to show the extension of this rear board downwards to the vibrating tray. In the first drawings the side is not cut away, and it does not show whether the rear board goes down to the tray or not. In all other respects the drawings are the same in the two patents. The law authorizes the change of the specification—authorizes the specifications, for the purpose of

[1] From 8th Sawyer.

the reissue, to be amended *by the model* in a machine patent *as well as by the drawings;* and the supreme court, in *Seymour* v. *Osborne*, 11 Wall. 516, recognizes the right to amend the specifications by the model in such patents, as well as by the drawings. I think, therefore, from the comparison of the original patent with the reissue, without the model, that I cannot assume that the specifications have been enlarged, so as to embrace matters not indicated in the original model. The original patent does not show that this rear hopper-board did *not* extend down so as to act as a scraper; and the model filed, as required by the patent law, may, and probably does, show that it is so extended. As the specifications may have been amended by the model from a mere comparison of the original patent with the reissue, it cannot be seen that the amendments in the specifications have not been properly made from the model, or that the invention is not therein clearly indicated; consequently I cannot say, without seeing the model deposited, that the reissue embraces more than the original invention. It does not appear, affirmatively, that it does, and the presumption is that the commissioner did not exceed his jurisdiction in granting the reissue.

The demurrer is overruled.

McKay and others *v.* Stowe and others.

(*Circuit Court, D. Massachusetts.* June 22, 1883.)

1. Patent — Reissue Invalid — Improvement in Machine for Nailing Shoe and Boot Soles.

   Reissue, granted March 28, 1876, of the original patent granted to Gordon McKay, as assignee of himself and Hadley P. Fairfield, on October 13, 1874, for improvements in machines for nailing the soles of boots and shoes, was not intended to supply an omission or correct a mistake in the original patent, but is a deliberate attempt by the inventors to contradict the leading assertion most positively and unequivocally made by them in their first specification, and to enlarge their claim so as to cover a combination which omits the most ingenious and distinctive element of the combination originally patented, and the first, second, and third claims of such reissue cannot be upheld.

2. Same—Infringement.

   The fourth claim of the reissue is not infringed by the machine of defendant, in which the selection of the nails to be driven is not made automatically according to the thickness of sole to be nailed, but is controlled by the direct intervening action of an attendant, interrupting the automatic action at such times as he chooses.

In Equity.

E. Merwin and *J. J. Storrow*, for plaintiffs.

B. F. Thurston and *J. E. Maynadier*, for defendants.

Before Gray and Lowell, JJ.

Gray, Justice. This is a bill in equity for the infringement of two patents for improvements in machines for nailing the soles of boots and

shoes. The first patent was granted to Gordon McKay, as assignee of himself and Hadley P. Fairfield, on October 13, 1874, and was reissued on March 28, 1876, on an application filed March 13, 1876. The original specification describes, with the aid of accompanying drawings, a most complex and ingenious mechanism, the principal parts of which are (1) a nail-tube resting upon the sole, and which is raised or lowered according to the thickness of the stock; (2) a nail-driver; (3) a series of stationary vertical nail receptacles, varying in depth, and containing nails of various lengths; and (4) a nail-carrier, by which the nails are selected and transferred from the nail receptacles to the nail-tube. "The mechanism for selecting from the nail receptacles a nail corresponding most nearly to the thickness of the material, and its operation," are described in great detail.

In the reissue the main body of the description is not substantially varied, although perhaps a little warped so as to give countenance to the remarkable changes at the beginning and end of the specification. At the beginning of the original specification the inventors—

"Declare that the following, taken in connection with the drawings which accompany and form part of this specification, is a description of our invention sufficient to enable those skilled in the art to practice it.

"*The invention relates to the organization of that class of sole-nailing machines in which, the parts to be united being of varying thickness, each nail unites such parts as correspond in thickness to the length of such nail.* Heretofore the nail [used] in *such* [nailing] machines has usually been cut in the machine to the length required by the thickness of the particular parts to be united by it, such nail[s] being sometimes cut from a continuous wire, and sometimes from a continuous or ribbon-like plate; but in the present invention the nails are formed of different lengths prior to entering the machine, and with or without heads, and are placed in *respective pockets or* [separate] receptacles attached to the machine, from which they are *automatically removed and* transferred to position to be driven, and *so that* the sole and upper are united by metal fastenings, each corresponding in length to the thickness of parts to be united by it.

"*Our invention consists, primarily, in the combination, with a nail-driving mechanism and a mechanism that automatically determines the position of the upper surface of the parts to be united, of a transfer mechanism, which selects a nail of proper length for the thickness of the parts to be united by it, and carries it into position to be driven.*"

The reissue omits the words printed above in italics, and inserts those printed in brackets, and substitutes for the last sentence above quoted the following:

"This invention consists, primarily, in the combination, in a nailing machine, and with its nail-tube and driver, of nail-receptacles—two or more—adapted to receive and support separate nails of different lengths, to be used in different portions of the stock, according to the length of nail required."

The original specification ends with three claims, the first and second of which (being the only ones material to this case) are as follows:

"We claim (1) the combination, with a nail-tube and nail-driver, of the nail-receptacles and mechanism, substantially as shown, for transferring the nail from the receptacles to position to be driven, all substantially as and for the purposes described; (2) the combination, with the nail-tube and nail-driver, of nail-receptacles and transferring mechanism, so constructed and arranged, and so operating, that the nails are selected in accordance with their respective lengths, and are transferred and positioned to unite parts corresponding ing in thickness to the length of the respective nails."

The reissue substitutes for these two claims the following four claims:

"We claim, (1) in a nailing-machine, the combination, with the nail-tube and driver, of nail-receptacles adapted to receive and support separate nails of different lengths; (2) a series of nail-receptacles adapted to sustain nails of different lengths, and with or without heads, in combination with a carrier to remove a nail from either of the receptacles to a position in line with the driver by which it is to be driven, and with a driver to drive the nail from the carrier; (3) a series of nail-receptacles adapted to sustain and guide separate nails of different lengths, in combination with a nail-tube and driver, and with mechanism to present the nails singly to the nail-tube in line with the driver, substantially as described; (4) the nail-tube and driver, and receptacles to contain separate nails of different lengths, in combination with mechanism adapted to select the nails to be driven, according to the thickness of the stock to be united, substantially as described."

The parts of the original patent, and of the reissue, above quoted, sufficiently show the wide and essential difference between the two. The original specification, at the very outset, declares that the invention primarily consists in the combination, with the other designated parts of the machine, of a transfer mechanism, which automatically selects, and carries into position to be driven, a nail of proper length for the thickness of the parts to be united. And both claims of that specification are equally limited; the second, by a full and explicit statement of this distinguishing characteristic; and the first, with equal clearness, and like legal effect, by the words of reference to the preceding description, "substantially as shown," and "all substantially as and for the purpose described." The specification of the reissue begins by ignoring and repudiating the leading declaration of the original specification, and by declaring that the invention primarily consists, not in the combination, with the nail-tube, nail-driver, and nail-receptacles, of the curious mechanism for selecting from the receptacles and carrying to the driver nails of different lengths, but in the mere combination, with the tube and driver, of the receptacles to hold nails of different sizes. And it undertakes to enlarge the claim accordingly. This is not a case of supplying an omission, or correcting a mistake, in the original patent. But it is a deliberate attempt by the inventors to contradict the leading assertion most positively and unequivocally made by them in their first specification, and to enlarge their claim so as to cover a combination which omits the most ingenious and distinctive element of the combination originally patented. To allow a claim to be so enlarged by a reissue, after the

lapse of 17 months, during all which time the inventors cannot have been ignorant of what was their real invention, or of what they had so explicitly declared it to be in the original patent, would be unreasonable and mischievous. In the defendants' machine, the selection of the nails to be driven is not made automatically, according to the thickness of the sole to be nailed; but it is controlled by the direct intervening action of an attendant, interrupting the automatic action of the machine at such times as he chooses.

The result is that the first, second, and third claims of the reissue cannot be upheld, and that the defendants have not infringed the fourth claim of the reissue. *Gage* v. *Herring*, 108 U. S. —; S. C. 2 Sup. Ct. Rep. 819.

For similar reasons the plaintiffs fail to show any infringement of the patent granted to Louis Goddu on May 18, 1875.

Bill dismissed, with costs.

KELLY *v.* PORTER and others.[1]

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

1. LICENSE PENDING APPLICATION FOR PATENT—MODIFIED CLAIMS.
An inventor filed in the patent-office his specifications, claims, and application for a patent. He then entered into a contract with other parties, describing his invention, setting forth therein that he had filed his specifications and application for a patent, and granting "the exclusive right and privilege of manufacturing and selling the aforesaid goods *under any patent that he might obtain by or through his application aforesaid*," in a large tract of territory described. Afterwards, upon the requirement of the commissioner, the claims appended to the specifications were modified, and in accordance with such modified claims the patent issued. *Held*, that the license covered the patent issued upon the claims as modified.

2. LICENSE, WHEN IRREVOCABLE.
A license to use a patent given pending the application for its issue, unlimited as to time, and providing, only, that it should be void on failure to obtain the patent, wherein the licensor covenants to protect the licensee "against any and all persons, during the term of the application for a patent, as aforesaid, and *after he shall have obtained a patent* from the United States government, as aforesaid," is irrevocable by the licensor, without the consent of the licensee.

3. LICENSEE NOT AN INFRINGER.
A party manufacturing and selling a patented article, in pursuance of the terms of a licensee from the patentee, cannot be held liable as an infringer.

4. LICENSEE ONLY LIABLE FOR ROYALTY.
The only remedy of a patentee against a party manufacturing under a license is upon the contract granting the license for the royalty agreed upon.

5. JURISDICTION—LICENSE.
An action by the patentee against his licensee, for the stipulated royalty, presents no question of patent law, and no subject-matter, which can give the national courts jurisdiction on that ground.

[1] From 8th Sawyer.

The contract construed is as follows:

"Whereas, Mr. P. Kelly, of the city and county of San Francisco, and state of California, has applied for and is now endeavoring to obtain from the United States government a patent on or for the inserting of an elastic behind the ankle of short-legged bootees or gaiter boots, of which said Kelly claims to be the originator and inventor, together with all his style and cut, as in his plans and specifications accompanying said application set forth; and whereas, Porter, Oppenheimer, Slessinger & Co., of the city, county, and state aforesaid, are desirous of manufacturing and selling men's, youths', and boys' goods, and inserting an elastic behind the ankle, as aforesaid, therefore the said P. Kelly hereby covenants and agrees to give and grant to the said Porter, Oppenheimer, Slessinger & Co. the exclusive right and privilege of manufacturing and selling the aforesaid goods under any patent he may obtain by or through his applications as aforesaid, in the state and territories of California, Oregon, Nevada, Montana, and Colorado, Idaho, Washington, and Utah; but the said Kelly hereby reserves the right to manufacture said goods for retail purposes in his own store. And the said Porter, Oppenheimer, Slessinger & Co. hereby covenant and agree to pay to the said P. Kelly the sum of three dollars per dozen (of twelve pairs) as royalty for the privilege of manufacturing and selling said goods, as aforesaid, for all other kinds of goods made and sold by them as aforesaid. But it is hereby agreed that no royalty shall be paid to said P. Kelly for any goods manufactured by Porter, Oppenheimer, Slessinger & Co. for the said P. Kelly. And it is further agreed that any goods made and sold as aforesaid by Porter, Oppenheimer, Slessinger & Co. shall be sold by them on the conditions that the party purchasing the same shall not sell such goods at retail in the city and county of San Francisco, except by the said P. Kelly. And the said P. Kelly further covenants and agrees that for and in consideration of the royalty paid to him as aforesaid, that he, the said Kelly, will protect the said Porter, Oppenheimer, Slessinger & Co. in the rights hereby granted, as aforesaid, against any and all persons during the term of the application for a patent as aforesaid, and after he shall have obtained a patent from the United States government as aforesaid. And it is further agreed by and between the parties hereto that if the said P. Kelly from any cause fails to obtain a patent as aforesaid, or does not protect said Porter, Oppenheimer, Slessinger & Co. in the manufacturing and selling said goods as aforesaid, then, and in that event, the said Porter, Oppenheimer, Slessinger & Co. shall not pay unto the said P. Kelly any sum or royalty for the privilege hereby granted. And if the claims by Kelly for a patent are rejected by the United States government, Porter, Oppenheimer, Slessinger & Co. shall not pay unto the said Kelly any royalty from and after the date of the rejection of his claims for a patent as aforesaid. And in the event the said P. Kelly's claims for a patent, as aforesaid, are rejected by the United States government, then this agreement shall cease and become null and void. And it is further agreed, by and between the parties hereto, that if the said P. Kelly obtains a patent as aforesaid, then, and in that event, the royalty of one dollar and fifty cents, to be paid as aforesaid, may be changed in any manner that the parties hereto may agree upon.

"PORTER, OPPENHEIMER, SLESSINGER & CO. [Seal.]
"P. KELLY. [Seal.]

"Signed, sealed, and delivered in presence of JOHN HEIN.
"*San Francisco, March* 8, 1879."

Wheaton & Harpham, for complainant.
Boone & Miller, for defendants.

SAWYER, J., (*orally.*) This is a demurrer to a bill in equity to enjoin the infringement of a patent. The bill was originally filed without setting out a contract, which existed between the parties; and defendants by plea set it up as a defense. The complainant then amended his bill, and set out the contract. The defendants rely upon this contract, claiming that it is a license, and that the alleged infringement of the complainant's patent is merely manufacturing and selling the patented articles under and by authority of that license.

The complainant insists under the bill, as now drawn, that it appears that the patent, as issued, is not covered by the license, because there was a change made in the *claims* of the original application for the patent, so that they differ in the patent issued from the claims as they existed in the application, when the specifications were first filed, and at the date when this contract was entered into. The commissioner of patents refused to grant the patent on the claims as first made, and they were, therefore, modified, and the patent was finally issued on the modified claims, based upon the original application and specifications.

The complainant's counsel insist, in the first place, that the license does not extend to the patent as issued. But I think he is mistaken in that proposition. In the license the invention is described, and the facts set forth that the inventor has made his application for a patent, and filed his specifications; and the license is then granted, "with the exclusive right and privilege of manufacturing and selling the aforesaid goods *under any patent* that he [the inventor] *may obtain by or through his application as aforesaid,* in the states and territories of California, Oregon, Nevada, Montana, Colorado, Idaho, Washington, and Utah." The only change made in the application was in respect to the claims, which change was made pursuant to the decision of the commissioner that the invention was not properly covered by the claims, as originally drawn. The patent was then issued upon the original application, as thus amended, for the invention described, and comes plainly within the terms of the contract licensing the defendants to manufacture and sell goods "under *any* patent that he may obtain *by or through his application.*"

I think, therefore, that the right of respondents to manufacture and sell the goods described is established by the license. But, in case he should find himself mistaken in regard to this first proposition, complainant next alleges in his bill that he has revoked the license; that he has served upon the defendants a written revocation of it; and claims, therefore, that the license has ceased to be operative. Here the question arises as to whether or not the complainant is authorized to make such a revocation. There is nothing in the license which authorizes the revocation, or limits the time that the license is to remain in force. It contains this clause: "And the said P. Kelly further covenants and agrees that for and in consideration of the royalty paid to him as aforesaid, he, the said Kelly, will pro-

tect the said Porter, Oppenheimer, Slessinger & Co. in the rights hereby granted, as aforesaid, against any and all persons *during the term of the application for a patent*, as aforesaid, and *after he shall have obtained a patent from the United States government, as aforesaid.*" There is nowhere in the contract any limitation as to time, and no right of revocation reserved in terms. The only other clause that can affect the question is: "In the event the said P. Kelly's claims for a patent, as aforesaid, are rejected by the United States government, then this agreement shall cease, and become null and void." Thus it is provided in express terms under what circumstances the contract shall be abrogated; and, having named those terms, it must be presumed that they cover all the contingencies contemplated by the parties upon which the contract should cease.

The defendants agree to pay the royalty for all the goods they manufacture, embracing the invention even *before* the patent issued, when it was not certain that a patent would ever issue, or that they would ever be under any obligation to pay a royalty; and, undoubtedly, securing the right to continue to manufacture after the patent should issue, was an important part of the consideration in the view of the defendants, while receiving the royalty for the goods manufactured before the patent issued was, doubtless, deemed of no little importance by the parties applying for a patent. It may have been, and doubtless was, a very important consideration in the view of both parties. The great extent of territory covered by the license, as stated, was important and valuable, in case the patent should issue, and it is provided that the defendants are to be protected, not only during the pendency of the application for the patent, but also after the patent should issue, showing that the parties did not contemplate any revocation as soon as the patent should be obtained. The complainant ought not to be permitted to avail himself of the consideration valuable to himself, and then, as soon as the patent issued and became valuable, repudiate that part which is valuable to the licensee.

I think that the license runs for the entire term of the patent, and I do not think the complainant has a right to revoke it, there being no stipulation to that effect within the contract. And such, I think, is the proper construction, upon a consideration of the entire contract. I find no case, however, in which this question has been directly decided, but there are analogies favoring the view adopted. It seems to me that it would be a very one-sided contract—in fact, equivalent to no contract at all—if the complainant could, on the very next day, or as soon as the patent issued, revoke it.

I think, therefore, that this license is irrevocable, unless by some fault of the parties, or by their mutual consent. Being irrevocable, the license is still in existence, and the defendants are manufacturing under that license, and are, therefore, not liable as infringers.

The defendants do not dispute the validity of the patent, and do not deny that they have manufactured goods of the character de-

scribed in the patent. It is simply a question, then, of a cause of action arising upon the license. The only thing that can be recovered from the defendants is the royalty agreed upon for the quantity of boots and shoes manufactured by them, containing the complainant's patented improvements. Being simply a suit on the license,—on the contract between the parties,—there is no question here arising under the patent law, and there is no jurisdiction in this court to entertain such a suit on the ground of subject-matter, and no other ground of jurisdiction is shown. There is no jurisdictional fact, such as might arise from the character of the parties, to bring the case within the jurisdiction of this court. *Tilghman* v. *Hartell*, 2 Ban. & A. 260.

The demurrer must be sustained and the bill dismissed; and it is so ordered.

GRIER *v.* CASTLE.

(Circuit Court, W. D. Pennsylvania. August 10, 1883.)

1. PATENTS FOR INVENTIONS—DESCRIPTION.
   All that the law requires of an inventor of a machine is that he shall describe the manner of making, constructing, and using it in such full, clear, concise, and exact terms as will enable any one skilled in the art to which it appertains to make, use, and construct the same, and shall explain the principle thereof, and the best mode in which he contemplated applying that principle, so as to distinguish it from other inventions.
2. SAME—MODIFICATIONS—SPECIFICATIONS.
   A patentee is not generally limited by the literal import of his description of his invention, but may, in construction, make such modifications of it as do not involve a departure from its principle, or a material change in its mode of operation.
3. SAME—INFRINGEMENT.
   It is generally true that when a patentee describes a machine and then claims it as described, he is understood to intend to claim, and by law does actually cover, not only the precise forms he has described, but all other forms which embody his invention; and to copy a principle or mode of operation described is an infringement, although such copy is totally unlike the original in form or proportions.

In Equity.

Bakewell & Kerr, for complainant.

George H. Christy, for defendant.

MCKENNAN, J. The decision of this case turns upon the construction which may be given to the complainant's patent. If the scope of its claims is restricted by descriptive limitations, which the respondent's counsel contends are imposed upon it, the respondent is not an infringer. If it is susceptible of a construction, however, which will give full effect and protection to the distinctly stated principle of the invention, and the results of its operation as described in the specification, the complainant is entitled to a decree.

The invention described in the patent is an "improvement in vehicle

running gear." It consists of three essential elements,—a pair of parallel top springs to be attached to the upper side of the bolster and hind axle; a pair of bottom springs running diagonally from below the king-bolt at the front to each hind axle, "close to the shoulder," and hung directly under the hind axle,—these springs thus forming "a direct brace, keeping the carriage in proper shape, and, at the same time, said springs having their bearings at the rear ends wider than the bearings of the body, prevents any roll of the body by the weight being thrown suddenly from one side to the other;" and a stay rigidly attached to the body and both sets of springs, running "from the center of the top springs down to the centers of the bottom springs, and then up to the center in the bottom of the body, making just as much spring in the bottom springs as there is in the top springs, holding the axles at all times plumb up and down, without any roll of the axles."

"Perfect tracking of the wheels, harmony of action of the springs, and prevention of lateral motion and rocking of the body," are the results alleged to be accomplished by this organization.

The specification of this patent says that the bottom springs should be attached to the rear axle "close to the shoulder," and hence it is argued that these words, in connection with the terms of the claims, preclude any departure from that point of attachment, and that a structure, the bottom spring gearing of which is attached to the rear axle at a point nearer to its center, is not within the protection of the patent.

All that the patent law requires of an inventor of a machine is that he shall describe the manner of making, constructing, and using it in such full, clear, concise, and exact terms as will enable any one skilled in the art to which it appertains to make, use, and construct the same, and shall explain the principle thereof, and the best mode in which he contemplated applying that principle, so as to distinguish it from other inventions, etc. Under these provisions, it has been held that a patentee is not generally limited to the literal import of his description of his invention, but that, in construction, he may make such modifications of it as do not involve a departure from its principle, or a material change in its mode of operation. In *Winans* v. *Denmead*, 15 How. 342, the court say:

"It is generally true, when a patentee describes a machine and then claims it as described, that he is understood to intend to claim, *and does by law actually cover, not only the precise forms he has described, but all other forms which embody his invention;* it being a familiar rule that to copy a principle or mode of operation described is an infringement, although such copy should be totally unlike the original in form or proportions."

The proofs in this case abundantly show that an attachment of the bottom springs to the rear axle, at a point approximate to its center instead of its shoulder, is a mere matter of structural arrangement, which does not impinge upon the principal mode of operation or re-

sults accomplished by the invention described in the patent; and hence that such structural modification is within the constructive scope of the description. But a patentee may certainly restrict the comprehensiveness of his patent rights by the tenor of his claims. Has he done so in this instance?

The first claim is quite precise in its terms, and claims "the diagonal springs, G, G, running from below the center of the front axle to the ends of the hind axle, and suspended under the same by jacks, *a*, *a*, substantially as herein set forth." The argument that by the terms of this claim the point of attachment to the axle is made essential, and that it covers only diagonal springs, attached at the point indicated, is not without great force; but it is unnecessary to determine its construction and effect. The second claim is free from ambiguity, and covers the patentee's invention. It is as follows:

"The combination of the parallel top springs, A, A, the diagonal bottom springs, G, G, and center stay, K, substantially as and for the purposes herein set forth."

It contains no such limitation as is expressed in the first claim. It states the elements of the combination invented, and claims it without qualification, "*substantially* as and for the purposes set forth." It is, therefore, comprehensive enough, as was held in *Winans* v. *Denmead*, *supra*, to cover not only the precise forms described, but all other forms which embody the invention.

I cannot discover any special difference between the device made and used by the respondent, and that covered by the complainant's patent. Whatever difference there is, is only in arrangement, not in principle. They both embody the same elements, operate in substantially the same way, and produce the same results.

Of the patents—three in number—which are alleged to disprove priority of invention by Jackson, it is unnecessary to speak in detail. They are at least distinguishable from Jackson's invention in this: that they are without an essential and useful element of his combination,—the rigidly attached cross-stay, K,—and therefore do not embody his invention.

There must be a decree for the complainant for an injunction and an account, with costs.

MATTESON and others *v.* CAINE.[1]

(Circuit Court, D. California. February 5, 1883.)

1. COMBINATION PATENT—INFRINGEMENT.
A patent for a combination of several elements is not infringed by a machine which does not embrace all the elements employed to make up the combination as claimed.

[1] From 8th Sawyer.

2. ANTICIPATION.

A plow standard, with a lug on the upper end, by means of which it is fastened to the plow-beam by three bolts and nuts, not in line, but arranged in the form of a triangle, is anticipated by a cultivator standard fastened to the beam, or bar, by three bolts, arranged in the form of a triangle, although the head of the standard is square, instead of having a lug; and a standard having a bolt and nut with two dowel pins, similarly arranged, is also an anticipation.

In Equity.

Wheaton & Harpham, for complainants.

J. H. Budd and *J. L. Boone*, for defendant.

SAWYER, J., (*orally.*) This is a bill upon the second reissue of a patent. The reissued patent contains two claims, the first of which is as follows: "The curved standard, A, with the lug, B, and the offsets, D and E, substantially as and for the purpose described." That is a claim for the standard as a whole, but embracing certain elements, and is, in effect, a claim for a complete standard, made up of all those elements in combination; in other words, a patent for a combination.

The point is made here that the bill does not embrace this first claim, but that the suit is brought for an infringement of the second claim only of the patent. I think otherwise. An infringement of the first claim is clearly within the scope of the bill.

A standard introduced in evidence by complainants, and marked "Exhibit C," shows the complainants' standard as now made; and another, marked "Exhibit S," shows it as formerly made by them; and the standard, Exhibit B, made by defendant, is that which is claimed to be an infringement.

If Exhibit C is covered by the patent, then Exhibit B is an infringement. The question is whether or not Exhibit C is constructed in accordance with the patent. I find this difficulty in relation to that exhibit. Exhibit C does not contain one of the elements of the combination described in the first claim of the patent, namely, the offset, D. This offset, as well as the other elements, is very distinctly shown in the drawings of the patent, and described in the specifications, and is an element which is distinctly claimed as one of the features of the invention, as is shown by the following language in the specifications: "An *offset* is made at the point, *D*, of the standard, a little below the upper edge of the mould-board, and another at the point, E, so that the mould-board projects a little beyond the standard." The *offset, D*, then, is one of the features of the invention described in the specifications of the patent, and it is distinctly claimed in the first claim as one of the elements of the combination, which makes up the completed standard in one piece, composed of the standard, A, the lug, B, and the two offsets, D and E.

One of the elements of this combination, then, the offset, D, is not contained in the standard, Exhibit B, which is claimed to be an infringement; nor is it in Exhibit C, which represents the standard as now made by the complainants; nor is it seen in Exhibit S, the stand-

ard originally manufactured under the patent. A standard which does not contain all of the elements of the patented combination is not an infringement. The combination is patented as an entirety. *Coolidge* v. *McCone*, 2 Sawy. 576, and cases cited; *Sarven* v. *Hall*, 5 Fisher, 427. As defendant's standard does not contain the element referred to, offset D, I am compelled to hold that it is not an infringement upon the first claim of complainants' patent.

The second claim of the patent is: "A plow standard, constructed with the lug, B, upon its upper end, as described, so that the hole, *b*, may be outside of a direct line, with the holes, *a*, *a*, substantially as and for the purpose set forth." That claim is not in the original patent, or in the first reissue, but is only found in the second reissue. It is contended by the defendant that the second claim is improperly inserted in the patent; but, for the purpose of my decision, I shall assume that it is a proper claim.

I find, however, that the invention intended to be covered by that claim is anticipated by the devices shown in Exhibits 4 and 15. The only features of the standard-head described in this claim is the arrangement of the three bolts, and holes, *a*, *a*, and *b*, one out of line with the other two, for the purpose of strengthening the attachment of the standard to the plow-beam. That device is simply a combination of the standard with the bolt-holes and bolts arranged as described; that is, arranged in the form of a triangle, clearly giving a firmer support than would be given if they were arranged in a straight line.

Exhibit 4 is not a plow standard, but it is a cultivator standard, which is substantially the same thing, as the cultivator is practically a small plow, and the use of the standard-head on Exhibit 4 was of a date prior to the date of complainant's patent. The cultivator standard-head is not of the same shape as the head of the complainants' standard, but is square; but the arrangement of the bolts and bolt-holes is the same in both,—the bolts and holes being arranged in a triangle in the square head,—and the purpose of strengthening the attachment to the beam is accomplished by both in precisely the same way and by the same means. The difference in shape of the two heads is of no consequence. It does not matter whether the head of Exhibit 4 was made as there shown, square, or whether pieces were cut out of its sides, or two of its corners cut off so as to make a lug or triangle on it, like that in complainants' standard-head. Substantially they are the same. The bolts and holes are arranged in the same way in the head.

Exhibit 15 is also a cultivator standard, which was in use several years anterior to the date of the patent. The head of that standard also has the three holes, one out of line with the others. Only one of these holes, however, was for a bolt to pass through to be fastened with a nut, but the other two were made to receive dowel-pins instead of bolts. But the bolts are the equivalent of the dowel-pins, and the

purpose in both cases is the same—to strengthen the attachment of the standard to the beam. Exhibit 15, then, is a complete anticipation of the invention covered by the second claim of the patent.

Another standard-head introduced in evidence, which was made by Sperry, shows this same arrangement of the three holes out of line, one with the others; but the evidence as to prior use by Sperry is not very satisfactory. Three or four witnesses for the defendant state that it was made and used by Sperry 20 years or more ago; but there is testimony to the contrary on the part of complainants. One witness testified that Sperry died about 20 years ago, which is very indefinite. Defendant insists that this so-called Sperry standard was made before Sperry died, and before the date of plaintiff's invention. Mr. Matteson, however, states that he had a conversation with Sperry, in which Sperry called his attention to his tenon-head standard, and asked him if he could not rig another head for it; that he told Sperry that he could, and showed him the standard-head described in the patent; and that Sperry's standard was thereupon changed, upon Matteson's suggestion, and the Matteson or patented head substitated for the tenon-head.

As I have stated, the testimony in relation to the prior use of this Sperry standard-head is not satisfactory; but the standard-heads upon Exhibits 4 and 15, I think, clearly show an anticipation of the device described in the second claim of complainants' patent. I shall, therefore, be compelled to find against the validity of that claim upon that ground.

A decree will be entered dismissing the bill.

UNITED NICKEL CO. *v.* NEW HOME SEWING MACHINE CO.

(*Circuit Court, S. D. New York.* July 20, 1883.)

PATENTS FOR INVENTIONS—INFRINGEMENT—PRELIMINARY INJUNCTION.

Where it appears that defendant has been doing for seven years what plaintiff complains of, and that in 1880 he sued defendant at law in a circuit court of the United States for the infringement of the patent now sued on, and that such suit at law, after proceeding to a declaration, has been allowed by plaintiff to remain unprosecuted, and that defendant is pecuniarily responsible, a preliminary injunction will not be granted.

Motion for Preliminary Injunction.

Dickerson & Dickerson, for plaintiff.

W. A. Jenner and *Chauncey Smith*, for defendant.

BLATCHFORD, Justice. I do not deem it necessary or proper to consider, on this motion for a preliminary injunction, the merits of the controversy between the parties, for there is a sufficient ground for denying the motion in the fact that the defendant has been doing for

seven years what is now complained of, and that, in 1880, the plaintiff sued the defendant at law in the circuit court of the United States for the district of Massachusetts for the infringement of the patent now sued on, and that such suit at law, after proceeding to a declaration, has been allowed by the plaintiff to remain unprosecuted. It appears that what the defendant did before such suit at law was brought was of the same character with what it has done since. The plated articles it now has on hand for sale as parts of sewing-machines must have been plated by it since such suit at law was brought. The plaintiff does not plate, but licenses others to plate. It is shown that the defendant's license fee would be about $300 a year. That would be the amount of profits or damages to be recovered by the plaintiff. The defendant is shown to be pecuniarily responsible. Under the foregoing circumstances, there ought not to be an injunction before final hearing.

BRETT, Adm'x, etc., *v.* QUINTARD, Adm'r, etc.

(Circuit Court, D. Connecticut. August 16, 1883.)

PATENTS FOR INVENTIONS—INFRINGEMENT.

The sixth claim of the Henry A. Wells "hat-body patent" *held* to have been infringed by the manner in which defendant's intestate removed the bat from the revolving cone in the manufacture of hats, and a decree for an accounting granted.

In Equity.

E. N. Dickerson, for plaintiff.

John H. Perry and *Henry T. Blake*, for defendant.

SHIPMAN, J. The question of the infringement by the defendant's intestate of the sixth claim of the Henry A. Wells "hat-body patent" has again been heard upon the evidence introduced by the defendant. It is proved that the manner in which Mr. Brown removed the bat from the revolving cone was the same as that described by Prof. Trowbridge upon the seventh page of the printed testimony. The additional fact appears that 72 bats are plunged in the water each working hour, and consequently that the covering cloths are immersed in very hot water as often as once in each minute. It is to be remembered that in this examination the question of infringement only is at issue; all questions of the validity of the claim or of the novelty of the alleged invention are foreclosed. The defendant has, therefore, introduced the William Ponsford English patent of 1839, and, quoting the decision of the supreme court upon the Wells process patent, (*Burr* v. *Duryee*, 1 Wall. 531,) that the Wells process for removing the bat from the cone was the same as the Ponsford

process, says that the state of the art at the date of the Wells invention was such that the advance in the present Wells reissue over the Ponsford invention was trivial, and simply consisted in the use of a roller of cloth just taken from a kettle of very hot water, in distinction from the use of a wet and warm cloth cowl, and that Brown neither used a roller nor took his cloths freshly from hot water, and that, therefore, there was no infringement.

The Ponsford process was as follows:

"When the hair has been received on one of those perforated cones or moulds to a sufficient thickness, a cowl of linen or flannel is to be drawn gently over it, and then a hollow perforated cover of copper, or any other suitable metal, is to be dropped over the cowl."

The whole is then immersed in a vat of boiling water.

The last Wells reissue says:

"The attendant takes from a kettle of hot water a piece of felt or other cloth rolled upon a roller, and applies one end of it to the surface of the bat, still held by the pressure of the surrounding air, and as the cone rotates the felt cloth winds from the roller onto the bat; and as the tip of the cone is semi-spherical, and this cloth cannot be conveniently extended over the tip, another piece of cloth, also taken from hot water, is applied to the tip of the bat."

The sixth claim is:

"In combination with a pervious cone, provided with an exhausting mechanism, substantially as described, the covering cloth wet with hot water, substantially as and for the purpose specified."

The purpose was twofold—to hold the fibers upon the cone, and to partially felt the bat.

By Ponsford's patent, after the bat had been formed upon the cone, a cowl was drawn over the bat. Of course, as the cowl had recently been plunged in hot water, it was wet and warm. By the Wells patent, a cloth wet with hot water is wound around the bat, after it has been formed, and while the cone is revolving by the revolution of the cone. The distinction between the two methods seems to me to be without a serious patentable difference. In the one case, a cowl or hood is drawn over the bat; in the other, a cloth is wound around the bat by the revolution of the cone. But, as I have before said, the question of validity is not before me.

The sixth claim of the Wells patent covers, in combination with a pervious cone and an exhaust mechanism, a cloth upon a roller taken from a kettle of hot water and wound around the bat as the cone rotates. In combination with a pervious cone and an exhaust mechanism, Mr. Brown wound around the bat, as the cone rotated, an unrolled or unfolded cloth, wet and warm, and taken within a minute from a tub of hot water. If the sixth claim is valid, I think that infringement is proved.

Let there be a decree for an accounting in respect to the use of the sixth claim.

YALE LOCK MANUF'G CO. and others v. BERKSHIRE NAT. BANK and another.

(Circuit Court D. Massachusetts. August 14, 1883.)

PATENT—REISSUES NOS. 7,947 AND 8,550.

Claim 3 of reissued patent No. 7,947, granted to James Sargent, and all of the claims except claims 1 and 7 in reissued patent No. 8,550, granted to Samuel A. Little for "improvements in locks for safes and vaults," *held* void.

In Equity.

Causten Browne, Edmund Witmore, and *George T. Curtis,* for complainants.

E. N. Dickerson and *Thomas A. Logan,* for defendants.

LOWELL, J. This suit is brought to establish and enforce the rights of the plaintiffs as the owners of the two patents for improvements in locks for safes and vaults, reissue 8,550, to Samuel A. Little, and reissue 7,947, to James Sargent. The Little patent was reissued three times for the benefit of the plaintiffs, and its claims have been enlarged in number from 3 to 17. It is probable that the motive of this action was to enjoin the use of locks like the defendants'; and, if this intent were decisive, the reissue must be held void. The plaintiffs contend that intent and act must concur, as in other penal cases; that Little was the first person to make a time-lock, with adjustable devices for controlling the time of locking as well as that of unlocking a door; that this invention was clearly described and claimed in the original specification; and insist that claims 1 and 7 are saved by the operation of this rule. These claims were sustained by Judge SHIPMAN in *Yale Lock Manuf'g Co.* v. *Norwich Nat. Bank,* 19 Blatchf. 123, (S. C. 6 FED. REP. 377,) and all the questions of novelty and patentability were passed upon. With his opinion I fully agree, and I refer to the report of that case for an able, thorough, and satisfactory discussion of those questions. When the case in Connecticut was decided, *Miller* v. *Bridgeport Brass Co.* 104 U. S. 350, had not been published; but it was said in the argument before me that Judge SHIPMAN had had his attention called to that decision by a motion to dissolve the injunction in Connecticut, and had refused to dissolve it. This point, though a difficult one, I decide in conformity with Judge SHIPMAN's action, for the reason that in a patent like the original patent of Little, it would be proper to construe his second claim somewhat broadly, and so as to reach the substituted adjustable devices and their connection with the "dog," in the lock of the defendants in that case, which were substantially like those in question here.

The Hall lock has, besides the devices above referred to, an arrangement entirely different from any shown in the case in Connecticut. The plaintiffs have two time movements to control the lever which controls the "dog," and the defendant has but one. The seventh

claim of the patent is for the combination of the "time movements," in the plural number, "and two adjustable devices, one for determining the time of locking and the other of unlocking." But the first claim, which differs but little from the seventh, has the words "time mechanism," and both forms were well-known substitutes for each other at the date of the patent. The two movements are exactly alike, and the whole purpose of the second movement is to give an additional safeguard against a lock-out, if one movement should stop. It is not to be expected that the patentee would make the use of a single or double time movement an essential element of his invention, and I am fully satisfied that he had not such intent, and that he has not so expressed himself in his first claim, even if he has in his seventh claim, which, I think, he has not, when that claim is construed in connection with the rest of the specification.

I am not able to agree with the commissioner of patents, and with Judge SHIPMAN, that claim 3 of the Sargent reissue, No. 7,947, is valid; and my excuse for a somewhat elaborate discussion of the subject is that I differ from those high authorities, as well as from the able board of examiners in chief of the patent-office.

This patent was reissued so soon after its grant that it is not obnoxious to the objection of undue delay. Its invalidity is inherent in its nature. The specification mentions, without describing, a combination lock, which is declared to be of any ordinary construction; it carefully describes a time-lock, which is said by the plaintiffs to be new and highly useful, but says that any time-lock will serve the purpose of the combination. Claims 1 and 3 make no reference to this mechanism; and claim 3 undertakes to monopolize what is now called the triple combination of any time-lock, and any combination or key lock, with the multiple bolt-work of a single door of a vault or safe. The claim must be construed in the broadest possible manner, or there is no infringement. It is—

"(3) The combination, with the bolt-work of a safe or vault door, of a combination or key lock, controllable mechanically from the exterior of said door, with a time-lock having a lock-bolt or obstruction for locking and unlocking controllable from the interior of said door, both of said locks being arranged so as to rest against or connect with the bolt-work, the time-lock being automatically unlocked by the operation of the time-movement, both of said locks being independent of each other, and arranged to control the locking and unlocking of the bolt-work, so that said safe or vault door cannot be opened when locked until both of said locks have been unlocked, or have released their clogging action, to enable the door to be opened substantially as described."

This claim is a complete patent in itself, and has no necessary connection with the mechanism described in the specification; and the words "substantially as described" have no meaning.

Multiple bolt-work, which means several bolts connected with a common cross-bar, so that by locking the bar you lock all the bolts, had been used on heavy iron doors, such as those of safes and vaults,

long before the date of the patent, and had been known to Sargent himself for 16 years or more when he testified in 1877. Safe doors had been fastened by key-locks, by combination locks, and by time-locks, and all these locks had been applied to independent bolt-work. Two combination locks had been used upon a single door with such bolt-work; and a time-lock and combination lock had been put upon a single door with two sets of multiple bolt-work. This is found to be the state of the art by Judge SHIPMAN, and the record of his case, and of still another, as well as the evidence taken for this case, are made part of the record here, and I agree with his findings of fact. In this state of the art, there was no patentable novelty in putting one old form of lock, a time-lock, in place of another, a combination lock, in the instance above mentioned, of two combination locks dogging one compound bolt-work. Nor was it patentable to substitute a well-known multiple bolt-work for two such bolt-works with which a time-lock and combination lock had been combined in another of those instances. But my opinion does not depend wholly upon the proved state of the art, excepting that multiple bolt-work was a familiar part of a vault door. There never was a time, in my judgment, since the first lock was invented by Tubal Cain, or whoever was the inventor, when there was patentable novelty in combining two locks with a single door. There may be no record of its having been done, but no one can doubt that whenever one lock was found to be inadequate, another was added. I cannot make this plainer by argument, but I may, perhaps, by illustration. When nails were invented and had become public property, the carpenter who had the right to use one nail might use two, if he found one would not fasten his two pieces of wood sufficiently for his purpose. If one has invented a pair of shoes of a new form, and another a pair of shoes of a different form, a combination, consisting of putting a shoe of one of these forms upon the right foot, and one of the other form upon the left, would not be patentable. If one has made a new plow and used it with oxen, it is not patentable to use the same plow in combination with a horse, independently of the mechanical adaptation. In the language of the old law, it is a double use. To the man who invents a lock, there must always remain the right to use it on an old door, in addition to any old lock which he finds or may choose to put on that door.

I will now consider the reasons which have been given in the patent-office, and in the circuit court, for sustaining this broad claim. In *Little* v. *Sargent*, 12 O. G. 186, there were questions of priority between several inventors, and, incidentally, the point was taken that a claim, now the first of the reissue, which is only a trifle less broad than the third, could not be granted. The learned commissioner said:

"The very claim which Little now insists should be restricted, stands upon the record ascribed to himself."

Here, it seems, was a sort of estoppel. But he adds:

"I am inclined to think that the combination of the time-lock and the ordinary lock, each independent of the other, but so applied and connected to the bolt-work as to operate effectively in conjunction or independently, is an advance upon the old method of applying the time mechanism directly to the combination or key lock, and the original and first inventor is entitled to a patent."

This extract assumes, what is more fully stated in another part of the opinion, that the old method was to use a time-lock as a mere auxiliary to the key or combination lock, by dogging the bolt of that lock. This method, as the learned commissioner justly says, diminishes the value of the time-lock very materially. He was mistaken in supposing that Sargent was the first to separate the two locks, as is not only abundantly proved in this case, and found by Judge SHIPMAN, but is twice stated in Sargent's specification. Assuming, wrongly, that Sargent was the first to separate the locks,—that is to say, to make a time-lock capable of acting separately, (for key-locks and combination locks had always had that capacity,)—the commissioner argues that he should have a broad claim. This is true. He should have a broad claim for a separate time-lock; but the third claim is for the fact or principle of separation.

When the time came to pass upon the Sargent reissue, the examiner rejected claim 3, for the reasons which induce me to declare it too broad. He was overruled by the examiners in chief for the following reasons, found in the Connecticut Record of Complainants, page 288:

"The patentability of Little's claim [which was equally broad] has once been before us in the aforesaid interference, and, after full argument, we concluded that his claim was tenable, and held that some one who was first to combine with the bolt-work on a vault or safe door, key-lock and time-lock, acting independently of each other, but jointly upon the bolt-work, might have a valid patent therefor. All the purposes of security, or of locking a safe or vault door, are performed by the parts named. It is true that some means of connection and support must be resorted to, to keep the parts in their relative positions, in order that they may jointly perform their functions, but it will hardly be assumed that the first to combine these three principal elements must be limited to the particular way of fastening these parts in juxtaposition adopted by him, or that it is necessary for him to recite that they must be secured substantially as described."

"'Means whereby,' while being essential to the convenient use of the combination, is merely incidental to the main idea, and may be varied indefinitely without departing from the spirit and scope of the applicant's invention."

As I understand this reasoning and conclusion, they are that the applicant has discovered a great principle or process, which he may patent independently of any particular means for carrying it out, whether they be old or new, discovered before the date of the patent, or at any time during its continuance. In my opinion, such a claim in a mechanical patent like Sargent's is void on its face as a patent for a principle, of which this claim seems to be an excellent illustra-

tion, independently of the state of the art; and void in view of the state of the art, as I have before shown.

Judge SHIPMAN's very able argument is that the triple combination of bolt-work, time-lock, and key or combination lock, is a true combination, and not a mere aggregation, and is new and useful. To arrive at these conclusions, he compared the two locks on a single door with the same locks on separate doors, one inside of the other, as some persons had used them. He does not say wherein the patentable novelty consists in substituting a well-known time-lock for a well-known combination lock, in one of the old safes; or one kind of bolt-work for another, both well known, in another of them.

The fact, if it be one, relied on to prove the combination to be new, namely, that no person had actually, in 1874, put the two kinds of locks on a single bolt-work, is easily accounted for by another circumstance, much dwelt on by the plaintiffs, that time-locks had not gone into general use at that time. The man or men who have made successful time-locks cannot be prohibited the use of them, simply because some one steps forward at once, before any one else has had time to do so, and points out one of the obvious modes of their use. The first man who ever obtained a patent for a time-lock in the United States, in October, 1847,—J. Y. Savage, patent No. 5,321,—said in his specification: "Besides the bolt or bar and the other apparatus which I am about to describe, and which is to be operated on without the intervention of a key, any additional fastening may, of course, be used;" but he considers such a course unadvisable, because with the use of the time-lock alone the door might be made solid and flat, without openings to assist the burglar. The answer of the plaintiffs' expert to this reference is that, at that early day, multiple bolt-work was not well-known, and that it might, perhaps, have required invention to combine the two locks with such bolt-work in 1847. There was no such difficulty at the date of the Sargent patent, which contains a statement that time-locks and combination locks have been, severally, connected with independent bolt-work; and the "of course" remains true. It is "of course" that every owner of a lock knows, without experiment and without invention, that he can put it upon the same door with any other lock, if the door is large enough; and if it is not, every one knew at the date of the Sargent patent that a time-lock may be put in any convenient place on or in the safe near enough to dog the bolt-work.

For these reasons I hold claim 3 of Sargent's reissue to be void.

Decree for the complainants upon claims 1 and 7 of the Little reissue only.

PORTER NEEDLE CO. *v.* NAT. NEEDLE CO.

(Circuit Court, D. Massachusetts. August 20, 1883.)

1. PATENTS FOR INVENTIONS—CONTRACT CONSTRUED—INJUNCTION.

In a suit to enjoin defendants from the use of seven machines containing certain patents owned by complainant, defendant set up in defense a contract as follows:

"In consideration of the receipt in full of all bills and demands held against the Cook & Porter Needle Company by the National Needle Company, I do hereby agree to allow the National Needle Company the free use of the seven patent reducing, belting, and pointing machines now in their possession, from July 2, 1877, until April 1, 1878, and the further use of said machines at a royalty of one-quarter the saving made by the above-named machinery over the same class of work done by hand from April 1, 1878, to July 1, 1880.

"The said seven machines are valued at eight hundred dollars, the receipt of which is acknowledged, and are exchangeable, either separately or together, for other machines made under the same letters patent, at the same *pro rata* valuation; the difference in price of machine, if any, to be paid by the said National Needle Company.

"I grant the above right to use said patented machines by virtue of my ownership of [mentioning several patents,] and the National Needle Company is to have the right to use, without extra royalty, any improvement made, or caused to be made, by me on said machines, during the time of this agreement.

"*Newton, September* 12, 1877."

Held, that defendants took, in part payment of their debt, the seven machines at their cost, and could use them without royalty until April 1, 1878, and on payment of the stipulated royalty from that time to July 1, 1880, but that no arrangement was made for the remainder of the term; that it was not intended that defendant should thereafter use the machines without payment of royalty unless some new bargain should be made; that this limitation was not repugnant to the grant; and that defendants should be enjoined from the further use of the machines.

2. SAME—SALE OF PATENTED MACHINE—RIGHT OF USE.

An absolute and unqualified sale of a patented machine carries with it the right of use, but the courts will permit a severance of ownership and right of use where the patentee has chosen to dissever them, and his intention to do so is not doubtful.

In Equity.

E. W. Clarke, for complainants.

J. E. Abbott, for defendants.

Before LOWELL and NELSON, JJ.

LOWELL, J. The plaintiffs have succeeded to the rights and liabilities of the Cook & Porter Needle Company, and of Lewis B. Porter, in respect to certain patents, and the contracts and dealings relating thereto. They bring this suit to enjoin the use of seven machines, containing improvements in the art of grinding needles, invented by one Mallett, for which a patent (No. 172,639) was issued to the Cook & Porter Needle Company, January 25, 1876. It is agreed that since July 1, 1880, the defendants have used six machines containing the improvements. The dispute turns on the construction of a contract between Lewis B. Porter and the defendants, which the plaintiffs call a lease of the machines, and the defendants, a sale. The contract is as follows:

"In consideration of the receipt in full of all bills and demands held against the Cook & Porter Needle Company by the National Needle Company, I do hereby agree to allow the National Needle Company the free use of the seven patent reducing, belting, and pointing machines now in their possession, from July 2, 1877, until April 1, 1878, and the further use of said machines at a royalty of one-quarter the saving made by the above-named machinery over the same class of work done by hand from April 1, 1878, to July 1, 1880.

"The said seven machines are valued at eight hundred dollars, the receipt of which is acknowledged, and are exchangeable, either separately or together, for other machines made under the same letters patent, at the same *pro rata* valuation; the difference in price of machine, if any, to be paid by said National Needle Company.

"I grant the above right to use said patented machines, by virtue of my ownership of [mentioning several patents,] and the National Needle Company is to have the right to use, without extra royalty, any improvement made, or caused to be made, by me on said machines, during the time of this agreement.

"*Newton, September* 12, 1877. LEWIS B. PORTER,
"National Needle Co.
"GEORGE H. BLELOCH, Manager."

Before the date of this agreement, the defendants held a license to use these machines for one-half the saving over hand labor. They had various dealings with the owners of the patents in making and storing machinery, etc., and on the twelfth of September were creditors of Porter and his company for a sum which they estimated at $3,400, and Porter at $1,700, in settlement of which this contract was made, by which the defendants were released from the payment of the royalty before agreed on, for 9 months; and for the next 27 months, to July 1, 1880, the royalty was fixed at one-half the former rate. Besides this, certain belting and shafting, estimated to be worth $400, was conveyed to them by Porter by a bill of sale in due form.

Some evidence has been given of the value of the use of the machinery, which tends to prove that the royalties upon them, to the expiration of the patent, would very much exceed the debt due from Porter to the defendants. There is evidence that the plaintiffs, to the knowledge of the defendants, intended to make use of the patents, not by selling machines, but by letting them to hire with a royalty payable monthly.

Considering the evidence, we find that the plaintiffs did not grant to the defendants the absolute right to use the machines, but a right conditioned on the payment of a royalty, the terms of which were fixed to July 1, 1880, and after that time were left to future negotiation, whether purposely, or by an oversight, is not material.

We agree that the words, "the said seven machines are valued at $800, the receipt of which is acknowledged," import a sale of the machines; and that an absolute and unqualified sale of a patented machine carries with it the right of use. But the mere value of a patented machine is often, and is proved to be in this case, insignificant in comparison with the value of its use; and the courts have per-

mitted a severance of ownership and right of use, if the patentee has chosen to dissever them, and if his intent is not doubtful. For instance: a license to use a machine implies the right to make and own it; and yet, if the owner neglects to pay the license fee, he may be restrained from using a machine to which his title is undoubted. One who is licensed to make, use, and sell machines for the term of the patent, and no longer, sells a machine with the right to use it. The purchaser owns the machine; but if the patent is extended, he has no right to use it, during the extended term, without a further license from the patentee. *Mitchell* v. *Hawley*, 16 Wall. 544. In many other cases the ownership of the machine will not necessarily carry with it the right to use it without the permission of the patentee. See *Jenkins* v. *Greenwald*, 2 Fisher, 37; *Woodworth* v. *Curtis*, 2 Wood. & M. 524; *Steam Cutter Co.* v. *Sheldon*, 10 Blatchf. 1.

We find that this somewhat imperfect contract means that the defendants take, in part payment of their debt, the seven machines at their cost, and may use them without royalty until Aprll 1, 1878, and on payment of the stipulated royalty for that time to July 1, 1880; and that no arrangement is made for the remainder of the term; that it was not intended that the defendants should thereafter use the machines without payment of royalty unless some new bargain should be made; and that this limitation is not repugnant to the grant. The result is that the decree must be for the complainants.

ZINSSER and others *v.* COOLEDGE and others.

(*Circuit Court, S. D. New York.* July 18, 1883.)

PATENTS FOR INVENTIONS—PRELIMINARY INJUNCTION—INFRINGEMENT.

A preliminary injunction is only granted to restrain injury in its nature irreparable.

In Equity.

A. v. Briesen, for orators.

Edward Fitch, for defendants.

WHEELER, J. A preliminary injunction is granted only to restrain injury in its nature irreparable. The orators' patent would not be infringed without employing means for the introduction of steam into the mixer or hopper. The defendants do not employ any such device, and disclaim any intention of doing so. They did at one time employ steam in a manner that might be an infringement and might not. Whether it was or not is so doubtful as to make it seem most proper to leave that question to the hearing. The orators are not now in any danger of any irreparable injury. Motion denied.

HICKS v. OTTO and others.

(Circuit Court, S. D. New York. July 25, 1883.)

PATENTS FOR INVENTIONS—AMENDMENTS.

Motion for an amendment to answer, and commission to take testimony in a foreign country to prove who is the original inventor of a patent, will not be allowed when the affidavits filed by plaintiff show that there is no evidence to sustain the amendment.

In Equity.

Von Briesen & Steele, for defendants.

Frost & Coe, for orator.

WHEELER, J. The motion of defendants, now heard, for an amendment of the answer, and a commission to take the testimony of Denton, in London, to show that he, and not Peroni, is the original inventor of improvements in thermometers, patented to the orator as assignee of Peroni, must be denied. While such motions are granted with liberality, some prospect is required that there is evidence to support the amendment which can be had. Here, the affidavit of Denton, filed by the orator in opposition to the motion, stating that he does not claim to be and is not, and that Peroni is, the original inventor, and his refusal to make an affidavit for the defendants to the contrary, on their application, show that there is no such prospect. Motion denied.

URNER v. KAYTON and others.

(Circuit Court, S. D. New York. August 2, 1883.)

PATENTS—INFRINGEMENT—MASTER'S FEES—ACCOUNTING.

Where defendants have been adjudged to be infringers, and decreed to account for the gains and profits and damages of their infringement, they must go forward in the accounting and bear the necessary expenses of so doing, including the master's fee.

In Equity.

John A. Shields, master, *pro se*.

Andrew Comstock, for orator.

Wetmore & Jenner, for defendants.

WHEELER, J. This cause has now been heard on motion of the master for payment of his fees on the accounting. It is agreed that his fees amount to $150. Each party insists that the other should pay them. The question now is, not how the costs shall finally be allowed and taxed in favor of either party against the other, which can be determined properly only at the making of the final decree, but is, which party shall pay these fees in the first instance? As the defend-

ants have been adjudged to be infringers, and decreed to account for the gains, profits, and damages of their infringement, they are to go forward in the accounting and bear the necessary expenses of doing so, among which are the master's fees. This was so held in *Bridges* v. *Sheldon*, Dist. Vt. Oct. Term, 1879.

Let an order be entered that the defendants pay these fees within 15 days from the entry of the order.

The J. C. Stevenson, now the Stanmore.

(*District Court, D. Maryland.* June 20, 1883.)

1. Shipping—Loss of Cargo of Cattle—Storm at Sea—Burden of Proof—Suitableness of Vessel.
   Where respondents prove that a steam-ship, on which a lot of cattle were shipped by the libelant, encountered a storm of unusual severity, and show the character of the damage sustained by their vessel and by other steam-ships carrying cattle which encountered the same hurricane, the burden is put upon the libelant of proving that the losses sued for were occasioned by the want of due care in providing a proper ship, and suitable stalls and other fittings, for carrying the cattle.
2. Same—Evidence.
   Upon the whole testimony, considering the contrivances then in use for carrying cattle, and the known risks and uncertainties of the business, and the character of vessels customarily used, it does not appear that the steam-ship in this case would have been considered unsuitable for the business at the time she was so used, or that the fittings were improperly constructed, and no damage can be recovered on that account.
3. Same—Delay in Coming to Port for Cargo—Damages.
   Where a vessel is to arrive at a port and receive a cargo of cattle by a certain day specified, and she does not arrive for several weeks after the appointed time, the only damages that can be recovered on account of the delay, when the vessel is accepted and the cattle shipped, is such expense as may have been incurred for keeping the cattle during the period of delay, and the additional insurance the shipper may have had to pay by reason of the increased risk caused thereby.
4. Same—Damages a Lien on Vessel.
   Where the cattle were actually laden on board under the contract, and reference being specially made to it in the libel, and the ship has obtained the benefit of the contract, it seems that the shipper would have a lien on the vessel for such damages.

In Admiralty.

Marshall & Hall, for libelants.

Brown & Brune, for respondent.

Morris, J. This libel is filed to recover damages for the loss of a large number of cattle shipped by libelant on the steam-ship J. C. Stevenson, on November 13, 1879, to be carried to London, which were lost on the voyage, and for damages resulting from the delay of the steam-ship in arriving at the port of Baltimore to enter upon the voyage. The contract for the shipment of the cattle was as follows:

September 22, 1879, Mr. Francis Bell, hereinafter called the shipper, hereby agrees to ship in the steam-ship J. C. Stevenson, to sail from Baltimore for London on the twelfth day of October or thereabouts, seven days' notice having been previously given by the agents of the steam-ship to the shipper, 380 cattle, subject to the following conditions:

(1) The steam-ship is to carry the cattle stowed on her decks; (2) the steam-ship is to provide stalls or pens for the cattle constructed upon the plan of those hitherto adopted, or such new plan as may be mutually approved; (3) the between-decks are to be satisfactorily ventilated; (4) a supply of fresh, cool water, equal to a maximum of eight gallons per head *per diem* is to be supplied by the steam-ship; (5) the steam-ship is to provide free steerage passages to and from London to one attendant upon every 25 cattle, if required, and cabin passages to the foreman in charge; (6) the shipper is to provide feed, and all necessaries and utensils, such as buckets, pitchforks, ropes, etc.; (7) the ship is to carry all the feed that the animals consume on the passage freight free; (8) the shipper is to rope the animals before or after they are put on board; (9) the freight is payable upon said cattle, for transportation from Baltimore to Deptford, at the rate of three pounds ten shillings per head each, at Baltimore or Deptford, at shipper's option, but is to be collected upon the number shipped at Baltimore; (10) the steam-ship is warranted by the shipper free from responsibility for mortality or accident of any kind; and if any of them die, or are thrown overboard, or are washed overboard, or are lost in any manner whatsoever, the freight is nevertheless to be paid.

If the shipper desires that freight should be paid at Deptford he must, if required, deposit insurance policy with agent of vessel assigned to him, or, if insured in England, assign lien or policy to the amount that "may be incurred."

The bill of lading, dated November 13, 1879, contains all customary exceptions, and states the rate of freight to be £3 10s., "*and all other conditions as per contract dated September 22, 1879.*"

In the margin of the bill of lading is written: "Not responsible for mortality, nor for any accident of any nature or kind whatever; and if any of them die, or are thrown overboard, or are washed overboard, or are lost in any manner whatsoever, freight is nevertheless to be paid on them on arrival of vessel at London." When the ship arrived in the port of London, after a long and tempestuous voyage, of the 380 head of cattle all had been lost but 21.

The respondents having shown that the steam-ship encountered a storm of unusual severity, and having proved the character of the damage sustained by this and by other steam-ships carrying cattle which encountered the same hurricane, have shown enough, in my judgment, to put upon libelant the burden of proving that the losses sued for were occasioned by the want of due care in providing a proper ship, and suitable stalls and other fittings, for carrying the cattle. In judging of what was reasonable in this respect, we are to put ourselves in the situation of these parties who were contracting with respect to carrying cattle across the Atlantic in November, 1879. It was then a new and experimental venture, and the improved appliances now used in the business are greatly the result of the experience then being obtained. The original contract between the agents of the steam-ship and the libelant contained the following provisions with regard to the fittings for the cattle:

"The steam-ship is to provide stalls or pens for the cattle constructed upon the plan of those hitherto adopted, or such new plan as may be mutually approved."

It is shown that the stalls on this voyage on which the loss occurred were the same which had been put upon the steam-ship at Montreal and used on the previous voyage. On that voyage she had successfully carried 350 head of cattle and 400 sheep from Montreal to England, not losing a single head of cattle, and but a few of the sheep. Immediately after the voyage to England, on which she carried these cattle and sheep, the steam-ship came to Baltimore, bringing as cargo a small quantity of pig-iron. When the pig-iron was discharged, such of the stalls as had been taken down for that purpose were replaced, and all were put in repair by competent carpenters, experienced in putting up stalls for cattle on board ship. These fittings were then inspected and approved by a marine surveyor, who certified, after the cattle were on board, that the loading was completed properly, and the ship in good condition to proceed on her voyage. The stalls were seen by the libelant and his agents before and while the cattle were being put on board, and no complaint or suggestion was made with regard to them. When the ship arrived at the port of London the libelant paid the freight on all that were shipped, as had been agreed, and no complaint was ever made, or claim for damages, until the filing of this libel, 14 months afterwards. The respondents, in my judgment, have not only shown that the stalls and the ventilation were such as might reasonably have been expected to be sufficient, but have shown that they had been actually tested on the previous voyage and found sufficient.

It was urged on behalf of the libelant that the fact that 15 of the cattle between-decks died before there was any rough weather, and while the hatches were open, is conclusive that the ventilation could not have been sufficient. But it is shown that on the previous voyage 200 cattle were carried between-decks and not one died, although the weather experienced on that voyage required the hatches to be closed. In the face of this, it seems to me that it must be held that the owners of the steam-ship had every reason to believe that the ventilation was sufficient; and, indeed, it would appear that these 15 cattle must have died from some other cause than suffocation. As to the severity of the weather which the steam-ship encountered, and how long the cattle-stalls endured the violence of the storm before they were destroyed, I think that, probably, the most trustworthy testimony, after so long a lapse of time, is to be had from the ship's log. It contains these entries:

Tuesday, November 18, 1879. Towards midnight, fresh gale blowing, with heavy squalls and rain. Hands employed repairing cattle-stalls, and threw overboard three cattle that died in the hold. Midnight ends—fresh, increasing gale. Ship rolling heavily, and taking heavy water on deck.

Wednesday, November 19, A. M. Increasing gale, with hard rain-squalls; high sea getting up. At 2:30 A. M., washed several cattle-stalls away on the after-deck. Some cattle rolling about the decks. Hove ship to, and slowed engines. All hands employed securing the loose cattle and repairing stalls. At 8 A. M., set fore lower top-sail, and kept ship on her course. At 11 A. M., gale veered west with great violence. In top-sail, and brought ship to the wind. Battened all hatches down. Ship laboring heavily, and taking in heavy water fore and aft. Noon, cattle-stalls give way on the after-deck. 'Cattle all washing and rolling about the decks. All hands commenced throwing the cattle overboard. P. M., blowing a hurricane; a high cross-sea running; ship laboring heavily. Started starboard bulwark, with weight of the cattle rolling against it. Cattle washing and rolling about the after-deck; all hands throwing them overboard. 4 P. M., continues blowing a hurricane. At 8 P. M., gale moderating; kept ship S. E.; set fore trysail; ship laboring heavily. At 9 P. M. took off fore hatch for ventilation; found in the between-decks cattle-stalls all down; several dead. Midnight, moderate breeze.

Thursday, November 20, A. M. Moderate breeze; ship rolling heavily; a high cross-sea running. At daylight commenced throwing dead cattle overboard. After between-decks, several dead cattle and some stalls broken down. A quantity of water washing about the after between-decks. Noon, fresh increasing gale from southward. P. M., fresh increasing gale and high cross-sea running; ship laboring heavily, and taking heavy water on deck. All hands employed throwing the dead cattle overboard. At 5 P. M., violent gale blowing; battened all hatches down fore and aft. Several cattle-stalls on upper deck forward, washed away; cattle getting adrift, and rolling and washing about the decks. Several washed overboard. Midnight, gale moderating and sea going down.

Friday, November 21*st*. Gale moderating, and high cross-sea running; ship rolling heavily. At daylight, commenced throwing the dead cattle overboard out of the fore and aft between-decks. Five horses and three cattle left alive in the fore between-decks, and all dead in the after between-decks. P. M., high cross-sea running, and ship rolling heavily. At 6 P. M. got all dead cattle overboard, and commenced bailing water out of after between-decks. On looking around the ship found the starboard after-boat stove in and rails broken, ventilators washed down and broken, two stanchions started in the after between-decks.

Saturday, November 22*d*. Moderate breeze and clear weather. At daylight commenced taking out the dead cattle on the deck forward. Carpenter repairing stalls for the 35 cattle left.

These were the entries in the log, and the testimony of such of the officers of the ship as could be found after the libel was filed, show the storm to have been of the severest character.

It appears that the gale began at midnight on Tuesday, with the ship taking large quantities of water on deck, and continued with increasing violence, the stalls on the after-deck giving way about noon on Wednesday. This destroyed not only the cattle on the after-deck, but broke down the ventilators so that the cattle below, the hatches having to be battened down, were without any ventilation. The gale continued throughout Wednesday, doing more damage to the ship and to the cattle fittings on deck, and made it necessary to keep the hatches down until 9 o'clock in the evening. On Thursday morning the gale had moderated, but increased again in the afternoon, when

the stalls on the forward deck were broken down and the cattle were washed about the deck, and some of them carried overboard. The hatches were again battened down, and so continued until midnight of Thursday. I think the proof is quite convincing that experience has shown that no cattle fittings of a temporary nature, and without a permanent shelter deck over them, can be constructed which can be depended on to withstand a continuous gale of this character.

It is shown that the Rathmore, a steam-ship which sailed from Baltimore on November 18th with cattle, and which on the 20th encountered this same gale, although she was also a steam-ship which had previously carried cattle successfully, and had stalls constructed upon an improved plan, had nearly all her cattle-stalls forward of the bridge carried away, and suffered such damage that she put back to Baltimore, with a loss of 64 cattle and with others badly injured. The official survey of the Rathmore shows that the cattle pens were broken and mashed up, both forward and aft, on the main deck, and that between-decks some were broken down and more or less damaged by the heavy rolling and lurching of the ship.

It is contended that the fact that the stalls between-decks on the J. C. Stevenson did not stand, shows that they must have been improperly constructed. But the fact that many of the beasts had died of suffocation, and that a large weight of water had got down into the between-decks through the broken ventilators, and was washing the carcasses about as the vessel rolled, is, in my judgment, sufficient to account for the destruction of the stalls. Sufficient appears to make it evident that, except on a vessel specially constructed for the protection of cattle, their safe carriage across the Atlantic is much a question of good or bad weather on the voyage, and that, with bad weather and heavy seas sweeping the decks, temporary fittings will give way, and the cattle be lost, and if the cattle are between-decks the ventilators will be broken down and water get below, and their safety thus imperiled. Upon the whole testimony, I do not find that, considering the contrivances then in use for carrying cattle, and the known risks and uncertainties of the business, and the character of the vessels customarily used, that this steam-ship would then have been considered unsuitable for the business, or that the fittings were improperly constructed. I think the steam-ship and the fittings were as good as were ordinarily provided and used at that time.

It remains to consider what were the liabilities incurred by the steamer by her delay in arriving at Baltimore to perform the contract dated September 22, 1879, in which it is provided that "Mr. Francis Bell agrees to ship in the steam-ship J. C. Stevenson, to sail from Baltimore for London on the twelfth day of October, or thereabouts, (seven days' notice having been previously given by the agents of the steam-ship to the shipper,) 380 cattle, subject to the following conditions," etc. The steamer did not arrive in the port of Baltimore until November 4th, and did not take the cattle on board until No-

vember 13th, and sailed on the 14th. This was a delay of about one month.

Damages of various kinds are claimed in the libel for this delay; but, in my opinion, the damages on this ground cannot be extended beyond such as had accrued up to the time the cattle were put on board. The libelant, when the vessel did not arrive, had his right of action for breach of the contract, and could have recovered the expenses of keeping the cattle and any additional freight he might have had to pay if he sent them forward by another ship, and the additional insurance premium he might have had to pay if the premium was increased by the lateness of the season. As the ship, when she did arrive, was accepted by him, and did in part perform the contract by their taking the cattle with his consent, all he can recover is the cost of keeping the cattle during the delay, and the increased rate of insurance premium actually paid by him. It is a question not free from doubt, perhaps, whether for these items of damage the libelant has a lien on the ship; but as the cattle were actually laden on board under the contract, reference being specially made to it in the bill of lading, and as the ship obtained the benefit of the contract it seems to me within the spirit of the decisions that she should be held for the delay in receiving them on board. *Oakes* v. *Richardson*, 2 Low. 173.

I will sign a decree in favor of libelant, with a reference, if required, to ascertain the expenses of keeping the cattle for, say, one month, and the extra premium actually paid by libelant in excess of what he would have had to pay for the same insurance if the ship had sailed on the fourteenth of October.

The Morning Mail.[1]

(*District Court, D. Kentucky.* July, 1883.)

1. "Unavoidable Dangers of Navigation"—Loss by Striking Bridge Piers.
   The exception, "unavoidable dangers of navigation," as used in a bill of lading for transportation of goods by river, includes unavoidable dangers of navigation which may arise from bridges across the rivers to be navigated. Under the circumstances of this case, the goods being lost by the boat striking a bridge pier, and the court finding that the boat was properly navigated, *held*, that the loss was within the exception.

2. Detention of Goods until General Average Paid.
   Where there was a privilege of reshipping, and the goods were damaged while in the possession of one of the connecting lines, making a general average necessary, such connecting carrier can hold the goods until the average contribution is paid or secured.

[1] Reported by J. C. Harper, Esq., of the Cincinnati bar.

3. SAME—PROXIMATE CAUSE OF LOSS.

Where a detention takes place by reason of the adjustment of such general average contribution, one boat in the connecting line leaving port in the mean time, and the goods go forward on the succeeding boat of the line and are lost by the boat striking a bridge pier, *held*, that such detention was too remote, and not the proximate cause of the loss of the goods.

In Admiralty.

Collins & Beach, for libelant.

Lincoln & Stephens and *Goodloe & Roberts*, for respondent.

BARR, J. The libelant, Blatterman, sues to recover the value of goods and household furniture shipped at Maysville, Kentucky, to Kansas City, Missouri, by the Morning Mail, and which were sunk on the Joe Kinney in the Missouri river, at the Glasgow bridge, April 12, 1882. The bill of lading, which is dated March 16, 1882, agreed to deliver in good order, without delay, at Kansas City, "unavoidable dangers of navigation and fire only excepted." The Morning Mail was a packet running between Maysville and Cincinnati, and both parties understood the goods were to be reshipped at Cincinnati and St. Louis. The goods were reshipped at Cincinnati for St. Louis on the Montana, and passing down the Ohio river the Montana met with an accident at the mouth of Louisville canal, which detained her and made the cargo subject to general average. The Montana arrived at St. Louis, noon, March 25, 1882, and her cargo was there unloaded and the general average ascertained and apportioned. The libelant's goods remained in St. Louis until the eighth of April, when they were reshipped on the Joe Kinney. The Fanny Lewis went out on the first of April, but the libelant's goods were not sent on that boat, and were held subject to the claim for general average. The Kinney was the next boat of the packet line, and the average having been, as it was supposed, adjusted, the goods were shipped on her and lost, with the boat, at the bridge at Glasgow. The libelant's claim based upon this delay I do not think is good.

It is agreed that the goods were properly subjected to the payment of a general average claim, and the proof shows that five days were a reasonable time within which to assort and determine the amounts to be paid by the owners of the cargo. The shipper was not bound to send the goods on to Kansas City and there hold them until the average claim was paid, but, I think, might hold them at St. Louis, which was the termination of the Montana's voyage. Again, I think this claim cannot be sustained because the sinking of the Kinney was in no way connected with the detention of the goods, and the loss of the goods was not directly caused by their detention. This loss is too remote and indirect to be compensated for as the result of the detention.

The defendant, as common carrier, is liable for the loss occasioned by the sinking of the Kinney, as she gave a through bill of lading, unless the loss was caused by the "unavoidable dangers of navigation." This means the dangers of navigation as they existed at the

time, and includes, I think, unavoidable dangers of navigation which may arise from bridges across the rivers to be navigated.

The libel alleges that the Morning Mail had the right, by agreement, to reship said goods, etc., at Cincinnati and at St. Louis, which was done at St. Louis by shipping on the Joe Kinney; but there is no allegation that the Kinney was negligently or unskillfully navigated. The allegation is that the Kinney "was old and unseaworthy in this: that her tiller-rope was old and worn, and was carelessly, negligently, and improperly allowed so to remain; insomuch that, without unusual external cause co-operating, it was broken by the ordinary turning of the pilot-wheel in guiding said steamer under the bridge at Glasgow, whereby said steamer became unmanageable, and, striking the pier of the bridge, sank, and thus caused the total loss of said merchandise."

The libelant has taken no evidence upon this allegation resting upon the presumption which he is insisting arises from the fact that the tiller-rope did in fact break, and the boat and cargo were lost. The respondent has taken the depositions of all of the officers on the Kinney except the captain, who is now living in the city of Mexico, and several witnesses not on the boat, who prove the repairs done the Kinney just before she started on this trip.

This testimony shows that the Kinney had been on the docks some two weeks, and had been overhauled and repainted, and was generally in excellent condition. The tiller-rope was handled and examined. It was taken out, and greased and oiled, and then replaced, and no defect or weakness was discovered in it. It was not a new tiller-rope, nor is it shown how long it had been in service. There is nothing in the record tending to show that it was defective, either in size or strength, except the fact that it broke when put to the test under the bridge. This was a severe test, but not an extraordinary one. The pilot testifies that his wheel felt, at the time of the parting of the tiller-rope, as if the rudder had struck drift in the river. There is also proof that the river was rising rapidly and much drift in it, and that the piers had caused cross currents in the river.

Several of the officers of the boat testify that the tiller-rope would have been of no use at the time of the accident, as the boat was backing on both wheels, and that that was the only thing which could be done, and hence the parting of the tiller-rope made no difference in the result. If these opinions are correct, the sinking of the boat and cargo would have been unavoidable, even if the tiller-rope had not parted. There are no opposing opinions to this view taken by the libelant, but I must think these opinions are extreme ones, and not correct to the extent stated; since the rudder must have been of some use in getting to shore after the boat struck, if of no use in avoiding the pier which was struck.

It would not, however, do for me to ignore all of the evidence introduced by the defendant which tends to show that caution and care

were taken in overhauling and repairing this boat, and that the tiller-rope was taken out, examined, and oiled, without the discovery of any defect, and make the Morning Mail liable for the value of these goods, etc., because, and only because, the tiller-rope in fact broke, especially as the evidence shows this is not an unusual occurrence in the Missouri river.

The evidence, I think, proves that the sinking of the Kinney was caused by the "unavoidable dangers of navigation," within the meaning of the bill of lading.

The libel will be dismissed.

THE C. & C. BROOKS.

(*District Court, D. New Jersey.* July 26, 1883.)

1. SALVAGE SERVICE—TOWAGE—UNCONSCIONABLE CONTRACT.
   A schooner of 135 tons, worth about $2,000, with a cargo of the value of $400 or $500, was leaking badly on the high seas from the effect of a collision with a vessel that had afterwards abandoned her, but was not derelict. Her crew was tired out by pumping and long watchings; she was making very little progress, and with a change of wind was gradually working seaward, when a tug came to her and towed her up the bay to Jersey City, where she was left, at the request of her master, on the flats, consuming in so doing about four hours. *Held*, that this was a case of salvage service of low grade, involving no circumstances which would justify the court in making large compensation; that a contract to pay $1,000 for such service was unreasonable and would not be enforced; but that $250 and the costs of the proceeding would be allowed for the towage and salvage service.
2. SAME—CONTRACTS, WHEN ENFORCED.
   Contracts made for salvage service and salvage compensation will be enforced when the salvor has not taken advantage of his power to make an unconscionable bargain; but the courts will not tolerate the doctrine that a salvor can take advantage of his situation and avail himself of the calamities of others to drive a bargain; nor will they permit the performance of a public duty to be turned into a traffic of profit.

In Admiralty. Libel *in rem*.

Samuel H. Valentine, for libelants.

Bebee & Wilcox, for claimants.

NIXON, J. This is a libel *in rem*, and the claim is for $1,025 for a towing and salvage service rendered by the libelants. The libel sets forth that on the twenty-ninth of November, 1877, the schooner of the respondents was on the high seas, east of the Highlands, in a sinking condition, and with a flag of distress flying at her mast-head; that libelants' tug, seeing her in this condition, steamed along-side, and the master of the schooner requested the master of the tug to make fast and tow her into the port of New York; that the request was complied with, and the tug towed the schooner, with a hawser, up the bay to Jersey City, and, at the request of the master of the

schooner, left her on the flats there; and that for said service the master of the schooner agreed with the master of the tug to pay him the sum of $1,000. The libelants also claim the additional amount of $25 for the use of the hawser in towing. The answer of the claimants admits the towage, but denies that the schooner was in a sinking condition, or that her captain agreed to pay $1,000, or any other definite sum, for the service. The answer further alleges that, previous to the time of being taken in tow by the tug, the schooner had met with a collision with the United States torpedo boat Alarm, which caused her to leak, and disabled her, but as she was laden with a cargo of wood she was buoyant and not in a sinking condition; that the Alarm remained by the schooner for some time, and then left her, her master promising to send a tug to tow her into port; that the crew of the schooner remained aboard, and that by the use of her sails she was slowly working her way into port, and had proceeded about 20 miles when she was hailed by the tug-boat Hudson, whose master offered his services to tow her into the port of New York, which service was accepted, and the said schooner thereafter towed into New York by said tug, being engaged in said service from 3 o'clock P. M. to 7 o'clock P. M.; that the towing was performed under circumstances of no unusual risk, danger, or effort; and that the claimants had always, and were now, ready and willing to pay a reasonable amount for the services rendered by the tug.

The first question is whether the help rendered by the libelants' tug was a mere towage service, or whether it also embraced any of the elements of a salvage service. The schooner was not derelict, but she was leaking badly, and her crew was tired out by pumping and long watching. She had made small progress since she had been abandoned by the Alarm in the early part of the day. The best evidence of her semi-helpless condition is found in the fact that she had kept her flag flying union down during the day, and that the libelants were attracted to her by observing the signal of distress. I lay some stress, also, upon the proof that the captain of the schooner stated, after his arrival in Jersey City the same evening, that if the tug had not come to their relief there was danger of the loss of the vessel and crew. It must not be overlooked in this connection that just before the Hudson reached the schooner the wind changed from the south to the north-north-west; that a stiff breeze was blowing; and that the vessel was gradually working seaward. I am of the opinion, from the testimony, that it was a case of salvage service, but one of a low grade, and involving no circumstances which would justify the court in making large compensation.

The next inquiry is, was there a contract between the parties for the towing, and, if so, was it reasonable in its terms and character? The weight of the evidence is in favor of the existence of a contract. The master of the schooner denies it, but his denial is apparently based upon the fact that he did not in express terms agree to the

proposition of the master of the tug to pay the $1,000. He admits that when the latter told him that he should charge $1,000 for the service, and hold the schooner liable for its payment, he responded: "It don't make any difference; I want you to take hold of her and tow her up." He further states, in a subsequent part of his examination, that when the captain of the tug said he wanted $1,000 for towing her to New York, he made no objection, but told him to take a hold and tow her, and gave him a hawser. But did the circumstances of the case at the time render such charge reasonable and proper? Courts of admiralty look upon salvage contracts with great care, and will not be controlled by them when any advantage has been taken of the necessities of the party in need of help. The supreme court, in *Post* v. *Jones*, 19 How. 160, said:

"Contracts made for salvage service and salvage compensation will be enforced when the salvor has not taken advantage of his power to make an unconscionable bargain; but they [the courts] will not tolerate the doctrine that a salvor can take advantage of his situation and avail himself of the calamities of others to drive a bargain; nor will they permit the performance of a public duty to be turned into a traffic of profit. The general interests of commerce will be much better promoted by requiring the salvor to trust for compensation to the liberal recompense usually awarded by courts for such services."

The late Justice STORY, in *The Emulous*, 1 Sumn. 210, thus states the law:

"Contracts made for salvage services are not ordinarily held obligatory by the court of admiralty upon the persons whose property is saved, unless the court can clearly see that no advantage is taken of the parties' situation, and that the rate of compensation is just and reasonable."

Then, after stating that the doctrine is founded on principles of sound policy, as well as upon just views of moral obligation, he adds, with almost indignant emphasis:

"No system of jurisprudence, purporting to be founded upon moral or religious or even rational principles, could tolerate for a moment the doctrine that a salvor might avail himself of the calamities of others to force upon them a contract unjust, oppressive, or exorbitant; that he might turn the price of safety into the price of ruin; that he might turn an act demanded by Christian and public duty into a traffic of profit which would outrage human feelings and disgrace human justice."

Applying these principles to the case under consideration, I think the court ought not to sanction the contract. It was unreasonable and the charge exorbitant. The schooner doubtless needed help, and an allowance ought to be made, liberal enough to induce masters of other tugs, who are not moved to help their fellow-men, when in distress, by motives of sympathy, to do so from motives of compensation and gain. If the schooner and crew were in no peril, $50 would be ample pay for the few hours' towage which was rendered. If they were in peril, as the libelants stoutly contend, can anything be conceived more heartless than the master of the tug refusing all aid un-

less the master of the schooner would agree to pay him $1,000 for rescuing him and his vessel and cargo from danger? The registered tonnage of the schooner was 135 tons, and she was 12 years old. The witness valued her from one thousand two hundred and fifty to five thousand dollars. I think that $2,000 is a fair valuation of her after the collision and before she was repaired. The cargo not jettisoned was probably worth four or five hundred dollars more. No exposure, risk, or danger of any sort accompanied the service of the libelants. Under the circumstances, $250 is a liberal allowance for the towage and salvage services, and a decree will be entered for that amount. As no proof of the tender of any sum by the respondents has been made, the libelants are entitled to their costs.

THE ALGITHA.

(*District Court, D. Maryland.* June 19, 1883.)

SALVAGE SERVICE—TOWAGE—COMPENSATION.

A steamer, disabled by the breaking of her propeller shaft, made signals of distress, which were observed by another steamer, which took her in tow, and, after towing her 12 hours, voluntarily cast off the hawser, without communication with her and under no stress of weather, and left her in no better position in any respect than when she found her.

Held, not to be a salvage service, and not to be a towage service, for which any compensation should be made.

In Admiralty.

Brown & Brune, for libelant.

John H. Thomas, for respondent.

MORRIS, J. The Algitha, a British steamer of about 2,000 tons, having on board a valuable cargo of grain, was on a voyage from New Orleans via Sydney, Cape Breton, to Antwerp, Belgium, when she became disabled in her motive power by the breaking of her propeller shaft on September 3, 1882, in latitude 30 deg. 42 min. N., longitude 78 deg. 20 min. W. Her sails were sufficient to navigate her, and she had drifted with the gulf stream two to three miles an hour, until she was in latitude 32 deg. 15 min. N., longitude 77 deg. 45 min. W., on the eastern edge of the gulf stream, about 150 miles from Charleston, and about 340 miles from Cape Henry, when on the night of September 6th, about an hour after midnight, her signals of distress were observed from the American steamer Gaudaloupe, then on a voyage from Galveston, Texas, to New York. Capt. Nickerson, the master of the Gaudaloupe, went off his course some six or seven miles to the Algitha, and Capt. Barwise, her master, coming on board the Gaudaloupe, they had an interview. Capt. Barwise was anxious to have the Algitha towed to a place of safety inside the capes of the Chesapeake, so that he could get a tug to take him to

Norfolk or Baltimore for repairs. The Gaudaloupe was a steamer worth $400,000, and had on board 5,500 bales of cotton, worth $350,000, which she was carrying to New York to be transhipped to a Liverpool steamer which was to sail from New York on Wednesday, September 13th. She was rather short of coal, having only four days' supply, and being then about two days' sail from New York, so that if she undertook to tow the Algitha and rough weather should come on, her coal might entirely give out. For these reasons Capt. Nickerson hesitated undertaking to tow the Algitha to the Chesapeake, but as that was the same course he was sailing he reluctantly yielded to Capt. Barwise's request, who, as he says, told him if he would take hold and tow the Algitha, even if he had to let her go, he would be paid for as far as he did tow her, and that if the Gaudaloupe ran short of coal she could have a sufficient supply from the Algitha when she came to anchor; the only difficulty about that being that it might take 10 or 12 hours to put 50 tons of coal from one ship to the other.

Capt. Barwise's testimony is that Capt. Nickerson finally agreed that he would tow the Algitha to a safe anchorage in the Chesapeake. It is, however admitted, that there was discussion about the short supply of coal, and about the necessity of the Gaudaloupe reaching New York in time to deliver her cotton for reshipment, and that Capt. Nickerson was reluctant to attempt to tow the Algitha to the Chesapeake, and I think it most probable that what Capt. Nickerson finally consented to is just what he states, viz., that he was to tow the Algitha until he had to let her go, and that the compensation should be arranged by their respective owners. Thereupon the Gaudaloupe lay by the Algitha until the morning, when her hawser was put about the Gaudaloupe. She began towing the Algitha at 6 o'clock in the morning and continued until 6 in the evening, accomplishing about 77 miles, or at the rate of 6 miles an hour; her ordinary rate previously having been from 10 to 11 miles an hour. The wind then having risen a little, and the sea having become somewhat rougher, Capt. Nickerson directed the hawser to be cast off. This was done after a hail to the Algitha, the purport of which was not understood by those on board of her. The Algitha was left about 340 miles from Cape Henry, on the inner edge of the gulf stream, and about 40 miles nearer the land than when taken in tow. She drifted with the gulf stream for 37 hours, when she fell in with the steamer Seminole, plying between Boston and Charleston, and was towed by her into the Chesapeake.

The libel is filed for salvage, and claims $2,500.

It is apparent that there is in the case no element of a salvage service. The disabled vessel was not taken to a place of greater safety, but rather the contrary, nor was she left where her chance of meeting another steamer was better, but rather worse, and the distance accomplished, although in the desired direction, was insignificant.

The allegation in the libel is that during the 12 hours the towing lasted the sea was continuously rising and the wind getting stronger, and the severity of the weather such that great care was required, and at 6:30 the wind had increased to a gale, and the seas running exceedingly high, so that the hawser had to be cast off. But the proof of the claimants convinces me that when the hawser was cast off, although there was some little more wind and sea than in the morning, the increase was slight, and that the speed of the towing had not noticeably diminished. The log-book of the Gaudaloupe does not support the statements of the libel; the entries being, "at 6:30 P. M., *weather cloudy; strong north-east wind.*" At 1 A. M., during the night following, "*cloudy weather, moderate north-east wind, and small sea.*" The barometer had remained high, without marked change.

The proof leads me to the conclusion that Capt. Nickerson ordered the hawser to be cast off, not on account of any change in the weather, as the libel alleges, but because he began to repent of the undertaking, and to return to his original idea that his duty to the owners of his steamer, and to the owners of the cotton, required him to make all speed to New York, and not to run the risk of being obliged either to delay 10 or 12 hours in the Chesapeake for coal, or to go to sea from there with a very scant supply. I do not think it was the weather which changed, but his mind.

Taking Capt. Nickerson's own version of the agreement,—that if he would take hold and tow, and had to let go, he would be paid for what towing he did,—I do not think the libelant's case is made out. It must have been intended that he was to continue to tow until, from some change of circumstances, he was compelled to let go, not merely so long as he might continue to think it for the interest of his owners. Otherwise it would have been folly for Capt. Barwise to agree to pay the high rate usually allowed for such towage merely to be left in a position no better than he was at first, and it would have been misleading on the part of Capt. Nickerson to have undertaken such a service.

The conduct of Capt. Nickerson, upon observing the signals of distress, in going out of his course, and in lying by the Algitha during the night, evinced a highly commendable spirit, and it is with hesitation that I deny all compensation for their delay, and for the 12 hours' towing; but as the Algitha, without any stress of weather, was left by him as helpless, and in at least as unfavorable a position, as where he found her, if not in a worse one; and as he abandoned her without any communication or consultation with her master; and as I find that the contract, regarded simply as a towage contract, was not performed,—I do not think it is a case in which there should be any recovery. Services to vessels in distress should be encouraged, but not such as voluntarily leave the disabled vessel in the same plight. I think the duty of the court is well indicated by Judge BENEDICT in

The Edam, 13 FED. REP. 140. Speaking of the frequency with which it now happens that steamers are left, by accidents to their machinery at sea, wholly dependent on other steamers for relief, he says:

"It appears a duty owing by the courts of admiralty to the public to give a reward sufficiently liberal to induce the master of any steamer to overcome all unwillingness to assume additional labor, to put aside his desire to make a direct and quick passage, even to disregard the express instructions of his owners, in favor of the request of another steamer disabled at sea to be towed to a place of safety."

Libel dismissed, *without costs* to either party.

THE RHODE ISLAND.

THE EBEN FISHER.

(*District Court, S. D. New York.* July 18, 1883.)

1. COLLISION—STEAMER—MODERATE SPEED IN FOG.
   Fifteen miles an hour in a dense fog, in Long Island sound, is not a moderate speed in a steamer; and where, by moderate speed, a collision would have been avoided, the steamer *held* liable.
2. SAME—SAILING VESSELS.
   Although no express statute then required sailing vessels to slacken sail and go at a moderate speed in a fog, in a thoroughfare where other vessels must be expected to be met, such was, nevertheless, the duty of sailing vessels in the exercise of ordinary prudence in navigation. The new regulations require this.
3. SAME—SPEED AT NIGHT.
   A rate of speed at night and in a dense fog which is immoderate and excessive for a steamer, is less justifiable in a sailing vessel under the same circumstances, as she has less facilities for quickly stopping and changing her movements.
4. SAME—SCHOONER.
   A speed of seven miles an hour having been repeatedly held excessive in steamers in a dense fog, *held*, therefore, excessive in a schooner, and careless navigation, for which the schooner should be held in fault.
5. SAME—RULE 20.
   Rule 20, requiring steamers to keep out of the way of sailing vessels, cannot be construed to justify in sailing vessels a speed which would be deemed excessive as regards their duty to other sailing vessels which they are bound to avoid.
6. SAME—AMENDMENT OF PLEADINGS.
   Where the libel did not expressly charge excessive rate of speed in the schooner, but the facts appeared in the schooner's testimony, and there being no dispute about them, *held*, the pleadings should be deemed amended accordingly.
7. SAME—MUTUAL FAULT.
   Where a collision took place between the steamer R. I. and the schooner E. F., about 8 P. M., in a dense fog, in Long Island sound, at the commencement of the pilotage ground, where numerous other steamers and vessels should be expected to be met, and the steamer was going at the rate of 15 miles per hour, and the schooner sailing before the wind 7 miles per hour, and the collision would have been avoided had either been going at a more moderate speed, *held*, both were in fault.

8. FLASH-LIGHT.
Whistles being heard on the schooner during 15 minutes preceding the collision, *held*, that the latter should have exhibited a torch-light.

In Admiralty.

Benedict, Taft & Benedict, for the Eben Fisher and owners.

Miller, Peckham & Dixon, for the Rhode Island and owners.

BROWN, J. The above cross-libels were filed to recover damages arising from a collision between the schooner Eben Fisher, of which the libelant, Perry, was owner, and the steam-boat Rhode Island, owned by the Providence & Stonington Steam-ship Company. The collision occurred at about 10 minutes before 8 on the evening of April 16, 1880, in Long Island sound, at a point about three miles N. W. from Eaton's Neck light-house, and both vessels were injured.

The Eben Fisher was a three-masted schooner of 298 tons register, loaded with a cargo of between 300 and 400 tons of ice, bound from Wiscasset, Maine, to New York, by way of the sound. A fog set in after 6 P. M., which, prior to the collision, had become dense. The wind was strong from the eastward. The schooner had all her lower sails set, including two jibs, and was making about seven knots an hour on her port tack, on a course W. by S., with the wind nearly aft. She had one seaman on the lookout, about six or eight feet from the stern, and her fog-horn had been blown two or three times a minute for 15 or 20 minutes previous to the collision. The first and second mates and the captain, besides the man at the wheel, were also on deck at the time. The first mate, who was forward, first reported the steamer's white light ahead, estimated at only 150 yards off, and not more than a quarter of a minute before the collision. He says this was seen right ahead; the captain says it was a little on the port bow; the second mate says it was a little on the starboard bow. A few moments afterwards the bow of the steamer was seen coming out of the fog nearly ahead, or a little on the port bow. She passed along the port bow of the schooner, carrying away the schooner's jib-boom and bowsprit, and her guards ran over the schooner's bows, breaking her chain plates and carrying away the fore shrouds and the heel of the bowsprit, and breaking the forecastle deck rails and the capstan. The marks of the steamer's paddle-wheel were shown in the torn and crushed wood-work of the deck. All on board the schooner testify that no change was made in her course about the time of the collision; and she had the proper colored lights burning.

On the part of the steamer the testimony is to the effect that the schooner's red light was first seen and reported about one point on the steamer's port bow; that one bell was rung at once to slow, and the wheel put to port. The lookout testifies that the green light was seen and reported immediately after the red,—as quick as one could speak. The captain and pilots testify that it was 10 or 20 seconds afterwards when the green light came into view, and that this was only about 10 or 20 seconds before the collision; that the schooner's

jib-boom and bowsprit struck the port side of the steamer in range of the pilot-house, about 65 feet from the stem; that her wheel was at that time hard a-port, and that the engine had stopped. By the collision her paddle-wheel was disabled, five or six arms being broken and doubled up; the shaft was sprung back, and the journal broken, obliging her to come to anchor in Huntington bay.

The witnesses from the steamer also testify that the fog was dense at the time of the collision, having set in about 6:40 P. M., where the steamer then was; that she was pursuing her usual course upon one of her regular trips from New York to Stonington; that her full speed is about 18 miles per hour, in fair weather, under 19 revolutions of her engine per minute; that after the fog set in her engine was slowed to 16½ revolutions, which was the ordinary fog speed, making about 15 miles per hour; that by proceeding on her daily trips, always upon an exact course and upon a fixed speed of her engines during foggy weather, the position of the steamer at a given time is known almost precisely; and that on the evening of the collision she was going on her usual exact course, and at her usual fog speed; that after passing Execution rocks the course of the steamer, at 6:48, was shaped as usual for Captain's island, on a course N. E. by E. ½ E. for 31 minutes, and then changed to a course E. by ⅝ N., so as to pass about 2½ miles north of Eaton's light, in 39 minutes, at fog speed. The collision took place after they had been running upon the latter course 31 minutes. The fog-horn from Eaton's light was heard on the steamer, for about 10 minutes before the collision, every 20 seconds. The steamer's rudder-wheel was moved by steam, and goes over to hard a-port in 20 seconds. The wheel had been started to port immediately on the report of the schooner's red light, and had got hard a-port about 10 seconds before the collision, making a change in the steamer's course of about 2½ points to starboard. Shortly after the first bell to slow was given, the second bell was given to stop. The engineer testifies that he felt the list of the steamer from the shock of the collision about the time he had the engine stopped, and that if he had got bells to back at the same time with the first bell, he would not have been able to get the engine backing before the collision.

Though the discrepancies in the testimony are less than usual in such cases, there are some difficulties not easily reconcilable. If only the red light of the schooner was in range of vision, and that was one point on the steamer's port bow half a minute before the collision, and the steamer went to starboard over 2½ points, her speed being double that of the schooner, it is difficult to understand how the collision could have happened. The schooner could not have luffed much, so as thereby to have brought about the collision, notwithstanding the steamer's change to starboard, for in that case the schooner would have struck the steamer more nearly approaching a right angle. I think it most probable that the vessels were approaching

nearly end on, the schooner being a little on the steamer's port bow, and her course being nearly opposite and crossing that of the steamer, and diverging from it about half a point to the southward; and that both lights of the schooner were in a position to be seen at the same time, but that the red was first distinguished in the fog, and the green one very shortly afterwards seen and reported.

It is not necessary, however, in this case, to dwell on any of the minor points in controversy, as there are clear grounds, concerning which there is no dispute, on which, I think, both vessels must be charged with negligence contributing to the collision.

1. The rate of speed at which the Rhode Island was going in a dense fog, viz., 15 miles per hour, is far beyond that "moderate speed" which the rules of navigation permit. This has been so often discussed, and the prior adjudications are so numerous and uniform, that it cannot be deemed longer an open question. *The Bristol*, 4 Ben. 397; 10 Blatchf. 537; *The City of New York*, 15 FED. REP. 624, 628, and cases cited; *The Pennsylvania*, 12 FED. REP. 914.

If the owners of steamers think it more expedient or safer for the lives and property committed to their own care to run in fogs at almost full speed, instead of that much slower and more moderate speed which may enable them to keep out of the way of other craft, it must be understood that if collisions happen they must bear the loss, wholly or in part, unless they are able to show clearly that their legal fault in running at such speed in no way contributed to the accident. *The Pennsylvania*, 19 Wall. 125. In this case not only is this not shown, but the contrary is quite clear; for had the steamer been going at a moderate speed, of say six or eight miles per hour only, she could easily have reversed her engines and escaped the schooner after the latter was sighted.

2. But if steamers, which by their motive power are so much more manageable that sailing vessels, are chargeable with negligence in going beyond a moderate speed in a fog, the same rule must be applied to sailing vessels, which are comparatively helpless, when navigating in a fog a thoroughfare where other vessels must be expected to be frequently met.

No statute, it is true, then required a sailing vessel to shorten sail, and, like a steamer, to go at a moderate speed in a fog. But the exercise of reasonable prudence and caution in navigation, according to all the circumstances of the time and place, is a rule of universal obligation, and disregard of this rule is negligence. *The John Fenwick*, L. R. 3 Adm. & Ecc. 500. If a vessel on the high seas may sail before the wind in a gale under all the press of canvas she can bear, no one would deny that such navigation in the East river would be unquestionable negligence and recklessness.

The express statutory provision requiring steamers in a fog to go at moderate speed, is not an arbitrary enactment, but a statutory rec-

ognition and application, in a special case, of the universal rule which requires prudence and caution under circumstances of danger. Nor was the statute restricting steamers to a moderate speed designed to sanction or permit an immoderate speed in sailing vessels, where the circumstances demand cautious navigation. The act was doubtless passed with reference to steamers particularly, on account of the special temptation in their case to continue on at a high rate of speed, and sacrifice sailing vessels to their own comparative immunity. But the same rule, as a general maritime obligation of prudence and caution in navigation, was applied to steamers before any express statute on the subject was passed; and the general obligation of sailing vessels to moderate their speed according to special circumstances, has been repeatedly recognized. *The Morning Light*, 2 Wall. 550, 558; *The Rose*, 2 Wm. Rob. 1; *The Virgil*, Id. 201, 206; *The Iron Duke*, Id. 384–386; *The Thomas Martin*, 3 Blatchf. 517, 520; *The Vesper*, 9 FED. REP. 569. The new regulations (article 13) require moderate speed in a fog in all vessels alike.

If steamers are by rule 20 bound to keep out of the way of sailing vessels, the latter have no right to throw obstacles or to create unreasonable difficulties in the way of their doing so; nor does that rule in any degree exempt sailing vessels from the duty of exercising all reasonable care in their own navigation. An excessive and unreasonable speed in a densely foggy night, and in the usual track of steamers, is not only negligence and carelessness in itself, but also in the nature of an obstacle and an unreasonable difficulty deliberately put in the way of the steamers' performing their statutory duty.

Such I cannot help considering the speed of the Eben Fisher, under the circumstances of this case. She had approached the narrower part of the sound where the pilotage ground commences. She was on the known and ordinary track of numerous steamers passing daily at about that time. The fog, according to the schooner's testimony, was so dense that even the brilliant white light of the steamer could be seen scarcely more than her own length away; the sea was rough, the wind strong; the schooner, deeply loaded, was making under her five lower sails some seven knots an hour. It seems to me impossible to hold such a rate of speed in such a situation, and in such a night, other than carelessness, not to say recklessness. About the same speed, and even a less speed, under similar circumstances, has been frequently held to be immoderate even for steamers, which, through their ability to stop and back almost immediately, have means for avoiding impending danger so much superior to sailing vessels. *The Pennsylvania*, 19 Wall. 125; *The Pottsville*, 12 FED. REP. 631; *The Colorado*, 1 Brown, Adm. 393; *The Blackstone*, 1 LOW. 485; *The Monticello*, 1 Holmes, 7; *The Magna Charta*, 25 Law T. (N. S.) 512.

Ordinary care and prudence required the schooner either to avoid the known pathway of the steamers altogether, or else to slacken sail so as to reduce her speed within such moderate limits as were com-

patible with her duty to keep out of the way of other sailing vessels which she might meet and be bound to avoid. All sailing vessels going east that night would be beating and close-hauled, or nearly so; and this schooner, having the wind free, would be bound to keep out of the way. The necessity of her going at a moderate speed in such a night was doubtless more imperative in reference to such other sailing vessels which the schooner might meet, than as respects this steamer, because two sailing vessels meeting would see each other no sooner, but rather at less distance apart, on account of the more brilliant head-lights of steamers, while the means of sailing vessels for avoiding each other when meeting are far less available than those of steamers. The principle of those cases, therefore, which hold that a speed of seven or eight knots in a steamer in a thick fog is not a moderate, but excessive, speed, constituting negligence in navigation, viz., because such a speed is too great to admit of her being able to perform her duty of keeping out of the way of other vessels, applies far more forcibly to a sailing vessel going at the same speed under similar circumstances, in reference to other sailing vessels which she is bound to avoid. And if the navigation of a sailing vessel, as regards speed, is such that it must be held careless or reckless in reference to her duty to other sailing vessels which she is likely to meet, it must be held careless and faulty in reference to steamers also, though the latter are bound to keep out of the way; for there cannot be two diverse rules as to prudence in navigation applicable to the same vessel in the same situation; nor, as I have said above, was the rule requiring steamers to keep out of the way designed to encourage careless or reckless navigation in sailing vessels, or to sanction a rate of speed as against steamers which, as against sailing vessels, must be condemned. To permit this would be to permit sailing vessels to take advantage of the obligation imposed on steamers to go at moderate speed and to keep out of the way, and increase the difficulties of steamers in doing so. To allow sailing vessels to increase their own speed as that of steamers is diminished, would tend directly to thwart the very object of the rule requiring moderate speed, viz., to secure sufficient time to avoid collision; and it would thus convert a rule designed to insure greater safety into an occasion of greater danger. The duty of steamers to keep out of the way is a correlative one, and presupposes that the sailing vessel shall not only observe all the specific statutory rules, but all other general obligations of prudence and caution in navigation which the special circumstances demand. Among the latter must certainly be embraced a moderate rate of speed at night and in a fog, in a thoroughfare where numerous steamers and other vessels must be expected to be met; and a speed which is held immoderate for a steamer under such circumstances, cannot be held moderate or permissible for a schooner.

The great speed of the schooner in this case manifestly contributed

to the collision. At a more moderate rate, even from the time she was seen by the steamer, the latter would have gone clear; and the schooner must, for this reason, be held chargeable with contributory negligence.

This fault is not charged against the schooner in the libel, but it appeared from her own testimony and upon own showing at the trial. There would seem to be no possibility, therefore, of her owners having been misled by this proof, or in any way surprised; nor is it certain that before the trial the schooner's speed was known to the owners of the steamer. The fault was alleged and argued on the final hearing. An amendment of the pleadings would, on motion, have been allowed, as was done in the case of *The Oder*, even upon appeal in the circuit after a final decree in the district court. 13 FED. REP. 272, 283. If the admiralty, like other courts, proceeds *secundum allegata et probata*, and requires proper pleadings to apprise the respective parties of what they are to meet, and to prevent surprise, yet where the facts fully appear without objection, and there is no dispute or question concerning them, it would be a perversion of justice to disregard them; and in such a case the pleadings should be deemed to be amended accordingly; the only question is one of costs. See, also, Roscoe, Adm. Jur. (2d. Ed.) 194; Order 27, § 1, under "Judicature Act."

No satisfactory reason is given why the steamer's whistles were not heard, or, at all events, attended to, on board the schooner. The foghorn from Eaton's Neck could not be mistaken for them. The two seamen on the schooner seem to have heard these whistles during 15 minutes preceding the collision. That was ample time to have procured and exhibited a torch-light, as required by statute; and in this respect the schooner would seem to have been guilty of inattention and negligence. The direction in which the seamen heard the whistles, about two points on their port bow, showed that the whistles could not have come from Eaton's Neck, and indicated some steamer near the schooner's course. It is impossible to say that the exhibition of such a torch-light would not have done any good; it was one of those occasions when every requirement of the rules should have been observed, and when, through the obscuration of the colored lights by fog till the vessels were near each other, the display of a torch-light might, by its penetrating a few rods further through the fog, have enabled the steamer, notwithstanding her high speed, to have averted the collision. *The Pennsylvania*, 19 Wall. 125; S. C. 12 FED. REP. 914; *The Excelsior*, Id. 203.

Each vessel, therefore, must be held in fault. A reference may be taken to compute the damages to each, and judgment entered for half the excess in favor of the greater sufferer. *The North Star*, 106 U. S. 17; [S. C. 1 Sup. Ct. Rep. 41.]

In the proceeding of the owners of the schooner to limit their liability, they may take the usual order.

The new international sailing regulations which went into effect in 1880 have not yet been adopted by the United States.

UNITED STATES v. GEO. E. WHITE.

SAME v. WM. P. WHITE.

SAME v. JOHN P. WHITE.

SAME v. TUTTLE and others.

(Circuit Court, D. California. July 30, 1883.)

1. JURISDICTION—FRAUD.
   The United States courts have jurisdiction to vacate a patent to lands, in a proper case, on the ground of fraud.
2. FRAUD IN PROCURING PATENT.
   The frauds for which courts will set aside a patent, granted by the United States in the regular course of proceedings in the land-office, are frauds extrinsic or collateral to the matter tried and determined, upon which the patent issued, and not fraud consisting of perjury in the matter on which the determination was made.
3. PERJURY AND FALSE TESTIMONY.
   Perjury and false testimony in the proceeding, by means of which a patent is secured by fraud, is not fraud extrinsic or collateral to the matter tried and determined in the land-office, within the meaning of the rule, and a patent will not be set aside on that ground alone.
4. PERJURY—INJURY.
   Where no pecuniary injury to the United States is shown by the bill, and it does not appear that there is any other right in the land against the government, whether a court of equity should set aside a patent obtained on false testimony, if otherwise proper, *quære.*
5. RETURN OF PURCHASE MONEY.
   Where the United States files a bill to set aside a patent, on the ground that it was obtained upon false testimony, it should at least offer to return the purchase money paid by the patentee for the land.
6. EQUITY.
   When the United States comes into a court of equity asking equity like a private person, it should do equity.
7. SAME—FORFEITURE.
   Courts of equity never enforce penalties or forfeitures.
8. FORFEITURES.
   If the United States desires to enforce the penalties and forfeitures imposed by section 2262 of the Revised Statutes, for obtaining a patent to land upon false affidavits, it must do so by a proper proceeding at law, where the party charged will be entitled to a trial of the charge by a jury.

In Equity.

A. P. Van Duzer, for the United States.

L. D. Latimer and *Barclay Henley*, for defendants.

SAWYER, J. The first of these cases, *U. S.* v. *Geo. E. White*, is a bill in equity to vacate a United States patent, issued to the defendant on the ground that it was obtained upon false and fraudulent affidavits and proofs, made under the pre-emption laws. It is alleged that on May 6, 1876, the defendant filed a declaratory statement under the pre-emption laws upon a quarter section of land

situate in Humboldt county, described in the bill, and an affidavit stating that he had settled upon the land on November 5, 1873, and resided thereon ever since; that he had cultivated a portion as a garden, built a fence around about an acre, and built a house 9 by 12; that the improvements were of the value of $100; and that he was not the owner of 320 acres of land elsewhere. It is further alleged that he paid the sum of $200, and thereupon, and upon the making of said proofs, a certificate of purchase, in due form, was issued to said defendant; and afterwards, in pursuance of said certificate of purchase, a patent was issued on December 13, 1876. It is further alleged, *upon information and belief*, that said affidavits and proofs were false; that defendant did not make the settlement as stated; did not reside upon said lands; and that he did own 320 acres of land elsewhere. And on the grounds of these false representations and proofs the complainants ask that the patent be vacated and canceled, and that the money paid be adjudged forfeited to the United States.

There are numerous cases wherein the supreme court of the United States has said, in general terms, that a patent might be vacated for fraud on a bill of equity filed by the United States; as *Moore* v. *Robbins*, 96 U. S. 533; *Shepley* v. *Cowan*, 91 U. S. 330, and numerous others too familiar to require citation. There can, therefore, be no question as to the jurisdiction of the court to entertain such a bill where a proper case is presented. But it was never determined what kind of fraud, or in what form perpetrated, would furnish a proper case for the relief sought in this case, till the cases of *U. S.* v. *Flint* and *U. S.* v. *Throckmorton*, in this court, 4 Sawy. 51–53, affirmed in *U. S.* v. *Throckmorton*, 98 U. S. 68. These were cases wherein a petition was filed under the act of 1851, before the board of land commissioners, for confirmation of a Mexican grant, which had been confirmed. It was alleged in the bill that the grant presented was a fraud; that it had been fabricated in Mexico after the transfer of California to the United States; that the fraud was concealed from the government officers and the board of land commissioners; and that the confirmation was obtained upon false and perjured testimony. On these grounds it was sought to vacate the patent in the first case, and the confirmation in the second, and annul the titles. But the court decided that the confirmation could not be vacated, on the ground that it was obtained wholly upon false and perjured testimony, or for the palpable frauds alleged. The court held (affirming the views expressed by the circuit court in 4 Sawy. 51–53) that the frauds for which the judgments of tribunals could be impeached, are "frauds extrinsic or collateral to the matter tried by the first court," and do not extend "to a fraud in the matter on which the decision is rendered." Said the court, after citing and commenting on the authorities:

"We think these decisions establish the doctrine on which we decide the present case, namely, that the acts for which a court of equity will on account

of fraud set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds extrinsic or collateral to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered.

"That the mischief of retrying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases." 98 U. S. 68.

The same rule was adopted in *Vance* v. *Burbank*, which also went up from this circuit, and the principle applied to the decision on a question of residence and of fraud decided by the United States land-office, where one private party sought to control, for his own use, the title granted to another, upon alleged frauds practiced while obtaining the patent. Said the court, by the chief justice:

"The appropriate officers of the land department have been constituted a special tribunal to decide such questions, and their decisions are final to the same extent that those of other judicial or *quasi* judicial tribunals are.

"It has also been settled that the fraud in respect to which relief will be granted in this class of cases must be such as has been practiced on the unsuccessful party, and prevented him from exhibiting his case fully to the department, so that it may properly be said there has never been a decision in a real contest about the subject-matter of inquiry. False testimony or forged documents even are not enough, if the disputed matter has actually been presented to or considered by the appropriate tribunal. *U. S.* v. *Throckmorton*, 98 U. S. 61; *Marquez* v. *Frisbie*, *supra*. The decision of the proper officers of the department is in the nature of a judicial determination of the matter in dispute.

"The operative allegation in this bill is of false testimony only. * * * No fraud is charged on the register and receiver, or on the heirs of Perkins in respect to the keeping back of evidence." *Vance* v. *Burbank*, 101 U. S. 519.

Thus the decisions of the land-office on applications for patents were put upon the same footing as judgments and decisions of courts and other tribunals like the board of land commissioners. The only difference between this case and the others is, that in the first, the United States, and, in the other, the complainant, actually appeared—the United States not appearing—and were heard, while in this, the United States did not formally appear as a contestant. But the principle is the same, only the mode of proceeding being different. In the *Flint* and *Throckmorton Cases*, the claimant, under his grant, the treaty with Mexico, and the statutes of the United States, petitioned the board for a confirmation of his grant. In this, the purchaser, under and in conformity to the statutes, applied to the land-office for leave to purchase, as did the party in *Vance* v. *Burbank*, and the land-office, representing the United States, in due form heard the proofs and determined the question of the right to purchase. In *Vance* v. *Burbank* the complainant intervened in fact, as he had a right to do under the law, and contested the right of his opponent.

But the United States was not a party in any sense other than as a party in this case. So, in the present case, anybody claiming an adverse interest had a right to intervene, but nobody seems to have done so. The proceeding was in the nature of a proceeding *in rem*, of which everybody takes notice. The hearing was regularly had, and decided in favor of the applicant, White; and the only fraud, if any there was, was "in the matter on which the decision was rendered," and not "extrinsic or collateral to the matter tried" and determined in the land-office. The action of the land-office is judicial in its nature. *Smelting Co.* v. *Kemp*, 104 U. S. 640. I can perceive no good reason why the principle should not apply to this case as well as to the others, and especially to the case of *Vance* v. *Burbank*. That is the logical result of the principle established by the decisions cited, and I think the principle sound, and, upon the whole, safe. Again, it is a principle that, with reference to private parties, a court of equity will not grant relief against a fraud, unless it appears that some damage or injury has been sustained by reason of the fraud; for "courts of equity do not, any more than courts of law, sit for the purpose of enforcing moral obligations or correcting unconscientious acts which are followed by no loss or damages." 1 Story, Eq. Jur. 203. And when the United States enters the court as a litigant, "* * * it stands upon the same footing with private individuals." *U. S.* v. *Throckmorton*, 4 Sawy. 43.

It does not appear that the United States has been pecuniarily injured by the alleged fraud. No injury or damage is alleged, or in any way shown. The land was for sale to any duly-authorized pre-emptioner, at $1.25 per acre. Defendant paid the full amount of the purchase money, and it went into the United States treasury. The government got all that it would have obtained from any other party. It does not appear that anybody else had any rights, or wanted to purchase, or that the United States was under any obligation to patent the land to any other person. There is no possible pecuniary injury to complainant. The most that can be said is that a principle of public policy was violated, and thereby a moral wrong resulted by reason of the legal disqualification, under the pre-emption act, of defendant to purchase. But the wrong was only *malum prohibitum*, not *malum per se*. It is by no means clear that the demurrer ought not to be sustained on this ground, but it is unnecessary to so decide now, for, in my judgment, it is not a case to be taken out of the rule established in the cases cited of Throckmorton and Vance. In view of the notorious liberality in favor of purchasers, not to say looseness, with which the pre-emption laws have, ever since their adoption, been administered all over the western states, to relax the rules referred to in the authorities cited, especially where no actual pecuniary damage or injury has resulted either to the government or private parties, and "retry every case in which" the action of the land-office, as well as "judgments or decrees rendered on false testi-

mony given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent," would open a Pandora's box of evils "far greater than any compensation arising from doing justice in individual cases." It would open the door to any party stimulated by malice, or other unworthy motive, who could, upon *ex parte* and false statements, obtain the ear of the attorney general to promote suits in the name of the United States, to the great vexation of honest, as well as dishonest, pre-emptors, and to the great detriment of the public peace and prosperity.

Again, the claim is stale. Although statutes of limitation do not run against the government, yet the staleness of the claim may be taken into consideration in determining the question whether a court of equity should interfere and grant relief where the United States, as well as a natural person, is a complainant. When the United States comes into a court of equity as a suitor, it is subject to the defenses peculiar to that court. *U. S.* v. *Tichenor*, 8 Sawy. 156; [S. C. 12 FED. REP. 449;] *U. S.* v. *Flint*, 4 Sawy. 58–9; *Badger* v. *Badger*, 2 Wall. 94; *Stearns* v. *Page*, 7 How. 829. Under the state law this suit, if between private parties alone, would be barred within three years. *Manning* v. *San Jacinto Tin Co.* 7 Sawy. 430; [S. C. 9 FED. REP. 735.] Six years elapsed between the issue of the patent and the filing of the bill, and no averment is made to show that the fraud was not discovered, or by the exercise of ordinary diligence in the land-office might not have been discovered, immediately after its consummation.

The money received is retained, and no tender appears to have been made, nor is any offer to refund the money made in the bill. The United States, like an individual, when it comes into court and demands equity, must do equity, or at least offer to do equity. It has received the full value of the land in money—the same amount that it would have received had the land been sold and patented to an admittedly qualified purchaser. It cannot keep the money, and, in a court of equity, demand and receive a return of the land.

To meet this point, and as a basis for a decree for forfeiture of the money as a part of the relief demanded in the bill, the United States attorney relies on section 2262, Rev. St., which provides that "if any person taking such oath swears falsely in the premises, he shall forfeit the money which he may have paid for such land, and all right and title to the same." This is highly penal, and the only remedy, or rather punishment, other than an indictment for perjury, that appears to be provided by law for the wrong sought to be redressed. But the United States has come into the wrong forum to enforce this penalty. "It is a universal rule in equity never to enforce either a penalty or forfeiture." 2 Story, Eq. Jur. §§ 1319, 1494, 1509. So a bill of discovery will not lie in a case which involves a penalty or forfeiture. Id. As an answer on oath is not

waived, this bill is, in that particular, a bill of discovery, and demurrable on that ground also. If the United States desires to enforce the penalties—the forfeiture of the money paid and the land patented—provided for in section 2262, Rev. St., cited, it must proceed in some appropriate mode at law, where the defendant will be entitled to a trial by a jury of the question as to giving false testimony.

In my judgment the demurrer should be sustained and the bill dismissed; and it is so ordered.

TAYLOR and others *v.* CHARTER OAK LIFE INS. CO.

(Circuit Court, D. Iowa. January, 1882.)

1. BILL OF REVIEW—TIME OF FILING.
   A bill of review for errors apparent upon the face of the record will not lie after the time within which a writ of error could be brought.
2. SAME—INJUNCTION REFUSED.
   Where it is not made to appear that complainant was prejudiced by a supplemental decree, relief by injunction cannot be granted because of matters contained in such decree.
3. SAME—PARTIES BOUND BY RECORD.
   The parties to a suit in equity are bound by matters of record, and cannot be heard to complain that they were not advised of the contents of a decree passed in such suit, in time to appeal therefrom or take other steps to have such decree set aside or reversed.

In Equity.

Cole & Cole, for complainants.

Nourse & Kauffman, for respondents.

MCCRARY, J. So far as the original decree is concerned, this is a bill of review, brought for the purpose of reversing or modifying said decree, by reason of errors appearing upon the face thereof. These errors are stated in the bill to be—

(1) In this, that interest was calculated upon the several bonds sued on at the rate of 10 per cent. per annum, whereas, under the laws of Iowa, said complainants were not entitled to any interest thereon, because of the fact that there was usury embraced in the said several bonds. (2) In that by the laws of Iowa the said Taylor and wife were entitled to have said real estate sold, subject to their right to redeem the same at any time within one year after the sale, and said decree did not reserve this right, whereby they were greatly prejudiced.

It is insisted by the defense that this bill of review, considered as a bill to modify or annul the original decree, is filed too late. This position is manifestly well taken. A bill of review is in the nature of a writ of error, and its object is to procure an examination or alteration or reversal of the decree made upon a former bill which has been signed and enrolled. Story, Eq. Pl. § 403. "A bill of review for errors apparent upon the face of the record will not lie after

the time within which a writ of error could be brought; for courts of equity govern themselves in this particular by the analogy of the common law in regard to writs of error." Story, Eq. Pl. § 410; *Thomas* v. *Harvies' Heirs*, 10 Wheat. 146; *Ricker* v. *Powell*, 100 U. S. 109; *Pacific R. Co.* v. *Missouri Pacific Ry. Co.* 2 McCrary, 228.

It is apparent from these authorities that the original decree of foreclosure cannot be attacked in this proceeding. It must stand as final. It did not provide for redemption, but it was not void on that account. It may have been erroneous, and the error might have been corrected, either upon appeal within two years or by the filing of a bill of review within the same time.

As neither was done within the time required it stands now as a final adjudication. Such being the case, can the complainants have an injunction by reason of anything which appears upon the face of the supplemental decree?

Clearly not, because their complaint rests entirely upon the allegation that the proper provision was not made by the supplemental decree for the redemption of the property sold under the original decree. Inasmuch as at the time that they filed their bill of review their right of redemption had been absolutely lost, unless it be derived from the supplemental consent decree, it is clear that they were not injuriously affected by that decree. Whatever provision it contained upon the subject of redemption was in the interest and for the benefit and advantage of the present complainants. If their prayer should now be granted and the supplemental decree, so far as the provisions therein contained respecting redemption, were abrogated, it would leave them concluded by the original decree and altogether deprived of the right of redemption. So far as the provisions contained in the bill charging fraud are concerned, they all relate to the action of Barcroft, as the attorney of complainants, in consenting to the supplemental decree, and especially to the provisions in relation to redemption. As these provisions are all in the interest of complainants, they cannot be held to have been fraudulent as to them. Besides, I am satisfied that the evidence does not show any intent on the part of Barcroft to defraud, nor does it show to my satisfaction that he acted without authority. If it were necessary to decide that question, I should hold that Barcroft acted in good faith and with the knowledge and consent at least of complainant J. C. Taylor, who, it may have been reasonably assumed, represented his wife's interest as well as his own.

The charge of fraud, therefore, must be eliminated from the case; and this being done, the bill, considered as a bill of review to modify or reverse both the original and supplemental decrees, stands merely as a bill of review upon the errors apparent upon the face of the record; and, so considered, it is filed too late to reach even the supplemental decree, which was rendered November 1, 1878, while the present bill of review was filed in May, 1881, after the period for an

appeal from either the original or supplemental decree had expired. If, however, it be conceded that the charge of fraud is established as to the supplemental decree, and that the arrangement therein specified with respect to redemption was unauthorized and void, as I have already said, this would leave the original decree ordering a sale of the premises without redemption in full force to fix and determine the rights of the parties. When the bill of review was filed, both the original and supplemental decrees had by lapse of time become final and conclusive, unless attacked for fraud, and as to the original decree, no attempt has been made to charge fraud. It is said that Taylor and wife were not advised as to the terms of the supplemental decree respecting redemption until after the year had expired. If this were proved (I do not think that it is) it would not avail them, for they were bound to know what was done and spread upon record in a case to which they were parties. *Putnam* v. *Day*, 22 Wall. 60.

Whether the complainants have any cause of action against the respondent on account of a misappropriation of the proceeds of the crops grown upon the place during the year given for redemption, need not now be considered. It is enough for the present that I hold that the complainants have not shown themselves entitled to an injunction. In reaching this conclusion, I have not considered the question whether it was necessary for the complainants to obtain the leave of the court to file this bill of review, nor whether it was necessary that they should have performed the decree before being heard. See *Ricker* v. *Powell*, 100 U. S. 107, 108, and cases cited.

Motion for injunction denied.

SPARE *v.* HOME MUT. INS. CO.

(*Circuit Court, D. Oregon.* August 13, 1883.)

1. LIMITATION UPON RIGHT TO SUE ON POLICY OF INSURANCE.
   A policy of insurance against fire, issued by the defendant, provided that a loss thereunder should be payable 60 days after proof thereof; and that a suit for the recovery of any claim under the policy should be brought within 12 months after the loss occurred. *Held*, that the 12 months did not commence to run until the loss was due and payable—the expiration of the 60 days after the proof of the same.
2. ASSIGNMENT OF POLICY AFTER A FIRE.
   A clause in a policy providing that the same shall be void if assigned after a fire, is illegal, and such assignment is valid, and carries with it the right to maintain a suit to correct a mistake therein.
3. MISTAKE IN POLICY—CORRECTION OF, IN EQUITY.
   The owners of a warehouse, being indebted to the plaintiff, agreed to insure the same against fire for his benefit, and accordingly agreed with the defendant for such insurance in their names, with loss payable to the plaintiff, but by mistake the plaintiff's name was written in the policy as the assured and owner of the property. A loss occurred within the period of the risk, and after proof of loss by the owners, and adjustment by the defendant, the former assigned the policy and their rights thereunder to the plaintiff. *Held*, on demurrer, that

the equity of the case was with the plaintiff, and he was entitled to have the contract reformed according to the true understanding and purpose of the parties thereto.

Suit in Equity to Reform a Policy of Insurance.

George H. Williams and *W. Scott Beebe*, for plaintiff.

Cyrus A. Dolph, for defendant.

DEADY, J. This suit is brought by a citizen of Oregon against a corporation formed under the laws of California, to reform a policy of insurance, and recover an alleged loss thereunder as reformed.

It appears from the bill that on July 26, 1881, Aaron and Ben Lurch were doing business as Lurch Bros., at Cottage Grove, Oregon, and were the owners of a warehouse there of not less than $1,000 in value, and that at and before said date they were indebted to the plaintiff in a sum exceeding $1,000, and to secure him in the payment of the same it was agreed that they should insure the warehouse against loss by fire for the sum of $900 in their own names, for his benefit, and that, in pursuance of said agreement, it was agreed between Lurch Bros. and the defendant that the latter would insure said property accordingly; that on July 26, 1881, the defendant delivered to said Lurch Bros. its policy of insurance on said warehouse against loss by fire for the period of one year, in the sum of $900,—describing it as "his one-story frame warehouse occupied by the assured for the storage of grain only,"—but that in the execution of the policy the plaintiff's name was by mistake inserted therein as the assured, instead of that of Lurch Bros., and the provision that the loss, if any, should be payable to the plaintiff was omitted therefrom; that on February 14, 1882, said warehouse was totally destroyed by fire, and on March 24th, thereafter, Lurch Bros. furnished the defendant with the proof of loss, and the same was duly adjusted by it at $900; and that the plaintiff was not aware of the mistake in the policy until after the loss, and Lurch Bros. have since assigned the same, together with all their rights thereunder, to the plaintiff.

The defendant demurs to the bill, and for cause thereof alleges (1) that the suit is not brought within the 12 months limited therefor by the policy; (2) that the policy was void from its inception; (3) that the policy became void by the assignment thereof to the plaintiff contrary to its terms; (4) that the plaintiff is not the real party in interest; and (5) that the plaintiff is not entitled to any relief against the defendant.

The policy is annexed to the bill, and to understand the particular grounds of the demurrer some of its voluminous clauses must be stated; as, for instance: The assured shall give immediate notice and proof of any loss. Such loss is to be paid in 60 days after due notice and proof of the same. If the policy is assigned before or after a fire the same shall be void. "That no suit for the recovery of any claim by virtue of this policy shall be sustained unless commenced within 12 months next after the loss shall have occurred;

and should any such suit be commenced after the aforesaid 12 months, the lapse of time shall be taken as conclusive evidence against the validity of such claim."

The bill in this case was filed on April 28, and the subpœna thereon was issued and served on May 1, 1883. By rule 6 of this court a party filing a bill must cause proper process to issue thereon, and endeavor to have the same served within 90 days from such filing, or it may be dismissed for want of prosecution on the motion of any defendant who has not voluntarily appeared thereto. Under this rule this suit was commenced when the bill was filed; and, for aught that has been shown, such was the effect of filing the bill without the rule. However, the bill was not filed until 14 months and 14 days after the fire occurred.

On the authority of adjudged cases (*Davidson* v. *Phœnix Ins. Co.* 4 Sawy. 594; *Riddlesbarger* v. *Hartford Ins. Co.* 7 Wall. 389; May, Ins. § 478) it is admitted by counsel for the plaintiff that this clause in the policy, limiting the time within which a suit may be commenced thereon against the defendant, is valid; but they contend that it must be read in connection with that other clause which provides that a loss does not become payable until 60 days after the proof of that fact is made; and that, taken together, the reasonable construction of them is that the right to sue on the policy being postponed until the loss is payable,—namely, 60 days after proof thereof,—the 12 months' limitation upon such right does not commence to run until that time. This construction is supported by the decided weight of authority, and in my judgment is correct on principle. *Mayor, etc.*, v. *Hamilton Fire Ins. Co.* 39 N. Y. 45; *Hay* v. *Star Fire Ins. Co.* 77 N. Y. 241; *Barber* v. *Fire & Marine Ins. Co., etc.*, 16 W. Va. 658, (S. C. 37 Amer. Rep. 800;) *Chandler* v. *St. Paul F. & M. Ins. Co.* 21 Minn. 85; *Steen* v. *Niagara Fire Ins. Co.* 89 N. Y. 315, (S. C. 42 Amer. Rep. 297;) May, Ins. § 479.

The language of this policy is that of the defendant, and any ambiguity in its terms must be resolved against it. Taken literally, the clause limiting the time within which the defendant may be sued does provide that a suit on the policy must be commenced within 12 months after the loss has occurred; but the policy also provides that the loss is not payable until 60 days after proof of the fact, and even then the defendant may give notice of its intention not to pay, but to repair or replace. A stipulation that a suit may or must be brought within 12 months from a certain time, implies that the party has the whole 12 months for that purpose—that he may commence a suit on the first day of such period. But if it cannot be commenced until two months of the time has expired, then, in reality, only ten months are given in which to sue. Under this policy the period within which a suit may be brought ought to begin at the time when, by its terms, it *can* be commenced—when the loss is established, and the claim therefor is due and payable.

In *Steen* v. *Niagara Fire Ins. Co., supra,* 299, the policy contained two similar conditions, and the court, in construing them, said:

"We think the intention of the defendant was to give the insured a full period of twelve months, within any part of which he might commence his action; and having, by postponement of the time of payment, secured itself from suit, it did not intend to embrace that period within the term after the expiration of which it could not be sued. In other words, the parties cannot be presumed to have suspended the remedy and provided for the running of the period of limitation during the same time. Indeed, the actual case is stronger. Not only was the remedy postponed, but the liability even did not exist at the time of the fire, nor until it was fixed and ascertained according to the provisions of the policy. Having thus made the doing of certain things, and a fixed lapse of time thereafter, conditions precedent to the bringing of an action, the parties must be deemed to have contracted in reference to a time when the insured, except for that contract, might be in a condition to bring an action. Under any other construction, the two conditions are inconsistent with each other."

The objection that the policy is void, is based upon the fact disclosed in the bill that the assured, as the policy is written, has no interest in the property insured. But this is alleged to be the result of a mistake, by which the property was insured in the name of the plaintiff instead of that of the owners for his benefit, which mistake this suit is brought to correct. Neither has the policy become void by the assignment to the plaintiff. The stipulation that the policy shall be void if assigned before a fire, without the consent of the defendant, is valid. While the risk is active or pending, the contract is personal, and the policy cannot be assigned without the consent of the insurer. But the stipulation that the policy shall be void if so assigned after the fire, stands on a different footing. When the proof of loss was made, and the liability of the defendant under the policy fixed, the relation between the parties was changed from insurer and insured to that of debtor and creditor, and the *delectus personæ* of the contract was no longer material. Therefore this second stipulation is null and void, because it is intended to prevent the assignment of a chose in action contrary to the policy of the law. Wood, Fire Ins. §§ 94, 337, 340, 342, and cases there cited.

By the assignment of this policy to the plaintiff he certainly became the real party in interest therein, as it then stood, and is entitled, as such assignee, to recover from the defendant whatever sum was then due thereon from it to his assignors. If the assignment also carries with it the right to have the policy reformed in equity, as I think it does, (Story, Eq. Jur. § 165,) the plaintiff is also the real party in interest, in that aspect of the case, he being the person for whose benefit the insurance was effected.

The alleged mistake in this case appears to be a proper one for the interference of a court of equity. The objection that the plaintiff is asking the court to make a new contract between the two parties might be urged against any application of this nature. To reform a

contract, or correct a mistake in one, is to change the language of it in some material particular concerning the subject-matter or parties thereto. When reformed, as compared with the contract contained in the imperfect or erroneous writing, it may be said to be a new one, but in fact it is the true and only contract between the parties.

The defendant has had the benefit of the premium paid on this risk by these parties; but by reason of the plaintiff being erroneously named in the policy as the assured, instead of the owners thereof, it is not liable, as the policy stands, to pay the loss incurred and insured against to any one. Upon the transaction, as stated in the bill, there is a strong implication that there was a mistake in this particular. Spare, who is merely a creditor of the owners, does not appear to have had an insurable interest in the property, and therefore any insurance in his name was nugatory. *Spare* v. *Home M. Ins. Co.* 8 Sawy. 618; [S. C. 15 FED. REP. 707.] Lurch Bros. were the owners of the property, and they wished to insure it for the benefit of Spare, their creditor. As this could only be done by insuring it in their own names for his benefit, it is not unreasonable to suppose that such was the understanding or agreement. Either this must have been the case, or the parties, more intent upon the end to be accomplished than the choice of proper means, carelessly or ignorantly effected the insurance in the name of Spare, rather than their own. But the bill alleges that the agreement was to insure in the name of the owners for the benefit of the creditor, and that the mistake occurred in the writing of the policy; and this the demurrer admits to be the truth. See *Brugger* v. *State Invest. Ins. Co.* 5 Sawy. 304.

Putting aside the technical points made in the argument for the defendant, the equities of this case, as stated in the bill, are all with the plaintiff. An insurance on this property was duly effected for his benefit, and whether the mistake in the name of the assured was made in the application for the insurance, or in reducing the understanding of the parties to writing in the policy, is, in justice and right, of no material consequence to the defendant.

The demurrer is overruled.

UNITED STATES *v.* FIELDING and others.

(Circuit Court, D. Missouri. March, 1882.)

1. INTERNAL-REVENUE STAMPS—COMMISSIONS ON SALES—REV. ST. § 3425.
   Commissions to purchasers of internal-revenue stamps, under Rev. St. § 3425, must be paid in cash, whether the stamps purchased are paid for in cash, or the purchaser obtains a credit of 60 days, and gives bond as provided by such section.
2. SAME—PAYMENT IN STAMPS.
   The practice of the internal revenue department of paying such commissions in stamps instead of money, is not authorized by the statute.

At Law.

William H. Bliss, Dist. Atty., for the United States.

Noble & Orrick and *James T. Allen*, for defendants.

McCRARY, J. This is a suit upon a bond executed to the plaintiff by defendant Mansfield as principal, and the other defendants as sureties, under the provisions of section 3425 of the Revised Statutes of the United States, which is as follows:

"The commissioner of internal revenue is authorized to sell and supply to collectors, deputy collectors, postmasters, stationers, or any other persons, at his discretion, adhesive stamps, or stamped paper, as herein provided for, in amounts of not less than fifty dollars, upon the payment, at the time of delivery, of the amount of duties said stamps or stamped paper, so sold or supplied, represent, and may allow, upon the aggregate amount of such stamps, the sum of not exceeding five per centum as commission to such purchasers; but the cost of any paper shall be paid by the purchaser of such stamped paper. The proprietor of articles named in Schedule A, who furnishes his own die or design for stamps to be used especially for his own proprietary articles, shall be allowed the following commissions: On amounts purchased at one time of not less than fifty dollars nor more than five hundred dollars, five per centum; and on amounts over five hundred dollars, ten per centum on the whole amount purchased: provided, that the commissioner may, from time to time, deliver to any manufacturer of friction or other matches, cigar-lights, or wax-tapers, a suitable quantity of adhesive or other stamps, such as may be prescribed for use in such cases, without prepayment therefor, on a credit not exceeding sixty days, requiring, in advance, such security as he may judge necessary to secure payment therefor to the treasurer of the United States, within the time prescribed for such payment. And upon all bonds or other securities taken by said commissioner, under the provisions of this chapter, suits may be maintained by said treasurer in the circuit or district court of the United States, in the several districts where any of the persons giving said bonds or other securities reside or may be found, in any appropriate form of action."

Defendant Mansfield, under the firm name of F. Mansfield & Co., was engaged in the manufacture of matches, and under the section above named the commissioner of internal revenue was authorized to furnish to him a suitable quantity of adhesive stamps, on a credit of not more than 60 days, upon taking bond and security for the payment therefor within the time prescribed. It was for this purpose that the bond sued on was executed. The case of the government is set out fully in a second amended petition, to which the defendant Mansfield answers in substance as follows:

First. He admits the execution of the bond sued on. *Second.* He avers that defendant furnished his own die and design for stamps to be used especially for his own matches, and was therefore entitled to 10 per cent. as commissions upon all purchases over $500. *Third.* That he purchased stamps in amounts at each time of over $500, in all to the amount of $713,955, on a credit of 60 days upon each order; and that he was entitled as commissions thereon to the sum of $71,395.50. *Fourth.* That he has received as such commissions only the sum $63,305, and that he has paid on account of such purchases the sum in all of $633,050. *Fifth.* Defendant admits that there is due the plaintiff, on settlement, the sum of $9,509.50, which he has tendered to plaintiff and now offers to pay.

To this answer the plaintiff demurs. The controlling questions are—*First*, whether the statute contemplates payment of commissions in cash; *second*, whether any commissions are to be allowed where a credit of 60 days is given and bond taken under the statute above named. The section above quoted undoubtedly contemplates the payment of commissions to purchasers of stamps in cash. It plainly provides that the proprietor who furnishes his own die or design shall be allowed commissions, on amounts over $500, of 10 per centum on the whole amount purchased. It seems that the practice of the department has been to send to the purchaser his commissions in stamps, counting such stamps as cash. That is to say, upon an order for stamps to the amount of $500, the commissioner of internal revenue would send to the purchaser who furnished his own die or design $550 in stamps, thus assuming to pay $50 of commissions with $50 in stamps. But this is not authorized by the statute.

There is no provision for paying commissions in anything besides money. Power to allow and pay commissions means power to allow and pay the same in cash; that is, in the same which the government receives upon the sale. No doubt it is competent for the commissioner, with the assent of the purchaser, to make any arrangement which amounts in substance and legal effect to a sale according to the statute. It is not necessary that the purchasers of the stamps should actually pay over their face value to the commissioner and receive back the commissions in cash; but, unless a purchaser waives his right to it, he is entitled to that which is equivalent to 10 cents in cash upon each dollar's worth of stamps purchased. Nor can it be said, as contended by the district attorney, that the extra amount of stamps sent as commissions should be regarded as an additional and separate purchase of that amount, upon which only 5 per cent. commission could be allowed. In each instance there was but one single transaction. And if the commissioner saw fit to send upon an order for $1,000 worth of stamps $1,100 in stamps, and the defendant chose to accept them without objection, this amounted to one purchase of $1,100 in stamps by the defendant.

We are also of the opinion that commissions are to be allowed whether the purchaser pays cash or gives a bond and obtains 60 days' time. The bond is in lieu of present payment. It is provided for in a proviso which was evidently not intended to affect, in any way, the provision previously made with the respect to commissions. There is no reason, founded either in justice or public policy, for holding that the purchaser who avails himself of the privilege of giving bond should be deprived of his commissions; and there is certainly nothing in the terms of the statute that requires such a construction. Such being the true meaning of the act, we hold in the present case that the liability of the defendant Mansfield as principal in the bond sued on is to be ascertained by charging him with all the stamps purchased by him from the government, including such as were sent to him in ex-

cess of the amount ordered by him, and deducting from the total thus ascertained 10 per centum commissions allowed by law. It follows, if the answer is true, that the sum tendered by Mansfield is the sum due, and for which the United States is entitled to judgment. If, therefore, the district attorney stands upon the demurrer to the answer to the second amended petition, there will be judgment accordingly against the defendant Mansfield.

We do not at present pass upon the defense of the sureties on the bond, as it may not be necessary to do so. If the plaintiff accepts the sum tendered and the defendant Mansfield pays it at once, no question as to the rights of the sureties can arise. If this is not done, the court will, upon being so advised, consider and determine the questions raised on behalf of the sureties.

OSGOOD'S ADM'RS *v.* ARTT.

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

1. NEGOTIABLE PAPER—TRANSFER WITHOUT INDORSEMENT.
   By the rules of the law-merchant, the purchaser of negotiable paper, payable to order, unless it be indorsed by the payee, takes subject to any defense which the payor has against the payee. He becomes, in such case, only the equitable owner of the debt or claim evidenced by the security.
2. SAME—INDORSEMENT ON SECURITY.
   As a general rule the legal title to negotiable paper, payable to order, passes only by the payee's indorsement on the security itself, or on a piece of paper so attached to the original instrument as, in effect, to become a part of it, or incorporated into it.
3. SAME—ASSIGNMENT BY WORDS IN SEPARATE INSTRUMENT.
   Words of assignment and transfer, contained in a separate instrument, executed for a wholly different and distinct purpose, are not equivalent to an indorsement, within the settled rules of the law-merchant.
4. SAME—SUBSEQUENT INDORSEMENT—NOTICE OF DEFENSE.
   A subsequent indorsement made after notice of the payor's defense, although the paper was purchased without notice of defense, will not relate back to the time of purchase, so as to cut off the equities of the payor against the payee.

At Law.

W. H. Swift, for plaintiffs.

Edsall, Hawley & Edsall, for defendant.

HARLAN, Justice. On the fourteenth day of May, 1856, the defendant, Artt, executed and delivered to the Racine & Mississippi Railroad Company his note, whereby, for value received, he promised to pay to that company or order, at the expiration of five years from May 10, 1856, the sum of $2,500, together with interest at the rate of 10 per cent. per annum, payable annually on the tenth day of May of each year,—principal and interest payable at the office of the com-

pany in the city of Racine, Wisconsin. At the same time, Artt, to secure the payment of the note, executed to the company his mortgage upon certain real estate in Carroll county, in this state. Subsequently, the company made its bond, under date of June 10, 1856, acknowledging its indebtedness to and promising to pay Charles Osgood, or bearer, $2,500 on the tenth of May, 1861, at its office in the city of New York, together with interest from and after the tenth day of May, at the rate of 10 per cent. per annum, payable semi-annually on each tenth day of November and May, upon the presentation and surrender of the interest coupons at the said office. That bond contained these clauses:

"To the payment whereof the said company hereby bind themselves firmly by these presents; and, for the better security of such payments being made to the holder thereof, the said company *have assigned and transferred*, and *by these presents do assign and transfer*, to the said holder of this bond a certain note for the sum of $2,500, executed by Robert Artt, of Carroll county, together with a mortgage given collateral to and for the purpose of securing the payment of the same, dated on the fourteenth day of May, 1856, payable in five years from the tenth day of May, 1856, with interest at the rate of 10 per cent. per annum, which said note and mortgage are hereto appended, and *are transferable in connection with this bond, and not otherwise*, to any parties or purchasers whomsoever. And the said company do hereby authorize and empower the holder of this bond at any time, in case said company shall fail to perform any of the foregoing stipulations by neglecting to pay either principal or interest on this bond when the same shall become due, to proceed and foreclose the said mortgage, or take such other legal remedy on said note and mortgage against said mortgagor, or against this company on this present bond, or on both, as shall seem proper and expedient to said holder hereof."

Some time in the summer of 1857 the railroad company sold the bond, delivering therewith the note and mortgages to plaintiffs' intestate,—the bond, note, and mortgage being attached firmly together with eyelets in the order in which they are named, the bond on the top, next the note, and then the mortgage. The bond, note, and mortgage each bears the number 1,964 written thereon in ink. At the time of such purchase and delivery Osgood had no notice of any defense to the note, nor of any of the matters alleged in defendant's third plea. That plea states facts which are conceded to show a good defense as between Artt and the railroad company, viz., an entire failure of consideration, and also fraud, upon the part of the company, in procuring the execution of the note and mortgage. The note, bond, and mortgage, after their delivery to deceased, remained attached in the manner just stated. Upon the back of the note are the words "Racine & Mississippi Railroad Company, by H. S. Durand, President," which is the indorsement of the railroad company, placed thereon by its authority. It had not, however, been placed there when Osgood purchased and received the note, bond, and mortgage, but was made at some date subsequent to June, 1859. Before the indorsement was, in fact, made on the note, but after the purchase by Osgood, he had notice as well of the fraud practiced by the rail-

road on Artt, as of the failure of consideration in the note, as set out in the defendant's third plea.

These facts have been specially found by a jury, and the sole question for determination is whether, upon this finding, the plaintiffs are entitled to judgment. The only issue of fact made on the third plea is whether Osgood, prior to the indorsement of the note, had notice of the alleged fraud and failure of consideration.

1. It is a settled doctrine of the law-merchant that the *bona fide* purchaser for value of negotiable paper, payable to order, if it be indorsed by the payee, takes the legal title unaffected by any equities which the payor may have as against the payee.

2. But it is equally well settled that the purchaser, if the paper be delivered to him without indorsement, takes, by the law-merchant, only the rights which the payee has, and therefore takes subject to any defense the payor may rightfully assert as against the payee. The purchaser in such case becomes only the equitable owner of the claim or debt evidenced by the negotiable security, and, in the absence of defense by the payor, may demand and receive the amount due, and, if not paid, sue for its recovery, in the name of the payee, or in his own name, when so authorized by the local law.

3. As a general rule the legal title to negotiable paper, payable to order, passes, according to the law-merchant, only by the payee's indorsement on the security itself. The only established exception to this rule is where the indorsement is made on a piece of paper, so attached to the original instrument as, in effect, to become part thereof, or be incorporated into it. This addition is called, in the adjudged cases and elementary treatises, an *allonge*. That device had its origin in cases where the back of the instrument had been covered with indorsements, or writing, leaving no room for further indorsements thereon. But, perhaps, an indorsement upon a piece of paper, attached in the manner indicated, would now be deemed sufficient to pass the legal title, although there may have been, in fact, room for it on the original instrument.

4. But neither the general doctrines of commercial law, nor any established exception thereto, make words of mere assignment and transfer of such paper—contained in a separate instrument, executed for a wholly different and distinct purpose—equivalent to an indorsement within the rule, which admits the payor to urge, as against the holder of an unindorsed negotiable security, payable to order, any valid defense which he has against the original payee.

5. The transfer of the note in suit, by words of assignment in the body of the railroad company's bond, did not, in the judgment of the court, amount to an indorsement of the note, although the bond, note, and mortgage were orginally fastened together by eyelets. The facts set out in the third plea, and sustained by the special finding, constitute, therefore, a complete defense to the action, unless, as contended

by plaintiffs, the subsequent indorsement, in form, by the railroad company, after Osgood was informed of Artt's defense, has relation back to the time when the former, without notice of such defense, purchased the note for value then paid. If, at the time of Osgood's purchase, it had been agreed that the company should *indorse* the note, but the indorsement was omitted by accident or mistake or fraud upon the part of the company, a different question would have been presented. In such case, the company might, perhaps, have been compelled to make an indorsement which would have been deemed effectual as of the time when, according to the intention of the parties, it should have been made. But no such case is presented by the special finding. It is entirely consistent with the facts found that the indorsement by the company was an afterthought, induced by notice of Artt's defense, and was not within the contemplation or contract of the parties when Osgood purchased the bond. Moreover, and as a circumstance significant of an intention to restrict, in some degree, the assignability of the note and mortgage, it is expressly stipulated, in the company's bond, that they are transferable in connection with the bond, and not otherwise.

I am of opinion that the facts which came to Osgood's knowledge prior to the indorsement, and which, in substance, constitute the defense set out in the third plea, furnished notice that the company had, by reason of fraud and failure of consideration, lost its right to demand payment of the note from Artt. By the indorsement, after such notice, Osgood could not acquire any greater rights than the company possessed. He did not become the holder of the note by *indorsement*, as required by the law-merchant, until after he had notice that the company could not rightfully pass the legal title, so as to defeat Artt's defense.

While the adjudged cases are not in harmony upon some of these propositions, the conclusions indicated are, in the opinion of the court, consistent with sound reason, and are sustained by the great weight of authority.[1]

The facts specially found do not authorize a judgment for the plaintiffs.

[1] Chief Justice MARSHALL, in *Hopkirk* v. *Page*, 2 Brock. 41; *Sturges' Sons* v. *Met. Nat. Bank*, 49 Ill. 231; *Melendy* v. *Keen*, 89 Ill. 404; *Haskell* v. *Brown*, 65 Ill. 37; *Lancaster Nat. Bank* v. *Taylor*, 100 Mass. 24; *Bacon* v. *Cohea*, 12 Smedes & M. 522; *Grand Gulf Bank* v. *Wood*, Id. 482; *Clark* v. *Whitaker*, 50 N. H. 474; *Haskell* v. *Mitchell*, 53 Me. 468; *Franklin* v. *Twogood*, 18 Iowa, 515; *French* v. *Turner*, 15 Ind. 59; *Folger* v. *Chase*, 18 Pick. 63; *Whistler* v. *Forster*, 14 C. B. 246, (108 E. C. L. 248;) *Harrop* v. *Fisher*, 10 C. B. (N. S.) 196; *Gibson* v. *Minet*, 1 H. Bl. s. p. 606; Story, Notes, § 120; Story, Bills, § 201; Chitty, Bills, (12th Amer. from 9th Lond.) 252; 2 Pars. Notes & Bills, 1, 17, 18; 1 Daniel, Neg. Inst. (3d Ed.) §§ 664*a*, 689*a*, 690, 741, and 748*a*.

UNITED STATES v. BARNHART.

(*Circuit Court, D. Oregon.* August 24, 1883.)

1. BOND OF INDIAN AGENT—CONDITION OF.
   B. was appointed agent for the Indians in Washington territory, and as such gave a bond conditioned to faithfully account for all money and property that might come into his hands, and was thereupon assigned to duty on the Umatilla reservation, in Oregon, where he acted as agent to the Indians settled thereon, under the treaty of June 9, 1855, (12 St. 945,) some of whom had previously resided in Washington territory. *Held*, (1) the condition of the bond did not include or apply to money or property not received by the obligor as agent of the Indians in Washington territory; and (2) that he was not liable on said bond for money received by him while he was acting as agent to the Indians on the Umatilla reservation.
2. MOTION IN ARREST OF JUDGMENT.
   In the consideration of a motion in arrest of judgment the court cannot look beyond the record, and therefore will not take notice of a stipulation made during the trial, admitting the existence of certain facts in the case.
3. MOTION FOR NEW TRIAL.
   A motion for a new trial, on the ground that the verdict is contrary to evidence, will not be allowed where the amount in controversy is trifling; but when the verdict is probably the result of an erroneous ruling or direction of the judge, the motion will be allowed, however small the amount.

At Law. Action on official bond.

James F. Watson, for the United States.

Seneca Smith, for defendant.

DEADY, J. This action was commenced on July 26, 1881, to recover from the defendant the sum of $115.75 for money received by him as Indian agent between November 19, 1861, and September 30, 1865, and not duly accounted for. It appears from the complaint that the defendant was appointed "agent for the Indians in Washington territory," and as such gave a bond, with sureties, in the penal sum of $10,000, conditioned as follows: "Now, if the said Barnhart shall and doth at all times henceforth, and during his holding and remaining in said office, carefully discharge the duties thereof, and faithfully expend all public moneys and honestly account for the same, and for all public property which shall or may come into his hands without fraud or delay, then the above obligation to be void, otherwise to remain in full force and virtue;" and that, as such agent, he received from the plaintiff, under said bond, between the dates aforesaid, a large sum of money, of which he failed to account for $115.75, according to the condition thereof. The action is brought upon this bond against the defendant alone for this sum, with interest since September 30, 1865. The answer of the defendant is in effect a denial that he ever received any money from the plaintiff as "agent for the Indians in Washington territory" under said bond, or failed to account for the same. The cause was tried with a jury, who, on December 13, 1882, gave a verdict for the plaintiff for the sum of $10.75. The defendant moved in arrest of judgment, and for a new

trial, which motions were argued and submitted on August 17, 1883.

On the trial the plaintiff offered in evidence a stipulation by which the defendant admitted that the money in question was received by him while on the Umatilla reservation, and while acting as agent thereof, and not otherwise; and also the treasury statement of differences, as to money furnished and received by him while so acting thereon, to which the defendant objected as immaterial and irrelevant, because it appeared therefrom that said money was not received by him as "agent for the Indians in Washington territory," nor under his bond as such agent. The court overruled the objection *pro forma*, and admitted the evidence. This bond was taken under section 7 of the act of July 31, 1854, (10 St. 333,) by which the agents for the Indian tribes in the territory of Washington were required to give bond "in such penalties, and with such conditions and such security, as the president or secretary of the interior may require."

Whatever may be the general liability of the defendant to the United States for this money, as for money had and received by him to its use, he is not liable therefor on this bond, as the maker thereof, to account for any money or property not received by him as "agent for the Indians in Washington territory." It is true, he was required to give bond with such "conditions" as the president or secretary of the interior might require. And the bond actually given does contain the condition that the defendant will account for all public money and property that may come into his hands. But this general language must be construed with reference to the subject-matter,—the purpose and object of the bond,—which was to secure the faithful performance of the obligor's duty as "agent for the Indians in Washington territory," and nothing more. Nor will the power given to the president and secretary to require a bond from an agent with "conditions," be construed to authorize them to exact or impose conditions not relative to the duties and obligations of the office; as, for instance, that the agent would not be interested in the trade or business beyond the limits of the reservation.

Admitting this conclusion, counsel for the United States contends that the defendant, while acting as agent on the Umatilla reservation, was acting as agent for the Indians in Washington territory, within the obligation of his bond. The statutes applicable to the subject, and then in force, are the following:

By section 4 of the act of June 5, 1850, (9 St. 437; section 2052, Rev. St.,) the president was authorized "to appoint one or more Indian agents, not exceeding three," each of whom should perform the duties of agent to such tribe of Indians in Oregon as the superintendent might direct. By the act of March 2, 1853, (10 St. 172,) the territory of Washington was organized out of the northern part of Oregon; and by the act of July 31, 1854, (10 St. 332; section 2052, Rev. St.,) the president was authorized to appoint "such number of Indian

agents, not exceeding three, as he may deem expedient for the Indians in the territory of Washington."

By the treaty of June 9, 1855, (12 St. 945,) which was ratified by the senate on March 8, 1859, the Walla Walla, Cayuse, and Umatilla tribes and bands of Indians then occupying lands partly in Washington and partly in Oregon territory, ceded the country claimed by them collectively to the United States, with a reservation of a certain portion thereof on the Umatilla river, in Oregon, and since known as the Umatilla reservation, which was by the treaty set apart for the exclusive use of such Indians, who thereby agreed to remove to and settle upon the same within one year after the ratification of the treaty.

It is understood that these Indian tribes had removed to this reservation, and an agency had been established thereon, before the appointment of the defendant as agent. Some of them, as the Walla Wallas and a portion of the Cayuses, had lived in Washington territory before that time, but thereafter they lived upon the reservation established for them in Oregon, and were in fact no longer "Indians in Washington territory." And if the defendant could be considered as having received any portion of this money, while acting as agent at the Umatilla reservation, as agent of the Indians in Washington territory, because some of the Indians then settled on said reservation once lived in said territory, before he could be held liable on his bond for not accounting for the same, it would be necessary to show what portion of it was so received, of which there is no evidence.

The defendant was appointed and gave bond as agent for the Indians in Washington territory, but for some reason was assigned to duty upon a reservation in Oregon. The irregularity probably arose in this way: Including the Umatilla reservation, there were then four reservations in Oregon—the other three being the Warm Springs, the Siletz, and the Grand Round. But the law of 1850 only permitted the appointment of three agents for the Indians in Oregon; and instead of asking congress to increase the number, the department seems to have managed to get around the difficulty by appointing a fourth one as agent for the Indians in Washington, where I believe there were then only two, and assigning him to duty in Oregon, at a reservation where a portion of the Indians had once lived in Washington.

But as I read the statute of 1854, authorizing the appointment of not exceeding three agents for the Indians *in* Washington, such agent, when appointed, is a local officer, as much as the marshal and district attorney of the territory, and cannot be required or authorized to act as agent for Indians not settled or resident therein.

But the motion in arrest of judgment must be denied. Upon this motion the court cannot look beyond the record. *Carter* v. *Bennett*, 15 How. 356. Upon the face of this record—the pleadings—it does

not appear that this money was received by the plaintiff while acting as agent of the Indians in Oregon. The admission made to that effect on the trial is no part of the record. The complaint alleges that the defendant received the money while acting as "agent for the Indians in Washington," and the answer denies it. The verdict is for the plaintiff, and there is nothing on the record to prevent a verdict being given accordingly.

The motion for a new trial is allowed. Notwithstanding the small amount of the verdict, the case does not come within the rule, *de minimis non curat lex.* This maxim seems to be confined to cases when the matter in controversy is trifling, and the motion is made on the ground that the verdict is against the evidence. *Macrow* v. *Hull*, 1 Burr. 11; *Burton* v. *Thompson*, 2 Burr. 664. But where the verdict is probably the result of an erroneous ruling or direction of the judge, a new trial will be granted, however small the amount in question. Broom, Leg. Max. 142, and cases there cited. Now, but for the ruling of the court, admitting the plaintiff's proof of deficiency, as contained in the "statement of differences" from the treasury department, after the admission that the money was received by the defendant while acting as agent at the Umatilla reservation, in Oregon, the verdict must have been for the defendant. I stated at the time that the objection was probably well taken, but it was better for all concerned that the opinion of the jury be had upon the facts first, and then, if necessary, the defendant could raise the question again on a motion for a new trial.

The motion for a new trial is allowed, with the costs, to abide the event of the action.

WASHBURNE *v.* PINTSCH and others.

(*Circuit Court, S. D. New York.* June 6, 1883.)

1. AGENCY—PROMISE OF COMPENSATION—MORAL OBLIGATION.
   Where the owner of property is induced to believe that another, who has been trying to sell such property on speculation for his own benefit alone, was clearly acting as his agent in the matter, and that he is under a moral obligation to compensate him for his trouble, promises to do so, such promise is without color of consideration and void.
2. INSTRUCTION TO FIND FOR DEFENDANT.
   Where, if the case had been left to the jury and a verdict had been found for the plaintiff, it would have been the duty of the court to set it aside as contrary to the evidence, it was correct to instruct them to find for the defendant.

At Law.

Armstrong & Briggs, for plaintiffs.

Salomon & Dulon, for defendants.

WALLACE, J. The correspondence between Schoenrock and Pichon shows conclusively that when the interviews between the former and

the defendants took place at Berlin, the defendants were under no legal or moral obligations to Schoenrock to compensate him for his services regarding the sale of their patents. He had been trying to make a profit as a speculator out of their property by selling the patents to a syndicate, and found failure at hand unless he could induce the defendants to recognize him as their agent. He induced the defendants to believe that his efforts had been prompted by the assurance of their agent at London, Mr. Pichon, that he should receive a commission for his services, and that, acting upon these assurances, he had interested the New York syndicate in the purchase of the patents. In the interviews at Berlin the defendants, according to his testimony, promised to allow him a commission in case the syndicate should buy the patents. This promise was made upon a misconception of the relations Schoenrock sustained to them in the transaction. The letter of the defendants to Mr. Blanchard, of June 3, 1879, is consistent with this theory. If he had really been acting for them the question would be presented whether their promise in recognition of his services could not be enforced, notwithstanding he had no legal claim against them for commissions at the time. But as he had been acting for himself instead, their promise, made upon the assumption that they were under a moral or equitable obligation to him, was without color of consideration.

If the case had been left to the jury and a verdict had been found for the plaintiff, it would have been the duty of the court to set it aside as contrary to the evidence. It was, therefore, correct to instruct them to find for the defendant.

The motion for a new trial is denied.

MELENTHIN v. KEITH.

(*Circuit Court, D. Minnesota.* June Term, 1883.)

EJECTMENT—TITLE OF PLAINTIFF—LAND CONTRACT.

A party who has paid part of the purchase money for land, and has made a contract with the owner that he may go into possession and cultivate the land and build thereon, and receive a deed therefor when the balance of the purchase money is paid, has sufficient title to maintain an action of ejectment.

MILLER, Justice. This is in the nature of an action of ejectment, brought to the United States circuit from the state court, by removal. The defendant makes a motion for judgment on the face of the papers, on the ground that the plaintiff's title is not a legal title, being simply a paper, or document, which the railroad company, who had the legal title, executed to him. The strict legal title—the full title—did not inure to the party who purchased the land of the railroad; and counsel for defendant relies upon the general proposition

that an action of ejectment cannot be maintained by a party where the legal title is in somebody else. That general proposition is stated by him too strongly. The legal title may be subdivided into several estates. There may be a legal title which is a fee-simple; there may be a legal title which is an estate in remainder; there may be a legal title which is a lease, the leasehold interest being in the lessee, and the title of the fee in the lessor. Any of these is sufficient, if the party is out of possession, to maintain an action of ejectment. The proposition is still stronger in most of these western states, where the language of the statute is that any party out of possession of real estate may bring an action to recover. But, conceding that in the United States courts a party can only recover on a legal title, as contradistinguished from an equitable title, I think that counsel for defendant in this case has not considered the fact that the plaintiff in this case, while he has a legal right of present possession, will have an equitable right to obtain the title from the railroad company when the money is all paid up. He has the legal right to the possession of that property if the vendor can give such a legal right, because the vendor has about $200 of the purchase money, and has agreed that the plaintiff shall go into possession,—take possession of, cultivate, and build, I think, is the language; something to that effect,—which necessarily implies a right of possession.

Now, taking the title of the railroad company, and the right which it has conferred on its vendee to possession, there is in this plaintiff a strict legal right of possession in this property, which does not depend upon any equitable proceedings whatever. If the defendant has a better right to the possession, he can show it; but as the papers stand I am of opinion that the contract between the railroad company (which in this motion is conceded to have a legal title) with the plaintiff in this case, which gives him the right of possession of the property, is a legal contract, and conferred the legal right of possession.

The motion in this case is, therefore, overruled.

PITTSBURGH BESSEMER STEEL RAIL CO. *v.* HINCKLEY.

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

1. CONTRACT TO SELL AND DELIVER STEEL RAILS—BREACH.

As, construing the contract, the breach of which is alleged in this case, in the light of the parol testimony, it appears that the giving of directions by defendant, as to how the steel rails which plaintiff was to deliver to him should be drilled, was a condition precedent to be performed by him before plaintiff could proceed with the proper execution of its contract, the neglect and final refusal of defendant to give such directions was of itself a breach of the contract, which excused plaintiff from the actual manufacture of the rails, and an actual tender of them to defendant, and for such breach of contract it is entitled to damages.

2. SAME—MEASURE OF DAMAGES—PROFIT.
The rule in awarding damages in such a case for a breach of contract is to make the plaintiff as nearly whole as he can be made in money damages; or, in other words, to leave him as nearly as possible as well off as he would have been if defendant had performed his contract; and he is entitled to recover the actual profit that he would have made had the contract been performed.

At Law.

Jewett, Norton & Larned, for plaintiff.

Geo. W. Cotherin, for defendant.

BLODGETT, J. This is an action to recover damages for the alleged breach by defendant of a contract made between himself and the plaintiff on the eighteenth day of February, 1882, whereby plaintiff sold to defendant 6,000 gross tons of first quality steel rails, to weigh 52 pounds to the yard, for which defendant agreed to pay plaintiff at the rate of $58 per ton of 2,240 pounds, delivered free on board cars at Chicago, Illinois; 1,000 tons of which rails were to be delivered in May, 1880, and the balance delivered at the rate of 2,500 tons per month, after July 1, 1882. By the terms of the contract, the rails were to be drilled as directed by the defendant.

It appears from the proof in the case that the plaintiff notified the defendant in the forepart of the month of April that it would be ready to commence rolling, the week ending May 5th, the 1,000 tons of rails which were to be delivered in May, and requested him to forward drilling directions at once. This the defendant neglected to do, but requested the plaintiff to delay rolling the rails for the May delivery. Plaintiff did so delay to roll and deliver any rails in May, but during the month of May again urged the defendant to furnish drilling directions, in order that it might commence the performance of its contract; and from time to time, during the months of May, June, and July, defendant was repeatedly requested to furnish drilling directions, and repeatedly requested to take said rails, but declined to do so, and finally, in the latter part of the month of July, defendant absolutely refused to give drilling directions for the manufacture of said rails, and notified the plaintiffs that he could not and would not accept and pay for them. The proof also shows that immediately after the making of the contract between the plaintiff and defendant the plaintiff purchased the material out of which to manufacture the rails called for by the contract, and was, at all times up to the time of the absolute refusal of the defendant to accept said rails, ready and able to manufacture said rails and deliver the same according to the terms of the contract.

The contract, taken in connection with the parol testimony in the case, satisfies me that the drilling directions—that is, the directions where and how to drill the holes near the ends of the rail by which the fish-plates or splice-bars are bolted to the rails—was an important item in the manufacture of the rails, and that if the plaintiff had made the rails and drilled them without the directions of the defendant, he could legally have refused to accept them on that ground, as

it appears from the proof that drilling is now considered a part of the manufacture of the rails; that a steel rail is usually drilled by the manufacturer; and that the purchaser gives directions as to how it shall be done.

Read, therefore, in the light of the parol proof offered by the defendant at the trial, I think the giving of drilling directions by the defendant was a condition precedent to be performed by the defendant before plaintiff could proceed with the proper execution of its contract, and that the neglect and final refusal of the defendant to give drilling directions was, of itself, a breach of the contract on the part of the defendant which excused the plaintiff from the actual manufacture of the rails and the actual tender of them to the defendant. I think the testimony in the case fully justifies the conclusion that defendant's neglect and refusal to furnish drilling directions was for the mere purpose of delay, and that from early in the month of May defendant did not intend to fulfill this contract. Not only had there been a large decline in the price of steel rails upon the market, but the defendant had failed to make satisfactory financial arrangements to enable him to pay for the rails. For a time, therefore, he asked and obtained from the plaintiff a delay and postponement of the time of delivery; but, finally, when pressed by plaintiff to give the directions for drilling and to take the rails, he frankly told the agents of plaintiff that he could not pay for the rails, and would not receive them. This statement by defendant, that he would not perform the contract by accepting and paying for the rails, was also a breach of the contract by defendant, and entitled plaintiff to damages.

The only question in the case, therefore, as it seems to me, is what damage the plaintiff has sustained by reason of defendant's breach of this contract.

The rule in awarding damages in cases of this character for a breach of contract is to make the plaintiff as nearly whole as he can be made in money damages; or, in other words, as nearly as possible leave him as well off as he would have been if the defendant had performed his contract. Here was a manufacturing corporation, with expensive machinery and plant, and compelled, from the nature of its business, to invest large sums of money in iron ore, pig iron, spiegel, coke, and other material, and in labor, for the purpose of performing this contract. The proof shows that the plaintiff, on making this contract in good faith, purchased the material necessary to fulfill it. The proof as to the cost of these rails to plaintiff rests on the testimony of two witnesses,—H. P. Smith, the manager of plaintiff's mill, and Richard C. Hanna, secretary of the North Chicago Rolling Mill Company. Mr. Smith states that the cost of manufacturing the rails in question, at plaintiff's mill in Pittsburgh, was $45.12 per ton, and that the freight on them to Chicago, where they were to be delivered to plaintiff, was three dollars per ton, making the total cost of manufacturing and delivering

the rails to defendant, under the terms of this contract, $48.12 per ton; while Mr. Hanna states that it cost his company $50 per ton to make such rails in Chicago, and that from information he had derived from his experience in the business plaintiff could make the steel rails called for by this contract in its mill at Pittsburgh, and deliver them in Chicago, at just about what it cost the North Chicago Rolling Mills Company to make them here. Mr. Hanna has no interest in the event of this suit, is not connected with either party, and I conclude that his testimony as to the cost of these rails here is the most reliable, and that it would, in fact, have cost the plaintiff $50 per ton to have made these rails and delivered them to the defendant, in accordance with the terms of this contract. The proof also shows that steel rails declined rapidly from about the time this contract was made, so that during the months of August and September they were not worth as much by from $10 to $12 per ton as the contract called for. The proof, however, further shows that after the plaintiff was informed that defendant would not take and pay for the rails at the time called for by his contract, the plaintiff sold to a railroad company in Michigan 4,000 tons of steel rails, which were manufactured out of the material provided for the fulfillment of this contract with the defendant, for which plaintiff received $54.60 per ton, delivered at a point on Lake Huron. These were 35-pound rails, and it cost the plaintiff $49 per ton, as the proof shows, to manufacture them, and $4 per ton to transport them, leaving a profit of $1.60 per ton to plaintiff, and this profit should be deducted from the difference between the contract price with the defendant and the cost of making the rails under the defendant's contract; that is to say, the difference between the cost of the rails in Chicago to the plaintiff and the contract price is eight dollars per ton, which on the 6,000 would amount to $48,000. From this should be deducted the profit of $1.60 per ton on the 4,000 tons of rails sold in Michigan, amounting to $6,400, leaving $42,400 as the loss to which plaintiff has been subjected by this breach of defendant's contract; and it seems to me, in the light of well-settled authorities, that this should be and is the true measure of plaintiff's damages.

In the case of the *Philadelphia, W. & B. R. Co.* v. *Howard*, 13 How. 307, where the opinion was delivered by Mr. Justice CURTIS, it is said:

"But it by no means follows that profits are not to be allowed, understanding as we must the term 'profits' in this instruction as meaning the gain which the plaintiff would have made if he had been permitted to complete his contract. Actual damages clearly include the direct and actual loss which the plaintiff sustained, *propter rem ipsam non habitare*. In case of a contract like this, that loss is, among other things, the difference between the cost of doing the work and the price to be paid for it. This difference is the inducement and real consideration which causes the contractor to enter into his contract. For that, he spends his time, exerts his skill, uses his capital, and as-

sumes the risks which attend the enterprise; and to deprive him of it when the other party has broken the contract and unlawfully put an end to the work, would be unjust. There is no rule of law which requires us to inflict this injustice. Wherever profits are spoken of as not a subject-matter of damages, it will be found that something contingent upon future bargains or speculations or states of the markets are referred to, and not the difference between the agreed price of something contracted for, and its ascertainable value or cost. We hold it to be a clear rule that the gains or profit, of which the contractor was deprived by the refusal of the company to allow him to proceed with and complete his work, was a proper subject of damages."

And the same rule is announced in the late work of Sutherland, Dam. vol. 1, p. 117, where it is said:

"Where a party has attempted to perform labor from which a profit is to spring as a direct result of the work done at the contract price, and he is prevented from earning this profit by the refusal to act of another party, the loss of this profit is the direct and natural result which the law will assume to be the breach of the contract, and he is entitled to recover it, with proper damages; and this he will be entitled to establish by showing how much less than the contract price it will cost to do the work or perform the contract."

And the conclusion just stated by Mr. Sutherland is supported by the citation of numerous recent cases. And in *Masterton* v. *Mayor, etc., of the City of Brooklyn*, 7 Hill, 61, the same rule was adopted. So, too, in *U. S.* v. *Speed*, 8 Wall. 77, the court said, by Mr. Justice MILLER:

"And we do not believe that any safer rule, or one nearer to that supported by the general current of authority, can be found than that adopted by the court, to-wit: The difference between the cost of doing the work and what the claimant was to receive for it, making reasonable deduction for the loss of time engaged, and for release from the care, trouble, risk, and responsibility attending a full execution of the contract."

The proof in this case abundantly shows that the plaintiff could not have manufactured its material into rails and sold those rails upon the market without sustaining a greater loss than the difference between the price called for by this contract and the cost of making the rails; in other words, if the plaintiff had manufactured the rails in pursuance of this contract, and, on defendant's refusal to receive them, had put them upon the market and sold them at the current market price, the loss to the plaintiff would have been greater than the amount of damages I have arrived at by the rule adopted.

There is, therefore, no allowance or deduction to be made in this case for a "release from the care, trouble, risk, and responsibility attending a full execution of the contract," because the plaintiff was obliged to go upon the general market to find a new customer for its goods, and sell them at a lower price than the difference between the cost of manufacturing and the contract price, instead of receiving the profit which the contract with the defendant entitled it to. The risk, care, and trouble, therefore, devolved upon plaintiff by reason

of the breach of the contract, rather than any which would have followed its performance.

I must, therefore, find the issues for the plaintiff, and assess the damages at $42,400.

SCHREIBER and others, who sue as well for the United States as for themselves, v. SHARPLESS.[1]

(District Court, E. D. Pennsylvania. April 17, 1883.)

1. ABATEMENT BY DEATH OF PARTY—PENALTIES AND FORFEITURES—COPYRIGHT.
   An action for the penalty provided by act of congress (section 4965, Rev. St.) for infringement of a copyright, abates by the death of the defendant.
2. FEDERAL JURISDICTION—STATE LEGISLATION—SECTION 721, REV. ST.
   Section 721, Rev. St., providing that "the laws of the several states, except where the constitution or treaties of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply," refers to cases where the federal courts obtain jurisdiction by reason of the *citizenship of parties*, and has no application to those cases in which the jurisdiction of the court arises out of the *cause of action*, and consequently involves rights over which the state legislature can exercise no authority, except in so far as the same may relate to the method of proceeding and practice.

Motion to Quash a Writ of *scire facias* against the legal representatives of the defendant, who died after issue joined, but before trial.

This was a *qui tam* action pursuant to section 4965, Rev. St., brought by Francis Schreiber and others, suing as well for the United States as for themselves, against Charles L. Sharpless, to recover the statutory penalty for the copying, printing, publishing, selling, and exposing for sale by the defendant of a photograph copyrighted by plaintiffs, and was for the same matter as the case of *Schreiber* v. *Sharpless*, 6 FED. REP. 175. After issue joined, but before the trial, the attorney for defendant suggested the death of defendant, and plaintiffs issued a *scire facias* against his executors, whereupon this motion to quash was made.

MCKENNAN, C. J., was present and concurred in the following opinion.

H. P. Brown, Asst. Dist. Atty., and *John K. Valentine*, Dist. Atty., for the United States.

A. Sydney Biddle, for plaintiffs.

E. Hunn, Jr., for defendants.

BUTLER, J. The defendant having died, the plaintiff issued a *scire facias* to bring in his legal representatives. A motion to quash this writ raises the question before us. By agreement of parties, the question was heard before the circuit as well as the district judge.

[1] Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.

That the cause of action terminated with the defendant's death, unless saved by statutory provision, is clear. That no such provision, in direct terms, is made by federal statute, is equally clear. An act of the state legislature preserves personal actions generally against abatement by death of parties, and the provisions of this statute are invoked by the plaintiff in support of his writ. That they are inapplicable, unless the federal legislature has provided otherwise, is also clear. It is urged, however, that such provision has been made; and in support of this position our attention was directed at the outset to the act of 1872 (section 914 of the Revised Statutes) relating to modes of proceeding and practice in civil causes, and to the provisions of the judiciary act of 1789, (Rev. St. §§ 721, 955.) It is now conceded, however, that the act of 1872 falls short of the case, and reliance is placed exclusively on the sections referred to of the act of 1789. The first of these sections reads as follows:

"Sec. 721. The laws of the several states, except where the constitution or treaties of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."

That this section does not sustain the plaintiff seems quite plain. The laws of the state are made "rules of decision" in the federal courts, in cases where they apply. That is to say, in cases where the federal courts obtain jurisdiction by reason of the *citizenship of parties*, the statutes and customs of the state, which lawfully affect their rights, shall be regarded as rules of decision in passing upon such rights. The section can have no application to cases in which the jurisdiction of the court arises out of the *cause of action*, and consequently involves rights over which the state legislature can exercise no authority, except, of course, in so far as the section may relate to the method of proceeding and practice, and, in this respect, it is virtually superseded by the clause before referred to, of the act of 1872. Nor does the remaining section, 955, afford the plaintiff any better support. It reads as follows:

"When either of the parties, whether plaintiff, petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend such suit to final judgment."

This simply provides for bringing in the legal representatives, where a party dies pending suit, in cases wherein the "cause of action survives by law." The purpose of the section is to give effect in the federal court to state statutes, preserving causes of action cognizable in the state courts, and over which the state legislature may lawfully exercise authority,—causes of action of which the federal courts obtain concurrent jurisdiction, by reason of the citizenship of parties. In the case before us the cause of action, founded upon a federal statute, is beyond the reach of state legislation. The local law invoked has, therefore, no effect upon it; is consequently inap-

plicable and not within the terms of the section, 955, above cited. All the cases invoked are consistent with this view.

Our conclusion, therefore, is, that the right of action terminated with the death of the defendant. Were it held otherwise, for the reasons urged by counsel, there would be one rule of action in this respect governing suits by the United States for penalties for infractions of its copyright laws in one state, and another in other states, dependent upon local legislation respecting the survival of action.

Vide U. S. v. *Richardson*, 9 FED. REP. 804; *Sarony* v. *Burrow-Giles Lith. Co., infra.*

SARONY *v.* BURROW-GILES LITHOGRAPHIC CO.

(Circuit Court, S. D. New York. April Term, 1883.)

1. CONSTITUTIONALITY OF STATUTE—WHEN COURT WILL DECLARE VOID.
   The court should hesitate long, and be convinced beyond a reasonable doubt, before pronouncing an act of congress invalid. The argument should amount almost to a demonstration. If doubt exists, the act should be sustained,—the presumption is in favor of its validity.
2. COPYRIGHT—REV. ST. § 4952—PHOTOGRAPHS AND NEGATIVES.
   The act of congress (Rev. St. § 4952) granting copyright protection to photographs, and negatives thereof, is not so clearly unconstitutional as to authorize the court at *nisi prius* to declare it invalid.
3. SAME—INSERTING IN COPYRIGHT, NAME, AND DATE.
   The object of inscribing upon copyright articles the word "copyright," with the year when the copyright was taken out, and the name of the party taking it out, (Laws 1874, *c.* 301,) is to give notice of the copyright to the public; to prevent a person from being punished who ignorantly and innocently reproduces the photograph without knowledge of the protecting copyright.
4. SAME—INITIAL OF CHRISTIAN NAME AND FULL SURNAME.
   Inserting in such a notice the initial of the Christian name and the full surname is a sufficient compliance with the law; it does not violate the letter of the law, and accomplishes its object.

This was an action at law for the violation of the plaintiff's copyright of a photograph of Oscar Wilde, which the defendant had copied by the process known as chromo-lithography. It was admitted on the trial that the plaintiff had taken all the steps required by law to secure the copyright except to insert his Christian name in the notice, and there was no dispute as to the number of copies printed by the defendant, the value thereof, or the number on hand. The notice of copyright on the plaintiff's photographs was as follows: "Copyright, 1882, by N. Sarony." A jury was waived, and the case was argued upon questions of law only, which appear in the opinion.

Guernsey Sackett and *A. T. Gurlitz*, for plaintiff.

Stine & Calman and *D. Calman*, for defendant.

COXE, J. This is an action to recover—pursuant to section 4965 of the Revised Statutes—for the infringement of a copyright of a pho-

tograph. Two defenses are interposed: *First*, that the act securing copyright protection to photographs is unconstitutional; *second*, that the plaintiff, in printing upon the photograph the initial letter of his Christian name, N., instead of the name itself—Napoleon—has not given the notice required by the statute.

Article 1, § 8, of the constitution vests in congress the power to make laws "to promote the progress of science and useful arts by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."

Upon the authority of this constitutional grant congress extended, or assumed to extend, copyright protection to "any citizen * * * who shall be the author, inventor, designer, or proprietor of any * * * photograph or negative thereof." (Section 4952, Rev. St.)

The contention of the defendant, briefly stated, is this: That there was no constitutional warrant for this act; that a photographer is not an author, and a photograph is not a writing. The court should hesitate long and be convinced beyond a reasonable doubt before pronouncing the invalidity of an act of congress. The argument should amount almost to a demonstration. If doubt exists the act should be sustained. The presumption is in favor of its validity. This has long been the rule—a rule applicable to all tribunals, and particularly to courts sitting at *nisi prius*. Were it otherwise, endless complications would result, and a law which, in one circuit, was declared unconstitutional and void, might, in another, be enforced as valid.

The result of a careful consideration of the learned and exhaustive briefs submitted, and of such further research and examination as time has permitted, is that I do not feel that clear and unhesitating conviction which should possess the mind of the court in such cases. Many cogent reasons can be and have been urged in favor of the validity of the statute. It is, however, sufficient for the purposes of this case to say that in the judgment of the court the question is involved in doubt. This view is sustained by a recent decision of the judges of the eastern district of Pennsylvania, where the precise question was under consideration. The case (*Schreiber* v. *Thornton*) is not yet reported,[1] but the facts may be found in *Schreiber* v. *Sharpless*, 6 FED. REP. 175, where there was a controversy evidently growing out of the same transaction.

Regarding the other defense, above stated, I have little doubt. The object of the statute was to give notice of the copyright to the public; to prevent a person from being punished who ignorantly and innocently reproduces the photograph without knowledge of the protecting copyright. It would be too narrow a construction to say that the plaintiff, when he placed "N. Sarony" upon the card, did not comply with the terms of the statute requiring "the name of the party" to be placed there. If the letter of the law is not violated,

[1] See *post*, p. 603.

and its object accomplished, it is enough. The strict technical rules of pleading in the criminal courts furnish but slight analogy for the guidance of the court in determining what interpretation shall be given to the statute.

The English courts, construing an act very similar in terms, have frequently upheld notices of copyright obnoxious to all of the defendant's criticisms. Although innumerable notices have in this country been worded in the precise form adopted by the plaintiff, and many of these copyrights and notices have been the subject of judicial investigation, the precise question here presented, though it might have been raised, has not apparently been decided. No American authority directly in point has been cited by counsel or found by the court.

It follows that the plaintiff is entitled to judgment, pursuant to the terms of the stipulation.

LITERARY PROPERTY AT COMMON LAW. At the common law an author had the sole right of first printing and publishing for sale his writings;[1] yet, after such publication made by him, it has been doubted whether he possessed any property rights in the production which could be infringed by republication by a stranger. Such, at any rate, seems to have been the opinion of the supreme court of the United States,[2] although the house of lords, by a vote of seven to four, laid down the proposition that the author and his assigns had the sole right of printing and publishing in perpetuity by the common law.[3] But copyright protection was secured in England by 8 Anne, *c.* 19, and in this country in 1790, when congress passed the first of our copyright acts. And it is now agreed, both in England and in this country, that copyright exists only by statute;[4] that an author has no exclusive property in his published works, except when he has secured and protected it by compliance with the copyright laws of the United States.[5] "When a person enters the field of authorship he can secure to himself the exclusive right to his writings by a copyright under the laws of the United States. If he publishes anything of which he is the author or compiler, either under his own proper name or an assumed name, without protecting it by copyright, it becomes public property, and any person who chooses to do so has the right to republish it, and to state the name of the author in such form in the book, either upon the title-page or otherwise, as to show who was the writer or author thereof."[6]

WHO ARE PROTECTED BY COPYRIGHT. The proprietor or owner of a work has not, in that character alone, any right of copyright. It is only to authors and inventors, or to persons representing the author or inventor, that congress has any authority to grant a copyright. And when a person comes into court, asking for the protection of a copyright, it is necessary for him to show that he is the author or inventor of the work, or that he has an exclusive right, lawfully derived from the author or inventor.[7] To constitute one an author,

[1] Millar v. Taylor, 4 Burr. 2303, (1769;) French v. Maguire, 55 How. Pr. 471; Boucicault v. Fox, 5 Blatchf. 88, 97.

[2] See Wheaton v. Peters, 8 Pet. 591, 657.

[3] Donaldson v. Becket, 4 Burr. 2408.

[4] Jeffreys v. Boosey, 4 H. L. 838; Reade v. Conquest, 9 C. B. (N. S.) 768; Wheaton v. Peters, 8 Pet. 591; Parton v. Prang, 3 Cliff. 537; Rees v Peltzer, 75 Ill. 475, 478.

[5] Clayton v. Stone, 2 Paine, 382; Bartlett v. Crittenden, 5 McLean, 32; Pulte v. Derby, Id. 328; Stowe v. Thomas, 2 Wall. Jr. 547.

[6] Clemens v. Belford, 14 Fed. Rep. 728, 730.

[7] Greene v. Bishop, 1 Cliff. 186, 195; Little v. Gould, 2 Blatchf. 181.

he must, by his own intellectual labor applied to the materials of his composition, produce an arrangement or compilation new in itself.[1]

DIFFERENCE BETWEEN COPYRIGHT AND LETTERS PATENT. In *Baker* v. *Selden*,[2] decided in the United States supreme court in 1879, Mr. Justice BRADLEY stated and illustrated the difference between a copyright and letters patent. The complainant had copyrighted a book explaining a particular system of book-keeping, to which book were annexed certain forms or blanks, consisting of ruled lines and headings illustrating the system, and showing how it was to be used and carried out in practice. It was claimed that the copyright protected the system, because no one could use the system without using substantially the same ruled lines and headings which he had appended to his book in illustration of it. The court held otherwise, and that there was a clear distinction between the book as such and the art which it was intended to illustrate. The copyright protected the book, but the protection of the art was within the province of letters patent. "To give to the author of the book an exclusive property in the art described therein, when no examination of its novelty has ever been officially made, would be a surprise and a fraud upon the public."

NOM DE PLUME AS A TRADE-NAME OR TRADE-MARK. In *Clemens* v. *Belford*,[3] better known, perhaps, as the "Mark Twain" case, the novel idea was advanced that an author who had not copyrighted his work had an exclusive right to his literary property under the law applicable to trade-marks, upon the theory that the assumed name under which he had written was a trade-name or trade-mark. This ingenious idea was very seriously urged upon the attention of the court, but all to no purpose; and it was laid down that the invention of a *nom de plume* gave a writer no increase of right over another who used his own name; that an author could not, by the adoption of a *nom de plume*, be allowed to defeat the well-settled rules of the common law, that the publication of a literary work, without copyright, was a dedication to the public, after which any one might republish it. "No pseudonym, however ingenious, novel, or quaint, can give an author any more rights than he would have under his own name."

LECTURES. The delivery of a lecture is not such a publication of it as deprives the lecturer of his property rights therein.[4] And it seems there is no right to report phonographically or otherwise a lecture which has been delivered before a public audience, and which the lecturer desires to use again in like manner. In England it was provided by statute that no person, allowed for a certain fee to be present at any lecture delivered at any place, should be deemed to be licensed to publish such lecture on account of having been permitted to attend the lecture, etc.[5]

ABRIDGMENTS. Abridgments are considered to be in the nature of new and meritorious works, and if done in good faith they constitute no violation of copyright.[6] Where books are only colorably shortened the rule would be different.[7]

TRANSLATIONS. For a long time considerable doubt was entertained as to whether the mere act of giving to a literary composition the new dress of another language entitled one to the protection of copyright. But it is now

1 Atwill v. Ferrett, 2 Blatchf. 39, 46; Gray v. Russell, 1 Story, 11.

2 101 U. S. 99

3 14 Fed. Rep. 728.

4 See Crowe v. Aiken, 2 Biss. 208; Keene v. Kimball, 16 Gray, 545, 551; Palmer v. De Witt, 47 N. Y. 532.

5 5 & 6 Wm. IV. c. 65. See Abernethy v. Hutchinson, 3 L. J. Ch. 209.

6 Gyles v. Wilcox, 2 Atk. 141; Dodsley v. Kinnersley, Ambler, 403; Whittingham v. Wooler, 2 Swanst. 428, 430; Tonson v. Walker, 3 Swanst. 672.

7 See Cop. Copyr. 37.

well settled that a translator may copyright his translation.[1] It is no infringement of the copyright to translate a work which the author has already had translated into the same language, although he may have secured a copyright for that translation.[2] In the case first cited in the above note, Mr. Justice GRIER said: "To make a good translation of a work often requires more learning, talent, and judgment than was required to write the original. Many can transfer from one language to another, but few can translate. To call the translations of an author's ideas and conceptions into another language a *copy* of his *book*, would be an abuse of terms, and arbitrary judicial legislation."

MUSICAL COMPOSITIONS. In *Thomas* v. *Lennon*[3] the composer of an oratorio permitted the words and vocal parts of his oratorio, set to an accompaniment for the piano, to be published in a book. This publication contained all the melodies and harmonies of the original oratorio. It had in the margin references to the particular instruments which were to be employed in playing the different parts of the piece, or many of them. Two questions were involved in the case. The first was, whether the publication of the book, with the score for the piano and the marginal notes, gave to every one the right to reproduce or copy the orchestral score if he could. And it was answered in the negative. And the second question was, whether a new orchestration, not copied from the original by memory, report, or otherwise, but made from the book, was an infringement of the plaintiff's rights. In answering this question the court said: "An opera is more like a patented invention than like a common book; he who shall obtain similar results, better or worse, by similar means, though the opportunity is furnished by an unprotected book, should be held to infringe the rights of the composer."[4]

DRAMATIC COMPOSITIONS. The representation upon the stage of an unprinted work is not a publication which deprives the author or his assignee of his property rights therein, and does not interfere with his claim to obtain a copyright therefor.[5] As the mere representation of a play does not of itself dedicate it to the public, it has been held, where a copy of such a play has been unlawfully made by persons witnessing its performance, and who have reproduced it by phonographic report or notes, that its representation from such copy will be restrained by injunction.[6] In 1860 the supreme court of Massachusetts, in *Keene* v. *Kimball*,[7] decided "that the literary proprietor of an unprinted play cannot, after making or sanctioning its representation before an indiscriminate audience, maintain an objection to any such literary or dramatic republication by others, as they may be enabled, either directly or secondarily, to make from its being retained in the *memory* of any of the audience." In 1882 the same question again came up in this same court in *Tompkins* v. *Halleck*.[8] The whole question was elaborately argued, and very carefully considered, being rightly deemed one of great importance. An injunction was asked to restrain the representation of a drama called "The World," which had been reproduced by a person who had attended the representation of the play at Wallack's theatre in New York on several occasions, and on each occasion had committed as much of the play as he could to mem-

[1] Millar v. Taylor, 4 Burr. 2348; Burnet v. Chetwood, 2 Mer. 441; Prince Albert v. Strange, 2 De G. & S. 693; Wyatt v. Barnard, 3 Ves. & B. 77; Emerson v. Davies, 3 Story, 768, 781; Shook v. Rankin, 6 Biss. 480.

[2] Stowe v. Thomas, 2 Wall. Jr. 547. See Murray v. Boque, 17 Jur. 219; 1 Drew. 353.

[3] 14 Fed. Rep. 849.

[4] See, also, to same effect, Boosey v. Fairlie, L. R. 7 Ch. Div. 301; affirmed, 4 App. Cas. 711.

[5] Roberts v. Myers, U. S. C. C. Mass. Dist. 23 Law Rep. 396; Keene v. Kimball, 16 Gray, 545.

[6] Boucicault v. Fox, 5 Blatchf. C. C. 87; Shook v. Daly, 49 How. Pr. 366; Palmer v. De Witt, 2 Sweeney, 530; 7 Rob. 530; 36 How. Pr. 222; and 47 N. Y. 532; French v. Maguire, 55 How. Pr. 471; Shook v. Rankin, 6 Biss. 477; Boucicault v. Wood, 2 Biss. 34; Crowe v. Aiken, Id. 208.

[7] 16 Gray, 545.

[8] 133 Mass. 32.

ory, and had then dictated it to another until the copy was complete. It was not shown that any notes were taken in the theatre. The court overruled *Keene* v. *Kimball*, and granted an injunction restraining the representation of a play, which had not been copyrighted, from a copy obtained by a spectator attending a public representation by the proprietor for money, and afterwards writing it from memory. See, to the same effect, *French* v. *Connelly*.[1] There are to be found *dicta* to the contrary, which need not be here considered. They are believed to be based on *Keene* v. *Kimball*.

REPORTS—JUDICIAL DECISIONS. It is laid down that any person who employs another to prepare a work may, by virtue of the contract of employment, become the owner of the literary property therein.[2] Consequently, the people who employ and pay judges are said to be the rightful owners of the literary property in the opinions written by them, and the United States government might secure to itself copyright in the decisions pronounced in the federal courts, while the several state governments have the same right as to the opinions announced by the judges in the state courts. It is settled that no reporter has or can have any copyright in the written opinions of a court, and that the judges cannot confer on him any such right.[3] All that the reporter can copyright is his own individual work—the head-notes, the statement of the case, analysis or summary of the arguments of counsel, the index, etc.[4]

NEWSPAPERS AND MAGAZINES. In England there is a provision relating to copyright in magazines, reviews, and other periodicals.[5] Newspapers are not expressly mentioned in the act, but it is held that one may have copyright therein.[6] In the United States there is no express provision in the copyright law as to newspapers and magazines, but the opinion is that there is nothing in the law of copyright to prevent valid copyright from vesting in a magazine or a newspaper.[7]

PHOTOGRAPHS. In *Wood* v. *Abbott*,[8] a photograph was held not to be a *print*, *cut*, or *engraving* under section 1 of the act of 1831. But in 1865, congress, acting upon the authority of the constitutional provision set forth in the decision in the particular case, extended copyright protection to photographs by expressly including them among the articles for which copyright was provided. Section 4952, Rev. St.

In England it has been provided by statute that the author, being a British subject or resident within the dominions of the crown, of every original painting, drawing, and photograph, shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing, and the design thereof, or such photograph, and the negative thereof.[9] Paintings, drawings, and photographs were the last of the branches of the fine arts to be recognized as worthy of copyright protection in England. Previous to the adoption of the above provision, an act had been passed giving copyright in sculptures and engravings. And in most European countries copyright protection has been extended through the whole range of the fine arts.[10]

Upon the question raised in the principal case, as to whether a photographer is an author, and a photograph a writing, within the meaning of the constitutional provision vesting power in congress to pass copyright laws, it ap-

1 N. Y. Week. Dig. 196.

2 Drone, Copyr. 162.

3 Wheaton v. Peters, 8 Pet. 668.

4 Wheaton v. Peters, supra; Backus v. Gould, 7 How. 798; Little v. Hall, 18 How. 165; Paige v. Banks, 7 Blatchf. 152; Little v. Gould, 2 Blatchf. 165, 362; Paige v. Banks, 13 Wall. 608; Myers v. Callaghan, 5 Fed. Rep. 726.

5 5 & 6 Vict. c. 45, § 18.

6 Cox v. Land Water Journal Co. L. R. 9 Eq. 324; Platt v. Walter, 17 L. T. (N. S.) 159; Ex parte Foss, 2 De G. & J. 239.

7 Drone, Copyr. 169.

8 5 Blatchf. 325.

9 25 & 26 Vict. c. 68.

10 Cop. Law Copyr. 388.

pears that grave and serious doubts may be entertained. It seems that the court, in the principal case, was not convinced beyond a reasonable doubt that a photograph was not a writing. There was no escape, therefore, from holding the law constitutional.

But, laying aside the constitutional question involved, the question may be raised whether a photograph deserves copyright protection at all. The answer must depend upon whether it constitutes artistic work or not. This question has been the subject of considerable consideration in France, and is fully discussed in Pouillet's *Propriete Litteraire et Artistique.* Through the kindness of *Mr. William Alexandre Heydecker, of Brooklyn, New York,* who has taken considerable interest in copyright litigation, and made an excellent translation of the chapter on Property in Photographs, the FEDERAL REPORTER is enabled to present the substance of that discussion:

"The question as to whether the products of photography constitute artistic works or not, and are protected by the law of 1793, has been much discussed. Several theories have been advanced. It has been maintained, absolutely, that the law of 1793 does not apply to photography. M. Thomas, at the time imperial advocate, speaking of the subject before the tribunal of the Seine, urged this view as follows:

"'The law of 1793 has taken a certain number of arts; it has recognized that, in general, no productions were obtained in their domains without genius, and none ever without a certain labor of the mind; it has provided that these deserve protection; it has specified them, it has enumerated them, and it has protected equally, and I may almost say blindly, all their products. The law of 1793 protects paintings; it protects without distinction all such products, good or bad,—the immortal works of genius, or the ephemeral and grotesque conceptions of the most idle fantasy. The judge has naught to do with the degree of perfection of the product; the counterfeited object is a painting; that is sufficient, and without this the law would be as impracticable as it would be dangerous. If, therefore, photography were protected by the law of 1793, as it could only be for the same reasons as paintings, it would be protected without any distinctions, and without the judge having to determine the artistic value. * * * The law of 1793 does not protect the labor of thought previous to execution; not that kind of invention which is the work in the mind alone, but it protects the mental labor in its material product. The law of 1793 is essentially a practical law; it protects the vendible, the commercial product as it comes from the hands of an intelligent man, who, looking at the practical side of things, asks the law to enable him to live by his labor. But, if the law does not protect the thought without the execution, so in all the arts which it does protect this intervention of intelligence, as the director in the execution, is always to be found. It is never a purely material labor; it is always the intelligence of man expressing what his intelligence has conceived, guiding his brush or his graver, and contending with them against material difficulties. If photography, as a work of intelligence and of mind, is to be protected, it is, then, not only in the search for the subject that the intervention of intelligence and of mind ought to be found; especially will it be necessary that, in the execution, should also be found this intelligence of man acting upon the instrument. Is that what takes place? All of the intellectual and artistic work of the photograper is anterior to the material execution; his mind or his genius have nothing to do with this execution; up to the point where the photographer can be compared to the painter, by the creation of his work in his imagination, the law does not yet afford protection; and when the idea is about to take shape as a production,—when the protection of the law is about to extend to this production,—no comparison is possible. On the one hand, the painter continues his work; his intelligence directs his hand; he corrects his first thought, he modifies it, he perfects it,

and up to the last moment he impresses on it the stamp of his own personality. On the other hand, the photographer erects his apparatus, he thenceforth remains a complete stranger to what is taking place; light does its work: a splendid but independent agent has accomplished all. The man may disappear at the beginning of the operation; it will, nevertheless, be performed without the assistance of his intelligence or his mind; his personality will be lacking to the product at the only time in which, according to the spirit of the law, this personality could afford him any protection. Therefore, from the legal point of view, photographs are not products of the intelligence and the mind, susceptible of being protected by the law of 1793.'

"Thus it has been adjudged (1) that the products obtained by the help of photography do not present the essential characteristics of works of art; though they require a certain degree of skill in the use of the apparatus, and show at times the taste of the operator in the choice and arrangement of the subject or in the pose of the model, they are yet but the result of mechanical process and of chemical combinations which reproduce mechanically the material objects, without the artist's talent being necessary to obtain them. Trib. Civ. Seine, 12 Dec. 1863, aff. Disderi Pataille, 63, 396. (2) That even though it be necessary, in order to obtain fine photographic proofs, to have gone through a certain course of study on these subjects, and even though the talent of the operator may contribute much to the success of the portraits or views which are desired, it is none the less certain that these products or views are mechanically made, by the action of light upon certain chemicals, and, in this operation, genius can have no effect on the result to be obtained; whence the consequence that photographic productions cannot be brought under the category of works of art protected by the law of 1793. Trib. Corr. Seine, 16 Mars, 1864, aff. Masson, Pataille, 64, 227.

"*Second Theory.* It is maintained, in opposition to the first, and in as absolute a manner, that the products of photography constitute productions of the mind in the sense of the law, and should be, for this reason, protected by it. 'Article 1 of the law of 1793,' argued M. l'avocat imperial Bachelier, in another case, 'contains an enumeration, but article 7 contains the real spirit of the law; what it protects is the work, and the work alone. A photograph is a design, for it is a reproduction of nature by a play of light and shade. It is argued that photography cannot be protected by a law which antedates it by nearly 60 years. That does not appear conclusive. What the law protects is the picture—the work; and the result of photography is a picture, no matter what the process. Drawings obtained by means of the diagraph and pantograph have been considered works of art, and no one ever thought of maintaining that the process took from the drawing its artistic character, because, in fact, it is only the result that is important. It cannot be denied that photographic productions are often admirable pictures, though mechanical means are used. The art is in the exercise of the will in the choice of the subject; of the hour at which to obtain certain effects of light; all that is the creation of the man who reproduces nature, and never will it be true to say that there is mechanical action only.'

"M. A. Rendu, the eminent advocate of the Cour de Cassation, while defending before the Cour Supreme a decree of the Cour de Paris, expressed himself thus: 'Artistic property is governed by the law of 1793, and by the articles 425 and 427 of the Penal Code. Without doubt these laws could not provide specifically for all advances in the domain of art; art, like its object, is infinite; but, nevertheless, they are not confined to what is already known, because they provide for "every production of the mind and of genius which belongs to the fine arts," and they insure beforehand, to the author of any work, the exclusive right of reproducing it. The Cour Supreme has given to these laws the widest range. It has, by numerous decrees, prescribed a

distinction dear, without doubt, to certain artists of the first rank, true from a purely speculative stand-point, but inexact in the reality of things, and inadmissible from a legal point of view: the distinction between the arts truly so-called and the industrial arts. In our present condition of civilization it must have been recognized that every work offering by its form and figure an impress of the personality of its author,—that every work worthy of being called a production of the human mind,—is legally a work of art, whether it be reserved for the admiration of people of taste, or destined to strengthen or embellish some industry. A blessed and fruitful alliance has, in our day, been consummated between art and industry. The latter is not only to satisfy material necessities, but the sentiment of the beautiful, and in order to do this it must address itself to art. Thus it is not art which is lowered, but industry which is raised and ennobled. * * * The human intelligence, even in the domain of art, can produce nothing without material assistance; though man's help be a tool, a machine, another's hand, he does not the less produce a work of art, if he continues to exercise the faculties which are concerned in that art: sentiment, mind, taste. When the sculptor makes use of the precision compass, when the draughtsman employs the reducing mirror or the *chambre claire*, it is always the thought of the artist which directs the instrument,—which guides and inspires the material means. Thought retains its supreme role. In photography, the apparatus takes the place, though not entirely, of hand labor,—the material part of the labor,—but it leaves to the artist, to its fullest extent, the labor of the mind.'

"Thus it has been adjudged, in this sense, that photographic images are pictures. Whatever may be their æsthetic value,—however great may have been the part played by the agents pressed into his service by the operator,—it is certain that there yet remains to him an important part: he determines the aspect under which the subject of the picture is to be presented to the luminous ray; he disposes the lines, and gives evidence, in a certain measure, of taste, of discernment, of skill. The work which, without the exercise of these various faculties, would not be brought forth, may thus be justly called a work of the mind, and protected on this ground by the law of 1793. Paris, 12 Juin, 1863, aff. Meyer et Pierson, Pataille, 63, 225.

"*Intermediate Theory.* Between these two theories there is an intermediate one. The propositions enunciated are not contested. It is recognized that, in photography, the apparatus takes a prominent place; but, at the same time, it is not denied that in certain cases the work of the photographer reaches a perfection, a degree of finish, which makes of it a veritable picture. This view leaves, therefore, to the tribunals the matter of deciding, according to circumstances, whether the photographic reproduction is or is not a work of art. This theory is founded upon the following decisions: (1) That photographic pictures should not be necessarily and in every case considered destitute of all artistic character, nor ranked among the purely material works; in fact, these pictures, though obtained by the help of a camera and under the influence of light, may be, within limits and to a certain degree, the product of the thought, of the mind, of the taste, and of the intelligence of the operator; their perfection, independently of the manual skill, depends largely in the reproduction of landscapes, upon the choice of the point of view, upon the combination of effects of light and shade, and, besides, in portraits, upon the pose of the subject, upon the arrangement of the costume and accessories.—all of them matters concerning the artistic sentiment, which give to the work of the photographer the stamp of his personality. Paris, 10 Avr. 1862, aff. Meyer et Pierson, Pataille, 62, 113. (2) That the law, not having defined the characteristics which constitute, in an artistic product, a creation of the mind or of genius, it appertains to the judges of the fact to declare whether the product

submitted to their investigation is, by its nature, one of those works of art which the law of 1793 protects; in particular, the decision by which the judges of the fact decide that a photographic portrait is a production of the mind coming under the terms of the law, is not under the control of the Cour de Cassation. Rej. 28 Nov. 1862, aff. Meyer et Pierson, Pataille, 62, 419. (3) That if, in general, the reproduction of a picture or of a portrait by photographic process may not constitute a work of art in the spirit of the law, it is otherwise when there is joined to the ordinary labor of the photographer that of the designer, or any other artistic combination; in particular, the fact of a photographic negative having been touched up by a draughtsman and having undergone important modifications, gives to it, unquestionably, the character of a work of art. Paris, 29 Avr. 1864, aff. Duroni et Muller, Pataille, 64, 235. (4) That if the photographic products are not necessarily works which should be classed in the category of fine arts, they can be considered as such, and be protected by the law of 1793, when they are invested with the characteristics exacted by that law; particularly, in a portrait, the pose, the arrangement of the clothing, and the accessories, may give to the work the imprint of the personality of the photographer, and place him under the protection of the law. Paris, 6 Mai, 1864, aff. Masson, Pataille, 64, 232.

"*Our Opinion.* Of these three theories we do not hesitate, so far as we are concerned, to adopt the second; but the last, especially, seems to us altogether inadmissible. It may be argued that the work of the photographer is or is not protected by the law, and, without agreeing with those who maintain the negative, we, at least, understand their view. As to the intermediate opinion, it is evidently contrary to the letter as well as to the spirit of the law. It cannot, indeed, have come into the mind of the legislator to transform our tribunals into academies, and to confide to our judges the duty of deciding that this is art and that that is not. Are such powers granted to our judges in the matters of drawing, of painting, and of sculpture; that is, in those departments which are certainly regulated by the law of 1793? Can they say of one painting that it is a work of art, and of another that it has in it nothing artistic? Can they grant protection to the one and refuse it to the other? No; the law is wiser; good or bad, whether it conform or not to the laws of æsthetics, every painting, drawing, and piece of sculpture is a work of art. Thus it was rightly said by M. l'avocat imperial Thomas, in the conclusions which we gave above, that it is impossible to avoid this alternative; either refuse the title of artistic works to all photographs, or grant it to all; outside of that there is only room for arbitrariness, and, consequently, for danger, as well for the judge as for the litigant.

"Let us now come to the reasons which, in our estimation, justify the second theory. The law of 1793 is a general law; we think we have shown that: it protects, as we have seen, every production of the mind, provided it be connected with the fine arts; and we have admitted, in common with all authors, that a casting, even of a natural object, comes under the provisions of the law. How, after that, could we exclude photography? What impresses the adversaries of our theory is that, in photography, the apparatus plays so important a role,—even the preponderant role. What does that show? If the painter, after having conceived his picture, should find the means of reproducing it on the canvas with one stroke, just as he conceived it, would it be denied that his work was a production of the mind? What matters the greater or less rapidity and ease of the execution? Is it not the conception, however expressed, which constitutes the artistic work? The photographer conceives his work; he arranges the accessories and play of light; he arranges the distance of his instrument according as he wants, in the reproduction, either distinctness or size; thus, also, he obtains this or that effect of perspect-

ive. After that, what matters the rapidity, the perfection, the fidelity of the instrument with which he executes what he has conceived, arranged, created? We have said many times already that the author's right was derived from the creation which gives to the work its character of individuality. Is this individuality lacking here? Is it not certain that two photographers, reproducing, each for himself, the same scene or the same model, will obtain two pictures capable of being distinguished? There is, therefore, a creation in the juridical sense of the word. The argument which we have used in an analogous question may be used here: Suppose the discovery of the photograph to have remained secret; its inventor presents the copies obtained by its process, without disclosing the mystery; he allows it to be believed that this copy is obtained by some improvement in the ordinary process of printing and engraving. Would any one think of denying his right? Would not this copy be put in the same category as other copies, and would the protection of the law be unhesitatingly granted to it? Why change opinions because the process of photography is known? Has its work not remained the same? Has it lost anything of its personal character?

"It is almost useless to add—so evident is it—that our theory has the advantage of respecting the rights of each person; for if the photographer has the property in his proof, his property does not go beyond that, and everybody is none the less free to reproduce the same subject. Why not leave to him the property in the work which he has conceived and executed? Why encourage the piracy of his rivals? What good does society derive?"

DESCRIPTIVE ADVERTISEMENTS. It was adjudged in England in 1872 that there could be no copyright in a descriptive advertisement, illustrated or otherwise, of articles which any one might sell.[1] In that case an upholsterer had published an illustrated furnishing guide, with engravings of the articles of furniture which he sold, and descriptive remarks thereon. A bill was filed to restrain another upholsterer from publishing, for the purpose of his own trade, a similar work, in which many of the said engravings were alleged to be copied. And it was held that he could not be restrained from copying illustrations which were merely descriptive of his stock, or of common articles of furniture. Lord ROMILLY, M. R., declared: "At the last it always comes round to this: that, in fact, there is no copyright in an advertisement. If you copy the advertisement of another, you do him no wrong, unless in so doing you lead the public to believe that you sell the articles of the person whose advertisement you copy." In a case decided two years afterwards,[2] it appeared that a cemetery stone-mason employed and remunerated a person to collect monumental designs, and published a book containing sketches of such designs, with scarcely any letterpress. It was held that a tradesman who employed another, for renumeration, to compile a book of designs for him, was himself entitled to copyright in the book, and that a book in the nature of an advertising catalogue might be the subject of copyright. The distinction between the two cases seems to be that in the latter case the subject-matter was a book, which had a value as a book of reference, while in the former case it was a simple catalogue of articles offered for sale.

In this country it was held[3] that an advertising card, devised for the purpose of displaying paints of various colors, "consisting of a sheet of paper having attached thereto square bits of paper painted in various colors, each square having a different color, with some lithographic work surrounding the squares advertising the sale of the colors," was not the subject of copy-

[1] Cobbett v. Woodward, L. R. 14 Eq. 407.
[2] Grace v. Newman, L. R. 19 Eq. 623.
[3] Ehret v. Pierce, 10 Fed. Rep. 653; S. C. 18 Blatchf. 302.

right. "True, it has lithographic work upon it," said BENEDICT, J., "and also words and sentences; but it has none of the characteristics of a work of art, or of a literary production. It is an advertisement, and nothing more. Aside from its functions as an advertisement of the Morris paints, it has no value."

In a subsequent case it was decided, in the circuit court for the southern district of New York, that a chromo, which was a meritorious work of art, might be copyrighted, though designed and used for gratuitous distribution as an advertisement for the purpose of attracting business.[1] It was designed, said the court, as a symbolic glorification of lager-beer drinking. In the center was a conspicuous figure of King Gambrinus, his left arm resting upon a keg of lager, the right holding up a foaming glass of beer. On either side of him were a dozen figures of persons representing various classes in life, into whose eager hands his page was distributing the beer. "This chromo, by its subject, its brilliant coloring, its excellent finish, and the artistic grouping of its figures, forms a striking picture, suitable for hanging in saloons, and well calculated to draw attention to the plaintiff, whose name is printed in large type beneath the figures as a person engaged in the lager-beer business, and constituting, therefore, a valuable mode of advertising." The distinction between this case and that of *Ehret* v. *Pierce*, *supra*, and *Cobbett* v. *Woodward*, *supra*, lies in the fact that it was not a mere print or engraving of an article offered for sale. It was in itself a work of the imagination, possessing artistic qualities. And the court laid down the proposition that when the work in question was clearly one of artistic merit, it was not material whether the person claiming the copyright expected to obtain his reward directly through a sale of the copies, or indirectly through an increase of profits in his business, to be obtained through their gratuitous distribution.

PRINTS. In *Rosenbach* v. *Dreyfuss*,[2] the question was whether "prints of small balloons, with printing for embroidery and cutting lines," and "prints of hanging baskets, with printing for embroidery and cutting lines," were subject to copyright. The form of the different parts of the balloon was marked out with lines showing how the paper was to be cut to make the different parts fit together, so as to construct of them a balloon, and with marks showing how and where they might be embroidered. It was held not subject to copyright as being a "print," within the meaning of the statute. "It (the word 'print') means, apparently, a picture; something complete in itself, similar in kind to an engraving, cut, or photograph. It clearly does not mean something printed on paper, that is not intended for use as a picture, but is itself to be cut up and embroidered, and thus made into an entirely different article, as a balloon or hanging basket." It was also held that they did not come within the clause, "models or designs intended to be perfected as works of the fine arts."

PROTECTION LIMITED TO NATIVE ART. The claim has been recently advanced that the act of 1870 (Rev. St. § 4952) authorizes a citizen or resident of this country, if he be "proprietor" of any book, map, print, etc., to obtain a copyright therefor, although the author, inventor, or designer was an alien. The literal reading of the section of the act does not require that both the "author" and the "proprietor" shall be citizens or residents of the United States. Owing to the peculiar phraseology of the statute, it was claimed that as to "paintings, drawings, chromos, statues, statuary, and models," a "proprietor" might obtain a copyright, though the artist or author was an alien. But the court held that such a holding would involve a reversal of the policy of the government from its foundation, to protect American artists and

[1] Yuengling v. Schile, 12 Fed. Rep. 97. [2] 32 Fed. Rep. 217.

authors only; and that the word "proprietor," as used in the copyright laws, meant the representative of an artist or author who might himself obtain a copyright.[1]

HENRY WADE ROGERS.

[1] Yuengling v. Schile, 12 Fed. Rep. 97.

SCHREIBER and others, who sue as well for the United States as for themselves, v. THORNTON.[2]

(*District Court, E. D. Pennsylvania.* April 24, 1883.)

1. COPYRIGHT—COPYING AND PUBLISHING COPYRIGHTED PHOTOGRAPH—CONSTITUTIONALITY OF REV. ST. §§ 4952 AND 4965—POWER OF CONGRESS TO SECURE COPYRIGHT TO PROPRIETOR OF A PHOTOGRAPH.
   The act of congress (Rev. St. §§ 4952 and 4965) securing a copyright to the proprietor of a photograph, and imposing a penalty for the infringement of such copyright, is constitutional.
2. QUI TAM ACTION—PENALTY FOR THE INFRINGEMENT OF COPYRIGHT TO THE PROPRIETORS OF A PHOTOGRAPH.
   In an action by several persons, being the proprietors of a duly copyrighted photograph, to recover, as well for the United States as for themselves, the penalty for infringement provided by section 4965, it appeared that the defendant had caused lithographic copies of the photograph to be made, of which 14,800 were found in his possession or control. *Held*, that the defendant was liable to a penalty of one dollar for each copy so found in his possession or control.

Motion for a New Trial.

This was a *qui tam* action, pursuant to section 4965, Rev. St., brought by Francis Schreiber and others, suing as well for the United States as for themselves, against Edward B. Thornton, to recover a statutory penalty for the copying, printing, publishing, selling, and exposing to sale by the defendant of a photograph, copyrighted by plaintiffs. The defendant pleaded "not guilty." The facts appearing upon the trial were similar to those disclosed by the evidence in a former trial for the same matter, and fully reported in *Schreiber* v. *Sharpless*, 6 FED. REP. 175. The plaintiffs, being photographers, had made and copyrighted, as proprietors, a certain photograph, the title thereof being "The Mother Elephant 'Hebe' and her baby 'Americus,' the first known to have been born in captivity in the world. *Born* at Philadelphia, United States, March 10, 1880. The property of Cooper and Bailey." Notice of the copyright was printed on each copy of the photograph. The defendant had charge of the dry goods department of the business house of Sharpless & Sons, dealing in general merchandise, and desired a new label for certain goods. He purchased one of plaintiff's photographs, took it to a lithographer, and caused a lithographic copy thereof to be made, and 15,200 copies

[2] Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.

thereof to be printed for labels. Four hundred of these were distributed as labels on cambrics, and as circulars, and 14,800 of them were subsequently found in the store in defendant's department, and in his possession or under his control. The court instructed the jury that under these circumstances the defendant was liable to a penalty of one dollar for every sheet of such copy found in his possession or under his control. The verdict was against the defendant for $14,800, and 6 cents costs. Whereupon the defendant moved for a new trial. McKENNAN, J., was present at the argument of the rule.

H. P. Brown, Ass't Dist. Atty., and *John K. Valentine*, Dist. Atty., for the United States.

A. Sydney Biddle, for plaintiffs.

E. Hunn, Jr., for defendant.

The act of congress (section 4952) securing a copyright to the proprietor of a photograph, and in this case to a firm composed of several persons, and (section 4965) imposing a penalty for infringement, is unconstitutional, since by article 1, § 8, cl. 8, of the constitution, power is conferred upon congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries," and a mere proprietor is neither an author nor inventor, and a photograph of a natural object, as an elephant, is not a subject for such protection, within the meaning of the constitution.

BUTLER, J. The denial of constitutional warrant for the statute authorizing the plaintiff's copyright, raises an important question. To justify this court in declaring the statute invalid, however, the fact should be reasonably free from doubt. Under the circumstances, I think the question should be left to the court of review.

The other points made are not sustained, and judgment must therefore be entered on the verdict.

Rule discharged.

Vide Sarony v. *Burrow-Giles Lithographic Co.*, *ante*, 591, [S. C. Daily Register, vol. 23, No. 132,] wherein COXE, J., sustains the constitutionality of the same act in an action for the infringement of a copyrighted photograph of Oscar Wilde.—[REP.

AMERICAN BELL TELEPHONE CO. *v.* DOLBEAR and others.

(*Circuit Court, D. Massachusetts.* August 25, 1883.)

PATENTS FOR INVENTIONS—BELL TELEPHONE.

The Bell telephone is not anticipated by the Reis instrument, and is infringed by the Dolbear apparatus, in which a part of Bell's process is employed.

American Bell Telephone Co. v. *Dolbear*, 15 FED. REP. 448, affirmed.

In Equity.

Chauncey Smith and *J. J. Storrow*, for complainant.

Causten Browne and *J. E. Maynadier*, for defendants.

LOWELL, J. The final hearing in this case was hardly more than a form, because the two questions which are raised by the record have been decided in favor of the plaintiff on motions for preliminary injunction, which were prepared and argued with unusual thoroughness. These questions are: "Whether the telephone described by Reis anticipates the Bell telephone?" and, "Whether Dolbear's apparatus infringes Bell's patent?"

1. I decided in *American Bell Telephone Co.* v. *Spencer*, 8 FED. REP. 509, that Reis had not described a telephone which anticipated Bell's invention. The same point has since been decided in the same way in England. *United Telephone Co.* v. *Harrison*, 21 Ch. Div. 720. It is admitted in the present case that the Reis instrument, if used as he intended to use it, can never serve as a speaking telephone, because the current of electricity is constantly broken; and it is essential for the transmission of speech that the current should not be broken. The defendant now testifies that the Reis instrument can be made to transmit speech, under some circumstances, if operated in the way which Bell has shown to be necessary. In 1877 he several times expressed the opinion that Bell made the invention and that Reis did not make it. The experiment made in the presence of counsel, which was intended to prove the correctness of the defendants' present opinion, was an utter failure. But if it be admitted that the Reis instrument is capable of such use to a very limited extent and after a change in its proportions, and when used in a way which the inventor did not intend, still I am of opinion that it was not an anticipation of Bell. The case of *Clough* v. *Barker*, 106 U. S. 166, [S. C. 1 Sup. Ct. Rep. 188,] would apply to such a state of facts. That case, undoubtedly, is an exceptional one, and its doctrine must be applied with much reserve; but when so applied it will occasionally be useful. It is, that if a certain machine or organization is capable of a certain use only under unusual and, as I may say, abnormal conditions, so that a person of skill and knowledge in the art to which it relates, or a person using the machine, would not, unless by accident, discover that it was capable of such mode of operation, it shall not be considered an anticipation of a machine or organization which is founded upon such mode of operation.

2. At the former hearing in this case before Mr. Justice GRAY and me, we decided that the defendant, whatever the merits of his telephone may be, employs in it a part, at least, of Bell's process. No additional evidence has been given at the final hearing, unless a further explanation of that already given may be called additional; and I remain of the opinion expressed by the presiding justice at that time. *American Bell Telephone Co.* v. *Dolbear*, 15 FED. REP. 448.

Decree for the complainant.

The Hercules.

Philadelphia & Reading R. Co. *v.* Warren Foundry & Machine Co.

Same *v.* Perkins and others.

(*Circuit Court, D. Massachusetts.* August 14, 1883.)

Collision—Steamer—Schooner—Torch—Damages Divided.

The evidence in this case *held* to sustain the judgment of the district court as to the fault of the steamer in not avoiding the schooner with which she collided, but that the failure of the schooner to exhibit a torch, as required by Rev. St. § 4234, "on the approach of a steam-vessel during the night-time," rendered her also in fault, and that the damages should be divided between the two vessels.

In Admiralty.

Morse & Stone, for claimants.

John C. Dodge & Sons, for Warren Foundry & Machine Company.

John Lathrop and *John C. Dodge*, for Perkins and others.

Lowell, J. I agree with the district court that the steamer's people have not sustained the burden which rests upon them of proving a change of course on the part of the schooner. It is not easy to understand how they could have mistaken a green light for a red one; but it is still more difficult to believe in so sudden and complete a change by the schooner as would account for the collision. The "stereotyped excuse," as it has come to be called, from an energetic remark of Grier, J., in *Haney* v. *Baltimore Steam Packet Co.* 23 How. 291, "always improbable, and generally false," that the sailing vessel changed her course, always seems probable to the persons on board the steam-ship; for, assuming as they do, that they have made no mistake in courses and distances, the necessary inference is that the other vessel has failed in the simple duty of keeping her course. My own observation has taught me that a great many of these accidents happen from a failure to see the approaching vessel, which may be due to a defect in her lights, or to a want of vigilance. In this case, there is no complaint of the side lights, and the vessels were approaching each other at the rate of about a mile in four minutes; and, if the schooner's lights had been seen from the first moment that they were visible, the time would have been short; and one possible explanation of the mistake is that the ships were so near each other when the light was seen that there was hurry and excitement on board the steamer. It is not necessary, however, to decide more than that the night was clear, the schooner had the side lights, and should have been avoided by the steamer.

Upon the other part of the case, I fail to agree with the district judge. The schooner showed no torch, as the statute orders every sailing vessel to do "on the approach of a steam-vessel during the night-time." Rev. St. § 4234. Our sailing rules have not the strict

and arbitrary character which the highest court in England attributes to the act of parliament, making a departure from any rule conclusive evidence of fault, though no damage has resulted from it. *Stoomvaart Maatschappy Nederland* v. *Peninsular & Oriental Steam Nav. Co.* 5 App. Cas. 876. We admit the usual exception of the admiralty law, that a fault which has had no ill consequence is immaterial. *The Leopard*, 2 Low. 238; *The John H. Starin*, 2 FED. REP. 100; *The C. Whiting*, 3 FED. REP. 870; *The Oder*, 8 FED. REP. 172. Still great caution must be used in applying this exception.

Congress has refused to relieve steam-ships of the burden of avoiding sailing-ships, however difficult it may be for large steamers to be handled readily, and however easy for some light sailing craft; but they have imposed upon the latter the duty of giving notice of their presence by certain definite means. We are bound, therefore, to believe that the exhibition of a torch is useful under ordinary circumstances. Experts may, perhaps, be found to testify that a moderate speed is harmful, a fog-horn useless, and a torch actually misleading; but the statute must be obeyed. Accordingly, it is held in recent cases that a sailing vessel neglecting this precaution must satisfy the court, beyond a reasonable doubt, that no injury can have resulted from the omission. See *The Eleanora*, 17 Blatchf. 88, in which the chief justice says (p. 102,) "Nothing short of an absolute certainty that it would do no good, to be established by proof on the trial, will justify an omission to obey the rule;" and *The Sarmatian*, 2 FED. REP. 911; *The Narragansett*, 3 FED. REP. 251; S. C. 11 FED. REP. 918; *The Samuel H. Crawford*, 6 FED. REP. 906; *The Alabama*, 10 FED. REP. 394; *The Roman*, 12 FED. REP. 219; S. C. 14 FED. REP. 61; *The Pennsylvania*, 12 FED. REP. 914; *The Johns Hopkins*, 13 FED. REP. 185.

Whether all the earlier cases were rightly decided on their facts, is of no great consequence at present. The principle is clear, and must be adhered to. In this case, by holding the witnesses of the steamer to the exact accuracy of their statements, we might say that they had seen the schooner's light so early that a torch would not have added anything to their knowledge; but there is always a strong temptation for the steamer's witnesses to exaggerate the distance at which the sailing vessel was seen, in order to show their vigilance; and it would not be just to hold them responsible for neglecting or failing to see the schooner, and at the same time to hold that they did see it so soon that a torch would not have enlightened them.

In this case there is no evidence upon either side on this point, except that no torch was shown. It does not appear whether there was a torch on board the schooner. One rather significant circumstance is that the mate, who was the lookout, saw the danger in time to blow a fog-horn; why he did not then, or a little sooner, show a torch, he has not explained. I must therefore vary the decree so far as to divide the damages, and it is so ordered.

THE BLENHEIM.

BALL *v.* WINSLOW. (Two Cases.)

(Circuit Court, D. Massachusetts. August 20, 1883.)

1. COLLISION—EVIDENCE—FAULT.
   The evidence in this case, upon examination, appears to sustain the judgment of the district court, and it is accordingly affirmed.
   The Blenheim, 14 FED. REP. 797, affirmed.
2. SAME—VALUATION OF VESSEL—TORT—TIME AND PLACE.
   The maxim that damages for a tort are to be assessed as of the time and place at which the tort is committed, must be taken with a good deal of allowance, so far as the place is concerned. If a foreign ship is destroyed in American waters, and if in such a place her market value is low by reason of our navigation laws, the measure of damages for her loss would be her value in the home port.

In Admiralty.

Frank Goodwin, for Ball.

Almon A. Strout, for Winslow.

LOWELL, J. The causes of this collision are obscured by the usual conflict of testimony; but, after a careful study of the record, I concur in the conclusions of the district judge in *The Blenheim*, 14 FED. REP. 797, that the brigantine is not proved to have contributed to the disaster by a change of course. That her people tried to deaden her way, is proved; but, if that is all, no possible injury can have resulted from their action. I find the preponderance of the evidence to be that whatever they did was done in the last extremity, and was not the cause, in whole or in part, of the collision.

The objection taken to the assessor's report, ably argued as a point of law, is rather one of fact. The valuation of $12,000 for the ship was adopted from the evidence of two persons who were well acquainted with her, one of whom had an interest in the result, and the other not. The experts called on behalf of the claimants, who estimated the ship at about $1,500 less, candidly admitted that they should prefer the opinion of persons who had actual knowledge.

The point that the market value at Demarara should be the measure of damages, because the collision happened within a few miles of a port in that country, is not in the case, because there is no evidence from either side of such value. I will say, however, that the maxim that damages for a tort are to be assessed as of the time and place at which the tort is committed, must be taken with a good deal of allowance, so far as the place is concerned. If a foreign ship is destroyed in American waters, and if in such a place her market value is low by reason of our navigation laws, the measure of damages for her loss would be her value in the home market. However, that point is merely a moot one in this case. The witnesses on both sides have adopted the home market in making their estimates, and the assessor has decided fairly and justly upon the weight of the evidence. Decrees affirmed.

FILER and others *v.* LEVY.[1]

(Circuit Court, W. D. Louisiana. 1883.)

1. JURISDICTION—CITIZENSHIP—MOTION TO REMAND.
   The question, whether or not this cause is a suit in which there exists a controversy between citizens of different states, is not an issue which can be raised and judicially determined on the trial of a motion to remand the case to the state court.
2. SAME—PLEA—EQUITY RULE 31.
   When the pleadings show jurisdiction, as in the instant case, the question of citizenship can only be brought to the attention of the court by a plea duly filed and sworn to according to rule 31, Rules of Practice in Equity. *Hoyt* v. *Wright*, 4 FED. REP. 168; 12 Blatchf. 320; 6 Blatchf. 130.
3. SAME—SUIT BY EXECUTOR, LEGATEE, AND PARTNER.
   A suit originally instituted in the state court by an executor, legatee, who also sues as the agent of other legatees, non-residents, claiming a sum of money from a liquidating partner as due to the succession of his deceased partner, is not an action merely incidental to the settlement of the succession of the deceased partner; is not an action which is supplemental to nor auxiliary of any pending proceeding in such succession, nor in any sense an ancillary suit; but is a separate, distinct, and independent suit, purely within the provisions of the federal judiciary act of 1875, and is properly removed to this court on the application of either party litigant.
4. SAME—SUBJECT-MATTER OF SUIT—ACT OF 1875.
   The judiciary act of 1875 does not declare what particular subject-matter shall or shall not enter into the controversy sought to be removed; hence it is not within the province of the state or federal courts to say that a suit in equity, where there is a controversy between parties of different citizenship, cannot be removed because of its peculiar subject-matter.
5. SAME—BONDING IN PROBATE COURT.
   The fact that the liquidating partner gave bond in the probate court of the state, or that he is an officer of such court, might affect this court's jurisdiction *ratione materiæ* to entertain the suit originally, but these facts are of no consequence in considering the motion to remand.
6. SAME—REMOVAL OF PROBATE PROCEEDINGS.
   This court has jurisdiction of *suits* in what are called probate proceedings, when properly removed to it from the state court.
   Suits and *proceedings in rem* defined.

On Motion to Remand.

Alexander & Blanchard, for plaintiff.

Land & Land and *R. I. Looney*, for defendant.

BOARMAN, J. Lazarus Bodenheimer, a member of the commercial partnership of Levy & Bodenheimer, died, leaving a large estate in the partnership. In his will he appointed William Filer and Simon Levy executors, and Simon Levy also qualified, as liquidating partner. Levy having administered the partnership for one year,—the time allowed him for closing up the business,—William Filer, as executor, legatee, and as the agent for other legatees, citizens of New York, sued Levy in the state court. They allege that Levy, having made no final account of his administration of the partnership, has

[1] Reported by Talbot Stillman, Esq., of the Monroe, Louisiana, bar.

in his hands, as liquidating partner, a large sum of money belonging to Bodenheimer's succession, and they pray that he be ordered to make a complete account of his said administration and pay over to them whatever sum may be found to be due by him as liquidating partner. Levy, the state court having refused to allow his petition for removal, caused the transcript to be filed in this court. William Filer's counsel moves to remand the case for the following reasons:

"(1) This is not a 'suit at law or in equity,' within the meaning of the acts of congress for the removal of causes; the proceedings sought to be removed not being an independent suit, but simply a sequence, dependency, or supplemental proceeding, based upon the laws and statutes of the state of Louisiana. (2) That the said Simon Levy having applied for the appointment of liquidator of the firm of Levy & Bodenheimer to the state court, and having been appointed by said court, qualified, and given bond as such, all in accordance with the peculiar statute of the state, thereby voluntarily submitted himself to the jurisdiction of said court, and rendered himself amenable solely to the control and jurisdiction of said court, in all matters pertaining to the administration of his said trust as liquidator, and accounting for the same. (3) The same cause was not and is not a suit in which there is a controversy between citizens of different states, for that the said L. Bodenheimer, in his life-time, was a citizen of the state of Louisiana, and said Simon Levy, one of the executors, is, and has at all times been, a citizen of Louisiana; that the minor children of S. Levy, special legatees under the will of L. Bodenheimer, are also residents of the same state; that William Filer, one of the executors, and also a legatee and agent for Bertha and Fanny Filer, and Mary Bodenheimer, legatees under same will, is also a resident of the state of Louisiana, and was such at the date of the application to remove this cause. (4) The condition of said cause, by reason of the decrees and orders already entered in the state court, and now in full force as to the executor, the legatees, the said liquidator, these defendants, and to others, is such that this court cannot proceed in the same manner as if the cause had been originally commenced in this court."

The issue sought to be made in the third ground for removal, as to citizenship, cannot be raised on the trial of this motion. When the pleadings show jurisdiction in this court, as in this case, the question of citizenship can be brought to the attention of the court only by a plea duly filed and sworn to according to rule 31, Rules of Practice in Equity. *Hoyt* v. *Wright*, 4 FED. REP. 168; 12 Blatchf. 320; 6 Blatchf. 130.

If the pleadings here do not disclose a "suit of a civil nature at law or in equity," as contemplated in the act of 1875, then it follows, without considering the matters set up in the second and fourth grounds, the latter of which seems to be outside of the pleadings, and is at best merely supplemental to or argumentative of the position taken in the first ground, that the motion to remand should prevail.

On the other hand, if the pleadings disclose a jurisdictional suit, the court will retain the suit, whatever difficulties may appear to attend its trial in the shape it now comes in.

The plaintiff's demand is that Levy, as liquidating partner, shall make a complete account of his administration of the partnership, and pay over a sum of money due by him, as liquidating partner, to

the succession of Bodenheimer. In the transcript is the opinion of the judge refusing the removal. He rests his judgment on his opinion "that the proceeding sought to be removed is merely auxiliary to the final settlement of the succession, and, being cognizable only in the state court in which the succession was opened, it cannot be removed." In maintenance of this view, that the action brought by Filer is an ancillary suit, he cites the cases reported in 29 La. Ann. 372; 30 La. Ann. 1; Id. 56; 34 La. Ann. 731.

The Louisiana supreme court, in 29 La. Ann. 372, held that a pending suit in a state court, whose object is to enjoin execution of a judgment of that court, is not removable, because it is an ancillary suit. This opinion was reaffirmed in the case of *Watson* v. *Bondurant*, 30 La. Ann. 1. On writ of error this latter case reached the United States supreme court, and in 93 U. S. 281, the court held that the case had all of the elements of a suit in equity, and was properly removed. In 30 La. Ann. 56, the state court held that a pending suit to annul a judgment of the state court, though the federal court had jurisdiction as to parties, was an ancillary suit and could not be removed. But the case in 30 La. Ann. 56, is not in point, because the opinion shows that the removal was sought in the state court prior to the act of 1875. The case cited from 34 La. Ann. 732, will be considered further on.

The right that citizens of different states have to sue each other, in the federal courts, is a constitutional right, for the exercise of which congress has amply provided in the several judiciary acts. "The constitution imposes no limitation *upon the class of cases* involving controversies between citizens of different states to which the judicial power of the United States may be extended; and congress may, therefore, lawfully provide for bringing, at the option of either of the parties, all such controversies within the jurisdiction of the federal judiciary." 92 U. S. 10.

There is nothing in the act of A. D. 1875 that forbids this court to take jurisdiction of *suits*, in what are called "probate proceedings," when the case is removed to it. In *Gaines* v. *Fuentes*, 92 U. S. 10, the court held *that a proceeding* to probate a will was an action *in rem*, and that such proceeding was not a suit, because it did not involve a controversy *between parties*, hence the federal court had no original jurisdiction to try such a proceeding. But congress, in providing for the removal of any pending suit, in the act of 1875, did not deem it necessary to say what particular subject-matter shall or shall not enter into the controversy sought to be removed, and it is not within the province of the state or federal courts to say that a suit in equity, where there is a controversy *between parties* of different citizenship, cannot be removed because of its peculiar subject-matter. It is the fact that there is a suit or controversy *between the parties*, not ancillary to a judgment or pending suit in a state court, that warrants the removal.

In 103 U. S. 485, Justice WOODS said:

"Upon the question of removal it is entirely immaterial whether or not the suit, as an original action, could have been maintained in the federal court. In short, no provision of the state law, no peculiarity in the nature of the litigation, which would forbid the United States court from entertaining original jurisdiction, could prevent the removal, provided the case fell within the terms of the statute for the removal of causes. *Railway Co.* v. *Whitton*, 13 Wall. 270; *Ins. Co.* v. *Morse*, 20 Wall. 445; *Gaines* v. *Fuentes*, 92 U. S. 10; *Boom Co.* v. *Patterson*, 98 U. S. 403."

In an action brought in a state court by a legatee for a legacy under a lost will against a sole heir, it was held, though granting the case could not have been originally brought in the federal court, *its subject-matter* did not hinder its removal. *Southworth* v. *Adams*, 4 FED. REP. 1; 92 U. S. 10.

In 34 La. Ann. 731, it was held "that proceedings involving conflicts between heirs, legatees, or creditors of a succession, as well as between parties claiming contradictorily the right of administering the succession, are mere incidents to the settlement of an estate, and as such fall exclusively within the jurisdiction of a court having probate jurisdiction." Let this announcement be admitted, it does not by any means follow, under the jurisprudence of Louisiana, that an action by an executor or legatee, for a sum of money due by a liquidating partner to the succession of his deceased partner, is a mere incident to the settlement of the succession, and is cognizable only in a court having probate jurisdiction. This question was passed upon directly by the supreme court of the state in 31 La. Ann. 156, where it was held by an unanimous court that "the obligation of a surviving partner is an ordinary civil obligation, which must be enforced in the ordinary civil tribunals having ordinary jurisdiction, and is no more cognizable in a probate court than would be any obligation to the succession." Under this opinion of the state court it is clear that there is nothing in the peculiar laws of Louisiana that makes Levy, as he is sued in this case, liable exclusively, solely, or at all to a court having probate jurisdiction; and, if he is indebted to the succession, he must be proceeded against and held in the same way that any other debtor would be.

The fact that he qualified and gave his bond in the state court, or that he may be an officer of the court, as is suggested by the state judge in his opinion, may or may not affect this court's jurisdiction, *ratione materiæ*, to entertain such a suit originally; but such facts appear to me of but little consequence in considering this motion to remand.

It has never beeen contended that congress, in any of the several judiciary acts, intended to invest the circuit courts with powers to control the proceedings in the state courts, or to interfere with their power to execute their own judgments by proper process; nor do I think the act of A. D. 1875 was intended to provide for the removal

of controversies which present only supplemental actions relating to mere modes of execution or relief, and which are inseparably connected with a judgment or pending proceeding in a state court. It is clear enough that these are a class of actions recognized in the jurisprudence of the state, as well as federal courts, that are incidental to, and which are distinguished from, independent or original suits, and the character of such cases is always open to examination, for the purpose of determining, *ratione materiæ*, whether the courts of the United States have jurisdiction to entertain them either originally or on removal. But this class of cases, it will be found, are always of a supplemental character, and inseparably connected with an original suit, judgment, or decree, and relate to some mode of execution or relief, which cannot be transferred to the federal courts without interfering with the proceedings of the state court in which the original action was begun. But where the suit, whatever it may be called, is not merely a mode of relief or execution, but contains an independent controversy, it is equally as clear that it can be removed, because its transfer to the circuit court cannot at all interfere with the powers of, or control the proceedings of, the state court. *Buford* v. *Strother*, 10 FED. REP. 406; 4 Dill. 557; 5 Dill. 223; 99 U. S. 80.

As far as I am informed, by the pleadings and argument of counsel at the time this suit was filed in the state court, there was no suit of any kind pending between Levy, in any capacity, and these plaintiffs, and no suit for or against the succession affecting Levy as liquidating partner. The stages of progress made in the settlement of Bodenheimer's estate appear to be as follows: His will was probated; Levy and Filer qualified as executors; Levy qualified, gave bond, etc., as liquidating partner; and, after the year expired, Filer, as the next and last stage, instituted this suit for the recovery of a debt due the succession. In this summary of its development, to what suit is the action, now under discussion, a sequence? Upon what stock is the demand against Levy for a sum of money grafted? There is no mode of relief or execution asked for which is inseparably connected with any judgment, original suit, or proceeding now in the state court.

This suit being entirely free from such connections, and being between citizens of different states for a claim capable of pecuniary estimation within the jurisdiction of this court, it appears plainly to me that the motion should be denied.

WEST PORTLAND HOMESTEAD ASS'N *v.* LOWNSDALE, Assignee.

(*District Court, D. Oregon.* August 21, 1883.)

CLOUD ON TITLE.

In 1871 sundry persons who were owners in common of a tract of land, laid out thereon a Carter's addition to Portland, and partitioned the same among themselves by deed, designating therein the blocks and lots allotted to each, among which was block 67, allotted to Charles M. Carter. The deed of partition was recorded, but the plat was not. Shortly after, L. F. Grover and wife, who were parties to this partition deed, laid out an addition to this Carter's addition, on a tract of land belonging to said wife, and lying immediately south of said first survey, and numbered one of the blocks therein 67; said Charles M. Carter having, in the mean time, changed the designation of the first block 67 to that of park block, and set it apart for public use as such; and thereupon the parties to both surveys united in executing a common plat of them as Carter's addition to Portland, in which the first block 67 was designated as a park block, and the second one by that number. In 1875 Grover and wife conveyed block 67 in the second survey to the plaintiff, and on February 19, 1878, the defendant was appointed by this court assignee in bankruptcy of the estate of said Carter, and within less than a year before the commencement of this suit set up a claim to the property, as such assignee, under the deed to Carter, and was proceeding to sell the same. The bankrupt never claimed the property, and the plaintiff and his grantors have always paid the taxes thereon. *Held*, (1) that it was a case of latent ambiguity in the deed to Carter arising out of the subsequent circumstances, which the plaintiff was entitled to explain by showing that it was not the intention of the parties thereto to convey the second block 67, and that it appeared from the facts that the plaintiff had the legal title to the property, and was not precluded by the circumstances from asserting it in this suit; (2) that the defendant, under the circumstances, has color of title to the property, and if he were allowed to sell it, he would thereby cast a cloud upon the plaintiff's title, and therefore equity will restrain him by injunction from so doing; (3) that if section 5057 of the Revised Statutes is applicable to the case, this suit is not barred by it, because it is only brought to prevent the threatened wrongful sale, and therefore the right to sue did not accrue until the defendant undertook to sell the premises, and did some act in pursuance of such purpose.

Suit in Equity to prevent a cloud on title.

C. P. Heald, for plaintiff.

George H. Williams, for defendant.

DEADY, J. This suit was commenced on March 27, 1883, and on July 20th the court sustained a plea to the bill of the limitation contained in section 2 of the bankrupt act, (section 5057, Rev. St.,) *ante*, p. 205.

It has since been heard and submitted on a demurrer to an amended bill, filed July 24th, which presents the case in quite a different aspect.

The plaintiff is a corporation formed and existing under the laws of Oregon, and brings this suit to restrain the defendant, as assignee of Charles M. Carter, from selling block 67 in Carter's addition to Portland as the property of the bankrupt.

It appears from the amended bill that on and prior to September 7, 1871, Joseph S. Smith, Charles M. Carter, T. J. Carter, and L. F. Grover were the owners in common of the then unsold portion of the

donation of Thomas and Minerva Carter, in township 1 south, of range 1 east of the Wallamet meridian,—the same being bounded on the south by the east and west subdivision line of section 4 of said township,—and as such owners, in August, 1871, surveyed and laid out Carter's addition to Portland thereon, and designated the blocks, lots, and streets thereof by numbers and names on a plat that they then executed and acknowledged, but did not record, and by deed duly recorded then partitioned the premises among themselves, designating therein, according to said plat, the lots and blocks allotted to each; that on said plat there was a block designated 67, and the same was conveyed, by the deed so executed, to Charles M. Carter as "block 67 in Carter's addition to Portland," but said survey and plat were afterwards so changed "by said Carter and others" that the said block has ever since been known as a park, and not as block 67; that at the time of said partition said parties had no interest in any land south of said east and west subdivision line, and there was then no other plat in existence than the one aforesaid, to which they could have referred in the execution of said partition deed; that in October, 1871, said Grover, and Elizabeth, his wife, caused a certain tract of land, belonging to said Elizabeth and adjoining the aforesaid tract on the south, to be surveyed and mapped into blocks, lots, and streets, and designated by numbers and names as a part of Carter's addition to Portland, among which was a block numbered 67; that afterwards said Grover and wife, together with the parties to the said partition, made a general plat of both said additions to Portland, and duly executed the same and caused it to be recorded on November 4, 1871; that the block designated as 67 in the first survey is marked on said plat as a park, while the block now known and designated thereon as number 67 is the one surveyed and mapped by Grover and wife on her land, subsequently to the making of said partition deed to Charles M. Carter, and was not in existence, as such, at the date thereof.

It is also alleged in the bill that said Grover block 67 was no part of the consideration in or for said partition; nor was it the intention of the parties thereto to refer to it or comprehend it therein, but that the block numbered 67 in the deed to Carter was another parcel of land included in the tract owned in common by said parties, and not the parcel now known as block 67, in Carter's addition to Portland; and "that it is by accident" that the description of the block conveyed to Carter answers to that now known as block 67, in said addition.

On August 11, 1875, said Grover and wife, for a valuable consideration, conveyed the block now known as 67 to the plaintiff, by a deed which was duly recorded; and it is alleged that the plaintiff, in obtaining such conveyance, acted in good faith; that at the date of such conveyance, and prior to the one to Charles M. Carter, said Grover and wife were in the exclusive possession of said block, and paid the taxes thereon, and since said conveyance to the plaintiff it

has been and now is in the like possession, and has paid the taxes thereon; that said Carter was never in the possession of the premises, nor ever paid any taxes thereon, or claimed any title or interest therein, or contracted any debt upon the faith of such title or interest, and that no judgment creditor of said Carter was deceived by the fact that a block 67 was contained in the deed to him; and that Grover and wife, when they gave the number 67 to the block in question, acted in good faith, relying upon the records of the county, and the understanding that such designation, as applied to the parcel of land first numbered 67, had been abandoned.

The bill further alleges that the defendant, as assignee aforesaid, and by reason of the premises, now claims to be the owner of the block in question, and is about to sell the same at public auction, and will so do unless restrained by this court, and will thereby cast a cloud upon the plaintiff's title thereto, to its manifest wrong and injury; that the defendant never set up any claim to the block in question, to the knowledge of the plaintiff, prior to the publication of the advertisement giving notice that he would sell the same on March 28, 1883.

The causes of demurrer are:

(1) The suit is barred by section 5057 of the Revised Statutes; (2) the plaintiff is chargeable with notice of the deed to Carter prior to the execution of the one to it; (3) the allegations as to the discovery of the plaintiff's right of suit are uncertain and insufficient; (4) there was no accident or mistake in the execution of the deed to Carter; (5) the parties to the deed to Carter mutually abandoned the first block 67, and dedicated it to public uses, and substituted the second block 67 therefor; and (6) there is no equity in the bill.

The identity of block 67 in Carter's addition is affected by this state of things, but the apparent confusion is neither the result of accident nor mistake. On the contrary, the separate acts which, taken together, have caused this ambiguity were deliberately intended by the parties, acting upon a correct conception of the facts pertaining to each, but apparently without consideration for, or attention to, their collateral or incidental effect.

An accident is an unforeseen or unexpected event, of which the party's own conduct is not the proximate cause. Pom. Eq. Jur. § 823. But the designation of the Grover block 67 by the plaintiff's grantors, while their deed was on record to another block 67 in a Carter's addition, was the immediate cause of this confusion.

A mistake is an erroneous mental conception that influences the will and leads to action. Pom. Eq. Jur. § 839. But the Grover block was designated 67, upon the impression, as was the fact, that the similar designation of a block in the first survey had been abandoned, and that parcel of land set apart as a park; and the conveyance of said block to Carter, as block 67, was made and accepted under the impression, as was also the fact, that there was then a block of that

number in the first survey, and not elsewhere. But if the parties, at the time of the execution and filing of the final plat of Carter's addition, were not aware or did not notice that the designation of this block thereon, under the circumstances, as block 67, might produce confusion of identity and lead to a conflict of claims concerning the same, they may be said to have made a mistake, but only such a mistake as arises from that inattention to known or knowable facts and their consequences as constitute negligence. Against such a mistake equity affords no relief. Pom. Eq. Jur. § 839.

Neither is there any doubt that upon the facts stated the plaintiff is the owner of the block in question, and has the legal title thereto. The conveyance to Carter of block 67 in the first survey did not affect the title to block 67 in the second survey, and would not even if the second 67 had been then in existence. It was this block that was conveyed to Carter, and not the number 67, wherever else it might be used or applied. This block was a particular parcel of ground, then designated 67, within the limits of the first survey, and not elsewhere.

The bill distinctly alleges that such was the intention and understanding of the parties to the conveyances, and the fact that the block 67 in the second survey was not then in existence is itself satisfactory evidence of that fact.

The claim that the parties substituted block 67 in the second survey for the one of that number in the first survey is not supported by the facts. Nothing of the kind is alleged in the bill, nor do the facts stated therein warrant any such inference. On the contrary, it appears that the first 67 was changed to a park block before the other was surveyed or designated; and that upon the final plat of Carter's addition, which was made up from the previous surveys of the two tracts, the first one was accordingly designated as a park block and formally dedicated to public use, while the latter was designated as private block 67.

But the making and recording of this plat did not operate to convey any block therein to Carter. That might have been done by marking the same on the plat as a donation or grant to him. Or. Laws, p. 777, § 3. And the very fact that this was not done is evidence, under the circumstances, that it was not within the contemplation of the parties. Nor does it appear probable that Mrs. Grover would surrender a block of her land to Carter in consideration of a dedication by him of another block to a public use that was of as much or more benefit to the rest of the parties to the plat than to her. And if there ever was any agreement or understanding between the parties, short of a legal conveyance, that in consideration of the dedication by Carter to a public use of the first block 67, he should receive the second block 67, it did not affect the legal title to said second block. And if it is sufficient to raise an equity in favor of Carter that the defendant can assert here, the burden is upon him to allege and prove it.

Neither is the plaintiff estopped to assert its right to the premises. True, it took the conveyance from Grover and wife with the notice of the prior conveyance to Carter, and it is also true that the latter deed appeared to convey block 67 in Carter's addition, and this was then the only block on the plat that answered that description. But it was no further affected by the notice of this deed than were the grantors therein by the deed itself; and if they could show, as certainly they could, that the block described therein as 67 was not this 67, but another, so can the plaintiff. Besides, the deed to Carter also showed upon its face that it was executed before this plat was, and therefore there was no ground for the inference that the former referred to the latter, or that the 67 mentioned in the one was the 67 mentioned in the other.

Upon the whole, this is simply a case of latent ambiguity in the deed to Carter, concerning the subject-matter of the conveyance, produced by circumstances subsequent as well as collateral to the deed. In such a case it is always competent to show, by evidence *dehors* the deed, the actual intention, in this respect, of the parties thereto. 1 Greenl. Ev. § 297; 2 Whart. Ev. §§ 956, 957; *Piper* v. *True*, 36 Cal. 614.

The effect of this ambiguity is to give defendant, as assignee of Carter, color of title to the premises, under which, it appears, he will, if not restrained by this court, sell the same, and thereby cast a cloud upon the title of the plaintiff. For it seems that although the second block 67 was a part of the separate property of Mrs. Grover, and therefore could not even appear to be affected by her husband's conveyance of the first block 67, that she signed the deed with her husband and his co-tenants, conveying the first 67 to Carter, so that upon the record Carter appears to have received the elder conveyance from Grover and wife to block 67.

That a sale of this property, under these circumstances, by the assignee would cast a cloud over the title of the plaintiff, and that, therefore, the court has power, by injunction, to prevent such sale, is a proposition well supported by the authorities. *Pixley* v. *Huggins*, 15 Cal. 132; *Coulson* v. *Portland*, 1 Deady, 487; *Ewing* v. *St. Louis*, 5 Wall. 418; *Lick* v. *Ray*, 43 Cal. 88; High, Inj. §§ 269–272.

The test of what is a cloud on title is shortly stated by Mr. Justice FIELD, in *Pixley* v. *Huggins*, *supra*, as follows: "Every deed from the same source through which the plaintiff derives his real property must, if valid on its face, necessarily have the effect of casting such cloud upon the title."

The plaintiff is clearly entitled to the relief sought unless the suit is barred by the lapse of time. It is the real owner of property. Carter never had any interest in it, nor made any claim to it. By reason of circumstances occurring after the conveyance to him, he came to have color of title to the premises, but nothing more. Nor is there any special ground on which his assignee, as the representa-

tive of his creditors, can make any better claim to the property than he could. No one of them, so far as appears, stands in any such relation to the property as a purchaser in good faith, and for a valuable consideration; and if he does, it is not perceived on what ground he could assert any right thereto as against the true owner, unless it be an estoppel by conduct arising out of the fact of the plaintiff's grantors executing and allowing a plat of Carter's addition to go upon the record with a block designated thereon as 67, when they knew, or may be presumed to have known, that a prior deed of theirs to Carter's for a block with a similar designation, in what purported to be Carter's addition, was already on record. But even then the fact that the deed was prior in point of time to the plat, and could not, therefore, be supposed to refer to it, may be a sufficient answer to this suggestion.

Neither is the right of the plaintiff to maintain this suit barred by lapse of time. Section 5057 of the Revised Statutes enacts:

"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."

But it is not clear to my mind that this case falls within this section. This is not a suit to establish or annul an adverse claim to this property, but a suit to prevent the doing of an act concerning the same which, under the circumstances, will cast a cloud upon the plaintiff's title. It is a suit to prevent the defendant from committing a threatened wrong. True, the right to maintain it rests upon the ownership of the plaintiff, and the threat to do the alleged wrong proceeds from a claim of ownership in the defendant which is adverse to that of the plaintiff.

Suppose, however, the assignee commits a trespass upon premises in the apparent ownership and possession of the plaintiff, as by entering thereon, and cutting and carrying away growing timber or grain; and suppose such entry is made in pursuance of a claim of ownership or interest adverse to the plaintiff,—does this section apply to an action to recover damages therefor? I think not; and that the section is confined in its operation to cases where the suit is brought directly to establish or annul an adverse claim to property vested in the assignee, or to recover the possession of that to which he is entitled as the representative of the creditors of the bankrupt. But suppose the section does apply, within what time must an action for the trespass be brought? In two years from the date of the adverse claim or the circumstance out of which it is alleged to arise, or the commission of the trespass? Certainly, within the latter period. Any other construction would involve the absurdity of a cause of action being barred by lapse of time before it arose. So in this case. Admitting that it falls within the section, when did the cause of suit accrue? At the

time the circumstances occurred which gave Carter the color of title to this property, on the strength of which his assignee is now threatening to commit the wrong complained of, or from the time when the proceeding for the sale was commenced, or first came to the knowledge of the plaintiff? In my judgment, there can be but one answer to this question.

As I have said, this is a suit to prevent a wrongful sale of the premises, which will have the effect to cast a cloud upon the plaintiff's title, and the right to maintain it could not have accrued until something was done by the defendant to manifest his intention or purpose to make such sale. The mere fact that the assignee had the same show of right to make this sale five years ago as now, is not material. He never had the legal right to sell, and the plaintiff could not have maintained a suit to enjoin him from doing an illegal act that he had not attempted, and, for aught that appeared, never would. If this was a suit to annul or set aside the deed to Carter, so far as block 67 is concerned, upon the ground that it constituted a cloud on the plaintiff's title to the existing block 67, the statute, if applicable, would doubtless be a bar to the relief sought. But this suit goes no further back than the wrongful attempt of the defendant to sell, and is limited in its object to the prevention of that wrong.

The case of *Bailey* v. *Glover*, 21 Wall. 346, is not in point. That was a suit by the assignee to set aside a fraudulent conveyance by the bankrupt, and of course the cause of action—the right to have such conveyance set aside—accrued as soon as it was made. The conveyance passed the title, subject to the right of the creditors to have it set aside for fraud, and the interest to the grantee therein was adverse to the creditors from the date of the transaction, and would, by lapse of time, ripen into an absolute estate in the premises. *In re Estes*, 6 Sawy. 460; [S. C. 3 FED. REP. 134.]

The demurrer is overruled.

HOSTETTER and others *v.* FRIES and others.

(*Circuit Court, S. D. New York.* May 31, 1883.)

1. NAME OF NEW ARTICLE—RIGHT TO USE OF.

When a new article is made a name must be given to it, and this name becomes, by common acceptation, the appropriate descriptive term by which it is known, and therefore becomes public property, so that all who have the right to manufacture and sell the preparation have the right to designate and sell it by the name by which alone it is known, provided care is observed to sell the preparation as the manufacture of the seller, and not the preparation made by another.

2. TRADE-MARK—DEFINITION.

A trade-mark consists of a word, mark, or device adopted by a manufacturer or vendor to distinguish his production from other productions of the same article.

3. SAME—NAME INDICATING KIND OR DESCRIPTION OF THING.
A name alone is not a trade-mark when it is understood to signify, not the particular manufacture of a certain proprietor, but the kind or description of thing which is manufactured.

4. SAME—INJUNCTION REFUSED.
Complainants claimed the right to use the name "Dr. J. Hostetter's Stomach Bitters" in connection with certain labels, bottles, and other devices which designated the preparation as of their own manufacture and indicated its origin, and in their bill they averred that defendants were selling to the trade an extract out of which it was claimed Hostetter's Bitters could be made, with directions how to make such bitters, and that the retail dealers were making these bitters and refilling complainant's bottles, with their labels and devices thereon, and thus selling them. *Held*, that defendants had the right to sell their extract as charged, as no purchaser could suppose that he was purchasing the preparation made by complainants; that they could not be held responsible for the acts of third parties; and that an injunction would not be granted.

In Equity.

A. H. Clark and *James Watson*, for complainants.

I. A. Englehart and *A. J. Dittenhoefer*, for defendant.

WALLACE, J. The motion for a preliminary injunction must be denied, because it does not appear from the bill and affidavits that defendants are infringing the complainant's trade-mark. Complainants' property consists in the right to use the name "Dr. J. Hostetter's Stomach Bitters" in connection with certain labels, bottles, and other devices, which designate the preparation as of their own manufacture, and indicate its origin. The bill alleges that the defendants are engaged in manufacturing and selling certain essences, oils, and extracts which they represent can be so manipulated and used as to produce a good imitation of various well-known brands of bitters, among them an imitation of Hostetter's Bitters; that they sell the same to compounders and jobbers, with instructions to the purchaser as to the mode of compounding the bitters and selling them as the genuine article; and that such purchasers compound the essence and sell the bitters made thereby to retail dealers, and the latter procure the second-hand empty bottles that have been sold by the complainants, having the labels thereon, and refill them with the bitters compounded from the defendants' essences and palm them off upon the public as the genuine bitters of the complainants' manufacture.

The complainants have neither the exclusive right to make bitters compounded after the formula of Dr. Hostetter, nor the exclusive right to sell bitters by the name of Hostetter's Bitters. The preparation never had any name until it was offered to the public and christened. When a new article is made a name must be given to it, and this name becomes by common acceptation the appropriate descriptive term by which it is known, and therefore becomes public property. If this were not so any person could acquire the exclusive right to a formula by giving a name to the compound produced, not only when the compound has not been patented, but when it might not be the subject of a patent. All who have the right to manufac-

ture and sell the preparation have the right to designate and sell it by the name by which alone it is known, provided care is observed to sell the preparation as the manufacture of the seller and not the preparation made by another. A trade-mark consists of a word, mark, or device adopted by a manufacturer or vendor to distinguish his production from other productions of the same article. A name alone is not a trade-mark when it is understood to signify, not the particular manufacture of a certain proprietor, but the kind or description of thing which is manufactured. *Singer Manuf'g Co.* v. *Loog*, 15 Reporter, 538; *Wheeler & Wilson Manuf'g Co.* v. *Shakespear*, 39 Law J. Ch. 36; *Young* v. *Macrae*, 9 Jur. (N. S.) 322.

Obviously, no one would be deceived into the supposition that the defendants were selling the complainants' production when they only profess to sell an extract from which Hostetter's Bitters can be made. Defendants not only have the right to make and sell the extract, but they have the legal right to make and sell a preparation which they call Hostetter's Bitters, provided they do not employ the bottles, labels, symbols, or devices which have been used by the complainant to distinguish their own production of that preparation, or such equivalents as may deceive the public in that regard. If the bill had distinctly alleged that the defendants were engaged in a scheme to put upon the market and palm off upon the public a preparation of their own as the complainants' preparation, and these allegations were shown to be true, the defendants could not escape an injunction merely upon the ground that they had not sold the preparation themselves. But all the general allegations of fraud and conspiracy in the bill are resolved into the specific acts of wrong-doing particularly stated; that is, selling the extract and informing their customers how it may be made into Hostetter's Bitters. The actionable transgression of the complainants' rights is that committed by the retail purchasers who buy from the defendants' customers—those who use the bottles, labels, and symbols which constitute the complainant's trade-mark. The defendants may be instrumental in effecting the wrong by providing some of the means employed, but they only do what the law permits them to do. And even if it could be assumed that they contemplated the further wrong-doing of the retailers, the law does not visit motives or intent unaccompanied by a wrongful overt act. The bill, however, does not allege that they are participants in the violation of the complainants' rights further than by selling the extract, and giving instructions how it can be made into Hostetter's Bitters.

The motion is denied.

See *Wilcox & Gibbs Sewing-machine Co.* v. *The Gibbens Frame, infra; Burton* v. *Stratton*, 12 FED. REP. 696, and note, 704; *Shaw Stocking Co.* v. *Mack*, Id. 707, and note, 717.—[ED.

WILCOX & GIBBS SEWING-MACHINE CO. *v.* THE GIBBENS FRAME.

(*Circuit Court, S. D. New York.* August 4, 1883.)

1. TRADE-MARK — FORM OR SHAPE OF PATENTED MACHINE — EXPIRATION OF PATENT.
   While no one has the right to make and sell his own wares as the wares of another, every one has the right to make and sell any wares not protected by patents; and a manufacturer of a patented article, after the expiration of the patent, has a right to represent that it was made according to the patent, and to use the name of the patentee for that purpose.
2. SAME — RIGHT TO USE FORM OR SHAPE OF MACHINE.
   Where frames for sewing-machines in the form of the letter G have been so extensively manufactured and sold by the inventor, during the time they were protected by patents, that the machines containing this feature come to be known in the trade thereby, after the expiration of the patents, the patentee cannot, by claiming such form or shape of frame as a trade-mark, prevent others from using such frames in sewing-machines manufactured and sold by them.
3. SAME — MARK DESCRIPTIVE OF QUALITY OR STYLE.
   Anything descriptive of the properties, style, or quality of an article merely, is open to all.

In Equity.

Stephen A. Walker and *A. C. Brown*, for orator.

J. Hampden Dougherty and *Joseph C. Fraley*, for defendant.

WHEELER, J. This suit was brought in the supreme court of the state to restrain the use of frames in sewing-machines in the shape of the Roman capital letter G. A preliminary injunction restraining such use until further order was granted *ex parte;* and before further proceedings the cause was removed to this court. It has now been heard on motion to dissolve this injunction.

As the case now stands it appears that letters patent No. 21,129 were granted to James E. A. Gibbs, under date of August 10, 1858, for improvements in sewing-machines, the drawings and model of which showed this frame, but it was not claimed as a part of the patented invention; that design letters patent No. 1,206, under date of February 21, 1860, were granted to him for this form of frame; that upon the surrender of the original patent No. 21,129, reissued letters patent No. 2,655, under date of June 18, 1867, were granted to him, in which this shape of frame was particularly described, and its advantages set forth as, "which not only stamps it with a peculiar character, but is also exceedingly useful, as it affords the greatest possible space for the cloth or material to be sewed of being turned and twisted under the needle and upon the table;" and there was claimed as a part of the patented invention, "combining with the vibrating needle-arm a frame-shape substantially like the Roman letter G, as herein shown and described, and for the purposes set forth." The orator operated under these patents until they expired,—the design patent, February 21, 1867, and the reissue patent, August 10, 1872. The orator registered this form of the frame as a trade-mark, and obtained certificate No. 8,356, dated from June 14, 1881, in the

declaration for which it is stated that "this trade-mark has been used continuously in the business of the said company since the year 1859." The orator manufactured and sold sewing-machines having this form of frame so extensively and for such length of time, while others were excluded from doing so, that its machines came to be known in the trade by this feature. The defendant makes and sells machines with the same style of frame, which, to some extent, indicates to those not informed that his machines are of the orator's make.

The question now is whether the defendant has the right to continue such use of this form of frame, or the orator has the right to have him restrained from such use. This frame is an essential part of these sewing-machines, as it supports most of the moving parts of the machinery in the proper place for doing their work. This form of frame has some advantages over others, in that it requires less room for itself in proportion to the room afforded by it for the other parts and the material sewed, as described in the patent for it. Sewing-machines made with these frames, otherwise good, were good machines. The frames in this form were a part of the manufacture to be identified as to source, and not an identifying mark, merely, of source, indifferent to the manufacture. The orator, in the use of this frame, made a good machine in this respect. Without the protection of a patent, however, the orator could not, by making good machines, either in form or style or other respects, exclude others from making the like in either or all of these particulars; in the first instance, certainly. Not until a feature had been used long enough to be known as a mark of the orator's machines, could the employment of it by others be a representation that their machines were the orator's. At common law this form was open to everybody, and, but for the exclusive use conferred by the patents, it might have been employed by others so extensively that the employment of it by the orators would not have amounted to any representation at all that machines having it were of the orator's make. The exclusive rights of the orator, up to the time of the expiration of the patents, appear to have rested upon the patents, and not upon any right acquired independently of the patents. All rights acquired under the patents expired with them.

Congress was given power to promote the progress of science and useful arts, "by securing for limited times, to authors and inventors," the exclusive right to their writings and discoveries. Const. art. 1, § 8. The grant to the inventor of the exclusive right for the limited time is in consideration of the benefit which the public will derive from the invention after the expiration of the term. *Grant* v. *Raymond*, 6 Pet. 218. Whatever was patented to the inventor, and enjoyed by him and those operating under him during the term, belongs to the public and is free to all at the expiration of the term. Accordingly, a manufacturer of a patented article, after the expiration of

the patent, has a right to represent that it was made according to the patent, and to use the name of the patentee for that purpose. *Fairbanks* v. *Jacobus*, 14 Blatchf. 337; *Singer Manuf'g Co.* v. *Stanage*, 6 FED. REP. 279; *Singer Manuf'g Co.* v. *Riley*, 11 FED. REP. 706; *Singer Manuf'g Co.* v. *Loog*, 48 Law T. Rep. (N. S.) 3; 15 Reporter, 538. Anything descriptive of the properties, style, or quality of the article merely, is open to all. *Canal Co.* v. *Clark*, 13 Wall. 311; *Manuf'g Co.* v. *Trainer*, 101 U. S. 51. While no one has the right to sell his own wares as the wares of another, every one has the right to make and sell any wares not protected by patents. Marks, symbols, or dress placed upon the wares might unlawfully misrepresent their source, but when left to speak for themselves alone there could be no wrongful misrepresentation. These principles are not much controverted by the orator's counsel, but it is claimed that as the orator's machines are somewhat known by this frame, and other shapes easily distinguishable from this might be equally useful, some of which in hexagonal or octagonal, instead of circular, shape are suggested, the defendant should use some of those. But those, doubtless, would have been infringements of the patents, and the style used is as much freed by the expiration of the patents as those are. All the effect which these frames have in representing machines to be those of the orator, appears to be due to the monopoly enjoyed under the patents; and to give the orator the benefit of the effect by calling the frame a trade-mark, would continue the monopoly indefinitely, when under the law it should cease.

It is obvious that the registration of the trade-mark in 1880 would not affect rights which the public already had acquired; it is not claimed that it should.

Motion granted.

See *Hostetter* v. *Fries*, *ante*, 620; *Burton* v. *Stratton*, 12 FED. REP. 696, and note, 704; *Shaw Stocking Co.* v. *Mack*, Id. 707, and note, 717.—[ED.

KIMBALL *v.* LION INS. CO.

SAME *v.* MERIDEN FIRE INS. CO.

(*Circuit Court, D. Rhode Island.* August 23, 1883.)

FIRE INSURANCE—EVIDENCE OF CONTRACT.

An oral agreement by an insurance agent to take $5,000 upon mill property is not a completed contract of insurance, if there was to be an apportionment between real and personal estate, and none had been made when the property was destroyed by fire.

Whether a contract for insurance made at a quarter before 6 o'clock in the evening dates back to noon of the same day, is not decided.

At Law.

C. P. Robinson, for plaintiff.

Miner & Roelker, for defendants.

Before LOWELL and COLT, JJ.

LOWELL, J. These cases were heard together, and raise interesting questions in the law of insurance.

The plaintiff was the owner of a mill at Burrillville, Rhode Island, to which he had made an addition, and happening to be in the office of his insurance agent at Providence, in the afternoon of October 14, 1881, he asked the agent, Mr. Shove, to procure him insurance for $5,000 in addition to $37,000, which he already had on his mill, machinery, and stock. The agent had taken as much of the risk as he thought advisable in the companies which he represented, and his son, by his direction, applied by telephone to another insurance agent in Providence, Mr. Spencer, who agreed to take the $5,000 in the defendant companies, one-half in each. Nothing was said about the rate of premium, the time for which the policy was to run, or the apportionment between the old and the new mill, or between buildings, machinery, and stock. Upon the acceptance by Spencer, the plaintiff's agent said that he would call in the morning with a form. Spencer already had insurance on the plaintiff's property in another company, and he proceeded to enter in his book the $5,000, divided equally between the two defendant companies, and apportioned between buildings, machinery, and stock in the same proportion as in the former policy, and at the same rate of premium. This occurred at a quarter before 6 o'clock in the evening, and in the mean time the premises had caught fire about noon of the same day, and were by this time much damaged. The existence of the fire was not known to any of the persons concerned in the negotiation. The evidence tended to show a custom to make all risks in policies against fire begin and end at noon, which is thought to be convenient for both parties, but more particularly for the underwriters, and they insist upon following the practice. If, therefore, a person procuring insurance is unwilling to date his policy from the noon next after his application, he may have it dated back to the noon next before; in this case it would be 12 o'clock of the day of the fire. The plaintiff contends that by virtue of this practice he had the promise of a policy from that hour.

We are of opinion that there was no completed contract for insurance at all. There is evidence enough that Spencer, the defendant's agent, was ready to grant a definite insurance, and if the entries in his book corresponded to any agreement of the parties, there would be no difficulty; but, in point of fact, not a word had been exchanged between the two brokers as to the rate of premium, or as to the apportionment of the risk, and it is clear that there was to be some apportionment; that is, the whole sum was not wanted for the protection of the mill itself, but some part for machinery, and some part for stock.

We may grant that the time would be understood to be one year, if nothing was said to the contrary. It was argued, but not proved, that the rate of premium was fixed by some usage or previous course of dealing. But there is nothing to show that the apportionment made by Spencer, on the basis of a former policy, would have been satisfactory to Shove, and to the plaintiff, if that were enough. On the contrary, we are disposed to believe that the new part of the mill and its contents were in their minds as being the property needing insurance, and that they would have changed the provisional apportionment very materially.

We are also strongly inclined to think that Shove understood that the risk was to begin on the following day, and that when he spoke of bringing to Spencer a "form" in the morning he meant a memorandum or scheme of the exact distribution of the risk. As to the mere form of policy there could be no occasion to bring one, that we can see. At any rate, we cannot find a completed contract in the few words which passed between the parties, and we could not fairly and justly apportion the loss and the salvage between real and personal estate, and between this company and others, upon so slight a foundation of contract as we have before us.

Judgment for the defendants.

LYNCH v. HARTFORD FIRE INS. CO.

SAME v. PHENIX INS. CO.

(Circuit Court, D. New Hampshire. August 20, 1883.)

1. PLEA OF LIS ALIBI PENDENS.
   A plea of *lis alibi pendens* is not good when the litigation is in a court of foreign jurisdiction.
2. SAME—RULE IN EQUITY AND ADMIRALTY.
   This rule is modified by courts of equity and admiralty, who will require a plaintiff, who has a suit pending elsewhere for the same cause and with an equally advantageous remedy, to elect which he will prosecute.
3. SAME—COMMON-LAW COURTS.
   Whether the courts of law may attain the same end through their power of postponing actions and suspending judgments, *quære.*
4. SAME—ATTACHMENT FROM STATE COURT.
   Plaintiff brought an action at law, and defendants pleaded in abatement that the amount in their hands due plaintiff had been attached by a trustee process from the state court by his creditors. *Held*, that such plea was not available, but that a continuance *ex comitate* should be granted in order that the plaintiffs in the foreign actions might have an opportunity to make their attachments available. *Held, further*, that the garnishee might plead judgment and satisfaction in either court as a bar to further action in the other.

Plaintiff brought this action to recover the amount of insurance on his stock of groceries in store No. 44 Market street, Portsmouth, de-

stroyed by fire November 28, 1882, entered in this court at the May term. The insurance companies filed a plea in abatement, on the ground that the amount in their hands had been attached by trustee processes, by various creditors of Lynch.

Frink & Batchelder, for plaintiff.

Mr. Page, for defendants.

LOWELL, J. The defendants severally plead in abatement of these actions that before the date of the writs they were summoned as trustees or garnishees of the plaintiff in three actions in the superior court of Massachusetts, and one in the supreme court of New Hampshire, which are still pending. The plaintiff demurs. The general rule is that a plea of *lis alibi pendens* is not good when the litigation is in a court of foreign jurisdiction. We may regret this, but it has been repeatedly so held. This rule is modified by courts of equity and admiralty, who will require a plaintiff who has a suit pending elsewhere for the same cause, and with an equally advantageous remedy, to elect which he will prosecute. I am much inclined to think that courts of law will hereafter hold that they may attain the same end through their power of postponing actions and suspending judgments. See the very able opinion of a late eminent judge in *McHenry* v. *Lewis*, 22 Ch. Div. 397, and of the judges in *Peruvian Guano Co.* v. *Bockwoldt*, 23 Ch. Div. 225, overruling *Lord Dillon* v. *Alvares*, 4 Ves. 357, and doubting the case of *Cox* v. *Mitchell*, 7 C. B. (N. S.) 55, if it is to be understood as deciding that a court of law will take no notice of the pendency of a foreign suit.

In the case of a garnishee process pending in a foreign court, the supreme court of New York, KENT, C. J., decided in 1809, upon the authority of English cases which referred to domestic actions, and upon the ground that a garnishee could not otherwise be protected, that a plea in abatement was good. *Embree* v. *Hanna*, 5 Johns. 101. This decision was made before the law in this country had been settled that the courts of the states are to be considered as foreign to each other, and the courts of the United States as foreign to those of the states in this matter. It was held in New Hampshire, as late as 1850, that a plea of an action pending in the circuit court of the United States must be sustained. *Smith* v. *Atlantic Mut. Fire Ins. Co.* 22 N. H. 21. But, as I have said, the law is now settled otherwise. *Stanton* v. *Embrey*, 93 U. S. 548.

Embree v. *Hanna, ubi supra*, has often been cited and approved, but I have not found a case in which it has been followed when the precise point was in judgment, unless it be a case in 20 How., which I shall presently consider.

The courts, when called upon to decide the question, have uniformly held that a creditor ought to be at liberty to secure himself by action against his debtor who may be about to become insolvent or to abscond, or who may be in collusion with the foreign plaintiff, notwithstanding an earlier foreign garnishment, and that the only protec-

tion which the defendant can require is to have a continuance of the action, or a moulding of the judgment in such a form that he should not be obliged to pay the same debt twice. This I understand to be the decided law of Massachusetts, Alabama, California, New Hampshire, Vermont, Georgia, Indiana, and Louisiana. *Winthrop* v. *Carlton*, 8 Mass. 456; *Crawford* v. *Slade*, 9 Ala. 887; *McFadden* v. *O'Donnell*, 18 Cal. 160; *McKeon* v. *McDermott*, 22 Cal. 667; *Wadleigh* v. *Pillsbury*, 14 N. H. 373; *Drew* v. *Towle*, 27 N. H. 412; *Hicks* v. *Gleason*, 20 Vt. 139; *Shealy* v. *Toole*, 56 Ga. 210; *Smith* v. *Blatchford*, 2 Ind. 183; *Carroll* v. *McDonogh*, 10 Mart. 609.

Judge DRAKE, in his valuable work on Attachments, cites most of these cases, and gives his own opinion emphatically in section 701, note 4, that a plea in abatement should not be allowed. He gives rather more show of authority to the other side than it can maintain, for he puts New Hampshire on that side. The other cases which he cites in favor of the plea in abatement are correctly stated by him as *dicta* in these words: "Similar views have been expressed by the courts of," etc. I have examined these, all except *Near* v. *Mitchell*, 23 Mich. 382, which is not at this moment within my reach, and they are "views" and not decisions.

In the case of *Mattingly* v. *Boyd*, 20 How. 128, (CATRON, J., giving the opinion of the court,) *Embree* v. *Hanna*, which decides the point, and some other cases which contain the *dicta* above referred to are cited, and the decision is that by the law of Tennessee the statute of limitations did not run against the defendant while he was under garnishment in a court of Virginia, because he might have pleaded such garnishee action in abatement. The law of New Hampshire, which governs the case before me in matters of pleading, is different from that of Tennessee, as I have already shown. In the courts of this state the plea would not be allowed, and therefore, and, as I conceive, upon a very decided weight of authority and reasoning, it is not available in this action. I am further of opinion that, in all ordinary cases, a continuance should be granted *ex comitate* that the plaintiffs in the foreign actions may have an opportunity to make their attachments available. The case of seamen's wages has been held to be an exception, for reasons of policy, in *Ross* v. *Bourne*, 14 FED. REP. 858. The garnishee, of course, must be protected; but the ground taken in *Embree* v. *Hanna*, that his only protection is by plea in abatement, is not the law at present. He may plead judgment and satisfaction in either court as a bar to further action in the other. *Bank of North America* v. *Wheeler*, 28 Conn. 433; *Eddy* v. *O'Hara*, 132 Mass. 56.

Plea in abatement overruled. Action to stand continued.

ADAMS *v.* MANUFACTURERS' & BUILDERS' FIRE INS. CO.

(*Circuit Court, D. Rhode Island.* August 23, 1883.)

1. INSURANCE—AUTHORITY OF AGENT.
   An agent to procure insurance is not, from that engagement alone, authorized to cancel the policy.
2. SAME—CONSTRUCTION OF POLICY.
   A policy of fire insurance contained provisions that "if any broker or other person than the insured had procured the policy, or any renewal thereof, or any indorsement thereon, he shall be deemed to be the agent of assured, and not of the company, in any transaction relating to the insurance;" and that "the insurance could be terminated at any time by request of the assured, or by the company, on giving notice to that effect." *Held*, that a notice of cancellation given to the agent who had procured the insurance, and not communicated to the assured, was not sufficient, and that such agent was not authorized to receive notice of cancellation for the assured.
3. SAME—USAGE AMONG BROKERS—EVIDENCE.
   Evidence that it is customary for the agent who procures a policy of insurance on the one side, and the local agent who grants it, to receive notice of the cancellation of policies, and notify each other in regard thereto, is admissible, but such usage must be proved by the most clear and unequivocal evidence, and be brought home to the actual knowledge of the party who is to be bound by it.

At Law.

C. B. Farnsworth, for plaintiff.

D. B. Potter and *T. Swarts*, for defendants.

Before LOWELL and COLT, JJ.

LOWELL, J. At the trial of this cause a verdict was ordered for the plaintiff, subject to the opinion of the court upon questions of law.

The defendants, a company incorporated in New York, insured $1,500 upon the plaintiff's mill, machinery, etc., situated at Attleborough, Massachusetts, by a policy dated and issued October 1, 1881, payable to certain mortgagees. The plaintiff lives in Pawtucket, and the insurance was obtained by the insurance agents, Starkweather and Shepley, doing business at Providence, of E. S. Babbitt, of the same place, local agent of the defendants, and was forwarded to the plaintiff. October 7, 1881, the defendants' general agent wrote from New York to Mr. Babbitt to cancel the policy, in virtue of the stipulation cited below, and he gave notice of cancellation to Starkweather and Shepley, who failed to notify the plaintiff, and a few days later the mill was destroyed by fire. The question is whether the notice of cancellation was sufficient.

An agent to procure insurance is not, from that engagement alone, authorized to cancel the policy, (*Latoix* v. *Germania Ins. Co.* 27 La. Ann. 113; *Rothschild* v. *American Cent. Ins. Co.* 74 Mo. 41;) and it was admitted at the hearing that he is not, by law, independently of stipulation or usage, an agent for any other purpose than that for which he was employed. The defendants contend that such a power was given in the policy itself, in the following paragraphs:

"5. RELATIVE TO ISSUE AND CANCELLATION OF POLICY:

"(1) If any broker or other person than the assured have procured this policy, or any renewel thereof, or any indorsement thereon, he shall be deemed to be the AGENT OF THE ASSURED, and not of this company, in any transaction relating to the insurance.

"(2) This insurance may be terminated at any time by request of the assured, or by the company, on giving notice to that effect. On surrender of the policy, the company shall refund any premium that may have been paid, reserving the usual short rates in the first case, and *pro rata* rates in the other case."

The defendants construe the provision of the policy first above quoted to mean that the agent who procures the policy shall be an agent to cancel it, or to receive notice of cancellation. But its meaning and purpose are plain. It was inserted for the purpose of meeting certain well-known decisions of the courts, among them the supreme court of the United States, holding the companies responsible for the mistakes of their agents in making up applications or doing other work for the assured; and its meaning is that in any transaction in procuring the insurance, or any renewal or indorsement, the person who acts for the assured shall be his agent, and not the agent of the company, although he may be in other matters their agent, general or special, or even one of their principal officers. The only possible ambiguity is in the words "any transaction," which might, under some circumstances, be broad enough to cover the defendants' position; but in this instance they are intended to make it clear that whether the dispute may concern a representation, a warranty, an application, an indorsement, or any other transaction, the person who acted for the assured shall be considered his agent, which is emphasized by large type, and shall not bind the company by any acts, omissions, or mistakes. This is its whole purpose and effect.

To hold that because of the words "any transaction," the assured has stipulated for an irrevocable agency for all purposes in any one who acted for him in procuring the policy, or any renewal thereof, or indorsement thereon, would be unreasonable, for there is no occasion for such an agency, except in the exigencies of this case; and it would be even absurd, for it might make three or four such agents, if so many persons had acted in the several matters referred to. That underwriters have so understood similar stipulations was asserted in argument; but we take leave to doubt it, as it supposes them unable to understand the meaning of a plain sentence of their own devising.

In the construction of written instruments containing no technical terms, authorities are of but little value. Each writing differs somewhat from every other, and if a judge cannot understand the one which he has before him, it is of little use to tell him how another judge has understood one that is more or less like it. So far as authority goes, however, it favors the construction which we adopt. The supreme courts of Massachusetts and Pennsylvania have so construed sim-

ilar stipulations, in *White* v. *Connecticut Fire Ins. Co.* 120 Mass. 330, and *First Nat. F. Ins. Co.* v. *Isett*, 14 Reporter, 378. The defendants cite *Grace* v. *American Cent. Ins. Co.* 16 Blatchf. 433; but in that case the collocation of the single paragraph concerning agency and cancellation was such as seemed to Judge BENEDICT to establish an intended connection between them. The defendants here argue that the collocation is of no importance; but as the judgment turned very largely upon that circumstance, this argument is a criticism upon the judgment itself, rather than a reason for applying it to a policy which is differently constructed.

As proof of a general agency the defendants offered to show that on one occasion a policy issued to the plaintiff by another company, through the agency of Mr. Babbitt, had been cancelled by notice to Messrs. Starkweather and Shepley; under what circumstances we do not know, as the judge rejected the evidence. An instance of this sort would be some slight evidence of agency, but the defendants afterwards called the plaintiff as a witness, and he denied that Starkweather and Shepley were his agents to receive notice. He was not testifying to a mere conclusion, for he told precisely what their employment was; namely, to obtain insurance for him, and nothing more. In the face of this uncontradicted and unimpeachable testimony, the jury would not have been warranted in finding that Starkweather and Shepley were authorized by the plaintiff to receive notice of cancellation, and so the exclusion of the evidence was immaterial for the purpose for which it was offered.

The defendants offered to prove a usage among insurance agents in Providence to notify each other of the cancellation of policies; that is, that the insurance agent who procured the policy on the one side, and the local agent who granted it on the other, were authorized by usage to receive such notices. Evidence of a similar usage was received by Judge BENEDICT in *Grace's Case*, 16 Blatchf. 433, to assist in the construction of the policy; and, for that purpose, it is before us on this motion. But it does not change our opinion of the meaning of the stipulation heretofore considered, because the usage extends only to insurance agents procuring a policy, and the stipulation refers to any person, whether an insurance agent or not, who shall have acted for the assured in any matter whatsoever.

Whether the evidence should have been received to add to the contract of the parties, is the difficult question of this case. In *Grace's Case*, Judge BENEDICT found that the usage was proved; but held that the stipulation for cancelling the policy by notice could not be varied by it even to the extent of allowing the assured a reasonable time in which to procure other insurance; and said, though he had no occasion to decide, that the usage could add nothing to the powers of the agent. The ruling in this case conformed to that *dictum*.

After an examination of the authorities we hold that a usage of this sort might be binding on the plaintiff if proved to be uniform,

and to be known to both parties, but not otherwise. It purports to make an agent for the respective parties whom they have not made for themselves. The policy provides that the defendants may cancel the policy by notice. This, of course, means notice to the plaintiff; and notice to the authorized agent of the plaintiff must be notice to him. To make Starkweather and Shepley the plaintiff's agents for this purpose the usage is invoked. If there is such a usage, it provides for a fictitious or arbitrary notice; as much so as if publication in a certain newspaper or proclamation at some public exchange were the mode of notice. If it governs this case, it must govern the next succeeding one, in which the plaintiff shall bring his action against Starkweather and Shepley for neglecting to inform him of the cancellation.

To establish a usage of this sort it must be proved to be uniform, and to be known to the plaintiff. In some cases, as where a note is made payable at a particular bank, or the contract of a charter-party is to be performed at a particular port, the ordinary usages of the bank or of the port make part of the contract. So of the usage of the stock exchange, which stands on a footing of its own, as is shown by FOLGER, J., in his able opinion in *Walls* v. *Bailey*, 49 N. Y. 464. But, in most cases, a usage which adds to or varies the contract must be proved to be known to the party sought to be bound by it; and this should clearly be the case where an artificial agency is to be made out. See *Savings Bank* v. *Ward*, 100 U. S. 195, where an attorney of the borrower had given a certificate of title upon which the lender relied in accepting a mortgage, and proof of a usage that the attorney should be considered the agent of both parties was rejected. In *Adams* v. *Otterback*, 15 How. 539, the usage of a bank, established but a short time, and not actually known to the defendant, was not permitted to bind him. This case resembles somewhat that of *Sweeting* v. *Pearce*, 9 C. B. (N. S.) 534, affirming S. C. 7 C. B. (N. S.) 449, in which one of the judges, speaking of a usage for insurance brokers to settle losses by set-off, instead of money, said it hardly seemed a reasonable custom unless known to the plaintiff, (the assured;) and as he did not know it, though it had been established for a great many years, and though the jury found that it was known to most merchants and ship-owners, they held that the plaintiff was not bound by it. See, also, on this point of actual knowledge, or that that the presumption of knowledge is rebuttable, Lawson, Usages, § 25, which is headed, "*Particular customs not known to the insured inadmissible;*" and *Walls* v. *Bailey*, 49 N. Y. 464; *Rogers* v. *Mechanics' Ins. Co.* 1 Story, 603; *Stebbins* v. *Globe Ins. Co.* 2 Hall, (N. Y.) 675; *Protection Ins. Co.* v. *Harmer*, 2 Ohio St. 452; *Howard* v. *Great Western Ins. Co.* 109 Mass. 384; *Kirchner* v. *Venus*, 12 Moore, P. C. 361; *Ward* v. *Harris*, L. R. 8 Ir. C. L. 365; *Adams* v. *Pittsburg Ins. Co.* 76 Pa. St. 411.

Upon these authorities, and upon the true theory of the admission

of usages to explain and add to contracts, we find nothing repugnant to this policy, or to any settled rule of law, which should oblige us to reject absolutely the proof of such a usage. It is not so unreasonable as the usage in *Savings Bank* v. *Ward*, 100 U. S. 295, which purported to make an attorney contract with all the world for an indefinite period. But, on the other hand, we do find that the addition of an arbitrary authority to a person other than the principal, to receive a notice which is to annul the contract, should be proved by the most clear and unequivocal evidence, and be brought home to the actual knowledge of the plaintiff or defendant who is to be bound by it. The question, then, is whether the rejection of the evidence should require us to grant a new trial. The offer of proof may not have contained all that the defendants could have produced if the ruling had been less absolute in rejecting the usage. The fact, if it be one, that the plaintiff had once held a policy which was afterwards cancelled by notice to his brokers, would, in this connection, be highly important. It was not offered with this view, but it may be so used on a second trial. We think it fairer to open the case upon this question of agency, though upon this only; and it is so ordered.

UNITED STATES *v.* DOUGLAS.

(Circuit Court, D. Massachusetts. August 18, 1883.)

"CHINESE LABORERS"—ACT OF MAY 6, 1882.

The term "Chinese laborers," as used in the act of congress of May 6, 1882, "to execute the treaty stipulations relating to the Chinese" contained in the treaty of 1868, as modified by the treaty of 1880, must have the same signification as when used in the treaty, and must be *held* to mean the subjects of the government of China to which the provisions of the treaty relate; and the inhibitions of the act cannot be construed to exclude from our shores laborers who are Chinese by race and language, but who are not, and never were, subjects of the emperor of China, or resident within his dominions.

Information.

Chas. Almy, Jr., Asst. U. S. Atty., for the United States.

Frank Goodwin, for Douglas.

Before LOWELL and NELSON, JJ.

NELSON, J. This is an information against the master of the British bark Eme, for bringing and landing within the port of Boston one Ah Shong, alleged to be a Chinese laborer, contrary to section 2 of the act of congress of May 6, 1882, which makes it a misdemeanor punishable by fine and imprisonment for the master of any vessel to "knowingly bring within the United States on such vessel, and to land or permit to be landed, any Chinese laborer from any foreign port or place."

The defendant has pleaded guilty to the information, subject to the opinion of the court whether, upon certain facts which the parties agree to be true, and desire to submit to the court for determination in this form, the offense with which he is charged has been committed. The material facts, so far as they bear upon the point decided, are as follows: Ah Shong, the alleged Chinese laborer, is Chinese by race and language, as well as in appearance and dress; but he has never been a subject or lived in the dominions of the emperor of China. He was born of Chinese parentage, in the island of Hong Kong, after its cession by China to Great Britain in 1842,[1] and he is now, and has been from his birth, a subject of the queen of Great Britain. He was shipped by the master in December last at Manilla as a carpenter, under shipping articles by which he was to serve in that capacity until the return of the vessel to her port of discharge in the United Kingdom, the voyage not to exceed two years. The vessel arrived in Boston on June 8th, with Ah Shong on board. On June 19th he left the vessel without leave of the master and came ashore, taking all his effects with him, and he has since refused to return on board the vessel. He was subsequently paid off and discharged.

It is unnecessary to consider whether, upon these facts, the defendant can be said to have landed, or permitted to be landed, the man Ah Shong, for we are of opinion that upon another ground the defendant should be discharged. Another question is presented for our determination, which is this: Whether, by the act of May 6, 1882, congress intended to exclude from our shores laborers who are Chinese by race and language, but who are not and never were subjects of the emperor of China, or resident within his dominions.

To arrive at the true construction of this act of congress it is necessary to refer to the treaties existing between this country and China at and previous to its passage. In the fifth article of the treaty of July 28, 1868, known as "the Burlingame treaty," the parties thereto declare that "they cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of free migration and emigration of their citizens and subjects, respectively, from the one country to the other for the purposes of curiosity, of trade, or as permanent residents." In the sixth article they agree that "citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities, and exemptions, in respect to travel or residence, as may be there enjoyed by the citizens or subjects of the most favored nation; and, reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities, and exemption, in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation."

These provisions of the Burlingame treaty remained in force be-

[1] Hertslet's Treaties, vol. 6, p. 222.

tween the two countries until the conclusion of the supplementary treaty of November 17, 1880, concerning immigration. By the new treaty, the absolute right previously granted to all subjects of the Chinese government, without distinction of class, to immigrate to and reside in this country, was materially modified and restricted. The first article of the new treaty provides that—

"Whenever, in the opinion of the government of the United States, the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country, or of any locality within the territory thereof, the government of China agrees that the government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable, and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation, or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse."

The second article declares that—

"Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation."

By the third article, this government guaranties against ill-treatment Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States.

The fourth and last article is as follows:

"The high-contracting powers having agreed upon the foregoing articles, whenever the government of the United States shall adopt *legislative measures in accordance therewith*, such measures shall be communicated to the government of China. If the measures, as enacted, are found to work hardship upon the subjects of China, the Chinese minister at Washington may bring the matter to the notice of the secretary of state of the United States, who will consider the subject with him; and the Chinese foreign office may also bring the matter to the notice of the United States minister at Peking, and consider the subject with him, to the end that mutual and unqualified benefit may result."

As was said by Mr. Justice FIELD, in *The Case of the Chinese Merchant*, 13 FED. REP. 607, referring to the fifth and sixth articles of the Burlingame treaty:

"While these articles remained in full force no legislation by congress looking to a suspension of, or restriction upon, the immigration of Chinese, engaged in any lawful occupation, was possible without a breach of faith towards China."

The treaty itself was sufficient to secure to the Chinese all the rights granted by it, and action by congress to that end was unnecessary. But effectually to limit or suspend the immigration into this

country of Chinese laborers, which we acquired the right to do under the new treaty, active legislative measures became indispensable; and this necessity was fully recognized in the treaty and provision made in regard to it. That the purpose of the act of May 6, 1882, was to supply these measures, there can be no doubt. An examination of its provisions will show very plainly that this was its only object. With perhaps the exception of the fourteenth section, which prohibits the federal and state courts from admitting Chinese to citizenship, there is not a word in the act which indicates any other intent or purpose on the part of its framers. The title of the act is "An act to execute certain treaty stipulations relating to Chinese;" and certainly there are no "treaty stipulations relating to Chinese" which congress could be called upon to execute, except those contained in the treaties with China.

The first section of the act, after reciting, in the terms of the supplementary treaty, that "*whereas, in the opinion of the government of the United States, the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof,*" proceeds to enact, also, in the terms of the treaty, "that from and after the expiration of ninety days next after the passage of this act, and until the expiration of ten years next after the passage of this act, *the coming of Chinese laborers to the United States be, and the same is hereby, suspended;* and during such suspension it shall not be lawful for any Chinese laborer to come, or, having so come after the expiration of said ninety days, to remain within the United States." The second section is the one upon which this information is framed. The third section provides that the two preceding sections shall not apply to Chinese laborers who were here on the seventeenth day of November, 1880, or who shall have come here before the expiration of 90 days after the passage of the act, and shall produce to the master of the vessel and the collector of the port certain prescribed certificates of identification. Sections 4 and 5 provide, "for the purpose of properly identifying Chinese laborers who were in the United States on the seventeenth day of November, 1880, or who shall have come into the same before the expiration of ninety days next after the passage of this act, and in order to furnish them with the proper evidence of their *right to go from and come to the United States of their free will and accord, as provided by the treaty between the United States and China, dated November 17, 1880,*" that lists shall be made and kept at the custom-house, which shall contain the evidence of identification of all Chinese laborers departing from the United States by sea, and that corresponding certificates shall be furnished them, which shall entitle them to return to and re-enter the United States, upon producing and delivering the same to the collector of customs. Section 6 provides "*that in order to the faithful execution of articles one and two of the treaty in this act before mentioned,*" Chinese persons who by the treaty were entitled to come to this country, shall be identified

by certificates issued by the Chinese government, which, among other things, shall state the "*former and present occupation or profession, and place of residence in China, of the person to whom the certificate is issued.*" These provisions, as well as many others that might be cited to the same effect, show conclusively that the act was passed to carry into effect the right acquired under the last treaty to exclude Chinese laborers who were subjects of the Chinese government. The same view is taken of the statute by the learned judges of the ninth circuit. In the case of *The Chinese Merchant, ubi supra,* it is said by Mr. Justice FIELD that "the act of May 6, 1882, was framed in supposed conformity with the provisions of this supplementary treaty. In the inhibitions which it imposes upon the immigration of Chinese, there is no purpose expressed in terms to go beyond the limitations prescribed by the treaty." In the *Case of George Moncan,* 14 FED. REP. 44, it is said by Judge DEADY that "this act was passed in pursuance of the treaty with China of November, 1880, supplementary to that of July 28, 1868," and that "it is not to be presumed that congress in the passage of this act intended to trench upon the treaty of 1868, as modified by that of 1880." See, also, *In re Ah Sing,* 13 FED. REP. 286; *In re Ah Tie,* Id. 291; *In re Ho King,* 14 FED. REP. 724.

The term "Chinese laborers," as used in the act, must, therefore, have the same signification as when used in the treaty, and must be held to mean the subjects of the government of China, to which the provisions of the treaty relate.

For these reasons, we are of opinion that the inhibitions of the act are not to be construed as applying to persons of the Chinese race who are not and never were subjects of or residents within the Chinese empire. As Ah Shong is a person of this description, it follows that the defendant cannot be guilty of a violation of section 2 of the act, and is therefore entitled to be discharged.

UNITED STATES *v.* HOWARD.

(*Circuit Court, D. Oregon.* August 15, 1883.)

1. INFORMATION—PENALTY PROVIDED IN SECTION 2148 OF THE REVISED STATUTES.

   Section 2148 of the Revised Statutes, section 2 of the act of August 18, 1856, (11 St. 80,) is in legal effect a prohibition against any person who has been removed from the Indian country returning thereto, and the penalty therein provided for its violation may be enforced by indictment or information.

2. REMEDY GIVEN BY SECTION 2124 OF THE REVISED STATUTES.

   Section 2124 of the Revised Statutes ought to be construed as only applicable to penalties imposed by the act of June 30, 1834, (4 St. 729,) of which it is a part; but if considered applicable at all to section 2148, *supra,* as being included

in title 28 of the Revised Statutes, the remedy therein provided for the enforcement of the penalty for returning to an Indian reservation is not exclusive of the common-law remedy by indictment or information, but only cumulative.

Information for Returning to the Siletz Reservation, contrary to section 2148 of the Revised Statutes.

James F. Watson, for plaintiff.

H. Y. Thompson and *Geo. H. Durham*, for defendant.

DEADY, J. On October 31, 1882, the district attorney filed an information in the district court charging Joseph Howard with the crime of returning to the Indian country, to-wit, the Siletz Indian reservation, after being removed therefrom by the Indian agent then in charge thereof. The case was afterwards transferred to this court, where the defendant was arraigned and tried upon a plea of not guilty, and a verdict found against him. Thereupon he filed a motion in arrest of judgment and for a new trial on various grounds, only one of which was insisted on at the argument of the motion, and that is: "The punishment sought to be inflicted upon the defendant cannot be inflicted in the course of a criminal prosecution, but the penalty only can be recovered in a civil action therefor."

The information is brought under section 2148 of the Revised Statutes, the same being taken from section 2 of the Indian appropriation act of August 18, 1856, (11 St. 80,) and reads as follows: "If any person who has been removed from the Indian country shall thereafter return or be found within the Indian country, he shall be liable to a penalty of $1,000."

By section 10 of the act of June 30, 1834, (4 St. 733; section 2147, Rev. St.,) Indian agents were authorized to remove from the Indian country "all persons found therein contrary to law," but no punishment was then provided in case of the return of any such person.

Section 2 of the former act referred to section 10 of the latter one, and declared that if any person who had been removed under said section 10 from "the Indian country," should thereafter return to or be found therein, "such offender shall forfeit and pay the sum of $1,000."

These two sections of the Revised Statutes occur in chapter 4 of title 28 thereof; and in chapter 3 of said title occurs section 2124,—the same being section 27 of the act of June 30, *supra*,—which provides:

"All penalties which shall accrue under this title shall be sued for and recovered in an action, in the nature of an action of debt, in the name of the United States, before any court having jurisdiction of the same, in any state or territory in which the defendant shall be arrested or found; one-half to the use of the informer, and the other half to the use of the United States, except when the prosecution shall be first instituted on behalf of the United States, in which case the whole shall be to their use."

Counsel for the defendant maintains that this section applies to a penalty incurred under section 2148, and excludes any other mode of

proceeding against the party incurring it than a civil action, as for a debt.

The rule is well settled that when a statute prohibits an act theretofore lawful, and imposes a penalty upon a party committing it, but prescribes no mode of proceeding to enforce it, such party may be prosecuted by indictment or information, and this mode of proceeding is not excluded by a subsequent statute prescribing another remedy. But if that portion of the statute containing the prohibition and penalty also prescribes a particular mode of proceeding to enforce the same, as a civil action to recover the penalty, as a debt, such proceeding is the only one that can be maintained. 1 Russ. Cr. 49; 1 Bish. Crim. Law, §§ 277, 278; 1 Whart. Crim. Law, §§ 24–26; *Rex* v. *Wright*, 1 Burr. 543.

Under this rule a party committing the act prohibited by section 2 of the act of 1856, *supra*, might have been prosecuted therefor criminally. There was no other mode of proceeding provided in the act.

Has the subsequent collation of this section in the Revised Statutes, into the same title with section 27 of the act of 1834, changed its character in this respect and restricted the means of its enforcement to the remedy prescribed by said section? Upon the face of the Revision, section 2148 is within the purview of section 2124, because it is in the same title; but I do not think that congress intended, in the enactment of this collation of these two statutes, to limit the mode of proceeding under section 2148 to the remedy prescribed in section 2124.

In *U. S.* v. *Bowen*, 100 U. S. 508, it is held that "when there is a substantial doubt as to the meaning of the language used in the Revision, the old law is a valuable source of information." But, when the meaning is plain, the courts cannot look to the statutes which have been revised to see if congress erred in that Revision, but may do so when necessary to construe doubtful language used in expressing the meaning of congress.

And by section 5600 of the Revision itself, it is declared that "the arrangement and classification of the several selections of the Revision have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the title under which any particular section is placed."

But, admitting that section 2148 is a contemporaneous enactment with section 2124, and a part of one and the same statute, the remedy provided in the latter section is not exclusive.

The rule seems to be that where a particular remedy is given for the commission or omission of an act prohibited or enjoined by statute, it is not exclusive, unless it is found in juxtaposition, or immediate connection, with the prohibitory or mandatory clause. *Rex* v. *Wright, supra;* Russ, Cr., *supra;* 1 Bish. Crim. Law, § 279. And the

section imposing the penalty contains no provision for its enforcement, and the general direction to proceed in such cases by a civil action is given in another section, in a title of the Revised Statutes, consisting of a collation of several distinct statutes on cognate subjects. Here a penalty is imposed on a person who returns to a reservation after being removed therefrom. Under the circumstances, this amounts to a prohibition against the act of returning. Therefore such act is illegal and criminal. It is committed in violation of a public law forbidding it. 4 Black, 5; *In re Pittock*, 2 Sawy. 421.

In the case of *U. S.* v. *Sturgeon*, 6 Sawy. 29, the defendants were proceeded against criminally in the district court of Nevada, under this section, 2148, for returning to the Pyramid lake reservation and taking fish there, and convicted; and the judgment was afterwards affirmed in the circuit court by Judge SAWYER.

The case appears to have turned, however, upon the questions, whether the reservation was "Indian country," and, if so, whether the defendants were there "contrary to law," without any objection being made to the mode of proceeding.

On the whole, my conclusion is that section 2124 ought to be construed as only applicable to the penalties imposed by the act of June 30, 1836, (4 St. 729,) of which it is a part, but if allowed to apply at all to section 2148, as being a part of title 28 of the Revised Statutes, still, it being a separate and distinct provision from section 2184, the remedy therein provided for a violation of this latter section is not exclusive of the one given by the common law, but only cumulative.

And therefore this section, 2148, being in legal effect a prohibition against the defendant's returning to the Siletz reservation, as he did, the penalty to which he is thereby made liable for so doing may be enforced against him by indictment or information.

The motion is denied, and the defendant ordered to appear for sentence.

MCKAY *v.* JACKMAN.

(*Circuit Court, S. D. New York.* June 26, 1883.)

1. PATENTS—LICENSEE NOT READING LICENSE.
   Where a party signs a license to use a patented machine without reading it, he is bound by the terms thereof, unless he lacks capacity to comprehend properly what he is doing.
2. SAME—RENEWAL OF LICENSE—DURESS—INJUNCTION.
   Where a party is enjoined from infringing a patent, and instead of contesting the validity of the patent and moving for a dissolution of the injunction, renews a license to use the said patent, which had been canceled by reason of a breach thereof, such renewal will not be considered as made under duress, and will be binding on him.

3. SAME—RECOVERY OF ROYALTIES—EVICTION.
Unless there has been an eviction, or its equivalent, the royalties agreed to be paid by a licensee for the use of a patent must be paid.

4. SAME—JURISDICTION OF CIRCUIT COURT—REV. ST. § 968—COSTS.
Where a patentee cancels a license because of a breach of its conditions, and proceeds against the licensee as an infringer, and the license is renewed after the institution of suit in a circuit court of the United States, and the citizenship of the parties gives the court jurisdiction, but the amount of royalty actually due to plaintiff is less than $500, a decree may be entered for the amount due, but neither party will be allowed costs.

In Equity.

Elias Merwin, for orator.

Jos. C. Clayton, for defendant.

WHEELER, J. The defendant, a citizen of New York, was a lessee of the orator, a citizen of Massachusetts, of a machine for making shoes, embodying several patented inventions owned by the orator, and a licensee of the right to practice the inventions for a royalty. In the instrument of lease and license he expressly stipulated not to contest the validity of the patents. The orator canceled the instrument for non-compliance with its terms; the defendant commenced using an infringing machine; and the orator brought this bill against the infringement, setting up the lease and license and breach, and praying for general relief, as well as for an injunction and an account. A preliminary injunction was granted, restraining practicing the inventions, except by the use of the leased machine. The defendant then asked a withdrawal of the cancellation, which was granted. On the hearing in chief, the two patents on which the bill was brought were adjudged invalid, but the suit was retained for an account of the royalties. *MacKay* v. *Jackman*, 12 FED. REP. 615. The report of the master, based upon a stipulation of the parties, shows that there is due for royalties for use of the leased machine $50, and for shoes made on the infringing machine $270. The report does not show whether any part of either of these sums had accrued when the suit was commenced. The report also shows that the defendant had paid to the orator $4,643.59 for royalties on the machine since a valid patent on the machine itself expired. Three principal questions are made. One is whether the orator is entitled to these royalties; another is whether he is entitled to retain those paid since the valid patent expired; the other is whether the relief can be had in this suit.

The defendant is bound to pay what he agreed to pay, if he has had what he agreed to pay it for. When the suit was brought he stood out from under the license and was using an infringing machine on his own right, independent of the license. Had he maintained that attitude, the vindication of his right to use the infringing machine would have relieved him from all liability for the use. The orator was treating him as an infringer, and if he could not be held as such he could not be held at all. But when the orator obtained an injunction against him, he changed his position and took that of a licensee,

again agreeing to pay royalties. It is argued that the obligation to pay royalties for anything but the use of the leased machine was entered into by mistake induced by deception, and that its renewal was compelled by the duress of the injunction. There is no proof of any misrepresentation or concealment from the defendant concerning the contents of the instrument of license. He testifies that he did not read it, but not that any one prevented his reading it, nor that he was unable to read it. He appears to have signed it without reading it, because he preferred to take the risk of its contents rather than the trouble of reading it. Under such circumstances he became bound by it, as it was, according to its terms. Nothing would save him from its effect but lack of capacity to comprehend properly what he was doing, and nothing of that sort is claimed or is at all apparent.

The injunction was not, as between the parties, any undue or illegal restraint or hardship. It was the judgment of the court, and, in contemplation of law, was right, because it was rendered by the court as by law the court was authorized to render it; and it was to be borne without any liability on one side or right to redress on the other while it continued in force. *Sturgis* v. *Knapp*, 33 Vt. 486. The dismissal of the bill as to that part of the case, or dissolution of the injunction, would not affect the rights of the parties as to its restraint during its continuance. Its dissolution would not be like the reversal of a judgment or decree which would leave the rights of the parties involved as if the judgment had never been rendered or decree made, but would merely relieve the restraint in the future, without removing its effect in the past. All the right the defendant had in respect to the injunction was to get it dissolved as soon as he could, and to respect it until dissolved. He preferred payment of the royalties to waiting for dissolution of the injunction, and agreed to pay them for the privilege to practice the invention. He had that privilege, which was exactly what he agreed to pay for. There was no eviction; the orator defended the patents against infringement by any others as long as the defendant used the inventions under the agreement to pay for the use. This subject has been so lately examined by Judge LOWELL, in *White* v. *Lee*, 14 FED. REP. 789, and the conclusion reached by him there upon review of the authorities, that without an eviction or its equivalent the royalties must be paid, is so satisfactory, that nothing further on this point than a reference to that decision seems necessary.

These views seem to be conclusive to the effect that those royalties already paid cannot be recovered back.

The citizenship of the parties gives this court jurisdiction of controversies between them, and it is not claimed but that a suit in equity for an account of royalties is proper. The defendant insists, however, that as the defendant stood as an infringer, and was proceeded against as such, at the commencement of the suit, nothing which occurred afterwards changing his attitude to that of a licensee could be brought

into the same suit, but that such subsequent matter should be left to another and a different suit. The defendant did not, after suit, obtain a new license. He sought and obtained a withdrawal of the cancellation of the old one. This would make him liable for the royalties upon his infringements by changing the tort to a matter of contract, as well the infringements before suit brought as those after. And when there is something to be accounted for that was prior to the commencement of the suit, so that the orator is entitled to a decree for an account, the account is taken of all matters up to the time at which it is taken.

The orator appears to be entitled to have the report as to the royalties unpaid accepted, and that part as to royalties paid set aside. Upon this conclusion the orator recovers less than $500, upon a cause of action or right of recovery which could not, by itself, be brought here, unless the amount in dispute exceeded that sum. *Hartell* v. *Tilghman*, 99 U. S. 547.

Section 968 of the Revised Statutes provides that—

"When, in a circuit court, a plaintiff in an action at law originally brought there, or a petitioner in equity other than the United States, recovers less than the sum or value of five hundred dollars, in a case which cannot be brought there unless the amount in dispute exceeds said sum or value, * * * he shall not be allowed, but at the discretion of the court may be adjudged to pay, costs."

That part of the case upon which the defendant has recovered could be brought here without reference to the amount in dispute, so that, literally, speaking of the whole case, this case could be; but the spirit and intention of the statute would seem to apply the restriction to that part of the case upon which the plaintiff recovers. Costs in equity cases are generally subject to the discretion of the court, to be exercised, however, according to general legal principles, and not arbitrarily. Ordinarily, the recovering party recovers costs in suits in equity as well as at law. This statute, however, seems to require that this orator should not recover costs, or at least its spirit seems to guide the discretion of the court in that direction. Without the statute the court might not be authorized to give costs to the defendant in a case in which the plaintiff recovers, although not upon the whole case, and as this statute does not in exact terms cover this case, no costs are allowed to the defendant. This would seem to be most just, under the circumstances.

The report of the master is accepted and confirmed as to the sum of $50 and $270 of unpaid royalties, and set aside as to the sum of $4,643.59, and a decree for the payment of $320 by the defendant to the orator is to be entered accordingly, without costs.

(July 11, 1883.)

WHEELER, J. The defendant was a licensee under the plaintiff's patents. The plaintiff canceled the license pursuant to its terms on

account of a breach of them by the defendant, and brought this suit against him as an infringer, and obtained an injunction against the use by him of an infringing machine. At the defendant's request the plaintiff withdrew the cancellation. The item of $270 mentioned in the master's report, and the decision of the court upon it, is made up of royalties reckoned at the licensed rate for the use of the infringing machine. The report of the master appears to be based wholly upon a stipulation filed, and neither the report nor stipulation shows what the relation of the parties was in respect to the license,—whether it was while the cancellation was in force, or while the license was in force, that the use was made of the infringing machine for which the $270 was allowed. This was a material matter in the disposition of the case, but was treated by the master and court as the parties by the stipulation left it. Since the decision, and before final decree entered, the defendant has moved to have the report recommitted to the master for the purpose of having the fact appear as to when this use was had, and presented an affidavit in support of the motion tending to show that it was while the cancellation was in force. The plaintiff insists, in opposition to the motion, that it was while the license was in force. It is not contended but that it is still within the power of the court to recommit the report. The amount involved is so small that if the right to that sum was all there was to follow the final disposition of the case, it might seem wisest to leave the case to stand as it would upon the facts as left by the stipulation of the parties. But this appears to be a test case to some considerable extent, and one that is likely to appealed, for the purpose of settling some of the questions involved, in view of other and greater interests, and upon which the matter desired to be shown may be quite material. Under these circumstances it seems to be better that this case should be so completed as to present the questions to be decided in all the aspects which may ultimately be found to be material. For these reasons the motion is granted.

Motion granted and report recommitted to master.

DODDS *v.* STODDARD and others.[1]

(Circuit Court, S. D. Ohio, W. D. July, 1883.)

1. PATENTS FOR INVENTIONS—HORSE RAKES—CONSTRUCTION.
Letters patent No. 65,573, granted J. M. Wanzer, assignee of James Hollingsworth, June 11, 1867, for an improvement in horse rakes, *held invalid for want of novelty* as to the *first* claim, and *not infringed* as to the *second*, *third*, and *fourth* claims.

[1] Reported by Herbert D. Blakemore, Esq., of the Cincinnati bar.

2. SAME—DEVICES DISTINGUISHED.

Complainant's mechanism consisting of tubular oscillating rake-teeth bearings, with three passages at right angles, formed to *abut* directly against each other; bearings for supporting the front ends of the teeth, having sliding pins with eyes, sustained upon springs and playing in guides above and below said eyes, and combinations of these tubular and eye-bearings, with rake teeth of a double-curved form, rocking-frame and arms of a horse rake, in view of the state of the art, *held, not infringed* by defendant's rake, in which the tubular bearings do not abut directly against each other, but are spaced by rings or washers, where the front end of the teeth are supported in tubular guides, sustained by springs, and play freely through slots in such guides, and having combinations of these tubular bearings and guides, rake teeth of the double-curved form, and rocking-frame.

3. SAME—TUBULAR BEARINGS OF FORM TO ABUT ANTICIPATED BY BEARINGS OF SAME FORM THOUGH NOT ABUTTING.

The first claim for tubular bearings of a form to abut against each other, *held, anticipated* by tubular bearings, which, though they are not shown nor described as so abutting, might, without any change of construction, have been made to abut against each other.

In Equity. Final hearing upon pleadings and proofs.

Parkinson & Parkinson, for complainant.

Stem & Peck, for defendants.

SAGE, J. The complainant sues for infringement of a patent for improvement in horse rakes, granted to his assignor, J. M. Wanzer, assignee of James Hollingsworth, the inventor, June 11, 1867. The defendants admit that since February 2, 1881, they have made hay rakes substantially in accordance with expired patent No. 41,433, granted to James Hollingsworth, February 2, 1864, and allege that they have added thereto several minor improvements, the invention of the defendant E. Fowler Stoddard. They deny the validity of the letters patent sued upon, and say that said Hollingsworth was not the original or first inventor of the alleged improvements therein described, and that said alleged improvements do not constitute a patentable invention, and that they are not novel; and they further say that they were described and shown in letters patent, named and described in the answer, long prior to said alleged invention of said Hollingsworth.

The patentee's claim in the patent sued on is:

(1) For the construction of a rake-tooth bearing, (which is described in the specifications as an oscillating tubular bearing, constructed with three passages through it, and constituting a means for attaching a tooth to a bar so as to articulate thereon, and also a means whereby the tooth can readily be attached or detached at pleasure, and adjusted forward or backward, according to the character of the ground over which the rake is to be drawn,) with three passages at right angles to each other, when said bearings are of a form to abut directly against one another, and the teeth extend clear through the top passages of the bearing, substantially in the manner and for the purposes described.

(2) The construction of eye-bearings for supporting the rake teeth at their front ends; each bearing holding a spring, substantially as described.

This part of the alleged invention, as set forth in the specifications, consists in sustaining the front ends of the rake teeth by means

of sliding pins, having eyes formed on them for receiving the ends of the teeth, said pins being sustained upon springs, and supported in guides above and below their eyes, in such manner as to form supports for the teeth against lateral displacement; also to afford the teeth an additional spring action to hold them down to their work, and allow them to rise and pass over obstructions which may be in their path.

(3) The combination of the jointed bearings (described in first above) and eye-bearings (described in second above) with a rake tooth of the form substantially as in the letters patent described.

The rake tooth is described in the specification as having a gradual curve from the rear to the forward supporting bar, which feature, in conjunction with a set-screw on the middle bearing,—the tubular bearing,—allows the tooth to be adjusted backward or forward, whereby one set of teeth can be adapted for level land, or for rough and uneven land, and for heavy and light raking.

(4) The combination of the tubular bearings above described with set-screws, (the holes for receiving the set-screws being perpendicular to the tooth, so that the screw serves to secure the tooth rigidly to the bearing, and to admit of its forward or backward adjustment,) the rocking-frame with its arms, and the eye-bearings (described in second above) with their springs, substantially in the manner and for the purposes described.

The hay rake which the defendants admit they have manufactured since February 2, 1881, and which, it is claimed, is an infringement of the patent sued upon, has—

(1) An oscillating tubular rake-tooth bearing, constructed with three passages through it at right angles to each other, and constituting a means for attaching a tooth to a bar, so as to articulate thereon, and also a means whereby the tooth can readily be attached or detached at pleasure, and adjusted forward or backward, according to the character of the ground over which the rake is to be drawn; and the tooth extends clear through the top passages of the bearing, substantially (indeed, it may be said, identically) in the manner and for the purposes described in the complainant's patent.

The tubular bearings in the defendants' rake are of the same shape, form, and construction as the tubular bearings in the complainant's rake. But in the defendants' rake these bearings do not abut directly against each other, as do the tubular bearings in the complainant's rake, but they abut against metal rings or washers, which space the distances between them.

(2) The defendants' rake has eye-bearings for supporting the rake teeth at their front ends, each bearing holding a spring. The eye-bearings in the defendants' rake differ in form from those described in the complainant's patent, in that they consist of a tube having a slot or elongated opening, in its two opposite sides, of the proper size to permit the front end of the rake tooth to be inserted and pass through the slots, and play freely up and down in the tubular guide.

(3) The combination of the tubular bearings with the rings or washers, above described, and eye-bearings, (as above described,) and a rake tooth substantially of the form of the rake tooth described in the letters patent under

which the complainant claims. There is no appreciable difference between the tooth in the defendants' rake and that in the complainant's.

(4) The combination of the tubular bearings, separated or spaced by rings or washers, as above described, with set-screws, (the holes for receiving the set-screws being perpendicular to the tooth, so that the screw serves to secure the tooth rigidly to the bearing and to admit of its forward or backward adjustment,) the rocking-frame with its arms, (which are substantially as in the complainant's rake,) and the eye-bearings, as above described, with their springs.

It is thus made clear that the only differences between the complainant's rake and that manufactured by the defendants are—*First*, that the tubular bearings in the defendants' rake do not abut directly against each other, as do the tubular bearings in the complainant's rake, but are separated or spaced by rings or washers, which fill the intervening spaces between the bearings; and, *second*, in defendants' rake the guides or eye-pieces of the eye-bearings are held stationary and the tooth plays up and down in the slots therein; while in complainant's rake the eye-piece, or guide, plays up and down with the tooth through holes in the bars.

The rocking-frame was not new at the date of the alleged invention described in the complainant's patent.

An oscillating tubular bearing, having three passages at right angles to each other, the tooth extending clear through the top passage of the bearing, and having a set-screw serving to secure the tooth rigidly to the bearing, and to admit of its forward or backward adjustment, was known and used before the date of said alleged invention, as were also guides, or eye-pieces, substantially the same as those used by the defendants.

The patentee of the complainant's rake, in his application for letters patent therefor, claimed the construction of a rake-tooth bearing with three passages at right angles to each other, as described in his specifications and as used in complainant's rake, and the commissioner of patents found that the claim was anticipated in the patent to Hollingsworth of February 2, 1864, whereupon the patentee accepted the decision of the commissioner, and modified his claim so as to make it apply when said bearings were of a form to abut directly against each other, as described in his application. He also claimed for adjusting rake teeth backward or forward when said teeth were constructed and supported by eye-bearings, substantially as described in his application, and the commissioner having found that this claim, too, was anticipated, the patentee erased said claim, and he is therefore estopped from making such claim, or from maintaining that the form of the tooth in the patent sued on is substantially different from that known and used before the date of his alleged invention.

The combination of tubular bearings, as in the complainant's rake, (excepting that they were not jointed,—that is, did not abut against each other,) and eye-bearings with a tooth substantially as described in the application for the patent sued upon, was anticipated in the

Hollingsworth patent of February 2, 1864, and the tubular bearings described in said patent are of a form to abut directly against one another. This is shown by defendant's exhibit, "Expired Hollingsworth Modifications." It is true that in that patent the tubular bearings are not described, nor are they shown by the model which is in evidence as abutting directly against each other, but their form is such that, without any change of construction, they might have been made to so abut; and the claim in the complainant's patent is for *the form* of the bearings.

In the defendant's rake the tubular bearings do not abut directly against one another. They are separated by metal rings or washers. If these rings or washers served no other purpose, it might well be insisted that they are only continuations of the tubular bearings, and are not deprived of any office or operation by being severed from them, instead of being made solid with them. But in the complainant's rake the tubular bearings differ in length, and have to be cast from different patterns on account of the end standards, and the arm or lever used for the purpose of stiffening the frame and strengthening the bars at the point where the power is applied for oscillating the frame. In the defendants' rake the tubular bearings are all of the same length. They may be cast from the same pattern, and are interchangeable, which is a great advantage to the manufacturer, and, in case of breakage, to the purchaser and user. The rings or washers serve to fill the spaces between the bearings, and obviate the necessity of having bearings of different lengths, which cannot be avoided if the bearings abut directly against each other. The introduction of the rings or washers is, therefore, an improvement; and, inasmuch as tubular bearings of a form to abut directly against one another are found in the expired Hollingsworth patent, the complainant's appeal to the doctrine of mechanical equivalents is not well taken.

It results that the defendants' rake is not an infringement of either of the combinations of the complainant's patent, and as the eye-bearing in defendants' rake is found substantially in the expired Hollingsworth patent, and the first claim in complainant's patent is anticipated, as already stated, in the expired Hollingsworth patent, there is no infringement of the first or second claims.

No questions depending upon the agreement of dissolution of partnership between the complainant and the defendant John W. Stoddard, referred to in the bill, can be considered in this court, for the reason that, the parties being citizens of Ohio, the state courts have exclusive jurisdiction, excepting of questions arising under the patent laws of the United States.

The bill must, therefore, be dismissed.

WOOD and another *v.* PACKER.

(Circuit Court, D. New Jersey. July 14, 1883.)

1. PATENTS FOR INVENTIONS—REISSUE.
   Reissued letters patent No. 9,368, dated August 31, 1880, for an improved coal cart with a sliding extension chute, *held* valid.
2. SAME—PATENTABILITY OF COMBINATION OF OLD ELEMENTS.
   A mere aggregation of old things is not patentable, and, in the sense of the patent law, is not a combination. In a combination the elementary parts must be so united that they will dependently co-operate and produce some new and useful result, and such result must be a product of the combination and not a mere aggregate of several results, each the complete product of the combined elements.
3. SAME—NOVELTY—RESULT.
   The subject-matter of a supposed invention is new, in the sense of the patent law, when it is substantially different from what has gone before it, and this is determined by the character of the result, and not the amount of skill, ingenuity, or thought exercised; and if the result has been substantially different from what had been effected before, the invention is patentable.
4. SAME—MECHANICAL SKILL.
   When the results are produced by mere mechanical skill, or where the change is only in degree and not new, the improvement is not patentable.
5. SAME—REISSUE—VOID CLAIM.
   An entire reissue will not be avoided on account of the existence of one void claim.

In Equity.

F. C. Lowthorp, Jr., for complainant.

James Buchanan, for defendant.

NIXON, J. This action is brought against the defendant for infringing certain reissued letters patent, No. 9,368, dated August 31, 1880. The Delaware Coal & Ice Company was the owner of the original patent, No. 73,684, and brought suit in this court against the same defendant for their infringement. It was found, upon examination, that although the patentee in his specifications stated the nature of his invention to consist in the funnel-shaped mouth attached to the cart, in combination with the chute and valve, he had failed to make any claim for such combination; and as none of the separate constituents, as set forth in the three claims, were new, the court was obliged to hold that the defendant was not shown to have infringed anything claimed in the complainant's patent. Since then the original patent has been surrendered, and a reissue obtained, with quite a different statement of the inventor's claims. They are as follows: (1) The combination of the body of a coal cart with a sliding extension chute, substantially as and for the purpose set forth; (2) the combination of the body of a coal cart and the outlet, having a gate or valve, with a sliding extension chute, adapted to the said outlet, substantially as specified.

The answer sets up three defenses: (1) That the reissue is void because the combination claimed is an expansion of the original; (2) want of novelty in the patent; (3) non-infringement.

The second is the only one of these defenses which seems to have merit, or which has been the occasion of any serious or extended in-

quiry. Do the specifications and claims of the patent as reissued indicate invention on the part of the patentee? The patent is for a combination, the constituents of which are stated in the claims above quoted. There is no difference, in fact, between the claims, except that the second has one element which is not named in the first, to-wit, the outlet, having a gate or valve, and which is the means of communication between the first and third constituents of the combination. Its absence gives much force to the argument of the learned counsel of the defendant, that the first claim is void because the parts are old, and there is no dependence or co-operation in their action whereby any new result is obtained. A mere aggregation of old things is not patentable, and, in the sense of the patent law, is not a combination. In a combination, the elemental parts must be so united that they will dependently co-operate and produce some new and useful result. A coal cart is not novel, nor is the chute for conducting coal from the cart to the place of its destination. These two instrumentalities are aggregated in the first claim; but no mechanism is suggested whereby the coal can be got out of the cart and into the chute. The complainant (Wood) testifies as a witness that it can be accomplished by the use of a man with a shovel. This is probably true; but it is difficult to see how the inventive faculty is put in exercise by any such arrangements. It is not necessary, however, to dwell upon this view of the case, because the entire reissue will not be avoided on account of the existence of one void claim. See *Carlton* v. *Bokee*, 17 Wall. 463.

The constituents of the second claim of the reissue are (1) the cart or wagon; (2) the outlet, with a gate or valve; and (3) the sliding extension chute. The patentee was asked whether he thought any of these elements, separated from the others, was novel, (Com. Rec. 28–9,) and replied, "I do not think they are, but only in combination."

The case is then presented here which was considered by the supreme court in *Hailes* v. *Van Wormer*, 20 Wall. 368, and in which Mr. Justice STRONG, speaking for the whole court, said:

"All the devices of which the alleged combination is made are confessedly old. No claim is made for any one of them singly as an independent invention. It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made. But the results must be a product of the combination, and not a mere aggregate of several results, each the complete product of one of the combined elements. * * * Merely bringing old devices into juxtaposition and then allowing each to work out its own effect, without the production of something novel, is not invention."

The question, then, is in regard to the second claim of the complainants' reissue: Is it a patentable combination, producing new and useful results, or is it a mere aggregation of old elements, each working out alone its single individual effect?

It is not a question of easy solution, for it requires us to find the

exceedingly delicate line which divides patentability from simple mechanical skill, or to ascertain the difference between real invention and a double use or application of something that has existed before. Mr. Curtis, in section 41 of his treatise on the Law of Patents, in discussing this subject, says:

"The subject-matter of a supposed invention is new, in the sense of the patent law, when it is substantially different from what has gone before it; and this substantial difference, in cases where other analogous or similar things have been previously known or used, is one measure of the sufficiency of invention to support a patent. Our courts have, in truth, without always using the same terms, applied the same tests of the sufficiency of invention which the English authorities exhibit in determining whether alleged inventions of various kinds possess the necessary element of novelty; that is to say, in determining this question, *the character of the result, and not the apparent amount of skill, ingenuity, or thought exercised, has been examined;* and if the result has been substantially different from what had been effected before, the invention has been pronounced entitled to a patent."

If all improvements upon existing organisms were patentable, there would be no doubt about sustaining at once the complainant's patent. But sometimes better results are produced by mere mechanical skill, without the exercise of invention. The law does not extend to or cover such cases, (*Smith* v. *Nichols*, 21 Wall. 118;) nor where the change is only in degree, and not new, (*Guidet* v. *Brooklin*, 105 U. S. 552; *McMurray* v. *Miller*, 16 FED. REP. 471.)

The complainant's patent is undoubtedly a great improvement upon everything that went before it. The invention of William Bell (*letters patent No. 14,301, granted February 26, 1856*) was set up by the defendant as an anticipation, and it certainly contains valuable suggestions. His dumping wagon, however, could not be used for delivering coal in cellar windows, but only for dumping it into pavement vault-holes, where they happened to exist in front of houses, at a proper distance from the edge of the pavement, and it seems to lack adjustability for doing even this successfully.

The evidence shows that Richard Hammell, a respectable citizen of Chambersburg, was formerly engaged in the coal business in Lambertville, New Jersey, and that as early as 1863 he was in the habit of using chutes in delivering coal from a wagon into a cellar. He thinks that he introduced the double or sliding chutes in the fall of 1865, and continued to use them for 10 years. The narrow end of one passed into the wider end of the other. He used the double chutes when the distance for delivery was too far for the single. When the distance was greater than the single chute, they pushed them one into the other to adjust the length. When the distance was still greater, they had chutes that would reach any house. The longest single chute was 16 feet; by combining them they could reach 24 feet, or more, if necessary. When more than one was used, they carried a light trestle to support them in the middle. * * * They had half a dozen such chutes, and when they had occasion put them together.

Peter C. Hoff was also in the coal business in Lambertville, in the

spring of 1867, and has continued therein ever since. He used chutes of different lengths, made tapering, and growing smaller to the end, which went into the cellar. The lower end would rest on the cellar window, or the place made to put in the coal. He used more than one at a time, but not frequently. He generally had three chutes,—one about 7 feet long, one about 12, and the other about 14 feet. Then if the place to put the coal in was 10 feet from the line of the street, he would use two chutes, would shove the small end of the one into the larger end of the other, with a trestle under where the connection was, and also a prop by the wagon,—being a seat, board, or something similar,—in order to hold it up to let the coal run into the cellar. He used the 14-feet chute and the 7-feet together in that way, which was about the longest distance he ever used the chute. But in all these cases the coal was shoveled from the wagon into the chutes, which were not attached to the wagon in any way. This testimony exhibits the state of the art when the complainant appeared with his improvement. He has not very largely exercised the inventive faculty in what he has done. His combination is so simple that it seems wonderful that other persons did not think of it. But they did not, and if it has effected any new and useful result the law protects him in its exclusive use. The evidence reveals that by his combination of old instrumentalities a load of coal can be emptied from a cart into a cellar without the agency of a man using a shovel. This is a new result, worthy of the notice of the law, and it is the duty of the court to give to the patentee the benefit of his invention.

A decree must be entered for the complainant, and a reference made for an account.

THE FRANK G. FOWLER.[1]

(Circuit Court, S. D. New York. July 19, 1883.)

COLLISIONS—PRIORITY OF LIENS.

Where several collisions are caused by the negligence of a tow in fulfilling a contract of towage, and each claimant for damages arrests the vessel at the same time to respond, there is no principle of the maritime law, and no interest of commerce or navigation, which requires that the elder lienor, not guilty of laches, and not having committed any waiver or abandonment, should have his claim postponed to that of the younger lienor.

In this case I find the following facts:

At all times from the fourth day of November, 1880, to the twenty-fourth day of December, 1880, both included, the steam-tug Frank G. Fowler was engaged as a tow-boat in New York harbor and Long Island sound, and the neighboring waters. At and prior to the time of the first disaster hereinafter mentioned, she was owned by Esther Pitt, of Staten island, and was run by W. D. B. Janes, of Brooklyn, as mortgagee in possession, or under a contract to purchase. Mr. Janes transacted the vessel's business at 124 Front street, in the city of New York. Subsequently, and from about November 14,

[1] See S. C. 8 FED. REP. 331, 340, 360.

1880, she was owned by the Neutral Transportation Company, a corporation organized under the laws of the state of New York, and having its principal office in the city of New York, of which the said W. D. B. Janes was manager. The place of transacting the tug's business continued to be at 124 Front street. On or about November 4, 1880, W. D. B. Janes, on behalf of the tug, for a stipulated price agreed to be paid, entered into a contract with Henry S. Conway and Charles M. Conway, owners of the canal-boat Lockport and of her cargo, to tow the said canal-boat and cargo from New London to New York. On the same day, in pursuance of said agreement, the tug took the canal-boat in tow at New London and started for New York. In the course of the voyage, and at about 2 o'clock on the morning of November 5, 1880, the canal-boat was cast adrift by the tug in Long Island sound, and, in consequence thereof, damages were sustained by the said Henry S. Conway and Charles M. Conway through injury to the canal-boat and cargo, and for which they, on the twenty-fourth of December, 1880, filed their libel in the district court of the United States for the southern district of New York, claiming $2,266.95. The damages arising through said injury to the canal-boat and cargo were occasioned solely by the fault and negligence of the persons in charge of and navigating the tug. On or about the twenty-third of April, 1880, the Phœnix Insurance Company issued its policy of insurance for the sum of $6,000 upon the hull of the barge W. H. McClave, said barge being of more than that value. On or about the nineteenth of November, 1880, the Eastern Transportation Company, a corporation organized under the laws of the state of New York, and having its principal office in the city of New York, entered into a contract with the owners of the barge, for a stipulated price agreed to be paid, to tow the barge from New York to Stamford, and from Stamford to Norwalk, Connecticut, and on that day it started to tow the barge to Stamford, where, afterwards, she safely arrived, and was there left to discharge part of her cargo. On the night of November 24, 1880, the Eastern Transportation Company sent the said tug to take the barge from Stamford to Norwalk, and at a very early hour on the morning of the next day the tug, with the barge in tow, left Stamford for Norwalk. In the course of the voyage, and before daybreak on November 25th, the barge was, through the negligence and mismanagement of those in charge of the navigation of the tug, run on a ledge of rock at Shippan point, near Stamford, and there stranded. The rescue and repairs of the barge were directed and carried on by the Phenix Insurance Company, as insurer. The repairs were completed on the twenty-third of December, 1880, and were paid for by the company on that day to the amount of $5,523.91. The company also paid the sum of $750 for wreckers on or about the tenth of December, 1880. On the twenty-third of December, 1880, the Phenix Insurance Company filed its libel against the tug for the recovery of its damages. Process was thereupon on that day issued to the marshal against the tug, and on the twenty-fourth of December, 1880, the marshal seized the tug under such process, and also under process issued under the first-named libel so filed, the processes under the two libels being served at one and the same time, and the tug being attached in both suits simultaneously. The damages of the Phenix Insurance Company amounted to $6,273.91, and have been determined at that amount by the district court by a final decree. There has been an interlocutory decree in the suit on the first above-named libel, awarding to the libelants therein a recovery of their damages, with costs, and a reference to ascertain such damages, but they have not been ascertained. The canal-boat was insured in the Buffalo Insurance Company, and the first above-named suit is prosecuted, so far as the damages to the canal-boat are concerned, for the benefit of that company. On the eighth of November, 1880, Henry S. Conway, with the representative of the Buffalo Insurance Company, consulted a lawyer with reference to their claim against the tug, and were advised that their claim was a good one. On that

day Henry S. Conway informed Mr. Janes that the tug would be held responsible for the damages. The canal-boat was at that time lying sunk in Guilford creek. Between the day of the casting adrift of the canal-boat and the date of the stranding of the barge, Henry S. Conway, who was master and managing owner of the canal-boat at the time of the disaster, was necessarily occupied in taking charge of her at Guilford creek, where she lay sunk, and in raising and saving her and her cargo, after engaging wreckers in New York City. It was not possible to ascertain the extent of the damage to the canal-boat or cargo until she was put on the marine railway at New Haven, on or after December 13, 1880. From November 15, 1880, to November 25, 1880, the tug was engaged in towing between various points in New Jersey and places in the sound, in the state of Connecticut. She usually arrived at the city of New York from the eastward in the evening, laid up for the night in New Jersey, and left early in the morning, and she only touched at the city of New York to report work done. Henry S. Conway and Charles M. Conway resided in the city of New York, and were acquainted with W. D. B. Janes. The Buffalo Insurance Company had a resident agent in the city of New York. On or about the seventeenth of February, 1881, the tug being in the custody of the marshal, the claimant, the Neutral Transportation Company, made application for her appraisal and her release from custody under bonds or on deposit of money. Such appraisal was had, and the valuation of the tug was fixed at $4,500, which sum of money the owner of the tug paid into the registry of the district court, and the tug was released. At the same time her owner paid into said registry $175 on account of costs for the Phenix Insurance Company, and $175 on account of costs for Henry S. Conway and Charles M. Conway, and also certain sums for marshal's fees and expenses of appraisal, all as provided by an order of the district court.

On the foregoing facts I find the following conclusions of law:

The Conways were not guilty of any laches prejudicing their lien or claim as between them and the Phenix Insurance Company. The claim and lien of the Conways are entitled to priority of payment over the claim and lien of the Phenix Insurance Company. The Conways are entitled to a decree accordingly, with costs in this court to be taxed. Both cases must be remanded to the district court, with directions to that court to proceed with the reference in the suit brought by the Conways, and to take such further proceedings thereafter as may not be inconsistent with the findings and opinion of this court. The decree of the district court must be reversed as to the matters appealed from. SAMUEL BLATCHFORD, Circuit Justice.

Carpenter & Mosher, for the Conways.

Butler, Stillman & Hubbard, for the Phenix Insurance Company.

BLATCHFORD, Justice. The district court awarded priority of claim and lien to the Phenix Insurance Company, and directed that the $4,500 and all accumulations of interest thereon be paid to it. The Conways appeal from such award and direction. The view of the district court was that the interest or lien of the Conways in the tug, growing out of the damage suffered by the canal-boat and cargo at the earlier date, was liable to respond for the damage to the barge at the later date. I cannot concur in this view. This is a case where there was no priority of attachment or seizure of the vessel, although the libel for the second damage was first filed, and it is not a case where either claim can be considered as other than one sounding in damages for a tort. The contention on the part of the Phenix Insurance Company is that the claims arising out of the two torts are

to be paid in the inverse order of their creation, on the view that though they are claims of the same class they are not claims of the same rank of privilege. It may very well be that among creditors he is to be preferred "who has contributed most immediately to the preservation of the thing;" that "the last bottomry bond is preferred to those of older date;" and "that repairs and supplies furnished a vessel in her last voyage take precedence of those furnished in a prior voyage." But the principle governing such cases is that "the services performed at the latest hour are most efficacious in bringing the vessel and her freightage safely to their final destination;" and that "each foregoing incumbrance, therefore, is actually benefited by reason of the succeeding incumbrance." This principle can have no place except where services are rendered, such as loaning money, furnishing supplies, making repairs, salvage, and claims arising out of contract generally. Such services benefit the vessel, make her better, preserve her, contribute to save her or improve her or keep her in running or going order for the benefit of all who have prior liens or claims on her. But a second tort or collision can have no such effect in reference to a party injured by a prior tort or collision. The second tort or collision does not benefit the vessel or add to her value or preserve her. It only tends to injure her, and the sufferer by the first tort or collision, in having recourse against the vessel after the second tort or collision, must take her as he finds her, damaged, perhaps, by a second collision. He ought not to lose the benefit of his lien arising out of the first tort or collision, unless the circumstances are such that in judgment of law he may fairly be held to have waived his lien, or postponed it, as regards the lien arising out of the second tort or collision. In the present case there was no waiver or postponement. No case cited declares any doctrine which sanctions the giving of priority in the present case to the Phenix Insurance Company, except what is found in the case of *The America*, 6 Monthly Law Rep. (N. S.) 264. That case is not sustained by authority, nor is it sustainable on principle. There was nothing in the mere fact of the second tort to extinguish the lien arising out of the first tort, and, when both torts were of the same character, each arising out of negligence towards a tow in fulfilling a contract of towage, and each claimant arrests the vessel at the same time, to respond, there is no principle of the maritime law, and no interest of commerce or navigation, which requires that the elder lienor, not guilty of laches, and not having committed any waiver or abandonment, should have his claim postponed to that of the younger lienor.

The decree of the district court must be reversed, as to the matters appealed from, with costs of the appeal, and priority of lien and of payment out of the fund be awarded to the Conways, and both cases be remanded to the district court, with directions to that court to proceed with the reference in the suit brought by the Conways, and to take such further proceedings thereafter as may not be inconsistent with the findings and opinion of this court.

SANTA CLARA MINING ASS'N *v.* QUICKSILVER MINING CO.[1]

(*Circuit Court, D. California.* October 6, 1882.)

1. MEXICAN GRANT—LEGAL AND EQUITABLE TITLE.
   The holder of a Mexican grant containing a quicksilver mine conveyed the mine, together with 1,000 acres of land surrounding the mine, to A., who went into possession, and he and his grantees continued in possession, working the mine for 25 years. After such conveyance the holder of the grant executed a second conveyance to B., also embracing the mine and the land before conveyed to A. The grantees of B. presented the grant for confirmation, which was duly confirmed, and a patent in due form was issued to the confirmees. *Held*, that the legal title derived under the patent would be controlled for the benefit of the grantees of A., who held the better title under the first conveyance.
2. LOCATION OF LAND INDEFINITELY DESCRIBED.
   Where a mine, together with 1,000 acres of land, "around, circumjacent, and adjoining said mine," is conveyed by the owner of a larger tract, the land will be located as nearly as practicable in a square form around the mine, taking the mine as the center of the location, and the grantor, by subsequent conveyances of the larger tract in two parts to other parties, cannot affect this right of location by the prior grantee.
3. MINING PARTNERS—TENANTS IN COMMON.
   Where a mine, together with the surrounding lands, is conveyed to, and the mine is worked by, an unincorporated association of individuals in the usual mode, as in the case of mining partnerships in California, the members of the association are tenants in common of the mine and the land so held.
4. SALE UNDER DECREE OF PROPERTY OF MINING PARTNERSHIP.
   Where a bill is filed by a member of a mining partnership to wind up the affairs of the association, some of the members being omitted from the bill because of the impracticability of bringing them all before the court, and a decree is made dissolving the association, directing the mines and lands of the company to be sold, the debts to be paid, etc., and a sale of the mines and lands of the association is made in pursuance of the decree, the title to the undivided interests in the mine and lands of those not parties to the suit will not be affected by the decree and sale.

In Equity.

Wm. Matthews, for complainant.

D. M. Delmas, for defendant.

SAWYER, J. This is a bill to control the title derived under a patent of the United States issued to the Guadalupe Mining Company. The Mexican grant of the land was made to one Larios in 1845. He afterwards conveyed to a man by the name of Cook. Cook subsequently conveyed to an association of persons, not a corporation, called the Guadalupe Mining Company, a mining partnership, or joint-stock company. The Guadalupe Mining Company presented its claim for confirmation and obtained a patent. Cook, prior to the conveyance under which this patent was obtained, had conveyed 1,000 acres embracing the mine—1,000 acres surrounding this mine—by an indefinite description, "around, circumjacent, and adjoining

[1] From 8th Sawyer.

said mine." That title has passed to the complainant in this case. That title passed through one Gray and wife, and complainant in this case has been in possession for 25 years under that title. The defendant, claiming under the patent, commenced sundry suits to recover the possession of the mine, and this bill is filed to control the title in favor of complainant, and restrain the prosecution of those suits at law. I am satisfied, upon an examination of the case, that the complainant is entitled to the relief sought, as to the 1,000 acres of land.

There is a question as to the location. At the time when this conveyance of the 1,000 acres was made the title to the entire grant was in Cook. Subsequently he conveyed in two parts to different parties; one, the northerly part, he conveyed to the grantors of the parties who have acquired the patent—the Guadalupe Mining Company. The other part was conveyed to somebody else. It is contended, on the part of complainant, that this 1,000 acres of land should be located on the portion patented to the Guadalupe Mining Company. On the other hand, it is contended that placing the principal mine in the center of the tract of land, it should be located, so far as practicable, so as to leave it in a square form, with the mine in the center. This 1,000 acres having been sold when the grantor owned the whole of the land, his subsequently dividing the grant into parts could not transfer the location to the part subsequently conveyed to the Guadalupe Mining Company. Locating it in this form, it will not cover the whole of the land patented by the mining company. There is a diagram made from a survey by Ross Brown, which I think correctly locates the 1,000 acres. This location shows the 1,000 acres located in a compact form, as nearly square as practicable, which embraces portions of both parts of the grant, taking the mine as the center of the location; and so far as that land is embraced in the patent to the Guadalupe Mining Company, I think the complainant is entitled to the relief sought—a conveyance of the legal title and an injunction against the prosecution of the suits at law. Under the decisions heretofore made in such cases as *Estrado* v. *Murphy*, *Samon* v. *Symons*, and that class of cases, complainant is also entitled to the relief sought as to those lands embraced within the Ross Brown survey, included in the patent, and within the lands described in the bill.

That leaves some other portions of the land described in the bill without the 1,000 acres so located. It is insisted by respondent's counsel that, as to those lands, the bill must be dismissed, because if the complainant has a title at all, as is alleged in the bill, it is a legal title, and complainant has a legal remedy. I think that the complainant having been in possession for the last 25 years, and being in possession at the commencement of the suit, it alleges such a case against an adverse claimant as entitles the complainant to proceed under the statute to have the adverse claim determined and

its title quieted with reference to that portion of the tract. The facts alleged are sufficient to give jurisdiction on that ground. The 1,000 acres are also embraced in this title.

The title of the complainant to that portion depends upon the sale under judicial proceedings in the case of *Hallam Eldridge* v. *Sansevain and others*. That was a bill filed to close up the affairs of another mining organization to which many of the members were made defendants, but some were omitted, it being alleged that the parties were numerous, and many of the real parties could not be ascertained, and they were, therefore, dispensed with, and the court proceeded to wind up the affairs of the mining copartnership, and placed the property in the hands of a receiver, who afterwards sold the lands out under a decree of the court, and they were conveyed to the purchaser. The title derived through that conveyance is vested in the complainant, and the allegation is that they have been in the possession ever since.

My conclusion upon that branch of the case is that complainant is entitled to a decree establishing and quieting the title to all of the undivided portions of the land, the title to which was in the defendants to that suit, who were served, or who appeared at the time or during the pendency of the suit, and to such others as make no resistance to the decree; but I think the Quicksilver Mining Company is entitled to a decree dismissing the bill as to those undivided parts held by it, derived from persons who were not parties to the suit, and were, therefore, not bound by that decree. That was a mining partnership, and the interests held in the land were in the nature of a tenancy in common, so far as the title is concerned, and I do not see how their title could be affected in their absence. It seems to me that this is the effect of the decree as laid down by equity rules 47 and 48 of the supreme court, which are founded upon a statute passed for such cases a few years before an adoption of the rule, and the rule established by decisions in such cases as *Shields* v. *Barrow*, 17 How. 139, and *Barney* v. *City of Baltimore*, 6 Wall. 280. In my judgment the title of the absent parties could not be affected without their presence as parties; but as to all except those parties, the complainant is entitled to a decree establishing and quieting its title derived under those proceedings as to the undivided interests in those parts lying both outside and inside of the patent, and within the lands described in the bill of complaint and in the conveyances in that case.

A decree will be rendered accordingly, and counsel for complainant will prepare the decree in accordance with these suggestions and submit it to Mr. Delmas.

The complainant will recover costs.

AMERICAN MORTGAGE CO. OF SCOTLAND (Limited) *v.* DOWNING.
(Two Cases.)

(*Circuit Court, D. Nebraska.* 1883.)

Note of decision holding agreement to pay attorney's fees in mortgage foreclosure valid.

These cases came up for hearing before Justice MILLER, of the supreme court of the United States, on motions to strike from the decrees the amounts allowed by the courts as attorney's fees.

C. J. Phelps, on behalf of Downing.

Judge Hull and *James M. Woolworth*, on behalf of the mortgage company.

Mr. Justice MILLER, in rendering the decision, remarked that, upon full review of the authorities, he was satisfied that the repeal of the Nebraska statute left the question as though no statute had ever been passed, and that, upon principle and authority, it was clear that parties were fully competent to make their own contracts, and there was nothing in the policy of the law which forbade them to agree to pay costs and expenses, including attorney's fees, which they might cause the loaner of money, by reason of their own default.

In no case cited was a satisfactory reason given why a provision in a mortgage to pay attorney fees should render the note non-negotiable, and it was absurd to say that it would render it usurious. Interest was allowed for the loan or forbearance of money, and it is quite evident when suit is begun to enforce the collection then forbearance ceases. The attorney fee is provided, not for use of money for a day, week, month, or year, or any other time, but is an incident to reimburse the owner in recovering his loan.

In the course of his opinion, Judge MILLER remarked that his sympathies were with the borrowing class, but he believed that a contract fairly and understandingly entered into should be enforced, and that the one by whose default the expense was incurred should pay the bill.

DUNDY, J., concurred.

DODGE *v.* MASTIN.

(*Circuit Court, W. D. Missouri, W. D.* 1883.)

1. BANK—INSOLVENCY.
   A bank is solvent, within the meaning of the constitution and statutes of Missouri, when it possesses sufficient assets to pay, within a reasonable time, all its liabilities through its own agencies; and is insolvent when, from the uncertainty of being able to realize on its assets in a reasonable time a sufficient amount to meet its liabilities, it makes an assignment, by which the control of its affairs and property passes out of its hands.

2. SAME—"IN FAILING CIRCUMSTANCES."
   The phrase "in failing circumstances," used in the constitution and statutes, when applied to a bank, must be taken to mean a state of uncertainty whether the bank will be able to sustain itself, depending on favorable or unfavorable contingencies, which in the course of business may occur, and over which its officers have no control.

3. SAME—RECEIVING DEPOSITS—KNOWLEDGE OF CASHIER—BURDEN OF PROOF.
In an action against the president, directors, cashier, or agent of a bank, under the act of April 23, 1877, for receiving a deposit knowing that the bank was insolvent or in failing circumstances, the plaintiff is only bound to prove to the satisfaction of the jury that the bank was insolvent. Upon this showing, the officers of the bank, to escape liability, must prove that they did not have the knowledge the law imputes to them, and thus overcome the law, which says they did know. The burden of proof of the want of knowledge of insolvency is on the officer sued.

At Law.

Scott & Taylor, for plaintiff.

Karnes & Ess, Tichenor & Warner, Pratt, Brimback & Ferry, and *L. H. Waters*, for defendant.

KREKEL, J., (*charging jury.*) An explanation is, perhaps, due to you for the delay that has occurred. The questions involved in this matter are questions pertaining to the constitution and laws of the state of Missouri, and whatever may be the charges against the federal judges, they always seek to avoid a construction of the constitution and statutes of a state, because they recognize that, under our system of government, the people of a state are authorized, through their legislature, to fix their own laws; and the probabilities are that those who expound those laws are more familiar with their spirit than the federal judge can be. Although a resident among you, yet his examination of law does not lead him to the examination of the statutes of the state, but upon another field altogether; and hence, whenever we are brought face to face with the necessity of construing the constitution and statute law, the first thing we do is to look anxiously into the decisions of their own courts to learn the spirit of their laws. Under the laws of congress, and by the whole system of our government, an injunction is upon us to avoid the usurpation of anything that does not properly belong to us; and we seek, whenever there is an opportunity, to avoid the original construction of laws that belong to the state rather than to the federal government. In the matter that is now presented the constitutional provision, as well as the law passed under it, is of recent date. You all recollect that the constitution under which we live is only a few years old, and the laws passed under the constitution are still younger, and have had but little time to be reviewed in the state courts. Hence, during the time that you have been delayed here I have been laboring diligently that I might arrive at a proper construction of this law, and I ask your careful attention, as this is a matter of importance.

The issue you are required to pass upon grows out of a suit between Richard Dodge and Julia R. Dodge, plaintiffs, and John J. Mastin, defendant. In this suit between these parties it is claimed by the plaintiffs that by the wrongful act of John J. Mastin they lost $6,000, which was received on deposit in the Mastin Bank, of which the defendant, Mastin, was cashier when it was known to be insolvent and in failing circumstances. In this suit here spoken of an attachment

was obtained by the plaintiffs, and property supposed to belong to John J. Mastin, the defendant, was attached for the purpose of securing the debt. The laws of Missouri allow such an attachment upon plaintiffs giving bond to pay damages, if any are done, and require further that the plaintiffs, or some one for them, shall file an affidavit alleging the cause or grounds for attachment. The law requires the facts to be set out in the affidavit. The affidavit filed in this case, for the purpose of obtaining the attachment, states first that the debt sued upon was fraudulently contracted, but as this is not relied upon by the plaintiffs nothing further may be said of or about it. The second cause for the attachment, and the one relied upon by the plaintiffs, is that the defendant, as a director, stockholder, and as cashier of the Mastin Bank, a corporation organized and existing by authority of the laws of the state of Missouri, received the sum of $6,000 into said bank at a time when the same was in his knowledge insolvent, and in a failing condition, and by reason thereof said sum of money has been lost to plaintiffs. That is the allegation in the affidavit under which the attachment was obtained. The defendant denies the facts set out in the affidavit, and puts the plaintiffs to the proof of them; and the affirmation, on the one hand, and the denial, on the other, constitute the issues you are to determine. This is called in technical language a "plea in abatement."

You have nothing whatever to do with the original suit, and it is in no manner before you. The question for you to determine is, "Was the Mastin Bank, on the twenty-sixth of June, 1878, insolvent or not?" and, if so, "did the defendant, John J. Mastin, know it?"

The Mastin Bank was one of that class of institutions which have received the attention of the legislative department of the state of Missouri, and so important has this supervision been deemed that it has not been made a matter of legislative action simply, but the constitution of the state itself seeks to regulate them. Section 27 says:

"It shall be a crime, the nature and punishment of which shall be prescribed by law, for any president, director, manager, cashier, or other officer of any banking institution to assent to the reception of deposits, or the creation of debts by such banking institution, after he shall he shall have had knowledge of the fact that the bank is insolvent or in failing circumstances, and such officer, agent, or manager shall be individually responsible for such deposits so received, and all such debts so created with his assent."

—That is, the constitutional provision — the constitution of Missouri itself—makes it a crime for the cashier, or other officer of a bank, to receive deposits after knowing the bank is insolvent or in failing circumstances, and further provides that the officer receiving such deposit, or creating such debt, shall be individually responsible. Thus spoke the people of Missouri in their sovereign capacity through the convention of delegates elected by them, and whose action they subsequently ratified at the polls. The duty then devolved upon the general assembly of Missouri to enact a law to carry this constitu-

tion into effect, and the following law was placed upon the statute-book and was in force at the time the deposit in controversy was received by the Mastin Bank:

"No president, director, manager, cashier, or other officer or agent of any bank or banking institution organized and doing business under the provisions of this article, or of any law of this state, shall receive or assent to the reception of deposits, or create or assent to the creation of any debts, by such bank or banking institution after he shall have had knowledge of the fact that it is insolvent and in failing circumstances; and it is hereby made the duty of every such officer, agent, or manager of such banking institution to examine into the affairs of the same, and, if possible, learn its condition. In all suits brought for the recovery of the amount of any deposits received, or debts so created, all officers, agents, or managers of any such banking institution charged with having so assented to the reception of such deposit, or the creation of such debt, may be joined as defendants or proceeded against severally, and the fact that such banking institution was so insolvent or in failing circumstances, at the time of the reception of the deposit charged to have been so received, or the creation of the debt charged to have been so created, shall be *prima facie* evidence of such knowledge and assent to such deposit and creation of such debt on the part of such officer, agent, or manager so charged therewith."

This act was passed on the twenty-third of April, 1877. Under the provisions of this law the plaintiff, in the first instance, must show to your satisfaction that the Mastin Bank, at the time of receiving the deposit in controversy, was insolvent or in failing circumstances. Upon such showing being made, the law implies that the officers of the bank knew of its insolvency, but provides that such officers may show that they did not in fact know of the insolvency, or did not assent to the deposit made. As soon as the insolvency of the bank has been established, the law imposes on the officer sued the duty to satisfy you that he did not in fact know the insolvency of the bank, or did not assent to the receiving of the deposit. The plaintiff is only bound to show that the bank was insolvent. Upon this showing being made, the officers of the bank, if they desire to escape liability, must show that they did not have the knowledge the law imputes to them, and thus overcome the law, which says they did know. This is what is meant by the words *prima facie* evidence, used in the law read to you. The burden of proof of the want of knowledge of insolvency is on the defendant. There is no dispute as to the defendant, John J. Mastin, as cashier, receiving the deposits in controversy.

So far as I remember, there is no evidence before you of any change in the financial condition of the Mastin Bank between the day of the reception of the deposits, June 26, 1878, and August 3, 1878, when the bank failed. Nor is there any evidence that John J. Mastin, the defendant, had or obtained any more or different knowledge, between the day of deposit and the day of failure, regarding the financial condition of the bank, so that whatever he knew on the third of August, 1878, he had knowledge of on the twenty-sixth of June, the day the deposit in controversy was made.

The defendant, Mastin, while upon the witness stand, admitted that he knew all about the bank on the twenty-sixth of June, and for a long time prior to that time, and up to the day of the failure; that he knew the liabilities of the bank, and was acquainted with its assets. I do not remember of his testifying to any change affecting the solvency of the bank, nor did any other witness testify to any change of the nature and character spoken of between the twenty-sixth of June, 1878, and August 3d, the day the bank failed.

What, then, is the effect of the failure occurring under such circumstances on the burden of the proof regarding the solvency or insolvency of the bank? We may fairly turn, I think, to the crimes act of the statutes of Missouri as furnishing us a guide in the determination of this question. Section 1350 of that act provides as follows:

"If any president, director, manager, cashier, or other officer of any banking institution, doing business in this state, shall receive or assent to the reception of any deposit of money or other valuable thing in such bank or banking institution, or if any such officer or agent shall create or assent to the creation of any debt or indebtedness by such bank or banking institution, in consideration or by reason of which indebtedness any money or valuable property shall be received into such bank, or banking institution, after he shall have had knowledge of the fact that it is insolvent or in failing circumstances, he shall be deemed guilty of larceny, and upon conviction thereof shall be punished in the same manner and to the same extent as is provided by law for stealing the same amount of money deposited, or valuable thing: provided, that the failure of any such bank or banking institution shall be *prima facie* evidence of knowledge on the part of any such officer or person that the same was insolvent or in failing circumstances when the money or property was received on deposit."

In order to arrive at the intention of the legislature in enacting laws pertaining to banks, it is proper to look at the whole of the enactments in order to discover their meaning and object. The law last quoted, taken from the crimes act, evidently proceeds upon the ground that the failure of a bank implies insolvency. The proviso proceeds upon this view, and is intended to enable an officer to show that he had in fact no knowledge of its financial condition, nor was he bound to have such knowledge by implication of law; or that, from the knowledge he had of the financial condition of the bank, he had good reason to believe the bank to be solvent. There is no pretension that the defendant, Mastin, had not full and complete knowledge of the financial condition of the bank. On the contrary, his position is that, knowing all about the bank, he believed it to be solvent. The law is held to be, and I so charge you, that the Mastin Bank, having failed to meet its liabilities in the usual course of business, thereby, in contemplation of law, became insolvent, and that defendant, Mastin, the cashier, knew of the insolvency when he received the deposit in controversy, and he is bound to overcome this legal presumption. There is no controversy as to the financial condition of

the bank between the day of deposit and the day of its failure being the same. If it was solvent on the day of receiving the deposit, it was solvent on the day when it closed, and *vice versa*. The defendant, Mastin, had the same knowledge of the financial condition of the bank on the day of receiving the deposit as on the day of failure. The law, as already stated, on account of its failure, treats the Mastin Bank as insolvent, and attributes to its cashier, the defendant, knowledge of its insolvency. The burden of proof to remove this presumption of law is upon the defendant, Mastin, and he must satisfy your minds that the bank, on the day when he received the deposit, was solvent. There is no controversy as to his not having the knowledge necessary to determine the solvency or insolvency of the bank.

I will proceed next to define the meaning of the word "solvent," and the phrase "in failing circumstances," used in the statutes and constitution. In the ordinary acceptation of the term, "insolvent," when applied to a bank, means inability to meet liabilities in the usual course of business. But a bank may be solvent, and yet, from temporary causes, over which its officers have no control, suspend until these causes can be overcome. But they must be causes for which prudence and foresight cannot provide, or over which the bank or its officers had no control, or could have none. Such causes, when they do occur, are usually soon overcome. The bank again takes up its business, and proceeds with it in the usual way. The failure of the First National Bank of Kansas City, Missouri, on the twenty-ninth of January, 1878, would not have been a good cause for suspension, for that could have been, and, as we have seen, was, overcome by means, however, which may aid you in determining the solvency or insolvency of the Mastin Bank at the time of its failure. As much of what I shall say upon the phrase "in failing circumstances" applies also to solvency and insolvency of a bank, I pass to this branch of the case with the declaration that a bank is solvent, within the meaning of the constitution and statutes we are considering, when it possesses sufficient of assets to pay within a reasonable time all its liabilities through its own agencies, and is insolvent when, from the uncertainty of being able to realize on its assets, in a reasonable time, a sufficient amount to meet its liabilities, and therefore makes an assignment by which the control of its affairs and property passes out of its hands. The phrase "in failing circumstances," used in the constitution and statutes, when applied to a bank, must be taken to mean a state of uncertainty whether the bank will be able to sustain itself, depending on favorable or unfavorable contingencies, which in the course of business may occur, and over which its officers have no control. Thus, for instance, an individual may be said to be in failing circumstances when he is put to unusual shifts to meet his liabilities, such as borrowing money at unusual rates of interest, makes sacrifice, in the disposition of his property, which he would not do but for his con-

dition. Such a condition of things may exist regarding a bank, and, when this is the case, a bank, like an individual, may be said to be in failing condition. The funds of banks are supposed to be ready at hand to meet the wants of commercial, trading, and manufacturing communities in which they are located. Anything interfering with the availability of its funds, such as the carrying of large debts upon which nothing can be realized, except after long delays, investments in real estate which it may take time to turn into currrent funds,—any and all of these things, when they occur, may or may not tend to show whether a bank is in failing circumstances. Whether the matters here spoken of apply to the Mastin Bank you must determine from the evidence. In trying to arrive at a conclusion whether the Mastin Bank was insolvent or in failing circumstances on the twenty-sixth of June, 1878, you will bring before your mind the fact of the deposit by Mercer, treasurer, of $212,000 in 1876, when he went out of office; the evidence of a desire of Mastin, as testified, to get on Treasurer Gates' bond, with a hope, it may be, of either retaining the funds of the treasurer then on deposit, or to obtain additional funds, even. You will recall to memory the condition on which the aid was furnished by Gates under the influence of Burnes. It will not be improper for you to consider the business the Mastin Bank engaged in or stimulated outside of a regular banking business, so as to enable you to judge what influence, if any, it might have had on the solvency or insolvency of the bank. These matters, together with all others testified to in connection with the evidence given by Mastin and others in explanation of them, should all be carefully examined by you.

In considering what weight you will give to the testimony of any witness you will take into consideration the relation in which the witness stands to the bank, what interest he has in this suit, or suits of a similar character, pending against him on account of his connection with the bank; in fine, everything bearing on the witness, and calculated to affect or influence his testimony. Formerly the defendant was not permitted to testify in his own case, but of late years the law has allowed him to do so, leaving it to you to attach whatever of weight you see cause to attach to his testimony. You are the sole judges of the weight you will give to the matter testified to by any of the witnesses.

The duty you have to discharge is an important one. The people, by constitutional provisions, followed up by laws, have sought to protect the rights of the people in moneyed institutions. All this amounts to nothing unless the courts and jurors support the laws, and in proper cases enforce them. The duty may be a disagreeable one, but cannot be avoided without frittering away the spirit of the legislation upon the statutes. Do your duty under the fact and the law as given you by the court.

ANDERSON *v.* SCOTLAND.

(Circuit Court, D. Minnesota. July, 1883.)

PRACTICE—SETTING ASIDE JUDGMENT—ABSENCE OF COUNSEL.

The general rule is that parties and counsel will be required to attend to their cases, and be prepared when they are reached on the docket; but cases may occur when, through the absence of counsel, if injustice is done to one party or the other, it can be afterwards corrected; and if a judgment is obtained through the absence of counsel, the judgment may be set aside upon terms.

At Law.

C. K. Davis and *H. H. Horton*, for plaintiff.

Lovely & Morgan, for defendant.

NELSON, J., *(orally.)* A motion is made by counsel for the defendant to set aside the verdict of the jury, which was obtained for the reason, substantially, that the counsel were taken by surprise, and that a judgment was obtained through accident or mistake. The general rule is that parties and counsel are required to attend to their cases, and to be prepared when the cases are reached. This case was No. 1 on the docket. The *venire* was returnable on the sixth day of July, the jury was in attendance, and this case, as I said, was No. 1 on the docket and could have been tried. It is true that cases sometimes occur when, through the absence of counsel, if injustice is done to one party or the other, it can be afterwards corrected; and if a judgment is obtained through the absence of counsel, the judgment may be set aside upon terms. When this case was reached upon the calendar, it is true, as stated by the deponent in his affidavit, the counsel for the defendant, the presiding judge stated there would be no peremptory call of the calendar; that the justice of the supreme court of the United States, who would preside, would be in attendance on the following Monday, and that no case would be peremptorily set down for trial; but that any case that could be heard by consent of counsel, or any cases of settlement of damages, or where there would not be any appearance on the part of the defendant, could be disposed of then. It was said by counsel for plaintiff that there would be no appearance on the part of the defendant; that he had communicated with the attorneys of record for the defendant, and they had stated to him, in this language, "Go ahead." It appears that the deponent in this case, the counsel for the defendant, although not appearing as counsel of record, had been managing the case since it was removed from the state court to this court, and among the papers a stipulation appeared in which Messrs. O'Brien & Wilson, Mr. O'Brien being the deponent in this case, appeared as the attorneys for the defendant. If the court had known, or if it had been intimated to the court, that the last-named counsel were to take charge of this case, and had participated in the management of the same, the case certainly would not have been

called without the consent of counsel. At the same time the attorney for the defendant should have been in attendance at the term of court, prepared, when the case was reached, either to dispose of it by trial, or to move for its continuance, or to take such steps as might be required.

In view of all the circumstances of the case, I think terms should be imposed upon counsel, and the verdict set aside. The verdict will be set aside on payment of the taxable costs of the term.

BARTLETT and others *v.* SMITH.

(Circuit Court, D. Minnesota. June Term, 1883.)

COMPROMISE AS CONSIDERATION FOR DEED—SUIT FOR BREACH OF CONTRACT—EVIDENCE.

A. engages in option deals with B., and loses a certain sum of money therein. A. refuses to pay B., alleging it to be a gambling contract. Suit is brought thereon by B., and the jury find a verdict in favor of A. B. then takes the necessary steps to appeal the case to the United States supreme court. Pending such appeal, A. offers to settle the case and to give B. a certain quantity of land, on condition that no further steps are taken to appeal the case. A. thereupon deeds to B. certain land, making certain representations as to its quality, and B., without seeing the land, gives to A. an instrument settling the case and agreeing to proceed no further therewith. B. afterwards, on seeing the land, declares the same to be worthless, sues A. for breach of contract, and recovers a verdict. *Held*, that evidence as to the consideration of the indebtedness upon which the first suit was brought is inadmissible, and that the settlement or compromise of the litigated question is a valid consideration for the conveyance of the land.

At Law.

MILLER, Justice, (*charging jury.*) The case before you is not a very complicated one, and I hope you will have very little difficulty in arriving at a speedy and satisfactory conclusion about it. It is a very ordinary action for false representations in regard to a contract for a sale of property. Whether the representations were made or not, and whether they were false or not, is for you to determine. I will lay down some of the propositions of law that are applicable to such a case, which the long experience of courts has found to be universal in determining cases of this character.

The first thing I have to say to you is that this transaction between these parties, in which the land was conveyed by the defendant to the plaintiff, stands about the same as if it had been bought and paid for at the time. Not that it stands as if it was paid for by $8,000 in money, but as if it was bought for any agreed sum that would be settled on. This settlement and compromise of a litigated question or of matters in litigation which have not been finished or ended is a valid consideration for the conveyance of the land; and it is immaterial in that view whether the defendant had actually a good defense

or not, because there is always a question which still remains to be tried when a lawsuit is compromised, and it is to avoid the trial of that issue that the parties did compromise, and the parties had a right to make such a compromise and settle their difficulties, and in my judgment the compromise of a lawsuit is a most meritorious consideration for a promise to pay money.

The question, then, for you to consider and determine, is, did Mr. Smith make certain representation to Mr. Mohr, including the letter which was read, in which he said, "I will give you good land?" Did he make such representations in regard to the nature and the character and value of that land so that Mr. Mohr had a right to rely on them, and which were false and deceptive representations? In the first place, it must appear to you that the representations were made, and you are to determine that from the testimony, and as to what these representations were.

Contrary to the view of defendant's counsel here I permitted questions as to the value of the land and the defendant's statement of the value of that land, because, while I admit that where the only question in the case is, was the land of the value that the defendant represented it to be? and where it was apparent that the value as he represented it was a mere matter of opinion, that such a thing alone would not be a foundation for, and would not justify, an action. But where other representations are made as to the quality and character and nature of the property which is subject of the litigation, and there is added to that a statement of its value by the party selling, I think that can go in as one of the representations constituting a fraud, if there had been a fraud in it. What representations, therefore, were made by Mr. Smith in regard to this tract of land, as to its character, its quality, and its value, you are to consider.

The next thing to be considered is, did Mr. Mohr rely on these representations when he made this contract? Because it is not every representation that a man makes in the sale of property that he is responsible for, and must answer for in damages. For instance, if he should say of a horse which he was selling, "This horse is 16 hands high," and the horse was present, and the other party had an opportunity of seeing the horse, and could see the mistake or falsehood, in that case the seller would not be accountable, because the buyer could have seen for himself. And so in a great many things, where the party to whom the representations are made could have an opportunity of examining for himself, it is his duty to examine for himself, and not to rely on what the other party says. There are many cases, and it is for you to say if this is one of them, in which the party makes these representations, and the other party does not seek to verify them at all. It may be too far away, or he may know nothing of the character of the thing to be sold. He may take the man at his word and say, "You say this property is so and so; you say in regard to this land that it is good arable land, and that it is good

meadow land, and that it is worth ten to fifteen or twenty dollars an acre, and I take your word for it, and take your value of it upon that representation." A party has a right to do that. If the seller makes representations as to the quality and character of the article he is selling, and the buyer buys upon that representation, relying upon the statements of the seller, then the seller is responsible for the truth of what he says. It is not necessary that it should be absolutely true, but it is necessary that the seller should believe it to be true. If he states that he thinks it to be so and so, and it turns out to be otherwise, he is not responsible. If it is not done with an intent to deceive the party buying, and the seller does not try to deceive him with false representations, he is not responsible. If he says it is so and so, and that he believes it to be so, then he is not responsible, even if it turns out to be otherwise. So the things that you are to inquire into are: What representations did Mr. Smith make? Were these representations as to the value of the land the main feature that induced Mr. Mohr to make this contract? Did Mr. Mohr make the contract relying solely and exclusively upon those representations? Were these representations correct or incorrect? Were they true or were they untrue? Were they false or were they sound? If they were false, did Mr. Smith know or believe them to be false? Did he intend to deceive? These are the criteria by which you will determine this question.

If you find from the evidence that Mr. Smith did not intend to deceive Mr. Mohr in this matter,—did not intend to make any false representations in regard to the character and value of this property; if you find that he believed the substance of what he said in a general way,—believed what he said about that land; and if you believe that the property is about as valuable as Mr. Smith led Mr. Mohr to believe it was,—(one of the witnesses, Mr. Whitford, says he listened to all this transaction, and he said he got the impression from Mr. Smith's statement that the land was worth $10 or $12 an acre,—I commend that statement to you as that of a man who heard the conversation,—and he came to that conclusion. Mr. Mohr said Mr. Smith represented it to be worth $20. Mr. Smith said he gave him the impression it was worth $10, and Mr. Whitford said, from all that was said about it, the impression that it left upon his mind was it was worth $10 or $12 an acre,)—if it was worth $10 or $12 an acre, or pretty near that sum, there is no fraud or deception or wrong about that; that is, if that is what Mr. Smith said, and what he intended to convey. If, on the other hand, this land is utterly worthless, as some of the witnesses say it is, and Mr. Smith represented it to be worth $10 or $15 an acre, and if he made those representations, intending to get the better of Mr. Mohr, he ought to be made responsible. If he is responsible, for what is he responsible? The price put in the deed has nothing to do with it. The question is, if you find anything at all against Mr. Smith, it will be the difference be-

tween the value of the land as he represented it to be, and the value of the land as you find it to be under the evidence. You may never come to that. I do not know that you will. But if you come to the question of damages,—as to how much the damages should be,—the rule is, you are to consider how much the property is worth; if it was just as Smith stated it to be, and what it was worth, as you find it to be under all the testimony in the case.

WATERBURY *v.* NEW YORK C. & H. R. R. CO.

(*Circuit Court, N. D. New York.* May 4, 1883.)

1. CARRIER OF PASSENGERS—RIDING ON ENGINE OF CATTLE TRAIN—VIOLATION OF ORDERS—QUESTION FOR JURY.
   Where a drover riding on an engine, in an action for negligence of the railroad company causing an injury to him, claims that he was riding on the engine by the consent of the engineer to look after his cattle, as was customary, and the defendant claims that it was contrary to orders for anybody to ride on an engine, the question to be left to the jury to determine is whether the defendant had, notwithstanding its rules for the government of its employes, by its conduct held out its employes to the plaintiff as authorized under the circumstances to consent to his being carried on the train with his cattle.
2. SAME—PRESUMPTION—REBUTTAL BY CIRCUMSTANCES.
   The presumption of law is that persons riding upon trains of a railroad carrier which are palpably not designed for the transportation of persons, are not lawfully there, and if they are permitted to be there by the consent of the carrier's employes, the presumption is against the authority of the employes to bind the carrier by such consent. But such presumption may be overthrown by special circumstances; and where the railroad company would derive a benefit from the presence of drovers upon its cattle trains, and may have allowed its employes in charge of such trains to invite or permit drovers to accompany their cattle, the presumption against a license to the person thus carried may be overthrown.
3. SAME—DUTY TO CARRY SAFELY—GRATUITIOUS CARRIAGE.
   The right which a passenger by railway has to be carried safely, does not depend on his having made a contract, but the fact of his being there creates a duty on the part of the company to carry him safely. It suffices to enable him to maintain an action for negligence if he was being carried by the railroad company voluntarily, although gratuitously, and as a mere matter of favor to him.

At Law. Motion for new trial.

Parker & Countryman, for plaintiff.

Hale & Bulkley and *Frank Loomis*, for defendant.

WALLACE, J. The plaintiff sued for personal injuries sustained, as he alleged, by the negligence of the defendant, and, having recovered a verdict, the defendant moves for a new trial. The plaintiff was riding on an engine of the defendant, when, in consequence of a misplaced switch, it was thrown from the track and he was injured. There was no evidence on the trial of any express contract between the parties creating the relation of passenger and carrier, but it ap-

peared that on various prior occasions the plaintiff and other drovers whose cattle were being transferred from West Albany to East Albany by the defendant, had been permitted by the employes of the defendant to accompany their cattle by the same train,—sometimes on the cars of the cattle train, and sometimes on the engine. At times the trains were delayed between these points and the cattle required attention, and as no employe of the defendant was assigned to the duty of looking after the cattle, it seemed to be assumed between the employes of the defendant and the drovers that the latter should look after their own cattle. Upon the occasion in question the plaintiff and another drover got upon the engine, there being none but box cars on the train. The engineer inquired if they had cattle on the train, and being informed that such was the fact, made no objection to their riding upon the engine. It was shown for the defendant that its rules for the government of its employes forbade them from permitting any person to ride upon the engine.

At the trial it was left to the jury to determine as questions of fact whether the plaintiff was a trespasser or a passenger; whether there was negligence on the part of the defendant; and whether there was contributory negligence on the part of the plaintiff. The jury were instructed in substance that if the plaintiff knew he was riding upon the engine in contravention of the rules of the defendant he was a trespasser, and in that case the defendant was not responsible for the injury. They were also instructed that if they found he was riding upon the engine pursuant to an implied understanding between himself and the defendant that he should accompany his cattle in order to take care of them on the way, he was a passenger; and that if he was a passenger, and entitled to accomodations as such, the defendant was not at liberty to assert that he was guilty of negligence in riding upon the engine, if the defendant had provided no safer place for him to ride.

A careful examination of the evidence shows quite satisfactorily that the case did not justify the assumption in any aspect of it that the plaintiff was entitled to be carried as a passenger, as an implied condition of the contract to carry his cattle. The most that can be fairly claimed for the plaintiff upon the evidence is that he was riding upon the engine permissively. If he was riding there with the consent of the defendant, express or implied, it is not material, so far as it affects the defendant's liability for negligence, whether he was there as a matter of right or a matter of favor,—as a passenger or a mere licensee. It suffices to enable him to maintain an action for negligence if he was being carried by the defendant voluntarily. If the defendant undertook to carry him, although gratuitously, and as a mere matter of favor to himself, it was obligated to exercise due care for his safety in performing the undertaking it had voluntarily assumed. *Philadelphia, etc., R. Co.* v. *Derby*, 14 How. 468; *Steam-boat New World* v. *King*, 16 How. 469. The carrier does not, by consent-

ing to carry a person gratuitously, relieve himself of responsibility for negligence. When the assent to his riding free has been legally and properly given, the person carried is entitled to the same degree of care as if he paid his fare. *Todd* v. *Old Colony, etc., R. Co.* 3 Allen, 18. As is tersely stated by BLACKBURN, J., in *Austin* v. *Great Western Ry. Co.* 15 Weekly Rep. 863, "the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but the fact of his being there creates a duty on the part of the company to carry him safely."

The real question in the case was lost sight of upon the trial. That question was whether the plaintiff was being carried upon the engine with the consent of the defendant, or only by the unauthorized permission or invitation of the defendant's employes. This question was not presented by the exceptions to the charge or by the instructions which the court was asked to give to the jury. But upon the theory on which the case was presented the jury must have found that the plaintiff had a right to be carried by the defendant as an implied condition of the contract for the transportation of his cattle. As the evidence does not warrant such a conclusion, and as the real question in the case has not been passed upon by the jury, there should be a new trial upon the ground of misdirection, although the defendant's exceptions do not reach the error.

It should have been left to the jury to determine, as a question of fact, whether the defendant had by its conduct held out its employes to the plaintiff as authorized, under the circumstances, to consent to his being carried on the train with his cattle. Undoubtedly the presumption of law is that persons riding upon trains of a railroad carrier, which are palpably not designed for the transportation of persons, are not lawfully there; and if they are permitted to be there by the consent of the carrier's employes, the presumption is against the authority of the employes to bind the carrier by such consent.

In *Eaton* v. *D., L. & W. R. Co.* 57 N. Y. 382, it is held that the conductor of a freight train has no authority to consent to the carrying of a person upon a caboose attached to such train, but designed for the accommodation of employes, and in such case the presumption is that the person carried is not lawfully there. On the other hand, this presumption may be overthrown by the special circumstances, as in the case of *Ohio & Miss. R. Co.* v. *Muhling*, 30 Ill. 9, where the plaintiff was riding on a construction train, and in the cases of *Ryan* v. *Cumberland Valley R. Co.* 23 Pa. St. 384, and *Gillshannon* v. *Stony Brook Co.* 10 Cush. 228, where the plaintiff was riding on a gravel train.

So, in a case like the present, where the railroad carrier may derive some benefit from the presence of drovers upon its cattle trains, and may have allowed its employes in charge of such trains to invite or permit drovers to accompany their cattle, the presumption against

a license to the person thus carried may be overthrown. It should have been left to the jury to determine, as a question of fact, whether, notwithstanding its rules for the government of its employes, the defendant had not held them out to the plaintiff as having authority to consent to his being carried. If it should appear that its employes have been accustomed to allow drovers to accompany their cattle on the cattle trains so generally and constantly that the officers of the company must have known it, the consent of the company may be predicated upon acquiescence and ratification.

A new trial is granted.

SCOPE OF THIS NOTE. The foregoing opinion touches upon three questions: (1) The duty of carriers of passengers to persons on their vehicles who have not paid their fare; (2) the liability of such carriers to persons on their vehicles who are injured while riding in a dangerous or improper place; and, as growing out of the second question, (3) whether, and, if at all, under what circumstances, the authorization or assent of the carrier's servants that the person injured should ride in a dangerous and improper place, will excuse such person and shift the risk upon the carrier. I shall not undertake to review all the decisions bearing upon these questions; that would go much beyond any limit of space which could be afforded me; but I shall render a more substantial service to the readers of the FEDERAL REPORTER by presenting in detail the decisions—and they are quite numerous—which have been rendered on these questions since the publication of any text-book or treatise on the subject of carriers,—referring to prior decisions so far as may be convenient.

I. Extent of Carrier's Duty to Non-Paying Passengers and Trespassers.

§ 1. CARRIER UNDER CERTAIN ABSOLUTE DUTIES TOWARDS HIS PASSENGERS. It must be stated, as necessary to the understanding of what follows, that a carrier of passengers for hire assumes certain absolute duties to them in respect of their safety. Without entering into particulars, or attempting to state the various expressions which are used in defining these duties, it may be said that they come substantially to this: that the carrier is bound to provide himself with, and to use the safest means of transportation which are reasonably consistent with the practical conduct of his business; that he is under a continuing duty of inspection and care, to the end that these means of transportation be kept in safe condition with reference to the uses to which they are put; that he is bound to exercise care that the servants whom he employs to conduct his business are careful and competent; and that in all these respects, and in all other respects relating to the safety of his passengers, he must exercise the highest degree of care which is exercised by very cautious persons in the conduct of their business.[1]

§ 2. CARRIER UNDER THE SAME DUTIES TOWARDS GRATUITOUS PASSENGERS. (1) *General Rule.* In the prosecution of his business, the carrier must generally, if a person, and always, if a corporation, act through the instrumentality of others. Where he is not personally in charge of his vehicle, some one must necessarily be there, to whom is committed the general duty of saying who shall and who shall not ride thereon. This person, in respect of the decision of this question, is the *alter ego* of the carrier. On vessels, this person is the master or captain; on railway trains, the conductor. To a

[1] Story, Bailm. § 592 et seq.; Thomp. Carr. Pass. p. 200 et seq.

person who is invited or permitted to ride on the carrier's vehicle without paying fare, either by the carrier himself or by this *alter ego*, the carrier owes the same measure of duty, in respect of carrying him safely, which he owes to passengers who have paid full fare.[1]

(2) *Comments on the Foregoing Rules.* It has been well said that there are no degrees of negligence known to the law, where the subject of the bailment is human life; and where a carrier undertakes to convey passengers by the dangerous agency of steam, any negligence is culpable and may well be deemed gross.[2] The correct principle applicable to such cases is believed to be that "if a man gratuitously undertakes to do a thing to the best of his skill, when his situation or profession is such as to imply skill, the omission of that skill is imputed to him as gross negligence."[3] This must, however, be said with the qualification that the word "gross" in this sense is not used as expressing the antithesis of a certain defined degree of care. It is either used in the sense of *culpable* or *actionable*, or else it is a mere epithet.[4]

(3) *Rule not Affected by the Circumstance that the Carrier's Servant Acted against his Orders.* If a servant, charged by his master with a particular employment, does a particular act in the course of such employment, from which damages happen to a third person, the master will be liable to such person, although the servant had no orders to do the particular act, or although, in doing it, he went against the master's express orders, providing the act was of such a nature that the master would be liable if done in conformity with his orders.[5] In conformity with this principle, the simple fact that the servant of a carrier violates his duty to his master and invites a person to ride free, without collusion between him and such person to defraud the carrier, will not operate to deprive the person so riding of an action for damages, if he is injured while so riding through the negligence of the carrier's servant.[6] Thus, if the driver of a street railway car permits a trespassing child to ride on the front platform, and the child is injured through his negligence, an action will lie against the company;[7] and so where the conductor of a railway train allows a person to ride on the train without paying fare.[8]

(4) *Illustrations.* Accordingly, where a *boy* got upon a *freight train* without the knowledge or consent of the conductor, but the conductor, after finding him there, suffered him to remain, it was held that he was entitled to the same protection as if he had been a passenger and had paid his fare.[9] So, although a railroad company may not be a common carrier of passengers by *hand car*, yet if it undertakes, for a purpose connected with its business or otherwise, to transport a person from one point to another on its road by this means of conveyance, it assumes the duty of seeing that its track is reasonably safe for the purposes of such a transit, and that the car is operated with due care by those intrusted with its management. Accordingly, where a detective, employed by a railroad company to ferret out thefts of prop-

1 Philadelphia, etc., R. Co. v. Derby, 14 How. 468; Steam-boat v. King, 16 How. 469; Wilton v. Middlesex R. Co. 107 Mass. 108; Sherman v. Hannibal, etc., R. Co. 72 Mo. 108; Jacobus v. St. Paul, etc., R. Co. 20 Minn. 125; S. C. 125 Mass. 130; Gradin v. St. Paul, etc., R. Co. 14 N. W. Rep. 881; Siegrist v. Arnot, 10 Mo. App. 197; Pittsburgh, etc., R. Co. v. Caldwell, 74 Pa. St. 421; Washburn v. Railroad Co. 1 Head, 638; Nolton v. Railroad Co. 20 Minn. 125; Rose v. Railroad Co. 39 Iowa, 246; Todd v. Old Colony R. Co. 3 Allen, 118; S. C. 7 Allen, 207; Railroad Co. v. Michie, 83 Ill. 428.

2 Steam-boat v. King, 16 How. 469.

3 Shiells v. Blackburn, 1 H. Bl. 158; Wilson v. Brell, 1 Mees. & W. 113; Nolton v. Western R. Corp. 15 N. Y. 444; Siegrist v. Arnot, 10 Mo. App. 197, 203.

4 Siegrist v. Arnot, supra.

5 Siegrist v. Arnot, 10 Mo. App. 197, 201; Philadelphia, etc., R. Co. v. Derby, 14 How. 468; Garretzen v. Duenckel, 50 Mo. 104; Snyder v. Hannibal, etc., R. Co. 60 Mo. 413.

6 Siegrist v. Arnot, supra; Wilton v. Railroad Co. 107 Mass. 108; S. C. 125 Mass. 130; Pittsburgh R. Co. v. Caldwell, 74 Pa. St. 421; Washburn v. Railroad Co. 4 Head, 638.

7 Wilton v. Railroad Co. supra; Pittsburgh R. Co. v. Caldwell, supra.

8 Washburn v. Railroad Co. supra.

9 Sherman v. Hannibal, etc., R. Co. 72 Mo. 62, 65.

erty of the company, was sent, by direction of one of its agents, upon a hand car, from one station to another, for this purpose, and was injured in consequence of the fact that he had, under the direction of the person in charge of the car, taken his position upon the car with his heels hanging down, and that some plank at a road-crossing had become warped so that they stuck up several inches from the level and came in contact with his heels as the car passed rapidly over them, it was held that there was a case to go to the jury. The court could not say, as a matter of law, that it was any negligence for the company to leave the plank warped and elevated as alleged; nor that it was negligence for the plaintiff to ride upon the car in the manner in which he did, he having done so at the direction of the person in charge of the car.[1]

§ 3. CARRIER OWES NO SPECIAL DUTY TO TRESPASSERS. (1) *General Rule.* The duties above enumerated arise only where the relation of carrier and passenger is deemed in law to exist. The carrier owes no such duties to trespassers upon his vehicles. He is not, in law, bound to furnish safe vehicles, and careful and skillful servants, to maintain a careful and continuous inspection, and to exert in all these particulars the highest degree of care of very cautious persons, *for them.* If they get upon his vehicle without his authority, they take things as they find them, and assume the risk, without recourse against him, of any injuries which may happen to them through any failure of the duties which he may owe to those who are passengers.[2]

(2) *Who are Trespassers within the Meaning of this Rule.* We have already seen[3] that those who ride upon the carrier's vehicle, with or without paying fare, with the authorization of the carrier himself, or of that particular servant of the carrier whose duty it is to determine who shall ride on his vehicles and who shall not,—as the master of his vessel, the conductor of his railway train, or the like,—is deemed in law a *passenger*, and not a *trespasser*. But, in the prosecution of his business, the carrier is frequently compelled to employ other servants, either subordinate to the former or whose duties are entirely disconnected from those of the former, such as the engineer, fireman, and brakemen of a railway train, or the engineers, pilots, firemen, and common seamen employed on a vessel. These servants of the carrier have special and limited duties to perform; they are not in general command of his vehicle; they are not his *alter ego* in the general conduct of the trip or voyage; they have no authority to say who shall or who shall not ride on the train or vessel; and their authorization, invitation, or consent that a person who has paid no fare to the carrier shall ride on his vehicle, does not make such person rightfully there, and does not extend to him the rights of a passenger, or made him any the less a trespasser.[4] It may accordingly be laid down that those are trespassers, within the meaning of the foregoing rule, who have

1 Cooly v. Chicago, etc., R. Co. 53 Wis. 657.

2 Toledo, etc., R. Co. v. Brooks, 81 Ill. 111; Chicago, etc., R. Co. v. Michie, 83 Ill. 427; Toledo, etc., R. Co. v. Biggs, 85 Ill. 80; Siegrist v. Arnot, 10 Mo. App. 197, 201; Duck v. Allegheny Valley R. Co. 91 Pa. St. 458; S. C. 2 Amer. & Eng. R. Cas. 1.

3 Ante, § 2.

4 Chicago, etc., R. Co. v. Casey, 9 Bradw. 632, 639; Chicago, etc., R. Co. v. Michie, 83 Ill. 427; Snyder v. Hannibal, etc., R. Co. 60 Mo. 412; Flower v. Penn. R. Co. 69 Pa. St. 210; Sherman v. Hannibal, etc., R. Co. 72 Mo. 62. The rule has been distinctly laid down in a late case in Pennsylvania that a person riding on a railroad train, in violation of the regulations of the company, with or without the knowledge of the company's train conductor, cannot recover damages for injuries received while so riding. The case was that of a boy who was permitted by the conductor of a passenger train to ride upon the train for the purpose of selling newspapers, in violation of the regulations of the company. He was killed by an accident. It was held that the company were not liable to pay damages on account of his death, in an action brought by his parents. The court said: "It is not like a person allowed by the conductor to ride in a car *as a passenger* without paying fare. In that case there is a legal liability to the company for the fare. This is the case of a mere trespasser, and the company owed him no duty." Duck v. Allegheny Valley R. Co. 91 Pa. St. 458; S. C. 2 Amer. & Eng. R. Cas. 1. This decision is contrary to the general current of authority. Ante, § 2.

not paid their fare, and who are not on the carrier's vehicle either by his own invitation, authorization, or consent, or by the invitation, authorization, or consent of his servant or agent in general charge of his vehicle; and, conversely, it may be added that those who are there merely by the authorization, invitation, or consent of other servants of the carrier are trespassers.

(3) *Illustrative Cases.* (*a*) *Locomotive Engineer no Authority to Invite Persons to Ride on the Train.* Applying this principle, it has been held that, if a locomotive engineer invite a boy to ride upon the train, contrary to his duty to the company and in violation of his instructions, the mere fact that he is in charge of the engine which is propelling the train at the time when he extends the invitation to the boy, will not make the company responsible for any hurt which the boy may receive in consequence of accepting such invitation.[1] Third persons are not bound in all cases by the private instructions which a carrier may have given to his servants, but are entitled to presume that such servants, in the particular employment, have the same authority which persons so employed usually have. "This," said the learned judge, "is what is meant by their *apparent authority.* It is based upon those presumptions which the public have a right to draw from the usual course of business in matters of a similar nature; or, in other words, from general knowledge and observation of the powers and duties ordinarily intrusted to servants employed to fill the same station."[2] Applying this principle to the authority of a railway locomotive engineer, it has been held that there is no implication, growing out of the well-known character of his employment, of any authority on his part to permit persons to ride upon the train who are not in possession of regular passenger tickets, or passes. In so holding, the following language was used: "The system by which railway companies conduct their business of carrying passengers and freight has now been so long in operation, and is being conducted with such a degree of uniformity, that its general features must be presumed to be known and understood by the public. Among these may be mentioned the division of their freight and passenger business into two distinct departments, and the admission of passengers upon freight trains only under well-known limitations and restrictions, or their exclusion therefrom. Another is the assignment to their respective and definite duties of the various employes on their trains. It is a fact with which the public must be presumed to be familiar, that the employes of an ordinary railway train consist of the conductor, an engineer, and one or more brakemen, and that each of these is charged with his own peculiar duties and powers. The conductor is the superior officer, and has general charge and control of the train, admitting and discharging passengers, collecting fares, and directly representing the company in its intercourse with the public. The duties of the engineer are subordinate, and of an entirely different character. His place is on the engine, and nowhere else, and his duties are limited to running and managing his engine. With the admission or discharge of passengers he has nothing to do, except so far as the proper management of his locomotive may furnish them the opportunity for getting on and off the train. No authority beyond this can be inferred from the usual course of his business on railway trains, or from the powers which locomotive engineers usually have and exercise."[3] The supreme court of the same state have expressed the same doctrine in the following language: "The permission of the engine-driver, if given, was not the permission of the company, as he had no power to give it. Had the conductor of the train given the permission, or, knowing he was upon the engine, suffered him there to remain, it might be considered the act of the company. The driver of the engine occupies a different and subordinate position. He has no right to say

[1] Chicago, etc., R. Co. v. Casey, supra.
[2] Id. 640, per BAILEY, J.
[3] Id. 640.

who shall be upon the train, or to take cognizance of such as may be upon it. He has to look to his engine and keep it in order, and permit no one to ride upon it without the permission of his superior."[1] When, therefore, according to the plaintiff's testimony, the engineer of a freight train, which was moving slowly past the station, gave some boys permission to ride on the train, and one of them, in attempting to get on, was killed, it was held that there could be no recovery from the company; for the engineer, in giving this permission, acted neither within the scope of his actual or of his implied authority.[2]

(b) *Child of Tender Years Injured while on Street Car Selling Water.* Two cases, the results in which are rather to be referred to the general rules of the law relating to negligence in the case of injuries to children, may be here inserted. In a late case in Philadelphia, it appeared that a child between six and seven years of age had been in the habit, with several companions, of getting on and off the company's street cars, while moving slowly in ascending a hill, for the purpose of selling water to the drivers and conductors, and that, while so engaged, the child fell from the front platform, which was without a guard, and was killed. It was held by ALLISON, P. J., that there was no case to go to a jury, because of contributory negligence of the plaintiff, the mother of the child, in allowing the child to engage in such an employment at such a tender age.[3]

(c) *Unattended Children on Railway Passenger Train.* Two little girls, one of them about five years old, and the other older, but not larger, were put by a female relative upon a passenger car, with the intention that they should go from one station to another without paying fare. It was not the custom of the company to demand fare of children so young, and the conductor passed them without noticing them, supposing that they were in charge of some adult person. No employe of the company knew that they were upon the train unattended. In attempting to get off at the station, through the aid of one of the passengers, one of them fell under the wheels and was injured. A Kansas jury awarded a verdict of $12,500 against the railroad company, and judgment was rendered thereon. This judgment was reversed, upon the ground that there was no evidence of any negligence upon the part of the company.[4]

(4) *Youth or Inexperience of Passenger not Looked to for the Purpose of Enlarging Implied Authority of Carrier's Servant.* If a youthful or inexperienced person is hurt or killed, in consequence of accepting the invitation, or obeying the direction, of one of the carrier's servants, who, at the time, is acting neither within the scope of his express nor implied authority,—as where the engineer of a freight train permits some boys to ride upon the train,—there is no principle of law under which the implied authority of the carrier's servant can be enlarged, in view of the youth or inexperience of the person so killed or injured. It matters not that *he* may not be of sufficient maturity to be presumed to know or understand the precise nature of the relative duties of the several employes of the carrier. It does not follow from this fact that, as to him, the invitation or direction which has been given to him by the particular servant should be regarded as within the scope of such servant's employment. "The scope of the servant's apparent authority cannot be made to depend upon the ignorance or want of experience of particular individuals, but upon the presumptions which the public at large have a right to draw from their general knowledge of the powers usually exercised by parties oc-

[1] Chicago, etc., R. Co. v. Michie, 83 Ill. 427.

[2] Chicago, etc., R. Co. v. Casey, 9 Bradw. 632, 641.

[3] Smith v. Passenger R. Co. 13 Phila. 6; S. C. 9 Reporter, 454; affirmed on appeal, 92 Pa. St. 450, opinion by TRUNKEY, J.

[4] Atchison, etc., R. Co. v. Flynn, 24 Kan. 627; S. C. 11 Reporter, 223; 1 Amer. & Eng. R. Cas. 240.

cupying the same station. The ignorance of the deceased should doubtless be considered as bearing upon the question of his own contributory negligence, but cannot operate to enlarge the boundaries of the agent's authority."[1] The youth or inexperience of the person injured "might excuse him from concurring negligence, but cannot supply the place of negligence on the part of the company, or confer an authority on one who has none."[2]

§ 4. (1) (*a*) BUT CARRIER OWES THE GENERAL DUTY TO TRESPASSERS OF TAKING CARE NOT TO INJURE THEM. But while the carrier does not owe to trespassers on his vehicle the special duties which he owes to passengers, he stands under the same general duty of taking ordinary or reasonable care not to injure them, which every person is bound to exercise towards every other person, and even towards animals, although such persons or animals may be found trespassing on his premises. This rule had its origin in the leading case of *Davies* v. *Mann*,[3] where it was laid down, in the English court of exchequer, that if A. has negligently exposed his property to injury, and B. has negligently injured it, B. must pay damages to A., if B. could, by the exercise of ordinary care, have avoided injuring it. That case was decided in 1842. It has met with almost uniform approval in England and in this country, from that day to this. A rule of law which has been almost uniformly conceded with regard to injuries to *property* when helplessly exposed, can, by no process of reasoning, be denied in case of injuries to *human beings* when exposed in the same way; and though there is some wavering in the decisions, it is now generally so applied. A frequent illustration of it is found in the case of injuries to trespassers upon railway tracks; and here the rule as laid down by HENRY J., in a case in the supreme court of Missouri, is believed to express in apt words the now generally received view: "When it is said, in cases where the plaintiff has been guilty of contributory negligence, that the company is liable if, by the exercise of ordinary care, it could have prevented the accident, it is to be understood that it will be so liable if, after the discovery by defendant of the danger in which the party stood, the accident could have been prevented; or if the company failed to discover the danger through the recklessness or carelessness of its employes, when the exercise of ordinary care would have discovered the danger and avoided the calamity."[4] The difference of opinion which is found in the cases under this head relates to the *degree of care* which a railroad company is bound to exert to prevent injuries to trespassers on its track or on its vehicles,—some courts holding that it is responsible for the want of ordinary care, and others, that it is responsible only for wanton injuries, or for such gross negligence as is equivalent in law to intentional mischief.[5] The same principles apply to some extent in respect of injuries to trespassers on the carrier's vehicles; though in respect of the degree of care which his servants are bound to exert before discovering the trespasser, the analogy may not be complete. It may be said that the running of a railway train at full speed is always dangerous, both to persons who may be upon the track, and to persons who may be upon the train. Those upon the engine are under the duty of maintaining a constant lookout, and in the night-time the company will not, under ordinary circumstances, be excusable for running an engine without a head-light, to enable those in charge of the engine to perform this duty. But it cannot be said that either those in

1 Chicago, etc., R. Co. v. Casey, 9 Bradw. 632, 643.

2 Flower v. Penn. R. Co. 69 Pa. St. 210; Towanda Coal Co. v. Heeman, 86 Pa. St. 418; Snyder v. Hannibal, etc., R. Co. 60 Mo. 413; Sherman v. Hannibal, etc., R. Co. 72 Mo. 62, 66.

3 10 Mees. & W. 545; S. C. 2 Thomp. Neg. 1105.

4 Harlan v. St. Louis, etc., R. Co. 65 Mo. 22; S. C. 6 Cent. L. J. 229; 1 Thomp. Neg. 439. See, also, Brown v. Hannibal, etc., R. Co. 50 Mo. 461; Isbel v. Hannibal, etc., R. Co. 60 Mo. 475; S. C. 2 Cent. L. J. 590; Finlayson v. Chicago, etc., R. Co. 1 Dill. 579; Baltimore, etc., R. Co. v. State, 36 Md. 366; Baltimore, etc., R. Co. v. State, 33 Md. 542; Morris v. Chicago, etc., R. Co. 45 Iowa, 29; Weymire v. Wolfe, 52 Iowa, 533.

5 See 2 Thomp. Neg. p. 448 et seq.

charge of the engine, or the conductor or brakemen, are under the duty of maintaining an active vigilance for the discovery of trespassers on the train, with the view of seeing that such persons do not ride in dangerous places, or that they otherwise avoid exposure to danger. But *after the discovery of the trespasser*, the parallel becomes complete in both cases. The trespasser has not forfeited his right to immunity from death or bodily harm by being a trespasser; and, on principle, the servants of the company are bound to exercise such reasonable care as they can, consistently with their other duties, to the end that the trespasser receive no injuries other than those which may arise from the accidents, the risks of which, as already stated,[1] he has assumed. If, then, they force him off the carrier's vehicle,[2] or order him off when it is going at a rate of speed which renders it dangerous for him to get off,[3] or otherwise negligently injure him, the carrier may become liable in damages. This will be made more clear by the following illustrative cases.

(*b*) *Trespassing Boy Ordered off a Train and Injured in Getting off.* The case was that a boy had gotten into a freight car for the purpose of stealing a ride, had been ordered out by the conductor, and, in getting out, had fallen under the wheels and was killed. The court, in charging the jury, directed their attention to a number of circumstances which they should take into consideration in determining the question whether the deceased was guilty of negligence which contributed to his death, but omitted to tell them that they should take into consideration the fact that the deceased was a trepasser upon the defendant's train. It was held that this was not erroneous. In so holding, the court, through ADAMS, C. J., made the following observations: "As the instruction directed the jury to consider all the circumstances, we are not prepared to say that it could be held to be erroneous, even if the circumstance that the deceased was a trespasser were as important as defendant contends that it is. But, in the view which we take of the case, that circumstance was not of great importance. The deceased, at the time he was discovered in the empty freight car, does not appear to have been in a place of immediate danger. If he had been allowed to ride there, or had been removed before the cars were put in motion, it does not appear that he would have been exposed to much danger; certainly not to the extent which happened. The danger arose and the accident happened by reason of something which transpired after the trespass had been committed, and, what is especially significant, *after the boy had been discovered by the conductor in the car.* The proximate cause of the boy's injury was not the entering of the car. It was either the carelessness in attempting to escape in the manner he did, while the car was in motion, or else it would be the carelessness of the company in causing him to do so. And this would be so, even if we should conclude that he exposed himself to danger by merely entering the car."[4]

(2) *Illustrative Cases—Carrier liable.* (*a*) *Trespasser on Engine Wrongfully Thrown off by the Defendant's Servants and Hurt.* While the engine of a railway company was standing still upon a side track, the plaintiff, with the knowledge of, and without any objection by, the company's servants, mounted upon the same and seated himself under the head-light. Shortly after this, the servants of the company put the engine in motion, and while the same was running at a rate of speed which rendered it unsafe for the plaintiff to get off, called upon him to do so. He replied that he would get off if the engine was stopped. The servants of the company declined to stop the engine, and one of them shoved him off in such a manner that the engine passed over his leg, crushing it. It was held that the wrongful act of the defendant's servants in

1 Ante, § 3.

2 Carter v. Louisville, etc., R. Co. 8 Amer. & Eng. R. Cas. 347, (Sup. Ct. Ind. 1882.)

3 Benton v. Chicago, etc., R. Co. 55 Iowa, 496; S. C. 11 Reporter, 837.

4 Benton v. Chicago, etc., R. Co. 55 Iowa, 496; S. C. 11 Reporter, 837.

thrusting him off the engine, under the circumstances, was the proximate cause of the injury, and not the wrongful act of the plaintiff in getting upon the engine. The servants of the defendant, in so thrusting him off, were acting within the general scope of their employment, and the defendant was accordingly liable.[1]

(*b*) *Contributory Negligence in Such a Case.* In the case just cited it was held that the question whether he was guilty of contributory negligence in obeying the order under the circumstances was a question for the jury. "It is not," said the court, "for the company to say, if the train was in motion when the order was given, that the imprudence of the boy was so great in yielding prompt obedience to the order that the company ought to be excused for giving such an order, unless the age of the boy was such that he might reasonably have been expected to refuse. Possibly the boy, young as he was, had such knowledge, and should have had such presence of mind, as to have remained in the car while in motion, notwithstanding he had been ordered to leave; but we cannot say, as a matter of law, that, if he had all the knowledge supposed in the instruction, and the other circumstances had been as supposed, he was necessarily guilty of contributory negligence."[2] A similar ruling is found in California, where a boy 16 years of age was ordered by the conductor of the train to leave a car while in motion. He obeyed the order and was injured. The court held that they could not judicially say that the act was voluntary, and that it must be left to the jury to say whether he did or did not leave under compulsion.[3]

(*c*) *Boy Stealing a Ride on Engine.* In a late case in Michigan a boy eight years old, trespassing on the premises of a railroad company, got on the step of an engine, and was ordered off by the fireman. In jumping off he fell. The locomotive was started at the same time, and the tender passed over his leg. He was a boy of more than average intelligence, and had been warned against going on the premises or riding on the engine. It was held that the company could not be held liable for the injury, in the absence of evidence tending to show that the engineer, or other servants of the company in charge of the locomotive, knew that the child was in the way, or that they had been reckless or negligent in the management of their engine, or could have anticipated the injury. The injury was deemed to have resulted from the negligence or carelessness of the boy himself, and from his fall, which was accidental, and such as the persons in charge of the engine would not be likely to anticipate.[4]

(*d*) *A Case which Ignores the Foregoing Rule—An Intruder on a Hand Car without Rights.* In a late case in Maine it is held that damages cannot be recovered for the death of a person caused by his being negligently run over by a train of cars while riding between stations on a hand car of the defendant's road, at the invitation of the foreman of a section of such road, unless it be made to appear that the company was a common carrier of passengers by hand cars.[5] Although the opinion in this case was pronounced by a judge of reputation, and was concurred in by four other judges, it seems entirely indefensible. It declares, in substance and effect, that an intruder or trespasser upon the track of a railway company can ordinarily be run down and killed by a train of the company, and that the company will not be liable to pay damages to his personal representative. If the deceased, instead of being a man, had been an ass,[6] or a hog,[7] or an oyster,[8] the rule must have

1 Carter v. Louisville, etc., R. Co. 8 Amer. & Eng. R. Cas. 347, Supreme Court of Indiana, 1882.

2 Benton v. Chicago, etc., R. Co., 55 Iowa, 496; S. C. 11 Reporter, 837,—opinion by ADAMS, C. J.

3 Kline v. Central Pac. R. Co. 37 Cal. 400, 404.

4 Chicago, etc., R. Co. v. Smith, 46 Mich. 504.

5 Hoar v. Maine Cent. R. Co. 70 Me. 65.

6 Davies v. Mann, 10 Mees. & W. 545.

7 Kerwhacker v. Cleveland, etc., R. Co. 3 Ohio St. 172.

8 Mayor of Colchester v. Brook, 7 Q. B. 339.

been different. The process of reasoning which culminates in the conclusion that, in order that a railway company may owe to a man who happens to be upon its track the duty of not killing him, it is necessary that such man should have bought a passage ticket, will certainly arrest the attention of the profession.

§ 5. BURDEN OF PROOF IN CASE OF ACCIDENTS TO TRESPASSERS. The rule that the mere happening of an accident to the passenger through the failure of some of the carrier's means of transportation is presumptive evidence of negligence, such as imposes upon the carrier the burden of excusing himself, has no application to a case where a child, in endeavoring to jump upon a moving train of cars for the purpose of stealing a ride, falls on the track and is killed. The relation of carrier and passenger does not exist. It was said that no authority could be produced which holds that, when a trespasser on a railroad train is killed, the burden of liability is thrown upon the company, upon proof of the fact, unless the company can show by satisfactory affirmative evidence that neither it nor its agents or employes were at fault.[1]

§ 6. PENNSYLVANIA STATUTE AS TO PERSONS WHO ARE NEITHER EMPLOYES NOR PASSENGERS. A state whose legislation has been notoriously corrupted by railroad influences, at the most corrupt period of its legislation, disfigured its statute-book with the following law: "If any person shall sustain personal injury or loss of life, while lawfully engaged or employed on or about the road, works, depots, and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employe, the right of action to recover in all such cases against the company shall be such only as would exist if such person were an employe: provided, that this section shall not apply to passengers."[2] The purpose of this law is seen at a glance. By a rule interpolated upon the common law by judicial legislation within the last 40 years, a servant cannot recover damages of his master for an injury which happens to him through the negligence of a fellow-servant engaged in the same common employment. Now, the object and effect of the above statute was to extend this rule to the cases of *all persons* who may happen to be laboring or engaged about the premises, or upon the trains of railroad companies, except those who are *passengers;* so that any person, not a passenger, who may be compelled to place himself in such a situation, must accept all risks of the negligence of the pecuniarily irresponsible persons who are employed by railroad companies, without any recourse in damages against the companies themselves, other than the limited recourse which an employe would have under like circumstances. Such a law could not have been passed except as the result of direct or indirect purchase. There is not a state in the Union in which such a law, submitted to the popular vote, would not be rejected by an overwhelming majority. Its very existence implies a breach of a public trust upon the part of the representatives of the people by whose votes it was enacted. That it has found judicial apologists is not creditable to the jurisprudence of Pennsylvania. A learned judge of the supreme court of that state has found "*strict justice*" in it.[3] Its constitutionality was affirmed by the supreme court of that state

[1] Sommers v. Mississippi, etc., R. Co. 71 Tenn. (7 Lea,) 201. In the opinion of the court in this case it is said by COOPER, J.: "There are cases where the occurrence of an injury is *prima facie* evidence of liability, and the burden is shifted accordingly. But the weight of authority seems to be that, in the case of an injury to a passenger, it is incumbent upon the plaintiff to prove that the proximate cause of the injury was the want of something which, as a general rule, the carrier was bound to supply, or the presence of something which, as a general rule, the carrier was bound to keep out of the way; or, as it has been otherwise expressed, the injured party must not only be free from fault, but must prove facts creating a presumption, at least, of negligence in the company producing the injury."

[2] Pennsylvania Act of April 4, 1868; Pennsylvania Pamphlet Laws, 1868, p. 58.

[3] Penn. R. Co. v. Price, 96 Pa. St. 256, 265; S. C. 1 Amer. & Eng. R. Cas. 234.

as soon as it was assailed.[1] It has been held to apply to one who is injured while unloading his own goods from the cars of a railroad company, under permission granted by the agent of the company.[2] It applies to the servants of a railroad company which has a right of trackage over the railroad of another company; so that if a servant of the former company, while employed under this right upon the road of the latter company, is injured through the negligence of a servant of the latter company, he cannot recover damages of the latter.[3] It also applies to the case of a route agent of the United States post-office department, riding upon a railway train in the discharge of his official duties. If injured through an accident to the train, this statute prevents him from recovering damages of the company, as he is not deemed a "passenger," within the proviso of the statute.[4]

II. Passenger Injured while Riding in a Dangerous and Improper Place on the Carrier's Vehicle.

§ 7. GENERAL RULE. It is a general rule that, if a passenger is injured while voluntarily and without necessity riding in a place on the carrier's vehicle which is not allotted to passengers, in which place a person would be more likely to be injured from an accident of a given kind, if an accident of such kind happens, and he is injured by it, and would not have been injured if he had remained in a proper place, he cannot recover damages from the carrier.[5] An exception to this rule, admitted by some courts,[6] and denied by others,[7] is that the carrier may be liable where the passenger assumed the dangerous and improper place on the carrier's vehicle by the authorization or consent of his conductor or other servant in charge of the same. Upon grounds fully set forth in the preceding subdivision,[8] this exception does not apply in cases where the passenger assumes the dangerous and improper place upon the invitation, or with the consent, of an *unauthorized* agent of the carrier,—as an engineer or brakeman of a railway train. This rule will now be discussed and illustrated.

§ 8. A RECENT COMMENTARY UPON THIS RULE. In cases of this kind, the right of such passenger or his legal representative to recover damages will clearly depend upon a consideration of the question whether the accident was such that his danger was or was not increased by riding where he did. A very intelligent discussion of this subject is found in a late case in Kentucky, where it is said by COFER, J.: "If a whole train be precipitated down an embankment, or through a bridge, into deep water, and a passenger seated in the express car is drowned, his representative will have the same right to recover as the representative of a passenger who was seated in a passenger coach. There could be no pretense for saying that, because the passenger in the express car was more exposed to danger in case of a collision with a train running in the opposite direction, than he would have been if he had been in the passenger coach, he ought not to recover, when it is clear that, as respects the misfortune which actually occurred, his danger was not at all increased

1 Kirby v. Railroad Co. 76 Pa. St. 506.

2 Richard v. North Penn. R. Co. 89 Pa. St. 193.

3 Mulherrin v. Delaware R. Co. 81 Pa. St. 366.

4 Penn. R. Co. v. Price, 96 Pa. St. 256, opinion by PAXSON, J.; TRUNKEY, J., dissented; S. C. 1 Amer. & Eng. R. Cas. 234.

5 Pennsylvania R. Co. v. Langdon, 92 Pa. St. 21, 27; Houston, etc., R. Co. v. Clemmons, 55 Tex. 89; Railroad Co. v. Jones, 95 U. S. 439; Chicago, etc., R. Co. v. Carroll, 5 Bradw. 201, 210; Kentucky Cent. R. Co. v. Thomas, 79 Ky. 160.

6 Kentucky Cent. R. Co. v. Thomas, supra; Dunn v. Grand Trunk R. Co. 58 Me. 187; Clarke v. Railroad Co. 36 N. Y. 135; Carroll v. New York, etc., R. Co. 1 Duer, 571; O'Donnell v. Allegheny, etc., R. Co. 59 Pa. St. 239; Watson v. Northern R. Co. 24 U. C. Q. B. 98; Fowler v. Baltimore, etc., R. Co. 18 W. Va. 579. See, also, St. Louis, etc., R. Co. v. Cantwell, 37 Ark. 519; Filer v. New York, etc., R. Co. 49 N. Y. 47; Lambette v. North Carolina, etc., R. Co. 66 N. C. 499.

7 Hickey v. Boston, etc., R. Co. 14 Allen, 429; Downey v. Hendrie, 46 Mich. 493, 501; Pennsylvania R. Co. v. Langdon, 92 Pa. St. 21; S. C. 1 Am. & Eng. R. Cas. 87.

8 Ante, § 3, (1,) (2,) (3.)

by the fact that he was in the express car. So, also, of a large class of railroad disasters which result from the giving way of the track, or the breaking of some portion of the car. These are as liable to occur at one portion of a train as at another, and consequently a passenger is in no more danger of injury from such accidents (?) in the express car than in a passenger car; and the fact that he was in that car when the accident occurred would not defeat his right to recover, unless, perhaps, the injury should result from some agency in that car which would not have existed in a passenger car. But there is another class of disasters in which the danger may be greater in the express car than in the passenger car. Express cars are usually in advance of passenger cars, and, in case of collision with stock or other objects on the track, or with trains running in the opposite direction, the danger would be greater in the express car. It seems to us, therefore, that when contributory negligence is interposed as a defense to an action against a railroad company for negligently injuring a passenger, and the supposed negligence consists in the fact that the passenger voluntarily occupied a position in the train other than the position he should have occupied, the nature of the accident causing the injury is to be considered; and if, upon such consideration, it appears that the danger of injury from that particular accident was materially increased by the fact that the passenger was in that particular place, instead of the place he should have occupied, he ought not to recover unless he was there with the consent of the conductor. But if the nature of the accident be such that the danger of injury was not enhanced in consequence of the position occupied by the passenger, or if the accident was of such a nature as was as likely to occur in one portion of the train as another, or if he occupied the place with the knowledge or consent of the conductor, his right of recovery will not be affected by the fact that he was at an improper place."[1]

§ 9. How, under Illinois Doctrine of Comparative Negligence. In Illinois, under the doctrine of comparative negligence which there obtains, it has been ruled that such conduct on the part of the passenger is such a high degree of negligence as will defeat a recovery, unless the servants of the company are guilty of wanton or reckless misconduct.[2]

§ 10. Illustrative Cases Falling within this Rule. (1) *Passenger Riding in Baggage Car.* A very valuable contribution to the law on this subject is found in a late case in Pennsylvania, in which the opinion of the court was delivered by Paxson, J. A railroad man traveling on the defendant's road as a passenger, chose to ride in a baggage car. He was well aware of a regulation of the company forbidding this, which regulation was conspicuously posted in the baggage car itself. The notice recited that "they [the train men] must see that passengers are properly seated, and will not allow them to stand on the platforms of cars, nor ride in the baggage or mail cars. Conductors and brakemen are instructed to strictly enforce this rule, and it is expected that passengers will cheerfully comply, as the rule is one intended for their own safety; it being particularly dangerous for passengers to be on platforms as trains approach stations." While so riding the train collided with another train. The baggage car was wrecked and the passenger was killed. If he had taken a seat in one of the passenger coaches, the evidence tended to show that he would not have been hurt. It was held, as applicable to these facts, substantially, that there could be no recovery. The right of a railroad company to make reasonable rules for its own protection and for the safety and convenience of its passengers had been frequently recognized, and was affirmed. It was held that a passenger who voluntarily leaves his proper place in a passenger car, in violation of the well-known rules of the company, to ride in the baggage car or other known place of danger, and is injured in con-

[1] Kentucky Cent. R. Co. v. Thomas, 79 Ky. 160. [2] Peoria, etc., R. Co. v. Lane, 83 Ill. 448.

sequence of such violation, cannot recover damages therefor. But it was conceded that this rule would not apply to an accident which might be the result of a brief visit to the baggage car to give some needed directions about the passenger's baggage, to have it rechecked, or for any other legitimate purpose. "The baggage car," said PAXSON, J., "is a known place of danger. In this respect it differs from the cow-catcher and platform only in degree. It is placed ahead of the passenger cars, and next to or near the locomotive. In cases of collision it is the first car to give way to the shock, and frequently is the only one seriously injured. It is treated as dangerous by the rules of all well-regulated companies, and the rule of the defendant company emphatically declared it to be so. An infant or an idiot might be excused from riding in such a position, by reason of his lack of mental capacity; but an intelligent man, accustomed to railroad travel, must be presumed to know its danger. It is patent, and the same under all circumstances. * * * In considering this question, regard must be had to the character of the rule violated. The rules adopted by railroad companies are a part of their police arrangements. Some of them are for the convenience of the company in the management of its business; others are for the comfort of passengers; and yet others have regard exclusively to the safety of passengers. The distinction between them and the difference in the consequences of their violation are manifest. As an illustration: it would be unreasonable to hold that the violation of the rule against smoking could be set up as a defense against an action for personal injuries resulting from the negligence of the company. On the other hand, should a passenger insist upon riding upon the cow-catcher in the face of the rule prohibiting it, and, as a consequence, should be injured, I apprehend it would be a good defense to an action against the company, even though the negligence of the latter's servant was the cause of the collision or other accident by which the injury was occasioned."[1]

In another case a passenger riding on a railway train, who, instead of occupying a coach provided for passengers, after going into the baggage car to get a drink of water, remained there for an unreasonable length of time,—in the particular case five minutes,—without necessity therefor, knowing the fact that he was in more danger there than in the passenger coach, and, while thus remaining, received an injury in consequence of the wrecking of the train, which injury he would have avoided if he had remained in the passenger coach, was held guilty of such contributory negligence as prevented him from recovering damages from the company.[2]

(2) *Passenger Riding on Platform of Steam Railway Car.* If a passenger, even at a time while many of the cars are crowded in consequence of an extraordinary influx of passengers, voluntarily remains on the platform at a time when he might, by the exercise of reasonable diligence and exertion, find room within some of the cars of the train, and, in consequence of being so upon the platform, is thrown or pushed off by the ordinary movements of the train, whereby he sustains injuries, he cannot recover damages from the company; and this is so, although he may not have actually known that there was any room for him in any of the cars, provided the circumstances were such that he might have discovered this by reasonable observation and effort.[3]

(3) *What if Passenger is Obliged so to Ride by Reason of Extraordinary Crowd of Passengers.* In a case of this kind it was urged that the carrier might, in view of the unexpected number of passengers who presented themselves, have refused to sell tickets, or admit passengers to its cars beyond their reasonable seating capacity, and that it could in no other way escape the imputation of negligence for a failure to furnish suitable accommodations

[1] Pennsylvania R. Co. v. Langdon, 92 Pa. St. 21, 27.

[2] Houston, etc., R. Co. v. Clemmons, 55 Tex. 89.

[3] Chicago, etc., R. Co. v. Carroll, 5 Bradw. 201, 210.

to all who were accepted as passengers. The court, however, did not take this view. BAILEY, P. J., said: "A rule somewhat analogous to the one here contended for obtains in the case of common carriers of freight. It is doubtless competent for such carriers, when there is a sudden and unexpected influx of freight beyond their ordinary means of transportation, to refuse to receive more than they could reasonably transport. But it is held that where they receive freights and undertake to carry them, they cannot excuse the failure to transport safely and deliver, by alleging that the amount received was beyond their means of transportation. There is, however, a very broad distinction between the duties and liabilities of common carriers of freights and passengers. The former are under an absolute duty to transport and deliver, from which, when once undertaken, nothing can release but the act of God or of the public enemy. The liability of common carriers of passengers is much more limited and qualified. The law enjoins a very high degree of care and diligence, it is true; but, unless there is some failure in the exercise of such care and diligence, there is no liability for any injuries their passengers may receive. Doubtless the defendant would have been justified in refusing to carry more than could be reasonably accommodated in the cars it had at command; but it was not bound to do so. If more than could be seated desired to ride, and were willing to stand in the aisles, or even on the platforms, we are unable to see how the defendant was guilty of negligence in permitting them to do so. Doubtless, greater care was required in the running and management of the train itself, crowded with passengers; but permitting it to be thus crowded, when there was no other means of transport, was not of itself negligence."[1] It was therefore held, in substance, that where an unforeseen crowd presents itself to a railway company for transportation, upon a holiday occasion, and the company is unable to furnish seats for all who purchase tickets, in consequence of which the platforms of the cars are crowded with passengers, and one of them is thrown off by an ordinary jerk of the car, in detaching another car from the train, and injured, the company will not be liable for the injury.[2]

(4) *Riding on the Pilot of the Engine.* The same rule was held to apply where the person injured was riding on the pilot or bumper of the engine.[3]

(5) *Riding in Sitting Position on Front Platform of Street Car.* Upon the same principle, it has been held that a passenger who receives an injury by falling from the front platform of a street railway car while in motion, upon which he occupied a sitting position, against the rules of the company and the warning of the driver of the car, and without any reasonable excuse therefor, is not in the exercise of such care as will entitle him to maintain an action against the company. A regulation by a street railway company that passengers shall not ride on the front platform of its cars is a reasonable regulation.[4]

§ 11. ILLUSTRATIVE CASES WHICH DO NOT FALL WITHIN THE RULE. (1) *Riding on Platforms of Street Cars.* (*a*) *So to Ride not Negligence per se.* For a passenger to ride on the *front* platform of a street railway car is not negligence *per se*.[5] And for stronger reasons, the same rule would apply to the act

[1] Chicago, etc., R. Co. v. Carroll, 5 Bradw. 201, 208.

[2] Id.

[3] Railroad Co. v. Jones, 95 U. S. 439.

[4] Will v. Lynn, etc., R. Co. 129 Mass. 359; 11 Reporter, 12.

[5] Nolan v. Brooklyn City R. Co. 87 N. Y. 63; Germantown Passenger R. Co. v. Walling, 97 Pa. St. 55; Maguire v. Middlesex R. Co. 115 Mass. 239; Burns v. Bellefontaine R. Co. 50 Mo. 139; Meesel v. Lynn, etc., R. Co. 8 Allen, 234. To the same effect, see Willis v Long Island R. Co. 34 N. Y. 670; Hadencamp v. Second Ave. R. Co. 1 Sweeney, 490; Ginna v. Second Ave. R. Co. 67 N. Y. 596; Zemp v. Wilmington, etc., R. Co. 9 Rich. L. 84; Lafayette, etc., R. Co. v. Sims, 27 Ind. 59; Macon, etc., R. Co. v. Johnson, 38 Ga. 409. It seems to have been conceded by the New York court of appeals in one case that the act of a passenger, in riding on the front platform of a street car, is negligence *per se*. But it was laid down that, if there is a presumption of negligence

of a passenger in riding on the rear platform.[1] The reasons for this rule are well stated in a case in Massachusetts: "It is well known that the highest speed of a horse railroad car is very moderate, and the driver easily controls it, and stops the car by means of his voice and reins and his brake. In turning round an angle from one street to another, passengers are not required to expect that he will drive at a rapid rate, but, on the contrary, might reasonably expect a careful driver to slacken his speed. The seats inside are not the only places in which the managers expect passengers to remain; but it is notorious that they stop habitually to receive passengers to stand inside until the car is full, and then stand on the platforms until they are full, and continue to stop and receive them even after there is no place to stand, except on the steps of the platform. Neither the officers of these corporations, nor the managers of the cars, nor the traveling public seem to regard this practice as hazardous; nor does experience thus far seem to require that it should be restrained on account of its danger. There is, therefore, no basis on which the court can decide, upon the evidence reported, that the plaintiff did not use ordinary care. It was a proper case to be submitted to the jury, upon the special circumstances which appeared in evidence."[2]

(*b*) *Cases of Injuries while Riding on Front Platform of Street Car.* Accordingly, if a passenger, while riding on the front platform of a street car, is thrown off, in consequence of an unusual motion of the car, caused by the driver striking or whipping the horses, or by the horses becoming unmanageable, there is a question of fact to go to a jury on the question of the negligence of the defendant and the contributory negligence of the plaintiff.[3] So, where a crowded passenger car was hailed and stopped for a passenger to get on; and he, being unable to get on the rear platform by reason of the crowd, went to the front platform, which was also crowded, but succeeded in standing on the step, on which there were already two persons, by holding on to the hand-rail at the side; and, in turning a curve, several passengers pushed against him, breaking his hold, so that he fell under the wheels and was killed,—in an action by his widow for damages, it was held, affirming the judgment of the court below, that the question whether the deceased was guilty of contributory negligence was properly submitted to the jury.[4]

(*c*) *Passenger Injured while Riding on Rear Platform of Street Car.* A passenger, riding on the rear platform of a crowded street car, was struck by the pole of the car following and seriously injured. It was held that, in riding in this place, he was not guilty of contributory negligence; that,

springing from this fact, yet the facts that the car and platform are full of passengers, so that there is no room for more, and that the conductor stops for and receives fare from the passenger so riding, are sufficient to rebut such presumption. Clark v. Eighth Ave. R. Co. 36 N. Y. 135. In like manner, where the street car was so crowded that a particular passenger was obliged to stand on the *rear platform*, and was there jerked off the car by its motion and hurt, it was held that the fact that there was no other place for him to stand rebutted the presumption of negligence which might arise from his standing in that position. Ward v. Cent. Park, etc., R. Co. 11 Abb. Pr. (N. S.) 411. So, where a conductor forced a boy, against his remonstrance, to give up an inside seat in the car, and occupy a place on the platform, there was no evidence of negligence on the part of the boy. Sheridan v. Brooklyn, etc., R. Co. 36 N. Y. 39. But this presumption of negligence is not rebutted, when all that appears by the evidence is that the passenger voluntarily seated himself on the front platform. Solomon v. Cent. Park., etc., R. Co. 1 Sweeney, 298. These latter decisions, it is perceived, assume that it is presumptive negligence for a passenger to ride on the platform of a car, and the case last cited expressly so holds; but, in view of the late decision of the court of appeals of New York in Nolan v. Brooklyn City R. Co. 87 N. Y. 63, this doctrine must now be regarded as overturned, and it is to be left as a question of fact for the jury, under the circumstances of each case, whether or not the act of the passenger in riding upon the platform of a street car is to be imputed to him as negligence.

[1] Thirteenth, etc., R. Co. v. Boudrou, 92 Pa. St. 475.

[2] Meesel v. Lynn, etc., R. Co. 8 Allen, 234.

[3] Nolan v. Brooklyn City, etc., R. Co. 87 N. Y. 63.

[4] Germantown Passenger R. Co. v. Walling, 97 Pa. St. 55; S. C. 2 Am. & Eng. R. Cas. 20; 12 Phila. 309.

although the accident would not have happened had he not been in this position, yet the position was but a *condition*, and not the *cause* of the injury; and that the court properly withheld from the jury the question of contributory negligence. The court, in so holding, recognized as the proper test of contributory negligence the affirmative of the question, did the plaintiff's negligence contribute in any degree to the furthering of the injury complained of? If it did, there can be no recovery. If it did not, it is not to be considered. The opinion of the court is, therefore, equivalent to a ruling that the act of the passenger in riding upon the rear platform of the car—the same being crowded—did not contribute in any degree, in a legal sense, to the injury which happened to him.[1]

(2) *Getting on Street Car by the Front Platform.* The rules of a street railway company placarded in its cars may prohibit passengers from getting on the cars by way of the front platform. The front platform of such cars may be surrounded by a railing to prevent passengers from getting on and off in this way; and it may be, under ordinary circumstances, so dangerous for them so to get on and off as to make such attempts negligence. But, nevertheless, circumstances may exist where a passenger will be justified in attempting to get on a street car by this mode; and, although not justified, if such an attempt is made, and the passenger thus wrongfully puts himself in a position of danger, and the driver, seeing his danger, or, owing to the peculiar circumstances, is under the duty of knowing it, nevertheless whips up his horses and throws the passenger down while so attempting to get on, and hurts him, there may be a question of negligence to go to a jury. In such cases as this the doctrine of the court of exchequer chamber in *Tuff* v. *Warman*,[2] that "mere negligence or want of ordinary care or caution would not disentitle him to recover, unless it were such that, but for such negligence or want of ordinary care and caution, the misfortune could not have happened, nor if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff," may well be held to apply. It was so held, where a street car was so crowded that some of the passengers had to stand on the front platform, and, the car having run off the track, these passengers, at the request of the driver, alighted and lifted it upon the track, after which several of them climbed again upon the front platform over the iron railing extending around it, and one of them, while so attempting to climb upon the front platform, was thrown down, by the act of the driver in releasing his brake and starting the car with a sudden motion, and was dragged for some distance and hurt. It was contrary to the rules of the company for passengers to get upon the car by way of the front platform, and a notice of this was posted in the car. It was held, notwithstanding these facts, that there was evidence of negligence on the part of the defendant, legally sufficient to take the case to the jury. In answer to the objection that there was no obligation on the part of the driver to look after or exercise any care or prudence in regard to persons attempting to board the car by the front platform, because such persons had no right to enter the car in that direction, the court said: "Ordinarily this would be true; but, under the circumstances of this case, taking into consideration that the appellee had paid his fare, and that, owing to the crowded condition of the car, he was obliged to stand on the front platform; that he had gotten off at the request of the driver to help in getting the car again on the track,—in view of this and other facts in this case, there was an obligation on the part of the driver to see that the appellee and others had an opportunity to get on the car again before he started the horses, and if he saw, or by the exercise of proper care might have seen, the position of the appellee, and thereby avoided the injury,

[1] Thirteenth, etc., R. Co. v. Boudrou, 92 Pa. St. 475.

[2] 2 C. B. (N. S.) 750.

we think the company was liable."[1] But this doctrine does not apply to a state of facts where the last link in the chain of concurring causes leading up to the injury was the negligence of the plaintiff himself, the negligence of the defendant being an intermediate link. Thus, where the step of a street car had been broken off and it had not been replaced, and where the car, moving along in the customary way, was approached by a boy 15 years of age, with the apparent purpose of getting aboard, and nevertheless did not stop for him to get on, and the boy, instead of attempting to get on by the rear platform, made the attempt by the front platform and was thrown down and hurt, it was held that there was no case to go to a jury, even conceding the negligence of the company in running a car whose front platform had no step, and in not stopping the car to enable the boy to get on.[2]

(3) *Passenger Traveling in a Different Sleeping Car from the One to which He had been Assigned.* In a late case in the supreme court of the United States, it was held an immaterial circumstance that the passenger, when injured, was not sitting in the particular sleeping car to which he had been originally assigned. His right for a time to occupy a seat in a car in which a friend was riding, where he was at the time of the accident, was not, the court said, and, under the facts disclosed, could not be, questioned.[3]

(4) *Passenger Riding with His Elbow on the Sill of Car Window.* It has been recently held by the supreme court of the United States not negligence for a passenger having a severe headache to rest his elbow on the sill of the window of the car in which he was riding; and where his elbow was jarred so as to be forced outside the window by reason of the car in which he was riding coming in contact with a freight car which had been negligently left on the side too near the line of the main track, along which the train was passing, so that he received a severe injury which required the amputation of his arm, it was held a case of culpable negligence on the part of the servants of the receiver in charge of the railway, and that the receiver must pay damages.[4]

[1] People's Passenger R. Co. v. Green, 56 Md. 84, 93.

[2] Dietrich v. Baltimore, etc., R. Co. 58 Md. 347. The court said: "The case falls fully within the principle and reasoning of the case of the Railroad Co. v. Jones, 95 U. S. 439, 443." ROBINSON and RITCHIE, JJ., dissented. In this latter case the following was laid down by Mr. Justice SWAYNE as the governing principle in cases of concurring negligence: "One who, by his negligence, has brought an injury upon himself, cannot recover damages for it. Such is the rule of the civil and common law. The plaintiff in such cases is entitled to no relief. But where the defendant has been guilty of negligence also, in the same connection, the result depends on the facts. The question in such cases is (1) whether damage was occasioned entirely by the neglect or improper conduct of the defendant; or (2) whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care or caution, that, but for such neglect and want of ordinary care and caution on his part, the misfortune would not have happened. In the former case he is entitled to recover; in the latter, he is not." Railroad Co. v. Jones, 95 U. S. 439. This language was cited with approval by the court of appeals of Virginia in Richmond, etc., R. Co. v. Morris, 31 Grat. 200, 203.

[3] Pennsylvania R. Co. v. Roy, 102 U. S. 451, 458.

[4] Farlow v. Kelley, 2 Sup. Ct. Rep. 555, (Sup. Ct. U. S. 1883.) There is some authority for the view that the act of a passenger in riding with his elbow on the sill of the window of a steam railway car is not negligence *per se*, even where it projects beyond the side of the car. Chicago & Alton R. Co. v. Pondrom, 51 Ill. 333, 340; Spencer v. Milwaukee, etc., R. Co. 17 Wis. 487. The author ventures to think that this is the better view, and he is glad to find his view sustained to some extent by the decision of the supreme court of the United States, above cited. The reason which supports this view is that the windows of railway passenger coaches being at a height at which it is convenient for passengers to rest their elbows upon them, tired passengers are tempted to do this; and those who are acquainted with railroad travel know, as a fact, that passengers generally do this. I do not see how a thing which people in a given situation generally do can be pronounced negligence as matter of law. I do not see how railroad managers who permit obstacles to come so near their passenger coaches as to strike the arms of passengers thus exposed can, in view of the high degree of care which the law puts upon them as carriers of passengers, ask the law to excuse them and to put the blame upon the passengers. The weight of authority, however, seems to be in favor of the view that the act of the passenger in riding with his arm

(5) *Passenger Standing in Door of Cabin Thrown Down by Boat Striking Wharf with Undue Violence.* It is not negligence for a passenger on a ferry-boat, as the boat approaches its slip, to rise from his or her seat in the cabin and move forward and stand in the doorway of the cabin, awaiting an opportunity for exit from the boat; and if, while so standing, he or she is thrown down and injured in consequence of the boat being permitted to strike the slip with undue violence, it is a case for damages against the owner.[1]

§ 12. WHAT IF PASSENGER RIDES IN SUCH POSITION WITH THE KNOWLEDGE OR CONSENT OF THE CONDUCTOR. (1) *General Views.* The courts generally hold, in such cases, that the act of the conductor in inviting the passenger to ride in a dangerous and improper place on the train, or the fact that the passenger so rides with the knowledge or consent of the conductor, will be an answer to the objection of contributory negligence on the part of the passenger.[2] A case in Massachusetts is to the contrary effect, and suggests a very good reason for the contrary view. A passenger had been injured while riding upon the platform of one of two colliding cars, with the express permission of the conductor. WELLS, J., said: "It is not enough for the plaintiff to show that Hickey, the passenger, was rightfully upon the platform. Because he might rightfully occupy whatever place the conductor should permit, it does not follow that he would do so at the risk exclusively of the corporation."[3] In like manner, in a late decision in Michigan, it is said that this rule is plainly not one of universal application: "Regard must be had to the passenger's capacity to look out for himself, to the opportunity there may be to get a safer position, to the distinctness and extent or degree of the peril, and so on. Take the case of a child, and the case of a man every way qualified to take care of himself; the case where the position given seems tolerably safe and no better is perceived, and the case where it is manifestly one full of danger, and a safe one is known which is equally accessible. It would be very unreasonable to apply the rule equally to all. May the ordinary passenger, with his eyes open and with abundant accommodations before him which are safe, accept an invitation from the carrier to ride on the cow-catcher, and then, if injury arise from it, be allowed to set up the invitation as a legal answer to the charge of contributory negligence? To conclude that he might would be to permit a person of full capacity to exempt himself from the duty and responsibility appertaining to him as a moral being, and, in substance, to stultify himself, in order to cast a liability upon another."[4] The supreme court of Pennsylvania has lately taken the same view. "If," said PAXSON, J., "the passenger thus recklessly exposing his life to possible accidents were a sane man, more especially if he were a railroad man, it is difficult to see how the knowledge, or even assent, of the conductor to his occupying such a position could affect the case. There can be no license to commit suicide. It is true, the conductor has control of the train, and may assign passengers seats. But he may not

out of the window is *per se* such negligence as will prevent him from recovering damages for an injury received by his arm coming in contact with some external object while in such position. Todd v. Old Colony, etc., R. Co. 3 Allen, 18; S. C. 7 Allen, 207; Pittsburgh, etc., R. Co. v. Andrews, 39 Md. 329; Indianapolis, etc., R. Co. v. Rutherford, 29 Ind. 82; Morel v. Miss. Ins. Co. 4 Bush, 535; Louisville, etc., R. Co. v. Sickings, 5 Bush, 1; Holbrook v. Utica, etc., R. Co. 12 N. Y. 236. In the case of Pittsburgh, etc., R. Co. v. McClurg, 56 Pa. St. 294, the court, in holding as above stated, expressly overruled the earlier case of New Jersey, etc., R. Co. v. Kennard, 21 Pa. St. 203. In Laing v. Colder, 8 Pa. St. 479, it was held that if the passenger's extended arm was broken by coming in contact with a bridge, the carrier would not be responsible for the injury, if he gave timely notice of the danger, so that the plaintiff might have avoided it.

1 Camden, etc., Ferry Co. v. Monoghan, 11 Reporter, 717, (Sup. Ct. Pa. 1881.)

2 O'Donnell v. Allegheny, etc., R. Co. 59 Pa. St. 239; Carroll v. New York, etc., R. Co. 1 Duer, 571; Watson v. Northern R. Co. 24 U. C. Q. B. 98; Burns v. Bellfontaine R. Co. 50 Mo. 139; Clarke v. Railroad Co. 36 N. Y. 135; Kentucky Cent. R. Co. v. Thomas, 79 Ky. 160, 165; Dunn v. Grand Trunk R. Co. 58 Me. 187.

3 Hickey v. Boston, etc., R. Co. 14 Allen, 429.

4 Downey v. Hendrie, 46 Mich. 498, 501, opinion by GRAVES, J.

assign the passenger to a seat on the cow-catcher, a position on the platform, or in the baggage car. This is known to every intelligent man, and appears upon the face of the rule itself. [The learned judge here referred to the rule set out in the preceding section.] He is expressly required to enforce it, and to prohibit any of the acts referred to, unless it might be riding on the cow-catcher, which is so manifestly dangerous and improper that it has not been deemed necessary to prohibit it. We are unable to see how a conductor, in violation of a known rule of the company, can license a man to occupy a place of danger so as to make the company responsible. It is otherwise as to rules which are intended merely for the convenience of the company or its passengers. * * * I am not aware that it has been decided in any well-considered case that a passenger may, as a matter of right, ride in the baggage car at the risk of the company. In a few cases it has been held that the assent of the conductor is sufficient to charge the latter with the consequences of such act; that it amounts to a waiver of the rule forbidding passengers to ride in the baggage car. But how can a conductor waive a rule which, by its very terms, he is commanded to enforce? He might neglect to perform it, and, when the rule is a mere police arrangement of the company, such neglect may, perhaps, amount to a waiver as between the passenger and the company. But when the rule is for the protection of human life, the case is very different. We are not disposed to encourage conductors, or other railroad officers, in violating reasonable rules which are essential to the protection of the traveling public. If it is once understood that a man who rides in the baggage car in violation of the rules does so at his own risk, we shall have fewer accidents of this description."[1]

(2) *Illustrative Cases.* Accordingly, where a passenger got upon a street car at the rear platform, entered the car in which there were unoccupied seats, passed on through the car, and, as he testified, at the invitation of the driver, took a seat upon the driving-bar or guard of the front platform, and the driver, after the car had moved on for a space, struck the horse, whereby the car gave a jerk which tipped the plaintiff off, so that a wheel passed over his arm and injured him, it was held that he could not recover damages, and that such a case ought not to go to a jury.[2] On the other hand, having stopped at a station, the conductor told the plaintiff, who was in charge of cattle on the train,

[1] Pennsylvania R. Co. v. Langdon, 92 Pa. St. 21, 28; S. C. 1 Am. & Eng. R. Cas. 87. The court met with no difficulty in deciding the case upon the obvious reason which ought to govern; but it did have difficulty in dealing with the adjudged cases, several of which have held that the assent of the conductor to the act of the passenger in riding in a dangerous and improper place, will prevent the company from setting up such act of the passenger as contributory negligence. "We are not aware," continued the learned judge who delivered the opinion, "that the foregoing views conflict with any of our own cases. They may not harmonize with some of the *dicta* which lie scattered through them; but a careful examination of the points decided shows no serious embarrassment." He then proceeded to distinguish the cases of O'Donnell v. Allegheny R. Co. 59 Pa. St. 239; Lackawanna, etc., R. Co. v. Chenewith, 52 Pa. St. 382; Creed v. Pennsylvania R. Co. 86 Pa. St. 139; Dunn v. Grand Trunk R. Co. 58 Me. 187; Isbell v. New York, etc., R. Co. 27 Conn. 393; Keith v. Finkham, 43 Me. 501; Huelsenkamp v. Citizens' R. Co. 34 Mo. 54; S. C. 37 Mo. 537. The case of Jacobus v. St. Paul, etc., R. Co. 20 Minn. 125; S. C. 1 Cent. Law J. 371, was not regarded as entitled to weight as authority. "The reasoning of the court," said PAXSON, J., "is not satisfactory, and the authorities do not sustain the position assumed by the learned judge who delivered the opinion." On the other hand, the learned judge referred to the case of Robertson v. New York, etc., R. Co. 22 Barb. 91, in which it was held that where one rode on the engine in violation of the known rules of the company, and was there injured, he could not recover, notwithstanding he was there with the assent of the engineer; and also the case of Pittsburgh, etc., R. Co. v. McClurg, 56 Pa. St. 294, in which it was held that where a traveler "puts his elbow or his arm out of the window voluntarily, without any qualifying circumstances impelling him to do it, it is negligence *in se*; and where that is the state of the evidence, it is the duty of the court to declare the act negligence in law." It may be observed that the doctrine of the case last cited has been denied in several of the courts. Ante, § 11, (4,) note.

[2] Downie v. Hendrie, 46 Mich. 498, 501.

that some cattle were down in the train behind them, and that he had better go and look after them. Two men, who were sitting in the caboose when this remark was made, went with their pole, and, while one of them was in an exposed position, endeavoring to raise a steer which had fallen down in the car, an express train swept by, striking him and causing severe injury. It was held a case for the jury. The person injured was not, under the circumstances, guilty of contributory negligence.[1]

§ 13. WHAT IF PASSENGER ASSUMES EXPOSED POSITION AT REQUEST OF UNAUTHORIZED SERVANT OF CARRIER. A brakeman on a freight train is not in charge of the train, where there is also a conductor upon it, and has no power to give directions to other persons upon the train. Accordingly, where a boy 13 years of age got upon a freight train without the knowledge and consent of the persons in charge of the train, but, on being discovered, was permitted to remain there, and was required by a brakeman to help brake, and assist in coaling the engine, and was told to go on top of one of the freight cars and adjust some loose lumber which was about to fall off, and, while so doing, was thrown off the car and hurt, in consequence of a piece of the lumber striking a post which the train was passing, it was held that there could be no recovery of damages from the company. The ruling was placed on the ground that the brakeman, in giving the order, was not acting within the scope of his employment, and accordingly that the railroad company was not liable. At the same time it was conceded that the boy, although he had paid no fare, was entitled to the rights of a passenger. The fact that he had gone into a dangerous and improper situation would not preclude him from recovering damages, since it did not appear that the Missouri statute, below quoted, which required the posting of printed regulations in a conspicuous place to warn passengers not to ride in dangerous places on the train, had been complied with.[2] The court quotes the language of AGNEW, J., in a Pennsylvania case,[3] that the youth of the plaintiff "may excuse him from concurring negligence, but it cannot supply the place of negligence on the part of the company, or confer authority on one who has none."

§ 14. STATUTORY REGULATIONS ON THE SUBJECT. In some of the states there are, or have been, statutory regulations on the subject, like the following in Missouri: "In case any passenger on any railroad shall be injured while on the platform of a car, or in any baggage, wood, or freight car, in violation of the printed regulations of the company, posted up at the time in a conspicuous place inside of its passenger cars then in the train, such company shall not be liable for the injury: provided, said company at the time furnish room inside the passenger cars sufficient for the proper accommodation of the passengers."[4] Under such a statute, it has been said: "The exemption of the company is made to depend upon a violation by the passenger of the printed regulations posted up in the passenger cars only. They are not required to be posted up in a baggage car. It is presumed that no passenger will ever be found there. * * * This statute proceeds again upon the general principles of law in relation to contributory negligence; and it supposes that the passenger who has had the warning of this notice, and who still ventures to place himself in a situation so dangerous as a baggage car, is to be considered as contributing by his own negligence to produce the injury, and therefore that the company is

[1] Fowler v. Baltimore, etc., R. Co. 18 W. Va. 579.

[2] Sherman v. Hannibal, etc., R. Co. 72 Mo. 62.

[3] Flower v. Railroad Co. 69 Pa. St. 216; S. C. 8 Am. Rep. 251. See, also, Snyder v. Hannibal, etc., R. Co. 60 Mo. 413; Towanda Coal Co. v. Heeman, 86 Pa. St. 418; Chicago, etc., R. Co. v. Casey, 9 Bradw. 632, 639; Chicago, etc., R. Co. v. Mitchie, 83 Ill. 427. Compare Pennsylvania R. Co. v. Hoagland, 78 Ind. 203; S. C. 3 Am. & Eng. R. Cas. 436.

[4] Rev. St. Mo. 1855, p. 438. For a similar statute in New York, see Laws N. Y. 1850, c. 140, § 46; 3 Edm. St. at Large, p. 636, § 46.

not to be held liable in such case."[1] And it is to be inferred from other portions of the opinion in the case just cited, that, where notices are posted in compliance with such a statute, the consent of the conductor to the act of the passenger in riding in an improper and dangerous place would not exonerate the latter from the imputation of contributory negligence. It has been held in New York that the company must strictly comply with the terms of such a statute in order to secure its benefit.[2] A notice that "passengers are forbidden to get on or off the car while in motion; or on or off the front platform; or on or off the side, except nearest the sidewalk,"—manifestly does not exempt the company from liability to a passenger for an injury sustained while merely riding upon the front platform.[3] SEYMOUR D. THOMPSON.

St. Louis.

[1] Higgins v. Hannibal, etc., R. Co. 36 Mo. 418, 435.

[2] Carroll v. New York, etc., R. Co. 1 Duer, 571; Clark v. Eighth Ave. R. Co. 32 Barb. 657; S. C. 36 N. Y. 135; Colgrove v. Harlem, etc., R. Co. 6 Duer, 382; S. C. 20 N. Y. 492.

[3] Nolan v. Brooklyn City, etc., R. Co. 87 N. Y. 63.

In re CADWELL and others, Bankrupts.

(*District Court, N. D. New York.* 1883.)

CREDITOR PROVING CLAIM — FRAUDULENT PREFERENCE — ACTUAL AND CONSTRUCTIVE FRAUD.

A creditor who is guilty of no actual fraud is not debarred from proving his debt for the reason that his preference has been set aside by the judgment of the court for constructive fraud only.

In Bankruptcy.

George W. Adams, for assignee.

John Lansing, for creditor.

COXE, J. This is an appeal from an order of the register expunging the proof of debt filed by the Jefferson County National Bank, founded upon three judgments which had previously been declared preferential and void for constructive fraud only. *Brown* v. *Jefferson Co. Nat. Bank*, 19 Blatchf. 315; S. C. 9 FED. REP. 258.

The sole question is whether a creditor, who is guilty of no actual fraud, is debarred from proving his debt for the reason that his preference has been set aside by the judgment of the court.

In August, 1877, the district court for the southern district of New York decided that there was no conflict between section 5084 of the Revised Statutes and section 12 of the act of June 22, 1874; that a person who surrenders his preference under section 5084 may, even then, under section 12, be prevented from proving more than a moiety of his debt, if guilty of actual fraud; that section 12 placed another limitation upon the proof of debts, and did nothing more. In other words, that the amendment, instead of relaxing, made still harsher the terms of the original act. *In re Stein*, 16 N. B. R. 569.

The register rests his decision wholly upon this authority. I find but one case decided subsequently in which a similar view is taken. *In re Graves*, 9 FED. REP. 816, (district court of Delaware, 1881.) See, also, *In re Cramer*, 13 N. B. R. 225, (district court of Minnesota, 1876.) On the contrary, the following authorities—two of them circuit court decisions—hold that it was the intention of congress, by the amendment of 1874, to distinguish between actual and constructive fraud, and remove the existing limitation upon the proof of debts by honest creditors. *Burr* v. *Hopkins*, 12 N. B. R. 211, (circuit court of Wisconsin;) *In re Black*, 17 N. B. R. 399, (district court of Massachusetts, 1878;) *In re Newcomer*, 18 N. B. R. 85, (district court of Illinois, 1878;) *In re Kaufman*, 19 N. B. R. 283, (district court of New Jersey, 1879;) *In re Reed*, 3 FED. REP. 798, (circuit court of Massachusetts, 1880.)

All of these decisions, with the exception of the first named, were rendered after the decision in the *Stein Case*. The reasoning of the learned judge in that case is referred to, reviewed, and disapproved. The construction contended for by the assignee, is, with great unanimity, rejected. It would hardly be profitable to restate the arguments upon this subject *pro* and *con;* they are very clearly and ably reviewed in the opinions referred to. The question is not free from doubt; each interpretation is surrounded with difficulties; but I am inclined to concur in the views expressed by Judges DRUMMOND, LOWELL, BLODGETT, NIXON, and CLIFFORD, as giving the most reasonable construction of the law. If the amendment had been stated affirmatively,—"and such person, if a creditor, shall, 'except' in cases of actual fraud on his part, be allowed to prove * * * his debt,"—there would be little difficulty in giving it force and effect, even though in conflict with some of the earlier provisions of the act. But is not the meaning the same, though the proposition is stated negatively? The law says that a guilty party shall "not be allowed to prove for more than" half his debt; is not the implication well-nigh conclusive that an innocent party may prove his entire debt? If this is not the meaning of the amendment, it is indeed difficult to imagine what the intention of congress was in adopting it.

The order of the register should be reversed and the expunged proof reinstated.

LIVERPOOL & GREAT WESTERN STEAM CO. *v.* SUITTER and others.[1]

(*District Court, E. D. New York.* June 7, 1883.)

1. COMMON CARRIER—WAREHOUSEMAN—DELIVERY—PERISHABLE CARGO.
The steamer W. arrived at New York on Friday, December 30, 1881, having on board various consignments of fruit, which, on the following day, were discharged on a covered pier, except part of the defendant's consignment, and were all removed on that day, except the defendant's consignment. Sunday being the first of January, and Monday kept as a holiday, it remained in the custody of the steamer till Tuesday, when the fruit which had remained on the pier during Sunday and Monday was found to be injured by frost, owing to the severity of the weather, although the steamer had covered it up and protected it against frost as well as could be reasonably expected. In an action against the consignees to recover the freight on the fruit, the defendants set up by way of recoupment the damage to the fruit caused by frost. The evidence showed that on the arrival of fruit cargoes, it was usual for consignees to sell the same at auction at 12 o'clock on the day of its discharge before it was removed from the pier, and by a certain firm of auctioneers; that such a sale took place of nearly all the fruit brought by the W. on December 30th, at which all was sold except that in question; and that all that arrived by the W. was removed from the pier on that day, except the defendants' consignment, which was not removed because the defendants did not learn that their fruit was in the W. till too late to get it advertised for the sale of that day. *Held*, that the contention of the defendants that they were not bound to receive their fruit on Saturday, because the weather on that day was so cold as to render it an unsuitable day, was untenable, because other fruit was discharged and removed on that day without being injured by frost; that, even if the defendants learned of the arrival too late to put their fruit into that day's sale, still that fact did not give them the right to compel the ship-owner to retain the fruit in his custody as common carrier over the two ensuing holidays, and that the ship-owner's responsibility as common carrier terminated when the fruit was discharged, with notice to the consignee in time to remove it on that day; and that in the absence of proof showing neglect on the part of the ship-owner as warehouseman, he could not be held liable for the damage by frost.

2. SAME—USAGE.
A usage in respect to cargoes of fruit to delay the delivery until a day when the consignee should be able to have it sold on the pier, by a certain single firm of auctioneers, could not be upheld, even if shown to exist, it being unreasonable and contrary to public policy to permit the time of a vessel's discharging her cargo to depend upon the ability of a single auction house, in the accumulation of business and other engagements, to effect a sale of such cargo.

In Admiralty.

Beebe, Wilcox & Hobbs, for libelant.

Charles E. Crowell, for respondents.

BENEDICT, J. This action is brought to recover freight, amounting to $879.75, alleged to be due for the transportation, in the steam-ship Wyoming, of a shipment of oranges and lemons consigned to the defendants.

Against the demand for freight the defendants set up, by way of recoupment, damage to the fruit, caused by frost while on the pier, after it had been landed from the steamer, exceeding the freight in amount. Whether the ship-owner is liable for the damage referred to is the question to be determined.

[1] Reported by R. D. & Wyllys Benedict, of the New York bar.

The fruit was transhipped at Liverpool to the Wyoming, and transported in her to the port of New York. The Wyoming arrived at her pier in New York on Friday evening, December 30, 1881, having on board a cargo of merchandise, including oranges and lemons consigned to various persons in New York. On Saturday morning, December 31st, at about 7 A. M., the ship commenced to discharge the fruit, which, as fast as landed, was placed upon the pier, assorted according to the marks, where it was accessible and ready for delivery to the consignees.

During that day all the fruit on board was so landed in good order, except some boxes, being part of the consignment belonging to the defendants, which were not then landed, because it was learned that the defendants would not remove their fruit from the pier on that day.

Of the fruit so landed upon the pier on Saturday all was on the same day removed from the pier, except the portion belonging to the defendants. There was plenty of time for the removal of that portion before night, but no effort was made to remove it. Sunday was the first of January. Monday was kept as a holiday. Consequently the discharging of the cargo was not resumed until Tuesday, when the remainder of the defendants' fruit was discharged, and on that day they removed all their fruit from the pier. The portion which had remained on the pier over Sunday and Monday had, however, sustained damage meanwhile by frost, which damage the defendants now rely on by way of recoupment as a defence to the ship-owner's claim for the freight.

Oranges and lemons are a perishable cargo, and it is in proof that upon the arrival of a steamer having importations of this character on board it is usual for the various consignees to sell the same at public auction on the day of its discharge from the steamer, and before it is removed from the pier. These sales are all conducted by a single firm of auctioneers, Messrs. Brown & Seccomb, at their auction house, at 12 o'clock, by which time the buyers are supposed to have had the opportunity to examine the fruit then lying on the pier at the ship's side.

In accordance with this usage, an auction sale of oranges and lemons imported by the Wyoming on the voyage in question was had on Saturday, December 30th, when all the fruit brought in the steamer was sold, except that belonging to the defendants, and some 37 boxes belonging to Phelps Bros. & Co.; and all the fruit landed from the steamer on that day, excepting that of the defendants, and including the fruit of Phelps Bros. & Co., was on the same day removed from the pier without sustaining any damage by frost.

The contention of these defendants is—*First*, that they were not bound to receive their fruit on Saturday, because the weather on that day was so cold as to render it an unsuitable day to discharge oranges and lemons. But this position is clearly untenable, for, as al-

ready stated, oranges and lemons belonging to other consignees were discharged from the steamer on the same Saturday and removed without any of it being injured by frost.

The real reason why the defendants did not accept their fruit on Saturday was, not the state of the weather, but because they did not learn that their fruit was in the Wyoming until during the forenoon of Saturday, and failed to get it advertised for the auction sale of that day.

It is next contended, in behalf of the defendants, that inasmuch as they did not learn that their fruit was in this steamer until a late hour on Saturday morning, and did not get their fruit into the auction sale of that day, they were not bound to receive it from the ship on that day.

Assuming the proof to be that the lateness of the hour on Saturday, at which the defendants learned of the arrival of their fruit in the Wyoming, rendered it impossible for them to put it into the sale of that day, still this fact did not give them the right to compel the ship-owner to retain the fruit in his custody as common carrier thereof over Sunday and Monday. The general rule is that when cargo has been landed at a suitable time, upon a suitable pier, and so placed on the pier that it can be examined by the consignee and removed from the pier, the liability of the ship-owner as common carrier in respect to such cargo terminates after the expiration of such a period of time after the goods are landed as may be reasonable to enable the consignee to examine and remove it, provided the consignee be informed of the time and place of landing. *Richardson* v. *Goddard*, 23 How. 28. This rule is applicable to cargo of the description under consideration. No reason is seen why the right of the ship-owner to terminate his liability as common carrier in respect to oranges and lemons should be affected by any necessity of the merchant to sell the fruit at auction while upon the pier. In the present instance, the fruit that was damaged on the pier was landed on Saturday, in abundant time for its removal from the pier on that day; and the consignee had actual notice of the landing in time to remove it on that day, as was done by all the other consignees whose fruit had been landed at the same time. The ship-owner's responsibility as common carrier thereof terminated on that day, therefore, and he cannot be liable for the freezing of the fruit, unless it has been shown that he neglected to take such care of the fruit left on the pier as would be required of a warehouseman in regard to fruit stored in his warehouse.

No such neglect has been proved. The pier was a covered pier, having upon it one or two stoves. As soon as knowledge came to the ship-owner that the fruit was to remain upon the pier overnight, it was covered with tarpaulins and bags, and as well protected against frost as could be reasonably expected. No precaution against frost, that was at the ship-owner's command, was neglected. The damage

which the fruit received during Sunday and Monday was owing, not to the neglect of reasonable precaution by the ship-owner, but to the severity of the weather during those days.

Thus far the case has been considered as if it were one of delivering ordinary cargo from a ship in the port of New York. But it has been sought to make the delivery of oranges and lemons an exception to the ordinary rule by testimony to the effect that in the port of New York a usage exists in respect to oranges and lemons, to delay the delivery of such fruit until a day when the consignee shall be able to procure it to be sold at auction, while on the pier, by the auctioners Brown & Seccomb, and it has been contended that no delivery of this fruit was made on Saturday, because it was not in the auction sale held on that day.

The evidence, in my opinion, fails to establish the existence of such a usage; but, if such a usage had been shown, I could not uphold it. It seems to me unreasonable, and contrary to public policy, to permit the time of discharging a ship of her cargo to depend upon the ability of a single auction house, in the accumulation of business and of other engagements, to effect a sale of such cargo for the owners thereof. Therefore I consider the fact that the defendants' fruit was not sold with the rest on Saturday, to be unimportant as affecting the liability of the ship-owner.

It results from these views that the decree must be that the libelant recover his freight, amounting to $879.75, less $38.55, for shortage, which the testimony proved, and is not disputed.

De Grau *v.* Wilson.[1]

(*District Court, E. D. New York.* June 6, 1883.)

1. Bill of Lading — Common Carrier — Warehouseman — Destruction of Goods by Fire.

Where goods were shipped to New York under a bill of lading containing a clause, "goods to be taken from along-side by the consignee immediately the vessel is ready to discharge, or otherwise they will be landed by the master and deposited at the expense of the consignee, and at his risk of fire, loss, or injury, in the warehouse provided for that purpose, or sent to the public store, as the collector of the district shall direct," and the vessel arrived on a Wednesday morning, and on Thursday the merchandise was landed in good order, and placed by itself at an accessible part of the pier, the arrival of the vessel being known to the consignees on Thursday, who, on that day, had the bill of lading stamped by the ship as proof that the goods had arrived, and also entered the goods at the custom-house and procured a permit to land them, but made no attempt to remove the goods till late on the following Saturday afternoon, when one truck-load was taken away, and on Sunday a fire broke out on the pier and the goods were destroyed, *held*, that when the goods were burned, the relation of the ship-owners to them as common carriers had been terminated, and they were in the custody of the ship-owners as warehousemen.

[1] Reported by R. D. & Wyllys Benedict, of the New York bar.

2. SAME—BURDEN OF PROOF—NEGLIGENCE.
The burden of proof was upon the libelants to show that the fire was caused by the negligence of the defendants, acting as warehousemen, or their servants, and in the absence of proof of such negligence the libel was dismissed.

In Admiralty.

R. P. Lee, for libelants.

Foster & Thomson, for respondents.

BENEDICT, J. This action is brought to recover of the owners of the steam-ship Rialto the value of 48 parcels of bolt-rope, being part of a shipment of bolt-rope and oakum in the Rialto, to be transported from Hull to New York, which were destroyed by fire at the burning of the Eagle pier on Sunday, the sixth day of November, 1881. The merchandise in question was transported under a bill of lading, which, among other things, contained a provision that "the goods be taken from along-side by the consignee immediately the vessel is ready to discharge, or otherwise they will be landed by the master and deposited at the expense of the consignee, and at his risk of fire, loss, or injury, in the warehouse provided for that purpose, or sent to the public store, as the collector of the district shall direct." The steamer arrived at the Eagle pier, which was a covered pier, and her regular landing-place in New York, on the morning of Wednesday, November 2d. On Thursday, the merchandise called for by the bill of lading referred to, was landed in good order and placed by itself at an accessible part of the pier. On Sunday afternoon, November 6th, just at dark, a fire broke out in the oakum, which, with the bolt-rope in question, still remained upon the pier, and the pier, together with a large quantity of merchandise, including the packages in question, were burned, causing the loss sued for. The libel sets forth the bill of lading, and avers a non-performance of the contract. It proceeds upon the ground that at the time of the fire this merchandise was in the custody of the defendants as common carriers. These averments are denied by the answer, and the question at the threshold of the case is, what was the legal character of the defendants' custody of the goods at the time they were burned? Upon this question my opinion is that when the goods were burned the defendants' relation to them as common carriers had been terminated, and they were then in the custody of the defendants as warehousemen. The evidence shows that the voyage was completed on Wednesday morning. On Thursday, November 3d, the goods were duly landed at the usual landing and placed by themselves upon the Eagle pier, at a place accessible to the consignees. The arrival of the vessel was known to the consignees on Thursday, and they procured the bill of lading to be stamped by the ship as proof that the goods described therein had arrived in the ship. They also entered the goods at the custom-house on Thursday, and on the same day they procured a permit to land the goods, which permit on that day they caused to be presented at the ship. They were acquainted with the course of business in discharging the steamer, and

are chargeable with knowledge that in the ordinary course of business the whole cargo of the ship, including their goods, would be landed upon the Eagle pier by Friday. No attempt was made to remove the goods until Saturday, at 3:30 P. M., when they sent one truck to the pier and one load was taken away. The removal of the remainder was postponed until Monday. The only reason assigned for not removing all the goods on Saturday is that when the truck came on Saturday afternoon the United States weigher refused to weigh more than one load.

It is quite evident from the facts that, if the libelants had used ordinary diligence to remove their goods after they knew that their goods were upon the pier, they would have obtained all their goods early on Saturday, and no loss would have occurred.

This case is not one of casual information of the consignee regarding the arrival of the ship containing his goods. The facts in proof here are sufficient to charge the consignees with actual knowledge, not only of the arrival of the ship with their goods, but that the goods would be at the Eagle pier awaiting removal by the consignees on Friday, and leave no room for the libelants to claim that the failure to remove their goods on Saturday arose from want of notice that they had been landed on the Eagle pier.

The provision of section 2871 of the Revised Statutes does not affect the responsibility of the defendants. The libelants' goods were not landed under general order, but upon a permit obtained by the libelants, and presented at the ship by them on Thursday.

These facts appear to me to warrant the conclusion that the relation of the defendants to the libelants' goods, at the time of the fire, was that of warehousemen, and not that of common carriers. The case appears to come within the principle of the decision of the supreme court in *Richardson* v. *Goddard*, 23 How. 28, where it was held that a deposit of cotton in proper order, made with the knowledge of the consignee, upon a suitable pier, at midday on a week-day, in good weather, constituted a good delivery, and therefore that the ship-owner was not responsible for the destruction of the cotton by fire on the following night. This conclusion would seem to dispose of the case, inasmuch as the libel proceeds upon the ground of the defendants' liability as common carriers.

But assuming that the libelants can recover under the libel upon the ground of the defendants' neglect as warehousemen, and assuming further, but not deciding, that the provision of the bill of lading above quoted is not effective to relieve the defendants from liability for loss arising from a fire caused by the negligence of their servants, and occurring after the defendants had ceased to hold the goods as common carriers, I am of the further opinion that such a liability on the part of the defendants has not been shown. The case in this aspect is one for damages caused by negligence, and the burden is upon the libelants to show that the fire which destroyed their goods was caused

by the negligence of the defendants or their servants. The proof, indeed, is that the libelants' goods were destroyed by fire which broke out upon the defendants' pier, where the goods were at the time stored. But proof of the occurrence of fire in goods upon the defendants' pier does not raise the presumption that the fire was caused by negligence either of the defendants or their servants, or any one else, (*Whitworth* v. *Erie Ry. Co.* 87 N. Y. 413,) and if, in the absence of any other ostensible cause, it is in this case to be presumed that the fire which broke out in the oakum on the defendants' pier was communicated to the oakum from a torch which the proof shows was being used at the time by the watchman of the pier for the purpose of lighting up the pier, still, proof of negligence on the part of the watchman is wanting. It was lawful and necessary for the watchman to light up the pier at the time he did, and to go near the oakum with the torch as he did, and fire might have been communicated from the torch to the oakum by a spark, or otherwise, without any negligence on the part of the person using the torch. In order, therefore, to find in the testimony proof that the fire was caused by negligence of the watchman, it is necessary to accept as true the narrative of the witness Rahman and his wife, called by the libelants to show the origin of the fire. But I am unable to accept that narrative as true, and rejecting that testimony leaves the libelants' charge of negligence to rest upon the inference that the cause of the fire was a negligent use of the torch by the watchman who was using it, drawn from the fact that the torch was being used at the time the fire broke out. Such an inference appears to me unwarrantable. I am unable, therefore, to find in the testimony proof that the loss of the libelants' goods was caused by negligence of the defendants or their servants.

For these reasons the libel is dismissed, and with costs.

See *Straus* v. *Wilson*, *infra*.

STRAUSS *v.* WILSON.[1]

(*District Court, E. D. New York.* June 6, 1883.)

COMMON CARRIER—WAREHOUSEMAN—DESTRUCTION OF GOODS BY FIRE—NEGLIGENCE—BURDEN OF PROOF.

In an action brought to recover the value of goods destroyed under circumstances similar to those described in *De Grau* v. *Wilson*, *ante*, 698, except that on the Friday before the fire the libelants' truckman went to the pier, but did not take the goods because he was told by the delivery clerk that the whole cargo was not then discharged, but would be during the day, and no effort was made to remove the goods on that day or the next, although they were then on the pier ready to be removed, and could have been removed, *held*, that at

[1] Reported by R. D. & Wyllys Benedict, of the New York bar.

the time of the destruction of the goods they were in the possession of the defendants as warehousemen and not as common carriers, and that, in the absence of proof that the fire was caused by the negligence of the defendants or their servants, the liability of the defendants had not been made to appear, and the libel was dismissed.

In Admiralty.

Anderson & Howland, for libelants.

Foster & Thomson, for respondents.

BENEDICT, J. This action is brought to recover of the owners of the steam-ship Rialto the value of 44 cases of chinaware, transported in that vessel from Hull to New York, and destroyed by fire at the time of the destruction of the Eagle pier, in November, 1881. The testimony in the case respecting the origin of the fire which destroyed the goods is the same as in the action of De Grau against the same defendants, (*ante*, p. 698.) The two cases having been tried together, what has been said, therefore, in deciding the case of De Grau upon the question of negligence is applicable in this case. There is, however, some difference between the two cases in the facts connected with the delivery of the goods. In the present case it appears that the goods could be removed in two truck-loads. They came out of the ship and were duly landed on the Eagle pier, on Thursday, November 3d, and were in all respects ready for delivery at the close of business on that day. On that day, also, the libelants entered their goods at the custom-house, and sent to the ship a permit for their landing. On Friday the libelants gave orders to their truckman to remove the goods. The truckman accordingly, on Friday, went to the pier, but did not take the goods, because, as he says, he was told by the delivery clerk that the whole cargo was not then discharged, but would be during that day. No inquiry was made for the goods at that time, nor any effort to remove them, although they were then upon the pier, ready to be removed, and could have been removed on that day. No attempt was made to remove the goods on Saturday, but they were allowed to remain on the pier over Saturday, and until the afternoon of Sunday, when they were burned. It thus appears that the consignees had actual notice that the goods would be upon the pier on Friday, and had more than a reasonable time to remove them before the fire occurred.

These facts compel the conclusion that at the time of the destruction of the goods they were in the possession of the defendants as warehousemen, and not as carriers. The case is stronger than the case of *Richardson* v. *Goddard*, 23 How. 28, where the supreme court held that a deposit of cotton in proper order, made with the knowledge of the consignee, upon a pier at midday, on a week-day, in good weather, constituted a good delivery, and the ship-owner was, therefore, not responsible for the destruction of the cotton by fire on the following night.

In this case, then, as in the previous case against the same de-

fendants, it must be held, in the absence of proof that the fire was caused by the negligence of the defendants or their servants, the liability of the defendants has not been made to appear.

Let a decree be entered dismissing the libel, with costs.

BOURNE v. ROSS.

(Circuit Court, D. Massachusetts. August 25, 1883.)

SEAMEN'S WAGES—SUIT IN ADMIRALTY—ATTACHMENT FROM STATE COURT.

The right of a seaman to sue in admiralty *in personam* for his wages is not taken away or suspended by an attachment of his wages by trustee process from a state court in an action at law.

Ross v. *Bourne*, 14 FED. REP. 858, affirmed.

In Admiralty.

E. L. Barney, for Bourne.

C. T. Bonney, for Ross.

LOWELL, J. To the reasons given by NELSON, J., in *Ross* v. *Bourne*, 14 FED. REP. 858, for entering a decree for the libelant, I assent. I have given my view of the law relating to attachments in a foreign jurisdiction in a late case in the district of New Hampshire. *Lynch* v. *Hartford Ins. Co.*, *ante*, 627. As a general rule such attachments should be respected out of comity; but the attachment of seamen's wages is so unusual that it has been held to be impossible by Judge BENEDICT, in *The City of New Bedford*, 4 FED. REP. 818; and though Mr. Justice GRAY has doubted the reasoning and conclusions of that case, in a very learned opinion from which I do not dissent, (see *Eddy* v. *O'Hara*, 132 Mass. 56,) still, I am of opinion that comity does not require us to hang up a summary action in the admiralty in favor of a seaman, to await the dilatory proceedings in a court of common law. In ordinary cases I should be inclined to go further than most of the courts have gone in the direction of comity. I have always regretted the narrow rulings in favor of domestic attachments as against foreign bankruptcies and assignments, especially when neighboring states are treated as foreign; but the present case is one in which the admiralty court is bound to give that prompt and speedy justice which is one of the principal reasons for its existence.

Decree affirmed.

THE WARREN.[1]

(*District Court, E. D. New York.* May 19, 1883.)

ADMIRALTY—WRECKAGE—PRIVATE SALE WITHOUT NOTICE OR APPRAISEMENT.

Where a boiler removed from the wreck of a vessel injured by collision was sold at private sale without the knowledge of those sought to be charged with its value, and without appraisement, the commissioner appointed to fix the amount of the damages credited the libelant with the full value of the boiler, as proved on the reference, instead of the price so realized; and, on exceptions to the commissioner's report, his finding was sustained.

In Admiralty.

Jas. K. Hill, Wing & Shoudy, for libelant.

Beebe, Wilcox & Hobbs, for claimants.

BENEDICT, J. The commissioner's report as to the value of the libelant's boat was made after hearing the testimony given by many witnesses, and upon a serious conflict of evidence. I have examined the evidence, and am unable to conclude that any injustice will be done to either party by confirming the report of the commissioner in that particular.

In regard to the value of $3,500 put by the commissioner upon the boiler removed from the wreck and sold by the libelant at private sale for $1,700, I should be induced to take the price realized for the boiler as its value, instead of the sum reported by the commissioner, if the libelant had given the claimants notice of his intention to sell the boiler, or afforded them an opportunity to examine it and determine its value. But the sale was a private sale, made without the knowledge of the parties who were to be charged with its value, and without any appraisement, and the sum realized is proved by the libelant himself to be less than the intrinsic value of the boiler, which he says was as good as new.

Upon such facts the finding of the value of the boiler to be $3,500 is justified. The exceptions of both sides are, therefore, overruled, and the report confirmed.

See *The Warren*, 11 FED. REP. 443.

[1] Reported by R. D & Wyllys Benedict, of the New York bar.

HOLLISTER v. BELL.[1]

JAMES v. SAME.

(Circuit Court, D. California. October 16, 1882.)

1. REMOVAL OF CAUSES.
The second clause of section 639 of the Revised Statutes was repealed by the act of congress of March 3, 1875.

SAWYER, J. This action was brought in the state court of Santa Barbara county, and removed by R. S. Den as to himself, under the second clause of section 639 of the Revised Statutes, on the ground of citizenship, and that there was a controversy which could be wholly determined as to him, without the presence of other parties.

At the last term of the supreme court of the United States it was held, in *Hyde* v. *Ruble*, that "the second clause of section 639 of the Revised Statutes was repealed by the act of 1875." *Hyde* v. *Ruble*, 104 U. S. 407.

The law under which the removal was had having been repealed long before the removal, it was not removable. The case must, therefore, be remanded to the state court for want of jurisdiction, and it is so ordered.

As to repeal of first clause of section 639 of the Revised Statutes, see *State* v. *Lewis*, 14 FED. REP. 65; and as to repeal of third clause, *Miller* v. *Chicago, B. & Q. R. Co.*, *ante*, 97.—[ED.

SMITH and others v. CRAFT and others.

(Circuit Court, D. Indiana. September 14, 1883.)

1. INSOLVENCY—OBTAINING CREDIT—PROMISE TO SECURE CREDITOR.
The mere fact that a borrower, at the time of procuring a loan or credit, makes an oral statement or promise that if he should become insolvent he will secure or prefer the one who gives such credit over others, will not disqualify him from giving, and the creditor from receiving, the promised favor; and a transfer of property made in pursuance of such promise will not be set aside as fraudulent, at the instance of the other creditors, except when a fraud was intended, or the circumstances within the knowledge of the creditor preferred were such that he must have known that injury to others would probably result.

2. SAME—EMPLOYMENT OF INSOLVENT TO MANAGE PROPERTY.
Nor will the fact that the insolvent, in the writing by which the agreement was effected, was employed to manage the property conveyed, in the absence of proof of fraud, be sufficient to avoid such transfer.

[1] From 8th Sawyer.

In Equity.

Horace Speed, for complainants.

McDonald & Butler and *Herod & Winter*, for respondents.

WOODS, J. Craft, being insolvent, made a transfer of his goods in trust to Churchman in payment of his indebtedness to Fletcher & Churchman, his bankers. This is an action by other creditors of Craft to set the transfer aside, and to have Fletcher & Churchman declared trustees, and, as such, accountable for the value of the goods. There are two grounds upon which, in argument, it is claimed that the transfer was unlawful and invalid: *First*, because of the stipulation in the writing by which the agreement was effected for the employment of Craft by Churchman; and, *second*, because of the promise made by Craft to Fletcher & Churchman, when obtaining credit with them, "that he would protect the bank if anything ever occurred by which he was not able to pay his debts; that if he met with losses he would secure the bank, if the bank would loan him money from time to time."

As to the agreement for employment, it may be observed that it was for no definite time, and was liable to be terminated by either party at will. Besides, it does not appear at whose instance, nor for whose benefit, the stipulation was made. Fraud is not to be presumed, and for all that is shown, Craft may have passed by opportunities for employment on better terms, in order to aid Fletcher & Churchman to make the best of the stock of goods, which, it is shown, was inadequate to pay in full the debt upon which it was taken. The fact that Craft had failed in the management of the business as owner, is no evidence of the value of his services in the capacity in which he was employed. It cannot, therefore, be said that this stipulation was extorted for Craft's benefit, and as a condition upon which the preference of Fletcher & Churchman over other creditors was granted.

As to the promise to secure the bank, it is insisted that this was in the nature of a secret lien, and that the tendency of the transaction was to give Craft a delusive credit, and that as the parties must have all known this tendency, they must all be held to have intended, indeed, to have contrived a fraud upon all who should thereafter deal with Craft upon credit. The argument is plausible, but in my judgment not sound. In the first place, the promise to secure the bank had no force in law, and gave no additional sanction to the obligation of the debtor, beyond what was involved in the contracting of the debt; though there are some decisions under the bankrupt law which hold that a security given in fulfillment of a previous parol promise will make good a preference which otherwise would have been declared unlawful. Bump, Bankr. (9th Ed.) 806; *In re Wood*, 5 N. B. R. 421. Such, indeed, seems to be the established English rule. See statement of LOWELL, J., *In re McKay*, 7 N. B. R. 230–232; S. C. 1 Low. 561. Other cases, however, are to the effect that such an

oral promise to give security is nugatory, and creates no obligation. Bump, *supra*, and cases cited. If of any binding or legal force between the parties, it is evident that the fulfillment of such a promise could not be deemed a fraud; but if of no force in law, then, except as it binds the individual conscience of the debtor, it cannot affect the exercise of his right to prefer one creditor over others; it can operate only as a motive by which the debtor may or may not in the end be controlled. But in respect to the right to prefer, it is settled law that the debtor's motive for his preference cannot be inquired into.

In *Grover* v. *Wakeman*, 11 Wend. 195, decided in 1833, and often cited, it was said:

"The right to prefer may originally have been sustained in part upon the supposition that just and proper grounds of preference did in most cases exist; and would be duly regarded by the debtor; but whatever may have been the reason or foundation of the rule, it is one of that numerous class of cases in which the rule has become absolute, without any regard to the fact whether the reason on which it was founded exists or not in the particular cases."

—And while in *Riggs* v. *Murray*, 2 Johns. Ch. 564, Chancellor KENT strongly condemns the inequalities and wrongs of preferences given sometimes "to the very creditor who is least entitled to it, because he lent to the debtor a delusive credit, and that, too, no doubt, under assurance, or a well-grounded confidence, of priority of payment, and perfect indemnity in case of 'failure,'" he adds, in the same connection: "I do not question the legality, however I may doubt the policy, of the rule which sanctions such partialities."

In no case or book cited has it been decided or said that merely because the borrower, at the time of procuring a loan or credit, had made an oral statement or promise that he would secure or prefer the one who gave such credit over others, he thereby disqualified himself from giving, and the creditor from receiving, the promised favor; and I am not able to agree that such is the law. If it be, then, instead of confining their prayer for relief to the goods in question, the plaintiffs might as well have asked that Fletcher & Churchman be held to account for all payments made to them upon their loans to Craft; for if the payment in goods was unlawful, payments in money were equally so, and, if necessary, should be brought under the same trust which it is sought to fasten upon the goods.

Carried to its logical consequences, the doctrine contended for made it impossible that Fletcher & Churchman, as against the plaintiffs or other creditors of Craft in the same situation, could have lawfully accepted payment from Craft upon the loans which they made him, so long as he was unable to pay the plaintiff and like creditors in full; and this would be so irrespective of the good faith of the parties, and notwithstanding the validity of the debt, its full consideration, and

every other feature of merit, except only the fatal promise to prefer, the taint of which, once it had attached, it would seem, could in no manner be escaped. If it be the law that an express promise to secure or prefer a loan cannot be performed, it must be that an implied promise, or tacit understanding, would have the same effect; and, whether or not there was such an understanding in each case, as it arises, must be a question to be determined usually upon circumstantial evidence. Upon such an inquiry, the personal and business connections, and even the social and domestic relations of the parties, might be deemed significant; and so the facts which afford the best motives for a proper preference might be converted into proof that the preference was given in consummation of an unlawful understanding or assurance given when the credit was obtained. Such a doctrine, if established, instead of constituting a healthful restriction upon the right of preference, would amount to a practical denial of the right in the cases wherein, if in any, it may be meritoriously exercised.

I do not doubt that a promise to secure or to prefer a creditor, made at the time the credit is given, may be fraudulent, but it must be when a fraud is intended, or when the circumstances within the knowledge of the creditor are such that he must know that injury to others will probably result. But when, as in this case, the debtor was doing an apparently prosperous business, though largely on credit, and advances were made to him without a belief, or any imperative reason for the belief, that he was, or was likely to become, insolvent, it cannot, in my judgment, be said that a promise to protect, if disaster should come, cannot be performed. It may be true that such a loan gives a delusive credit, and is in the nature of a secret lien; but the loan itself, without the promise of protection, unless published to the world, gives a delusive credit; and while, as already shown, there is no lien in fact, because such a promise, especially when made in the general terms employed in this instance, has no legal force, the law by no means condemns every transaction in the nature of a secret lien. In this state conditional sales are upheld, and every factor, commission merchant, or bailee of goods is clothed with the apparent ownership of property which is not his, and yet the secret rights of the real owner are protected.

A mortgage, if on real estate, may be kept off the record for 45 days, and a chattel mortgage for 10 days, without impairment of the lien, unless done with a fraudulent intent, though the mortgagee in every such instance must know that his failure to record may result in injury to others. As, in such cases of actual liens, the omission to record is not a fraud unless fraud was intended, much more is it no wrong to receive a mere promise of security, which may or may not be performed, and give no notice of it, if done without active concealment and without fraudulent intent. This is the doctrine of *Blennerhassett* v. *Sherman*, 105 U. S. 100, as I understand the decis-

ion in that case, in so far as it is applicable to the present discussion. In the case of *Hilliard* v. *Cagle*, 46 Miss. 309, which is urged upon my attention, there was such concealment of the trust deed as to justify the conclusion reached in the case; but, as it seems to me, neither the decision rendered nor the discussion upon which it is based is applicable with much, if any, force here. But while I have thus indicated my views upon the two propositions stated, I do not find it necessary to have decided upon either of them, because they are not embraced in the averments of the bill.

The substance of the charge of fraud contained in the bill is in the averment to the effect that, knowing Craft's insolvency, the defendants (including F. & C.) did not make it known, but concealed it from the plaintiffs and others, who became creditors of Craft; that they made a pretended sale of the stock of goods in payment of a pretended debt; that Craft continued in possession of the goods and made sales thereof, applying a part of the proceeds to his own use, and a part to the use of Fletcher & Churchman, with their consent and at their request; that the defendants, and each of them, knew that Craft's purchases of the plaintiffs and others were being made upon a credit, and upon misrepresentations by Craft as to his financial condition; that said pretended sale was without consideration, and was effected by the defendants with the intent to hinder, delay, and defraud the plaintiffs and other creditors of Craft; and that if Craft was indebted to Fletcher & Churchman it was kept secret and concealed by them with the intent that Craft should have and retain credit with the plaintiffs and other dealers. These averments, as made, are not proven; or, to say the least, the evidence is not such as to warrant the court in setting aside the conclusion of the master that they are not proven, and they are not comprehensive enough to embrace the grounds upon which counsel for the plaintiffs predicates and presses their right of recovery. The bill contains no suggestion that the writing by which the transfer of the stock was evidenced was void on account of any stipulation contained in it; nor is it indicated by any averment, or by the entire bill, that the sale was void because of the promise made to Churchman, when credit was extended, that, in the event of disaster, the bank should be protected.

My conclusion is that the exceptions to the master's report should be overruled and the bill dismissed.

BELL *v.* DONOHOE and others.[1]

(Circuit Court, D. California. January 15, 1883.)

1. PARTNERS—INDISPENSABLE PARTIES.
   Where a bill in equity is filed against one of the members of a copartnership to set aside partnership transactions, and vacate a conveyance of real estate, assets of the partnership, but held in the name of one of the partners for the benefit of the firm, and for an account, all the partners are indispensable parties to the bill.
2. INDISPENSABLE PARTIES TO STOCKHOLDERS' BILL.
   A stockholder of a New York corporation filed a bill in equity, on behalf of himself and such other stockholders of said corporation as should choose to come in, against a California corporation and other defendants, to set aside transactions between the said New York corporation and the other defendants; also, other transactions dependent thereon, without making the corporation of which he is a stockholder a party to the bill. *Held*, that the New York corporation, of which complainant is a stockholder, is an indispensable party to the bill.
3. REQUISITES OF STOCKHOLDERS' BILL.
   Bill also *held* insufficient, as not containing the allegations essential to a stockholder's bill as established in *Hawes* v. *Oakland*, 104 U. S. 450; *Huntington* v. *Palmer*, Id. 482; and *Dannmeyer* v. *Coleman*, 8 Sawy. 51; [S. C. 11 FED. REP. 97.]

Demurrer to Bill in Equity. This is a bill in equity, filed by complainant on his own behalf, and on behalf of all other stockholders of a New York corporation who may come in and join in the expense, against a California corporation, Donohoe, and other natural persons. The bill is very long, and sets out many large and complicated transactions which took place, as is alleged, under the authority and by direction of the firm of Donohoe, Kelly & Co., with the fraudulent purposes of obtaining possession of the large estates of the New York corporation. It is alleged generally, in substance, among other things, that, being stockholders of the New York corporation, Donohoe and Kelly managed to obtain control of a majority of the stock of the corporation through proxies and otherwise, elected and controlled its officers, and for fraudulent purposes organized another corporation under the laws of California, to which, by means of their control, they procured a conveyance by the New York corporation of all the property; that by means of their position they also took control and management of the California corporation, and in connection with it performed numerous other fraudulent acts alleged in the bill, by means of which the New York corporation and its stockholders were defrauded of their rights. This general statement will be sufficient to illustrate the points of the decision, without going into the particulars set out at great length in the bill. The New York corporation is not made a party to the bill, either as complainant or defendant. The acts complained of as against Donohoe are alleged to have been performed by him in connection with Kelly,

[1] From 8th Sawyer.

many of them, in fact, being performed by Kelly in person. But they are alleged to be partnership acts performed on partnership account, and the conveyance held by Donohoe, sought to be vacated, appears to be held for the firm. The bill prays, among other things, that the conveyance from the New York corporation to the California corporation, and various other transactions growing out of and connected with it, be set aside and declared void and held for naught; that the conveyance to Donohoe for the firm also be annulled; and that Donohoe account for the numerous transactions complained of, had by him and Kelly as partners with the New York and the California corporations. Defendants demur to the bill.

W. C. Belcher and *E. B. Mastick*, for complainant.

Doyle, Barber & Scripture, for defendants.

SAWYER, J. After a careful consideration of this very long and elaborately drawn bill I am satisfied that the demurrer must be sustained.

1. Kelly, in my judgment, is an indispensable party to the bill, without whose presence no decree can properly be made. He appears by the bill to be a partner with Donohoe in all the transactions of Donohoe of which complaint is made; and it appears that the title sought to be vacated or controlled is only nominally held by Donohoe for the benefit of the firm. No decree could finally settle the rights of Donohoe and Kelly or complainant without the presence of Kelly. Donohoe is as much entitled to have his rights finally determined in the case as the complainant. The case is, in my judgment, clearly within the principle established in *Shields* v. *Barrow*, 17 How. 139; *Barney* v. *Baltimore*, 6 Wall. 280; *Burke* v. *Flood*, 6 Sawy. 220; [S. C. 1 FED. REP. 541;] by Mr. Justice FIELD in *C. S. Min. Co.* v. *V. & G. H. W. Co.* 1 Sawy. 687; and in *Ribon* v. *Railroad Co.* 16 Wall. 450. It is difficult to perceive how partnership rights can be finally determined as to anybody without the presence of all the partners.

2. The complainant sues as a stockholder of a New York corporation, on behalf of himself and all other stockholders, but does not make the corporation itself, of which he is a stockholder and through which his rights are derived, a party to the suit. The corporation in such cases is certainly an indispensable party to the suit, without the presence of which no decree finally determining the rights of any of the parties can be made.

3. The bill does not allege many of the facts essential to give the complainant the *status* necessary to enable him to maintain the bill, as settled in *Hawes* v. *Oakland*, 104 U. S. 450; *Huntington* v. *Palmer*, Id. 482; and *Dannmeyer* v. *Coleman*, 8 Sawy. 51; [S. C. 11 FED. REP. 97.]

As Kelly is a citizen of the same state with complainant, making him a party would doubtless oust the jurisdiction of the court, and it is doubtful whether the third point can be obviated by amendment.

It will, therefore, be a waste of time at present to examine the important, not to say difficult, questions raised upon the equities of the bill. There are exceptions to large portions of the bill for impertinence. Some of them, doubtless, are well taken. But the demurrer waives the exceptions.

The demurrer is sustained. The complainant may think the objections to the bill can be obviated, and leave will be given to amend on or before the rule-day in March, if he be so advised; on failure to amend within the time given, the bill will be dismissed.

SLEPPY *v.* BANK OF COMMERCE and others.[1]

(*Circuit Court, D. Oregon.* February 22, 1882.)

1. DAMAGES FOR THE DETENTION OF CERTIFICATE OF DEPOSIT.
   The defendants unlawfully detained a certificate of deposit of the value of $2,000 from the plaintiff. *Held*, that the plaintiff was entitled to recover damages for such detention equal to legal interest on the value of the certificate from the date of the demand therefor and refusal, to the recovery; and this, without any evidence that the plaintiff would have converted said certificate into money and put it to use, other than his right to do so and the defendants' illegal prevention of the exercise of such right.

At Law.

Edward Bingham, for plaintiff.

M. W. Fechheimer, for Bank of Commerce.

DEADY, J. This action is brought to recover the possession of a certificate of deposit—No. 20,906—issued by the First National Bank of this city, on April 6, 1881, for the sum of $2,000, made returnable to the plaintiff or order, and since indorsed "S. P. Sleppy, G. L. Howard, Chas. H. Lee," and "Pay First National Bank or order for collection account of Bank of Commerce, St. Louis; J. C. Van Blarcom, Cashier," and alleged to be wrongfully detained from the plaintiff by the defendants.

The plaintiff is a citizen of Oregon, and the defendants are not. The action is brought under section 8 of the judiciary act of March 3, 1875, (18 St. 472,) authorizing an action to be maintained in a circuit court of the United States to enforce a claim to personal property within the district where such action is brought, although the defendant therein shall not appear thereto, nor be an inhabitant of such district or found therein.

An order was made requiring the defendants to appear and answer within 60 days from the service on them of a copy thereof. This order was served upon the defendant the Bank of Commerce personally, at St. Louis, it being a corporation formed under the laws of

[1] From 8th Sawyer.

that state and doing business therein, and on the National Bank aforesaid, in whose possession said certificate then was as the agent of the Bank of Commerce; and on the defendants Howard and Lee, who were not found anywhere, by publication.

The complaint has a double aspect, being in trover as well as replevin, and alleges that about May 20, 1881, the defendants "wrongfully converted said certificate to their own use," and still wrongfully "detain" the same from the plaintiff without his consent. But the action has been considered and tried as an action of replevin only, and the allegation as to the "conversion" of the certificate treated as surplusage.

It is also alleged that before the commencement of this action, and while said certificate was in the possession of said National Bank, as aforesaid, the plaintiff duly demanded of said bank, as the agent of said defendants, the possession of said certificate, which was refused.

The answer of the Bank of Commerce admits that the certificate was issued to the plaintiff, as alleged, but denies knowledge or information as to whom it belongs now or since; and alleges that on May 31, 1881, persons claiming to be the Lee and Howard whose names are indorsed on said certificate, deposited the same with it for collection, and that thereafter it forwarded the certificate to the National Bank aforesaid for collection; that about June 10th and 15th said Lee made inquiry of said defendant whether or not said certificate had been collected, and was told that it had not, since which time the defendant had not been able to obtain any information concerning said Lee.

The cause was tried by the court without a jury. Upon the trial it appeared from the testimony of the plaintiff that soon after receiving the certificate of deposit he went to San Antonio, Texas, and after tarrying there a few days, started home by the southern route on a through ticket to San Francisco in an emigrant train; that shortly before reaching St. Louis, a person calling himself E. L. Stevens stepped into the car and asked him where he was going, to which the plaintiff answered, Portland, Oregon; whereupon Stevens said he was going there also and would be glad of his company; that he was going on to Wallawalla, and upon the plaintiff mentioning the names of two well-known citizens there with whom he was acquainted, Stevens said one of them was his uncle. After sitting awhile by the plaintiff, Stevens proposed to give him his address, for which purpose the plaintiff handed him an ordinary pocket memorandum book, which contained this certificate and a ten-dollar bill. After writing the address—"E. L. Stevens, Wallawalla, Washington territory, met on train May 18, 1881"—he returned the book to the plaintiff, and after a short interval asked the plaintiff to write his name and address in his book, which he did. The train arrived at St. Louis about 8 in the evening, and there Stevens said he had some business to attend to, which would prevent his going on until

morning, and asked the plaintiff to wait for him at Kansas City. Before parting with the plaintiff, Stevens took him to a restaurant near by to get his supper, and as he turned away put 25 cents into his hand to pay for it, saying he might be short of change. The plaintiff objected to taking it, but Stevens insisted, and as he went away said he could make it all right when they met on the cars at Kansas City.

The plaintiff waited at the latter place for Stevens until the next evening, but he did not come, and then went on without him. At Los Angeles he made some purchases, and finding himself short of pocket money, took out his memorandum book, intending to get the ten-dollar bill changed, when he ascertained that both it and the certificate of deposit were missing. As the train was then starting, he had not time to telegraph, but at the next station,—Mojave,—on June 7th, he telegraphed to the National Bank to stop payment of the certificate. The name of the plaintiff as indorsed on the certificate was admitted by him to be a good imitation of his signature.

It was also admitted by counsel for defendant that the plaintiff demanded possession of the certificate as alleged, and that the National Bank, acting under the instruction of the defendant "to neither deliver the certificate to the plaintiff nor pay him any money on it," refused to surrender it, and still retains the possession of the same.

The evidence is satisfactory that the *chevalier d'industrie*, calling himself "Stevens," of Wallawalla, abstracted the certificate from the plaintiff's memorandum book when he got possession of it on the train, under pretense of writing his address therein. The giving him 25 cents to pay for his supper was a precaution against the plaintiff's having to resort to the ten-dollar bill for that purpose, and thus becoming aware of the theft before he left St. Louis. The subsequent indorsements upon the certificate of the names of the plaintiff, Howard, and Lee, and the deposit of the same with the Bank of Commerce for collection, are probably the work of the same party or some confederates, who have wisely kept in the background since they learned that the owner was asserting his claim to the possession of the property.

It is practically admitted that the plaintiff is entitled to recover the possession of the certificate, but the claim of damages for its detention is earnestly resisted, upon the ground that the detention has worked no injury to the plaintiff, for the reason that the certificate is not money, and there could be no profit in the mere possession of it; that although the plaintiff might have converted it into money and put the latter to profitable use, there is no evidence in the case that he would have done so. But so long as the National Bank is solvent the certificate is the exact equivalent of $2,000, and could be actually converted into that sum at the pleasure of the plaintiff. Practically it is money, and its detention has deprived the plaintiff of the use of that sum.

Nor is it necessary to prove that the plaintiff would have converted it into money and put it to use. It is sufficient that he had the *right* to do so; that he might have done so but for the unlawful detention of the certificate by the defendant.

When the use of property unjustly detained is valuable, the value of such use is generally adopted as the rule of damages. For instance, when work-cattle or horses are detained from the owner, who is thereby deprived of their use, the value of that use will ordinarily be the just compensation for their detention. Wells, Replevin, § 579, and cases there cited. But no proof is necessary to show that the owner would have used his horses or cattle during the time of their detention. His right to have done so is sufficient. And where the wrong consists merely in the detention of property, not the subject of daily use, without waste or depreciation, interest upon its value is often allowed as damages for the detention. Id. § 537, and cases there cited.

Merchants' S., etc., Co. v. *Goodrich*, 75 Ill. 554, was an action to recover two certified checks of $2,500 each. The verdict was for the plaintiff, and, in addition to the checks, gave him $6,275 damages for their detention, and $1,275 interest, besides the value of the checks. Judgment was rendered on the verdict, but on appeal to the supreme court the judgment was reversed, because it gave the plaintiff the checks, and also their value and interest thereon as damages. But in the course of the opinion of the court it is said:

"While there is no evidence upon the question of damages, the only damages which plaintiff could, in any event, recover for the wrongful detention of the checks, would be interest on five thousand dollars at the rate of six per centum per annum from the time of the demand and refusal until they were replevied by the plaintiff."

And this is equivalent to saying that such interest might be recovered as damages for the detention of certified checks, which in legal effect and contemplation are the same as this certificate of deposit.

The pleadings and evidence are silent as to the date of the demand and refusal, except that it was prior to the commencement of the action, which was on June 27, 1881.

Interest will be allowed on the value of the certificate, as damages for its detention, at the rate of 8 per centum per annum from that date—in even numbers for eight months.

The finding of the court will be that the certificate is the property of the plaintiff and of the value of $2,000, and that he is entitled to the possession of the same and $106.66\frac{2}{3}$ damages for its detention, and that he have judgment against the defendants for the delivery of said certificate, or the recovery of the value thereof, and the damages aforesaid and costs

GAUTHIER *v.* COLE.

(*Circuit Court, E. D. Michigan.* June Term, 1883.)

1. PLEADING—GENERAL ISSUE—ILLEGAL CONSIDERATION.
   At common law, illegality of consideration may be pleaded under the general issue.
2. SUNDAY—CONTRACT TO RUN BOAT ON—VOID.
   A contract to run a steam-boat upon Sundays is void, and its invalidity is not affected by the fact that it was to run partly through Canadian waters.

On Motion for a New Trial.

This was an action upon a contract to run a steam-boat. Defendants were the owners of a line of steamers running from Bay City to Alpena, upon Lake Huron. Plaintiff was the charterer of a rival steamer, know as the Gazelle, running from the Duck islands upon the Canadian shore of Lake Huron, where plaintiff was largely interested in fishing, by the way of Alpena to Bay City and back. For the purpose of getting the Gazelle off the route, and at the same time of affording plaintiff proper facilities for marketing his fish, plaintiff and defendants entered into the following contract:

"BAY CITY, MICH., September 29, 1881.

"We, the undersigned, owners of the steamers Metropolis, Dove, and Arundel, agree with C. W. Gauthier to send one of our steamers, weather permitting, on the continuation of each Saturday's trip from Alpena, to Duck islands and Cockburn island docks, when notified by said C. W. Gauthier or William Overton, his agent, to do so, and to carry fish cars, ice, and other merchandise that said Gauthier may have to ship from Alpena; also all freight, fish, etc., of his own he may have to ship from said islands to Alpena. In consideration of said trips, said Gauthier is to pay us for each trip to Duck islands $100, and each trip to Cockburn island, $120. In consideration, said Gauthier agrees to take the steamer Gazelle off of the route between Bay City and Alpena, Oscoda, and Tawas.

[Signed] "COLE & HOLT.
"C. W. GAUTHIER."

It appearing from the oral testimony that this contract must be performed on Sunday, if at all, the court stopped the case, and directed a verdict for the defendants. Motion was thereupon made for a new trial.

F. H. Canfield, for plaintiff.

W. H. Wells, for defendants.

BROWN, J. The contract provided that defendants should, upon request, send one of their steamers, in continuation of its Saturday's trip, from Alpena to the Duck islands or Cockburn island, upon the east shore of Lake Huron. Plaintiff's own testimony showed beyond contradiction that the steamers, upon their Saturday's trips from Bay City to Alpena, did not arrive at Alpena until about 3 o'clock Sunday morning, and that they advertised to leave Alpena for Bay City at 6 o'clock on Monday morning. The contract must,

therefore, be performed between these hours. The testimony further showed that the usual running time from Alpena to the islands and back was 12 hours, and that the steamer would be detained there, lading and unlading, about two hours. That would bring her back to Alpena about 6 o'clock Sunday evening.

Comp. Laws, § 1984, provide that "no person shall keep open his shop, warehouse, or work-house, or shall do any manner of labor, business, or work, except only works of necessity and charity, * * * on the first day of the week." Defendants' contention that this statute must be specially pleaded cannot be supported. It is true that in England, under the pleading rules of Hilary term, 4 Wm. IV., illegality of consideration must have been specially pleaded, (*Potts* v. *Sparrow*, 1 Bing. N. C. 594;) but the rule was otherwise at common law. 1 Chitty, Pl. (6th Ed.) 511. In this state illegality of consideration may be shown under the general issue. *Myers* v. *Carr*, 12 Mich. 69; *Dean* v. *Chapin*, 22 Mich. 276; *Hill* v. *Callaghan*, 31 Mich. 425; *Snyder* v. *Willey*, 33 Mich. 489. This was also held to be the proper practice under the common-law system of pleading by the supreme court of the United States in *Craig* v. *Missouri*, 4 Pet. 410, 426.

It is difficult, in this case, to see how the plaintiff can escape the application of the statute. Not only are contracts made upon Sunday void, but contracts to do any manner of work on Sunday are equally within the inhibition of the act. *Allen* v. *Duffie*, 43 Mich. 5; [S. C. 4 N. W. Rep. 427;] *Smith* v. *Wilcox*, 24 N. Y. 353; *Berrill* v. *Smith*, 2 Miles, (Pa.) 402; *Nodine* v. *Doherty*, 46 Barb. 59; *Adams* v. *Gay*, 19 Vt. 358; *Slade* v. *Arnold*, 14 B. Mon. 287; *Palmer* v. *City of New York*, 2 Sandf. 318; *Phillips* v. *Innes*, 4 Clark & F. 234.

Nor does the fact that the contract is maritime take it out of the operation of the statute. While the ordinary labor incident to the navigation of a vessel must undoubtedly go on upon Sunday as well as other days, it is neither usual, nor, under ordinary circumstances, lawful, to load or unload upon that day, or to require seamen to do any manner of work not demanded by the exigencies of the voyage. Thus, in *Pate* v. *Wright*, 30 Ind. 476, plaintiffs agreed to purchase of defendants 3,000 barrels of flour for the purpose of shipping the same to New Orleans, and, in anticipation of the completion of said purchase, engaged a steamer to take the flour on board, and transport the same to New Orleans. Defendants were notified that the steamer would stop at the place designated for the delivery of the flour on Sunday. The court held that they were under no obligation to deliver the flour upon that day, although there was danger at that time of navigation being closed by ice, so that the steamer might be unable to complete her voyage. This, it must be admitted, is an extreme case. In the case of the bark Tangier, (*Richardson* v. *Goddard*, 23 How. 28,) a distinction was drawn between a general fast day appointed by the governor of the state and Sunday, and it was

held that there was neither a law of the state forbidding the transaction of business on that day, nor a general usage ingrafted into the commercial and maritime law forbidding the unlading of vessels. See, also, *Powhattan Steam-boat Co.* v. *Appomattox R. Co.* 24 How. 247. In neither of these cases was it intimated that the Sunday laws were inappliable to maritime transactions.

Neither is this case affected by the fact that a portion of each voyage was to be performed within Canadian waters, and that the law of Canada upon the subject of Sunday observance is not proven. Both the inception and completion of performance were to take place in this state, and the mere circumstance that, in the course of their trips, the steamers must pass beyond the boundaries of the state, does not free the contract from its taint of illegality.

A new trial must be denied.

MOWAT and others *v.* BROWN and others.

(*Circuit Court, D. Minnesota.* July, 1883.)

PRACTICE—CONTINUANCE—ABSENCE OF MATERIAL WITNESS.

Where a defendant, having good reason to believe that his co-defendant, who is a resident of Canada and has not been served, will be present at the trial as he has promised, in reliance on such promise has failed to take his testimony by deposition, and the testimony of the co-defendant is material, a continuance of the case may be granted to allow such testimony to be taken.

At Law.

Atwater & Atwater, for plaintiffs.

A. R. Lewis, for defendants.

NELSON, J., (*orally.*) A motion is made in this case for a continuance on account of the absence of a material witness. The material witness is the co-defendant, who was not served with process. The suit was brought against Brown & Brown, consisting of Calvin Brown and his brother. The plaintiff resides in Minneapolis, and the co-defendant not served resides in Canada. The suit is brought upon a bill of exchange, in which both parties are interested. Issue was joined in the state court of the county of Hennepin some time in February, and the case was removed to this court some time in the month of July. The co-defendant, who was not served, it appears, according to the affidavit of the party served, was in Minneapolis in the latter part of February, this year. He stated to the co-defendant that he would be on hand ready to be a witness, and to be examined as a witness for him in the case. Calvin Brown, who was served, supposed and he had reason to believe that his co-defendant, who was equally interested in the result of the controversy, would be present in attendance as a witness, as he had so stated, and in view of that

fact his deposition was not taken, neither was he served with a summons to appear at this term, when he was in this state in February. I think, from all the facts stated in the case, that there is no doubt about the materiality of the testimony of the co-defendant, Brown, who is now in Canada. His brother was led to believe, even as late as this month,—about the sixth or seventh of this month,—that he would be in attendance, by a correspondence that he had with him. In view of these facts, stated in the affidavit, notwithstanding objection being made by plaintiff to the continuance of this case, it will have to go over the term.

The motion for continuance is granted.

UNITED STATES v. MARQUETTE, H. & O. R. Co.

(Circuit Court, W. D. Michigan, N. D. July 23, 1883.)

1. RAILROADS—TAXATION OF UNDIVIDED PROFITS—ACT OF 1866—ACT OF JULY 14, 1870.
   The undivided profits of a railroad corporation in 1871, carried to an account on the books of the company, known as "unexpended earnings," and used for construction, are liable to taxation under the act of congress amending the act of 1866, passed July 14, 1870, which provides that there "shall be collected for and during the year 1871 a tax of two and one-half per centum * * * on all undivided profits of such corporation which shall have accrued and been earned and added to any surplus, contingent, or other fund."
2. SAME—INTENT OF ACT OF 1870.
   The statute of 1870 was intended to reduce the tax on profits from five to two and one-half per cent., but was not intended to remove from such reduced tax any part of the profits.
3. SAME—FAILURE TO MAKE RETURNS—LAPSE OF TIME.
   As it was made the duty of the railroad company, under the acts of 1866 and 1870, to make returns to the proper internal revenue officer of the amount of income, profits, and taxes, when no returns have been made by the company, a failure on the part of the United States to demand such tax, or to institute proceedings to recover the same until 1881, cannot constitute a bar to an action to recover such tax when it does not appear that the delay has prejudiced the company by the disappearance or loss of evidence essential to its defense.
4. SAME—SHORTENING TRACK—IMPROVEMENTS—CONSTRUCTION.
   The amount expended by the railroad company in this case for a piece of new line for the purpose of shortening its tracks properly belonged with expenditures for improvements, and having been paid from the earnings, the amount so expended should be deducted from the amount subject to the tax.

Action of Debt.

John W. Stone, for the United States.

W. P. Healey and *J. L. Stackpole*, for the defendant.

WITHEY, J. The question in this case is whether a railroad company, in 1871, was required to pay an income tax on its undivided profits used for construction. In that year the Marquette & Ontonagon Railroad Company owned and operated a road in the upper peninsula of Michigan. In 1872 the road was sold and reorganized

with another road under the name of Marquette, Houghton & Ontonagon Railroad Company. By the state laws the new is liable for the debts of the former company. The gross receipts of the company, in 1871, were $578,565.93. It paid for operation expenses, repairs, incidental expenses, interest, and dividend, $417,121.06. There remained $161,444.87, were also expended during the year, together with $231,658.54, for the following purposes:

For a piece of new line, shortening the old line, and improving the grade,	$ 58,706 57
For Republic branch road,	28,537 05
" piers and water front,	128,449 46
" miscellaneous,	66,042 66
" equipment,	111,367 67
	$393,103 41

The United States claims a tax of 2½ per cent. upon the balance of the earnings before mentioned—$161,444.87—as undivided profits of the company for the year 1871. The company paid the tax on the divided earnings. The railroad company contends that the undivided profits used, during the year they were earned, for construction were not subject to tax by the act of July 14, 1870, which controlled as to 1871 profits. The question arises from a change made in 1870 in the language of the provision of the act of 1866 imposing an internal revenue tax on the profits of railroad and some other corporations. The substance of the provision in the act of 1866 is this:

"Any railroad company * * * that may have declared any dividend * * * as part of the earnings, profits, income, or gains of such company, and all profits of such company *carried to the account of any fund, or used for construction*, shall be subject to and pay a duty of 5 per centum on the amount of all such * * * dividend or profits." 14 St. at Large, p. 139, § 9; re-enacting section 122, act of 1864, (13 St. at Large,) p. 284.

The act of 1870, entitled "An act to reduce taxes, and for other purposes," wholly does away with such income tax after the year 1871, and reduces the tax for that year from 5 to 2½ per cent. The provision in question reads as follows:

"There shall be levied and collected for and during the year 1871 a tax of two and one-half per centum on the amount of * * * all dividends of earnings, income, or gains hereafter declared by any * * * railroad company, * * * *and on all undivided profits of any such corporation which have accrued and been earned and added to any surplus, contingent, or other fund.*" 16 St. at Large, p. 260, § 15.

Both acts required returns to be made to the proper internal revenue officer of the amount of income, profits, and taxes aforesaid, and impose a penalty for neglect to make such returns. Without the proper return of income the officers of the government would not know whether there were profits other than such as were divided on which the tax was paid. And yet defendant claims that, by

not demanding the tax now sought to be recovered, the government must have construed the change in the tax provision as exempting undivided profits used for construction from the tax of 2½ per cent. That the internal revenue commissioner did not require the tax to be paid till 1881, is urged as evidence of a change in the views of that office as to defendant's liability. But there is no evidence that it was known to the officers of the revenue that there were undivided profits in 1871, or that the fact was known to them until about the time this suit was brought, in August, 1881, which is a sufficient reply to the claim that in 1871 the government officers recognized the construction now contended for by defendant. This view leaves section 15 of the act of 1870 open to such construction as it ought to receive, considered in connection with the corresponding provision in the act of 1866, without its being said that any department of the government has acquiesced for 10 years in such construction of the law as contended for by the defendant. Both the provisions in 1866 and 1870 relate to and embrace profits not divided. That of 1866 is: "All profits carried to the account of any fund, or used for construction." In 1870, as recast, it reads: "All undivided profits added to any surplus, contingent, or other fund."

If the words "or used for construction" had been omitted from the clause in the act of 1866, would the scope of the provision be materially, or at all, different? Undivided profits are carried or added to construction fund as a matter of book-keeping, and, in fact, whenever they are used for construction. Do not and should not railroad companies transfer net earnings used for construction to construction fund accounts? If, as a matter of book-keeping, such is not only the proper but the usual practice, then it would not seem to affect the meaning and scope of the provision if the words "or used for construction" were omitted altogether from the act of 1866, for the congress of the United States will be presumed to have employed the language with reference to the known usage and proper practice in such cases. This view narrows the question to whether the undivided profits in question were "added" to "any fund." It is in proof, and is conceded by defendant's counsel, that these undivided profits of 1871 were carried to an account called "expended earnings," and that they were used for construction. Then it is manifest that the expended earnings account represented construction account, or construction fund, and when such undivided profits were carried to such account they were "added to a fund." In book-keeping, and within the meaning of the act of 1870, net earnings or undivided profits are added to a particular fund by proper transfer entries in the books of account. But the object of the statute is not defeated if profits used for construction are not carried into the proper account on the books; for within the meaning of the statute, and according to common understanding and experience, they must be considered as added to con-

struction fund, if they are used for construction. It is incorrect to say, in relation to this statute of 1870, that undivided profits cannot be added to a fund unless there remains in the particular fund a balance to be added to; for if undivided profits are carried in the books of account to surplus, contingent, or other fund account overdrawn, they are considered added to the fund which that account represents as much as though it was not overdrawn. In short, the provision of the statute of 1870 was intended to reduce the tax on profits from 5 to 2½ per cent., but was not intended to remove from such reduced tax any part of the profits.

The further contention is that the claim of the government is barred by time. Congress has not seen fit to enact a statute limiting the time within which the United States shall bring suit, in a case like the present one, and it does not appear that the defendant has been prejudiced by such delay as has occurred after allowing reasonable time to bring suit. In a case where commencement of suit by the United States is delayed many years, and the delay has prejudiced a defendant by the disappearance or loss of evidence essential to his defense, courts ought to apply a rule that will protect individual rights by giving repose and security to the citizen against stale claims; but such is not this case. The item of $58,706.57, expended by the railroad company for a piece of new line of road, for the purpose of shortening its track and reducing the grade of its road, properly belongs with expenditures for improvements, and, having been paid from earnings, reduces the undivided profits to $102,738.30. The court finds that this last sum was subject to a tax, by the law of 1870, as undivided profits, and that defendant is indebted to the plaintiff for a tax of 2½ per centum thereof, being a tax of $2,568.46, and also for interest from the time of the commencement of the suit, two years and one month, $374.56.

Judgment will be entered accordingly in favor of the plaintiff, and against the defendant, for $2,943.02, and for costs of suit, to be taxed, with interest on the judgment from this date.

Under act of June 30, 1864, c. 173, § 122, as amended by act of July 13, 1866, c. 184, the earnings of a railroad, used to pay interest or dividends, are taxable, whether actual profits or not; but earnings used for construction, or carried to the account of a fund, are not so taxed, unless they represent the profits of the company as a whole.

The law intended an annual statement of accounts, and when, in such statements, it appeared that a part of the excess of gains over losses had been used for construction, or added to some fund, a tax was to be paid on what had been so used or appropriated. *Little Miami & C. & X. R. Co.* v. *U. S.* 2 Sup. Ct. Rep. 627.—[ED.

In re WHITE.

(*Circuit Court, D. California.* July 24, 1883.)

1. COURT MARTIAL—JURISDICTION.
   A court martial has exclusive jurisdiction to try a party duly enlisted in the army for the military offense of desertion.
2. DESERTION—STATUTE OF LIMITATIONS.
   The limitation prescribed for the trial and punishment of the offense of desertion by the 103d article of war is matter of defense, and the tribunal having jurisdiction to try the charge of desertion, is the tribunal having jurisdiction to determine whether the bar of the statute has attached or not.
3. SAME—INTERFERENCE OF CIVIL COURTS.
   Civil courts have no jurisdiction to interfere with the military tribunals, while proceeding regularly in the exercise of their jurisdiction to try parties accused of desertion from the army.

Petitioner, *in pro. per.*

Major W. Winthrop, Judge Advocate, for Major Frank.

Before FIELD and SAWYER, JJ.

SAWYER, J. On July 13th a writ of *habeas corpus* was issued upon the petition of Arno White, in which he alleges that he is unlawfully detained by Major Royal T. Frank, of the First regiment of artillery, United States army, commanding the post at Alcatraz island; that the illegality consists in this: that he was arrested on June 23d last, and he is now held for trial before a court martial as an alleged deserter from the Eighth regiment of infantry, for the offense of desertion, alleged to have been committed at Benicia, California, on February 7, 1880; that the military statute of limitations in the 103d article of war provides that "no person shall be liable to be tried and punished by a general court martial for any offense which appears to have been committed more than two years before the issuing of the order for such trial, unless by reason of having absented himself, or of some other manifest impediment, he shall not have been amenable to justice within that period;" that more than two years had elapsed before his arrest, after the date of said alleged desertion; and he has not during said period absented himself, but has remained openly in San Francisco, and been, during all said period, within the jurisdiction of said court martial, amenable to justice. The writ having been served, the said Major Frank produced the body of the petitioner, and made due return to the writ that he is the officer in command of the post at Alcatraz island, employed by the military authorities as a place of detention and confinement of military prisoners; that the petitioner was, on June 23, 1883, by order of the commander of the proper military department, arrested and committed to said post, and to his charge as commandant, in whose custody he now is held in confinement; that he is so held by authority of the United States, and the order of his commander, as an alleged deserter from the Eighth regi-

ment of infantry of the United States army, to await trial by a general court martial, and for the performance of such military service as may be due by him to the United States.

Upon the hearing on the petition and return, the following facts were agreed to by the parties: The petitioner enlisted at Boston, Massachusetts, January 18, 1876, as a private in the Eighth regiment of infantry, United States army, for five years. He deserted from the said regiment and the military service at Benicia, California, where his company was then stationed, on February 7, 1880. After his alleged desertion, continuously till his arrest, he remained and resided in the state of California, and except one month, during which time he was at Red Bluff, California, he resided in the City of San Francisco, making no attempt to conceal himself. He was arrested in San Francisco on June 23, 1883, and by order of the commander of the department committed to, and he has ever since been confined at, the post at Alcatraz island, California, commanded, by the officer to whom the writ was directed, "to await trial by general court martial, and for the performance of such military service as may still be due by him to the United States." No order for his trial by a court martial has yet been issued.

On the state of facts set out, is the petitioner legally held for trial by a court martial for the military offense of desertion? If so, he must be remanded and the writ discharged, whether he is amenable to punishment under the statute of limitations or not. It is not disputed that a military court martial has *general* jurisdiction to try a party for the military offense of desertion. The jurisdiction is clearly conferred upon courts martial by the constitution and laws of the United States, and it is exclusive. This covers the whole ground. Jurisdiction to determine whether a party is guilty of the offense necessarily involves the jurisdiction to determine what constitutes the offense under the statute—jurisdiction to construe the statute and adjudge what under the statute constitutes a good defense against the prosecution, and to determine whether the facts exist or not which are claimed to constitute a valid defense. Jurisdiction is authority to hear, examine, and determine. The examination and determination of the issues presented is the exercise of jurisdiction. *In re Bogart*, 2 Sawy. 397, where the question is fully discussed and cases cited. A military court martial, duly organized, has jurisdiction to try a party charged with desertion. The fact of desertion being proved, if there is any legal ground of excuse or exoneration from punishment, that is matter of defense; and the court, having jurisdiction to try the charge, necessarily has jurisdiction to determine whether there is any legal defense. A desertion having taken place, whether the statute of limitations has run against it and barred punishment is matter of defense, and must be determined by the same tribunal which tries the charge. This point was made, care-

fully argued by counsel, and determined by the court, after full consideration, in *Bogart's Case*, 2 Sawy. 409, the circuit and district judges concurring.

In this case the petitioner alleges as a ground of the illegality of the imprisonment that the offense charged was committed more than two years before the arrest and order for a court martial. This is one of the issues tendered. It is not admitted in the return, but is in the statement of facts. This admission is only a substitute for evidence on the hearing. But this is not the court to try that issue. The court martial is the tribunal invested with that jurisdiction. Should this case be tried before a court martial duly organized, and decided against the petitioner, this court would have no appellate jurisdiction,—no reviewing power,—by *habeas corpus* or otherwise, over its decision. Nor are we authorized to interfere in advance, anticipating that the point may be wrongly decided, and take the case away from the court having jurisdiction to try it, and determine it ourselves. This would be, in our judgment, a plain usurpation of a jurisdiction committed to another tribunal—a jurisdiction not conferred upon this court. We can only inquire whether the military authorities are proceeding *regularly within their jurisdiction.* If they are, we cannot interfere, no matter what errors may be committed in the exercise of its lawful jurisdiction.

A case on *habeas corpus* in the United States district court for the southern district of New York has been called to our attention, (*In re Davison*, 4 FED. REP. 507,) where the petitioner was discharged on its appearing, by the admission of the parties, that more than two years had elapsed after the desertion without anything to obstruct an arrest and trial. We do not conceive that the admission of the facts in the course of the proceedings can affect the question of jurisdiction. The point is that the court martial, and not this court, has the jurisdiction to determine the facts and administer that branch of the law. The civil courts have nothing to do with it so long as the military tribunals are proceeding *regularly within* their *jurisdiction.* It does not appear that the jurisdictional point was distinctly presented or argued before the court in that case. The court seems to have assumed that it had jurisdiction without much consideration. However this may be, the point was fully argued by counsel, and examined and determined upon careful consideration by the court in this circuit, so long ago as 1873, in *Bogart's Case*, and notwithstanding our great respect for the decisions of the district judge of the southern district of New York, we see no good ground for doubting the correctness of our former decision. Were the question properly before us, we should have no difficulty in reaching the same conclusion as to the effect of the statute of limitations as that attained in *Davison's Case*, in the district court for the southern district of New York; but that question is not properly before us. As that is exclusively a question for the tribunal having jurisdiction to try a party

charged wifh the offense of desertion, we are not authorized to consider the question at all.

The prisoner must be remanded to the custody of the officer having him in charge, to be held for trial for the offense charged, in the due course of such proceedings, and the writ discharged; and it is so ordered.

GOLDSMITH *v.* SACHS and others.[1]

ISAM WHITE *v.* SACHS and others.

LEVY WHITE *v.* SACHS and others.

(*Circuit Court, D. California.* May 15, 1882.)

1. CONTRACT FOR FUTURE PARTNERSHIP.
   Where several parties agree to enter into partnership on a future day, but a part refuse to enter upon the business in pursuance of the terms agreed upon, and the partnership is never launched, whereby the others are injured, the only remedy is an action at law for the breach.
2. SAME—PARTIES.
   Where seven *parties* agree to enter into a partnership at a future day, the language being, "they have agreed to become partners," and four out of the seven, afterwards, jointly refuse to enter into the partnership, and thereby commit a breach, by reason of which each of the others sustains several, but no joint, damages, each party so sustaining several damages may maintain an action against the parties jointly committing the breach, without joining, either as plaintiffs or defendants, the others who have committed no breach.
3. BREACH OF CONTRACT.
   Parties jointly committing a breach of a contract may all be joined as defendants.
4. VOID FOR UNCERTAINTY.
   Where the contract provides that "the business of the partnership shall be buying, selling, and dealing in dry goods and furnishing goods, and such other merchandise as may be convenient and profitable to all parties concerned," the description of the business is not so vague and indefinite as to render the contract void for uncertainty.
5. DAMAGES.
   Where the complaint presents a case for some damages, even if only nominal, it is not necessary, on demurrer, to determine the rule of damages.
6. JOINT AND SEVERAL CONTRACTS.
   Rule in regard to parties stated, where contracts are not in express terms either joint or several; or when a contract will be regarded as joint, and when as several.

Demurrer to Complaint. The facts sufficiently appear in the opinion of the court.

McAllister & Bergin, for plaintiff.

Wilson & Wilson, for defendants.

SAWYER, J. This is an action on a contract to enter into a partnership, which the defendants are alleged to have refused to carry

[1] From 8th Sawyer.

out. They contend that the partnership never went into effect, and, consequently, that there are no partnership affairs to settle up. It is also correctly contended that only an action at law will lie for the breach. But this is an action at law by one of the parties against several of the others, who are alleged to have refused to go on with the partnership. The parties to the contract are Isam White, E. L. Heller, S. W. Heller, Martin Sachs, Sanford Sachs, Max Goldsmith, and Levi White.

This action is by Goldsmith against the two Sachs and the two Hellers. Neither Isam White nor Levi White is joined as plaintiff or defendant. He alleges special several damages resulting to him alone from the breach. It is claimed by the defendants that this action cannot be maintained if the parties L. and I. White are not joined. The only terms of the contract indicating its character, whether joint or several, are, "they have agreed to become partners." That is the language of the contract. The contract, therefore, is not in express terms either joint or several.

In the case of *Capen* v. *Barrows*, 1 Gray, 376, the court citing Broom on Parties, 8 and 10, these rules are laid down:

> Where the covenant is, in its terms, *several*, but the *interest* of the covenantees *is joint*, they must join in suing upon the covenant; (2) where the covenant is, in its terms, *expressly* and *positively joint*, the covenantees must join in an action upon the covenant, although as between themselves their interest is several; (3) where the language of the covenant is *capable of being so construed*, it shall be taken to be *joint or several according to* the INTEREST of the covenantees.

The last is the category in which this contract falls. The terms are expressly neither joint nor several; so the parties, according to that rule, may consider it as either joint or several, according to their interest and the nature of the cause of action. Certainly each party has an interest in having each and all of the other parties go on with the partnership and carry out the agreement. Each has a several interest in carrying out that partnership arrangement. He cannot sue them all, at law, because some of them have committed no breach. There is no cause of action against them. He cannot join them all as plaintiffs, because all are not injured, or have not all sustained the same injury.

The injury complained of is not joint. It affects no one but the plaintiff. If a recovery is had for the damages alleged, the partnership assets are neither increased nor diminished. The plaintiff does not contribute to pay his own judgment, nor do any of the others share in the judgment. He could not join as party plaintiff those who are guilty of the breach, and liable for the damages, because the damages are several and his own, and not theirs. The parties sued cannot be both plaintiffs and defendants; and unless he can sue those alone who committed the breach and are liable, there is no remedy whatever. There would be a wrong—an injury—without a

remedy. His several interest is injured by the action, alone, of those sued, for which he alleges special damages. He must be entitled to recover against somebody, and it must be against those who are guilty of the breach, or nobody. Nobody else can share in that recovery, or be compelled to contribute to the payment of the judgment, if he does recover damages. Although not so in express terms, I do not perceive why the contract might not be regarded as a contract both joint and several; a contract by each party with all the others to enter into a partnership with all the others; also, a contract between each one, with each or more of the others, that he will go into partnership with all the others. That would seem to be the effect. The interests of the parties seem to require it to be so regarded. It is a contract *sui generis*. None of the cases cited are exactly in point, but that seems to be the rule as stated in Gray, and in Broom on Parties, 8, 10. In the case in Gray the language is precisely in effect the same as in this case: "Have agreed to become partners," in one, and "parties agreed to form a partnership," in the other. The interest is held to be joint in that particular action. The rule of the cases appears to be this: Where the interest in the cause of action is several, the parties should sue separately, if the covenant is not "expressly and positively" in terms joint.

In 1 Saunders, p. 154, in a note to *Eccleston* v. *Clipsham*, cited by the defendant, it is said:

"So, though a man covenant with *two or more jointly*, yet, if the *interest and cause of action* of the covenantees be *several* and not joint, the covenant shall be taken to be *several*, and each of the covenantees may bring an action for *his particular damage*, notwithstanding the words of the covenant are *joint*."

The case coming nearest to this that I have seen is *Vance* v. *Blair*, 18 Ohio, 532. The parties entered into an agreement with reference to a particular transaction, which would make them partners in that transaction. Two of them finally sold out to a third, before commencing operations, and the third violated the agreement, and the two remaining parties sued that third party for the violation of the agreement. On demurrer for want of parties, the court says:

"Another objection is that Cary and Hyatt are not parties to the action. Cary and Hyatt, although parties to the contract, we think could not be parties to this suit. Before the work commenced, as can be fairly inferred from the declaration, they sold out, each his one-sixteenth of the right to the contract, to Blair. They have no cause of complaint against either party; nor can either party complain of them. They have not broken the contract, nor has either of the parties broken it with them. They cannot maintain a suit against Blair, because Blair admitted to them their rights under the contract, and paid them what they were willing to take for those rights. The plaintiffs cannot maintain a suit against them, because they duly claimed and received what they had a right to under the contract—the same that the plaintiffs were claiming in this suit."

And therefore the court overruled the demurrer upon that ground, but sustained it upon another technical ground, having no relation to this question. Levy and Isam White were willing to go on, and are not liable. Why should the plaintiff sue them? They have no interest in his recovery; why should they join? The only parties to the breach and the damages alleged are the plaintiff and the defendants. If plaintiff cannot sue in that way, he cannot sue at all. He has no right of action in equity, because the partnership was never launched. The agreement is to enter into partnership at a future day, which the defendants refuse to do. Certainly, the defendants cannot be both plaintiffs and defendants in an action at law. I think that point not tenable.

The next point is that the defendants cannot be joined. It is alleged that they jointly conspired together to commit the breach; that they jointly conspired and jointly acted. Then they are jointly liable. I do not see why they cannot be joined. It may be true that if one of them had refused to carry out the contract alone, the other defendants would be entitled, on that ground, to refuse to go on with the others without him. But that is not set up. That is not the case made by the complaint. It may be a proper matter for answer. It is contended that plaintiff cannot recover, *because* if any one of the parties to the contract refused to carry it out, the rest would be entitled to repudiate the contract until he consents, because they only agreed to go into partnership with the others alone. That is not the aspect presented in this case. It is not alleged here that one refuses to go on, and that the co-defendants refuse to go on *because* of that refusal. The allegation is that the defendants "jointly conspired together and jointly committed the breach complained of." That is the allegation. I think that ground is not tenable.

The further point is made that the contract is void for uncertainty. "The business of the partnership shall be buying, selling, and dealing in dry goods and furnishing goods, and such other wares and merchandise as may be convenient and profitable to all parties concerned." Certainly the dry goods business and furnishing goods business must be sufficiently well known to merchants to make it reasonably certain what the subject-matter is. Then, as to "such other wares and merchandise as may be convenient and profitable." I see no objection to it, if the parties so choose to stipulate. It is an agreement. First, they shall deal in dry goods and the general furnishing goods business. Those terms have a well-known meaning among mercantile men. Then the further agreement is, in effect, that they shall deal in such other wares and merchandise as they may agree upon to be convenient and profitable. If they choose to put it in that form, I do not see that they have not the right to do so. They have, substantially, provided a mode and means of making it specific, by leaving it for their future decision as the occasion may

call for when it arises. I think the demurrer, therefore, is not tenable on that point.

The next point is that either party could dissolve the contract, consequently no action lies. They have specified the term of five years from the first of January following for the term of the partnership; and it is provided that in case any one should go out of the firm there shall be no allowance for the good-will. After executing the contract these parties allege that they made certain other arrangements, which defendants knew, at the time of making the contract, the plaintiff must make in order to go into that partnership; by which arrangement plaintiff necessarily lost money. And then, after having sustained these losses, after taking upon himself these inconveniences, with the knowledge of defendants, these defendants refused to carry out the arrangements for the partnership, whereby the plaintiff sustained damages. It seems to me there is a cause of action stated here. What the rule of damage may be would be another question. What the amount of it, another question. They have agreed to enter into a partnership for the purpose of carrying on the prescribed business, which the defendants have violated. Certainly there must be some grounds for damage, at all events, even if nothing more than nominal.

The other point is that no such damages as alleged can be recovered. I have passed upon that point so far as the claim is concerned when I refused to strike out. I think there is a basis for damages of some sort alleged; certainly for nominal damages.

Demurrer overruled, with leave to answer on the usual terms.

Isam White against the same parties is an action brought by another one of the parties to the contract against the same parties for the several individual damage sustained by him.

Of course the same principle applies to that.

Levy White against the same defendants is the third case of the same kind, and the

Demurrer in each will be overruled on the usual terms.

There is no doubt whatever that an action at law may be maintained by a party to an executory contract to form a future copartnership, to recover damages for a wrongful refusal by the other party to execute such agreement.[1] It is also well settled that the wrongful refusal by a party to a contract of copartnership to permit the firm to commence business, or, as it is termed in the principal case, "to launch" the partnership business, is ground for an action at law by the injured partner to recover damages of the partner whose wrongful act has defeated the purposes for which the copartnership was formed.[2]

[1] Hill v. Palmer, 56 Wis. 123; S. C. 14 N. W. Rep. 20.

[2] Venning v. Leckie, 13 East, 7; Gale v. Leckie, 2 Starkie, 107; Manning v. Wadsworth, 4 Md. 59;

The test seems to be that if the damages resulting from the breach of a covenant or stipulation in the partnership agreement by one partner belong exclusively to the other partner, and can be assessed without taking an account of the partnership business, covenant or *assumpsit* may be maintained by the injured partner against the other for such damages.[1]

In *Hill* v. *Palmer*,[2] the complaint alleged that it was agreed between the plaintiffs and the defendant that they "should enter into a copartnership for the purpose of cutting, logging, and running" timber of one C.; that, by the terms of the agreement, the defendant was to make a contract with C. for said work, in his own name, for the benefit of the plaintiffs and himself, and that the work was to be done jointly, and the expenses and gains or losses to be shared by the plaintiffs and the defendant; that the plaintiffs gave the defendant valuable information concerning the work, which had been obtained by them at great expense; that the defendant entered into the contract with C.; that in so doing he relied upon the information given by the plaintiffs; that he counseled with them as to the various conditions of the contract, and that before its final execution he informed them of its contents, and was by them authorized to execute it; that the contract was executed by the defendant for the benefit and in behalf of the plaintiffs as well as himself, and in pursuance of the agreement between them; that the plaintiffs were ready and offered to perform the contract with C., and comply with the conditions of the partnership agreement as agreed to be entered into; that the defendant refused to comply with the conditions of his agreement with the plaintiffs "by refusing to enter into or carry out said partnership, and by refusing to permit" the plaintiffs to take any part in the performance of the contract with C.; that he performed such contract alone, and was paid therefor by C.; that the profits which would have been made by the plaintiffs and the defendant in said work would have been $11,000; and that the plaintiffs had been damaged by reason thereof in the sum of $5,500; and on demurrer the court held that it stated facts constituting a cause of action at law.

St. Paul, Minn., September 25, 1883. ROBERTSON HOWARD.

Glover v. Tuck, 24 Wend. 153; Bagley v. Smith, 10 N. Y. 489; Terrill v. Richards, 1 Nott & McC. 20; Ellison v. Chapman, 7 Blackf. 224; Williams v. Henshaw, 11 Pick. 79; Addams v. Tutten, 39 Pa. St. 447; Vance v. Blair, 18 Ohio, 532; 1 Story, Eq. Jur. § 665; Collyer, Partn. § 256; 2 Lindley, Partn. (4th Ed.) 1025, and cases cited in notes.

[1] Collamer v. Foster, 26 Vt. 754; Hill v. Palmer, supra; Venning v. Leekie, 13 East, 7; Elgie v. Webster, 5 Mees. & W. 518; Foster v. Allanson, 2 Term R. 479; Townsend v. Goewey, 19 Wend. 424; Bumpass v. Webb, 1 Stewart, (Ala.) 19; Williams v. Henshaw, supra.

[2] Supra.

UNITED STATES *v.* BRITTON.

(Commissioner's Court, S. D. Ohio. 1883.)

MAILING OBSCENE LETTER—REV. ST. § 3893.

The mailing in a sealed envelope of a letter which, in whole or in part, contains matter which would have a depraving, a demoralizing, or a corrupting influence on the person to whose hands it might come, is an offense within the meaning of section 3893 of the Revised Statutes.

On Motion for Discharge of Defendant.

Henry Hooper and *Theo. Kemper*, for the Government.

Wm. M. Ramsey and *John F. Follett*, for defendant.

PROBASCO, Commissioner. It is complained that defendant wrote and deposited for mailing to Mrs. Omer Cole a certain lewd, lascivious, and obscene writing, which writing was also of an indecent character, in violation of section 3893 of the Revised Statutes, as amended by the act of July 12, 1876.

Counsel for defendant stated that if the prosecution would introduce the letter in question and rest its case, that defendant would move his discharge, and, in the event of such motion being overruled, he would waive examination. This plan was adopted, and now this matter comes to be heard upon the motion of defendant for his discharge. The grounds of the motion are that the statute does not contemplate the mailing of such objectionable matter by a sealed letter, and that, even if it does so contemplate, the letter introduced is in no sense obscene, lewd, lascivious, or of an indecent character.

Congress, beyond doubt, having had its attention called to the abuse of the mails by the transmission of vulgar literature therein, and the consequent demoralization of the people at large, enacted this law intending thereby to purify the mails by stopping the dissemination of immoral and debasing matter or literature; and this literature or matter may be written, printed, drawn, or otherwise made intelligible to whomsoever might possibly be susceptible to the evil influences thereof. Congress did not seek protection of the post-office employe. It did not seek to prevent the printing of such matter. And, having in view the general purity and decency of the mail, it has not singled out a sealed letter as the only vehicle in which such vile trash can be sown through the land, and given it *carte blanche* privileges, while books, pamphlets, newspapers, and other printed matter of like ilk, which can be as securely sealed as the letter, is denied admission.

Can it be supposed that a "book," the only one of its kind, a mine of obscenity and a cess-pool of filth, can be tightly sealed and confidentially mailed to a susceptible person for him or her to exhaust of its poison and then remail it to a friend, and so on *ad infinitum* until thousands yield to its lewd influence and countless injury be done? Or suppose some master hand to have executed a skillfully lustful and lascivious picture, and sent it as in the instance of the book I have just imagined, can it be said that the result of such an act was not what was aimed at by this law, and is it possible that this would be no violation of the law? If it be so contended I think it a mistaken view. Judge DRUMMOND has decided, in *U. S.* v. *Gaylord*, 17 FED. REP. 438, that there need be no publication of such matter mailed, and that a letter is within the statute. Because the context contains the word "letter" in another connection, is no reason for an argument that the word "writing," as used in the statute, refers to some some other form of literature than a letter; for the word "writing" means anything written or expressed in "letters," and "letter" is defined as a "written or printed message," and what the the word "let-

ter," as used in the context, includes, is not now for consideration. Suffice it to say that "written," as used, includes a "letter."

Is the language used in the letter complained of, as read in the light of the statute, obscene or lewd or lascivious, or of an indecent character? In the case of *U. S.* v. *Bennett*, 16 Blatchf. 338, the court—all the judges, BLATCHFORD, BENEDICT, and CHOATE, concurring—laid down the "test of obscenity as used in the statute: It is whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands a publication of this kind may fall." They also have decided that the word "lewd," as used, means "having a tendency to excite lustful thoughts," and that "passages are indecent within the meaning of the act when they tend to obscenity; that is to say, matter having the form of indecency which is calculated to promote the general corruption of morals;" and, further, "it is not a question whether it would corrupt the morals of every person. * * * It is within the law if it would suggest impure and libidinous thoughts in the minds of the young and the inexperienced." And the court, in *U. S.* v. *Pratt*, 2 Amer. Law T. Rep. (N. S.) 228, went so far as to decide that in the case where "A. mailed a postal directed to B., having written upon it certain words which imputed illicit intercourse to C. and another, but in which no epithet in the form of substantive or adjective was used," there was no offense within the statute.

If this letter, in whole or in part, contains matter which, if in the hands of a young boy or girl, or of any susceptible or inexperienced person, would have a depraving, a demoralizing, or a corrupting influence upon him or her, then this is such a letter as is denied admission to the mails. And, in considering the question, I cannot inquire as to the purpose or motive of the writer. "It is the matter that governs, not the motive." It is what he says, not why he says it.

And now, with the judgment of the court in the *Bennett Case* as to what is "obscene" matter, and throwing aside what motive actuated the letter, and taking it alone, does the writing and mailing of the letter come within the statute? If this letter should fall into the hands of an inexperienced or susceptible boy or girl, or other persons, it could not but excite in him or her impure thoughts and indecent ideas. It is "obscene" because it is "offensive to delicacy, exposing or presenting to the mind something which delicacy, purity, and decency forbid to be exposed." It is certainly "indecent," for it is beyond mistake "offensive to modesty and delicacy." I do not regard the letter as "lascivious," for it does not "tend to excite lust," nor do I consider it "lewd."

Congress has passed this law, having in mind the meaning of common terms, and has used these, to-wit, "obscene," "indecent," "lewd," and "lascivious," in defining what kind of matter is non-mailable, and it meant, by the use of these common and plain words, that nothing should circulate in the mail which would disseminate immorality in

any form to the people. Therefore, I am led to the irresistible conclusion that the mailing of this letter is a violation of the law. To what extent or in what degree it is a violation is not for me to determine. Every violation of this law should be heeded, and thus there will be secured to the people a pure, decent, and undefiled mail.

The motion is overruled.

UNITED STATES *v.* COTA.

(District Court, W. D. Michigan, N. D. July 24, 1883.)

Note of Decision.

Information for carrying on the business of a retail liquor dealer without the payment of the special tax.

J. W. Stone, U. S. Atty., for the United States.

E. C. Clark, for defendant.

Before Hon. S. L. WITHEY, District Judge.

The evidence in this case showed that the defendant kept a boarding-house and had a bar where he sold cider and an article known as "Reed's gilt-edge tonic," by the glass or drink, to all persons who called for the same; that the tonic was sold in considerable quantities, by the glass or drink, to persons who drank it as a beverage as other liquors are drank, and that persons became intoxicated thereby; that said tonic was generally sold at saloons and drinking-places in that vicinity, and contained a large percentage of distilled spirits.

It was claimed on the part of the government that the evidence showed that this tonic was "compound liquors," within the meaning of the *third* subdivision of section 3244, Revised Statutes, and that the manufacturer of such compounds was liable to pay a rectifier's special tax, and that the defendant was guilty under the information for selling the same in the manner shown by the evidence.

The court charged the jury that if the article sold was a medicine and contained spirits simply to preserve its medicinal qualities, and was sold and taken as a medicine in good faith, that the defendant should be acquitted. But if the jury found from the evidence that the article was a compound containing such a quantity of spirits as to be intoxicating, and was sold by the defendant as a beverage, he knowing its intoxicating quality, and was drank by persons *not* as a medicine, but as a *beverage, because* of its intoxicating and stimulating qualities, then, no matter by what name it was known or called, the defendant was guilty as charged.

The jury returned a verdict of guilty, and the defendant was fined $300, and sentenced to imprisonment in the custody of the marshal for 30 days.

CALIFORNIA ARTIFICIAL STONE PAVING CO. *v.* FREEBORN.[1]

(Circuit Court, D. California. January 26, 1883.)

1. ARTIFICIAL STONE PAVEMENT.
   Cross-cutting the larger blocks of artificial stone pavements into smaller ones with a trowel during the process of formation, in the manner described in *Molitor* and *Perine Cases*, 7 Sawy. 190, [S. C. 8 FED. REP. 821,] is an infringement of the Schillinger patent.
2. MARKING JOINTS NOT INFRINGEMENT.
   Running the marker, described in *Molitor* and *Perine Cases*, along the line of the surface between the old block and the new one formed against it, without anything being interposed, or any cutting being done between the blocks during the process of formation, is not an infringement of Schillinger's patent.

In this case, after a line of blocks had been formed and become solidified, a new block, from 12 to 20 feet by 2 or 2½ feet wide, was formed between scantlings and the block or blocks before formed, without interposing anything whatever between the new and the old blocks. The material in its plastic state having been tamped down and then a layer of finer material put on top, the whole was finished and the blocks divided up into smaller ones during the process of formation, by use of a trowel, etc., in all respects, except as to the line between the old and new blocks, as is described in the *Cases of Molitor* and *Perine*, 7 Sawy. 190.[2] Nothing was interposed and no cutting was made in the joint between the old and the new blocks. But after the material had partially set, and the block had been finished and divided into smaller blocks, the marker described in *Molitor* and *Perine Cases* was run along the line between the old and new blocks on the surface. This is the only difference in making the pavement in this case and in those of *Molitor* and *Perine*.

Wheaton & Harpham, for plaintiff.

C. H. Parker, for defendant.

SAWYER, J. I have gone over this subject again as to the cross-cutting into blocks with a trowel during the process of formation. I adhere to the position that I took in the *Cases of Perine* and *Molitor*, 7 Sawy. 190.[3] There is in this case a mark on the surface along the line of division between the newly-formed block and the one before formed. The forming of the block against the pavement is according to the specifications in the reissue subsequently disclaimed; but it is claimed that running the marker along the line between the old and new blocks on the surface, after forming the latter, is an infringement. I am not able to take that view. I have gone as far in that direction as I think the patent will justify. I think in that particular it is not an infringement. Counsel for complainant have made a point as to simply marking lines upon the surface of the block with the marker employed. There is one case wherein it was

[1] From 8th Sawyer. [2] S. C. 8 FED. REP. 821. [3] Id.

held that marking the surface with a fish-line is an infringement. It is insisted by complainant that marking off the blocks on the surface at the time of laying the pavement with a marker about one-sixteenth of an inch in depth is an infringement. I am unable to perceive that the mere running along the surface of that blunt and rounded marker one-sixteenth of an inch in depth, there being no cutting elsewhere, is making a joint. I fail to see that that is an infringement.

The complainant is entitled to a decree against the defendant for the infringement by dividing the larger block into smaller ones by cross-cutting in the manner adopted and described in the *Cases of Perine* and *Molitor, supra*, and a decree will be entered accordingly. But I am unable to see that running the marker along the line between the old and newly-formed blocks, on the surface only, is an infringement.

MAIER *v.* BROWN.

(*Circuit Court, E. D. Michigan.* September 18, 1883.)

1. PATENTS FOR INVENTION—INFRINGEMENT.
   Plaintiff was the owner of a patented improvement in trunks, which consisted in covering the frame of the trunk with narrow strips of wood, laid in close proximity to each other, all around its top and sides. Defendant infringed by manufacturing and selling trunks containing the patented covering. *Held*, that plaintiff could not recover the net profits made by defendant in the manufacture and sale of the entire trunk, but was limited to such as were properly attributable to his improvement.
3. SAME—MEASURE OF DAMAGES.
   A proper method of estimating damages would be to take the profits made by the defendant upon one of these trunks, and deduct from them the profits upon an ordinary trunk of similar size and general description. The difference might be properly credited to plaintiff's invention.

In Equity. On exceptions to master's report.

This was a bill to recover damages for the infringement of plaintiff's patent, No. 72,988, for an improvement in trunks. The invention consisted "in covering the frame of the trunk with narrow strips of wood, laid in close proximity to each other all around its top and sides." Plaintiff obtained an interlocutory decree, with reference to a master to compute the damages. In his report the master allowed the plaintiff the entire net profits made by the defendant in the manufacture and sale of 37½ dozen of trunks covered by the patent, amounting to $1,412.72. Exceptions were filed, principally upon the ground that plaintiff failed to separate the profits attributable to his patent from those arising from other parts of the trunk.

Geo. H. Lothrop, for plaintiff.

C. J. Hunt, for defendant.

BROWN, J. There is no doubt whatever of the general proposition that the patentee of an improvement is limited in his recovery to

such profits as may be properly apportioned to the use of his improvement. He can only recover profits upon the entire article when such article is wholly his own invention, or when its entire value is properly and legally attributable to the patented feature. *Seymour* v. *McCormick*, 16 How. 480; *Mowry* v. *Whitney*, 14 Wall. 620; *Littlefield* v. *Perry*, 21 Wall. 205; *Elizabeth* v. *Pavement Co.* 97 U. S. 126; *Garretson* v. *Clark*, 15 Blatchf. 70; *Zane* v. *Peck*, 13 FED. REP. 475; *Fitch* v. *Bragg*, 16 FED. REP. 243.

The difficulty is in the application of this principle. Thus, if one discovers a new composition of matter, such as gun-cotton, nitroglycerine, or vulcanized rubber, or invents some new machine, such as the telephone, or some new article of manufacture, such as barbed wire, or a new pavement, he would obviously be entitled to damages arising from the manufacture and sale of the entire article. Upon the other hand, if his invention were limited to some particular part of a large machine, such as the cut-off of an engine, the axle of a wagon, or the seat upon a mowing-machine, it is equally clear that his recovery must be limited to such profits as arise from the manufacture and sale of the patented feature. His damages, too, must be proved, and not left to conjecture; and the fact that it is impossible to separate the profits arising from the improvement from those incident to the manufacture of the whole machine, is an insufficient reason for awarding the plaintiff more than he is justly entitled to receive. *Philp* v. *Nock*, 17 Wall. 460; *Calkins* v. *Bertrand*, 8 FED. REP. 755; *Gould Manuf'g Co.* v. *Cowing*, 12 Blatchf. 243. In case he is unable to prove how much of the entire profit upon the machine is due to his patent, he can recover only nominal damages. *Blake* v. *Robertson*, 94 U. S. 728.

In the case under consideration the master took the view that the plaintiff was the inventor of a rustic trunk in its entirety; an article complete in itself, differing from anything else in use before, and depending for its value upon the patented feature. He accordingly allowed the plaintiff the entire net profits made by the defendant in the manufacture and sale of the infringing trunks. Herein, we think, the master was in error. The invention is described as a rustic trunk, but in fact it consisted of nothing more than attaching to an ordinary frame strips of wood laid in close proximity to each other, at right angles to the grain of the trunk, thereby increasing its strength, durability, and beauty, and diminishing to some extent the cost of its manufacture. These slats (for they were all that was claimed as new) composed but a small part of the entire trunk, and took the place only of an ordinary leather covering. There was still the frame, the lock, hinges, catches, lining, trays, boxes, and interior decorations unaffected by the patent. We are bound to infer there was a profit upon the manufacture and sale of these as well as the plaintiff's attachment. A proper method of estimating dam-

ages in such cases would be to take the profits made by the defendant upon one of these trunks, and deduct from them the profits upon an ordinary trunk of similar size and general description. The difference might be properly attributed to the plaintiff's invention. *Locomotive Safety Truck Co.* v. *Pennsylvania R. Co.* 2 FED. REP. 677.

If the profits upon plaintiff's trunks were no larger than upon an ordinary trunk, it would indicate that he had suffered no damages legally capable of estimation. It is true that defendant may have sold trunks which the plaintiff would have sold if defendant had not infringed, but the damages thereby occasioned cannot be inferred without proof. *Buerk* v. *Imhaeuser*, 2 Ban. & A. 452.

Defendant's sales may have been the result of superior energy, diligence, and business capacity, or of the accidents of trade; and we think the burden is upon the plaintiff to show that such sales were attributable to the increased value given to the trunk by his patent.

As the case now stands there must be a decree for nominal damages only, and for a perpetual injunction.

THE JEREMIAH GODFREY.

(*District Court, N. D. New York.* 1883.)

1 COLLISION—MUTUAL FAULT—DIVISION OF DAMAGES.

As the evidence in this case shows that the collision was occasioned by the fault of both vessels,—the schooner in negligently entering the piers of the harbor, and the barge in occupying an improper position, in view of the time and the condition of the elements, and in maintaining such position, even if originally a proper one, after it became evident that disaster could only be averted by a change,—the aggregate of the damages to the vessels caused by the collision should be divided between the two vessels.

2. SAME—MOVING AND STATIONARY VESSELS—PRESUMPTION.

Where a moving vessel collides with a stationary one, it is presumed that the former is in fault.

In Admiralty.

H. D. Goulder, for libelants.

F. H. Canfield and *Spencer Clinton*, for respondent.

COXE, J. The entrance to the harbor at Cleveland, Ohio, is through two nearly parallel piers, extending into the lake a distance of about 1,650 feet. They are 200 feet apart, except that they flare in order to make a wider entrance, the distance between them at the extreme end being 250 feet. On the evening of October 4, 1881, the Jeremiah Godfrey lay moored at the east pier, 300 or 400 feet from the end. The channel at this point is about 230 feet wide. The Godfrey is a large three-masted barge, 198 feet long and 33 feet beam. She depends upon other vessels to tow her, having no means of propulsion of her own. She took her position at the point de-

scribed during the afternoon of the preceding day, and remained there continuously, awaiting her steamer. At about 7:30 o'clock on the evening of the 4th, the schooner Moonlight appeared in the offing and signaled for a tug. She was loaded with iron ore and drew 14 feet of water. Her length of keel is 205 feet, her beam 33 feet 6 inches. The tug Dreadnaught started to bring her in, but failed to do so, owing to the bursting of a water gauge, which the engineer misinterpreted, supposing that a much more serious accident had occurred. The schooner was then in close proximity to the piers, had only her head-sails set, and was in imminent danger of going ashore. She attempted to enter alone, but in doing so took what, in nautical parlance, is termed a "lee wipe," and struck heavily against the west pier. The effect was to head her towards the east pier, with which she collided a few moments afterwards. She tore down, with her bowsprit or jib-boom, 80 feet of the elevated walk on the pier, and then sagged up the river until she fouled with the Godfrey. Her bow was held at the east pier by the fore-rigging of the barge, while her stern was chaffing and pounding on the west pier. She remained in this position some time,—from 20 to 40 minutes,—and was finally released by the Godfrey's lines being slacked, which enabled her to swing clear. The collision occurred about 8 o'clock. It was dark. The wind had been blowing fresh all that afternoon from the N. or N. E. across the starboard bow of the Godfrey, quartering with the river. The velocity of the wind is variously estimated; it was probably about 12 miles an hour. Towards evening it increased, and at 7 o'clock had reached its maximum of about 28 miles. Storm signals were raised at 8:30 P. M.

The libelants argue that the Godfrey was negligent in two particulars: *First*, in lying at an improper place; *second*, in maintaining her position when, by abandoning it, she could have released the Moonlight. The respondent disputes these propositions, and insists that the Moonlight was negligent in entering the harbor in the manner described.

At the outset the Moonlight is met with the presumption that where a moving vessel collides with a stationary one the former is at fault. Has she overcome this presumption? I think not. It is true that the action of the tug placed her in a distressing and hazardous situation. She was then about a quarter of a mile from the piers. Four courses were open to her: *First*, to wear about; *second*, to anchor; *third*, to go ashore; *fourth*, to enter the piers. Difficulties and dangers attended each; there was but a moment for decision; the exigency was great. It is by no means certain that she did not adopt the wisest course—the one attended by the least danger. But who was to blame for the unfortunate position in which the Moonlight found herself? Surely not the Godfrey. The Moonlight had practically rendered herself helpless before the tug had attempted to obtain control over her, and this, too, when she was so close

to the piers that any maneuver which she might endeavor to execute unaided was fraught with danger. Would the court be justified in saying that a vessel, having voluntarily placed herself in this perilous situation, is free from fault when she enters a narrow harbor at night, in a high wind, with head-sails only, striking first one pier and then the other, and so proceeding up the river, broadside on, until there is a collision with a stationary vessel? Obviously not.

It is insisted that it was not the fault of the Moonlight that she lost the tug. Granted. It was her fault, however, that, having lost the tug, she was in a position where disaster awaited upon any course she might pursue. It is also argued that the "lee wipe" was an unavoidable occurrence; but the evidence, I think, sufficiently establishes the fact that this was one of the dangers to be anticipated and avoided. It is not unusual for vessels to sheer in shoal water, and especially where bars are formed at the entrance to harbors.

Did the Moonlight enter the piers in the usual and proper manner, having taken all the precautions which good seamanship required? I am constrained to answer the question in the negative.

Turning now to the Godfrey, was she moored in an improper place? Respondent invokes in his defense an alleged custom for vessels to lie at this point. It is thought, however, that the evidence does not go as far in this direction as the respondent insists. It is undoubtedly true that it is usual for vessels in fair weather to drop down to the end of the piers, there to remain a reasonable time for the expected steamer. But it does not, therefore, follow that a vessel may with propriety lie there at night, with a heavy sea rolling and a high wind blowing from the north. Indeed, the evidence establishes the contrary. A vessel entering at such a time has a right to assume that the whole entrance, at best a narrow one, is free from obstructions. The last extension put upon the piers widened the entrance by 50 feet. It was evidently the opinion of the government engineers that the former entrance was too narrow, and the present one none too wide, for the purposes of navigation. If a boat 33 feet beam can lie with impunity at the east pier, where the channel is but 230 feet wide, another has the same right to lie directly opposite at the west pier, thus leaving a water-way of but 164 feet for incoming and outgoing vessels. Should two boats of equal dimensions with the stationary ones meet at this point, there would be but 98 feet of open water between the piers, and obviously insufficient room in which to maneuver.

At night the difficulty of distinguishing the lights on stationary, from those on moving vessels and on shore, would greatly add to the perplexities of a mariner attempting to make the harbor. In determining whether it was safe to enter or not, the fact that the channel was unobstructed would most surely be a very important factor in enabling him to reach an affirmative conclusion.

It never was intended that these channels should be blocked by

moored or anchored vessels. Accordingly, it has frequently been held that it was negligence to anchor in the track of vessels, at night, without taking extraordinary precautions against danger. It must be said, upon all the evidence of the case, taking into consideration the state of the wind and waves, the time, the warnings, and all the circumstances, that the Godfrey was at fault in lying where she did. But the evidence would seem also to warrant the conclusion that after the collision, the barge, with stubborn persistency, continued to hold her place even after she could have slacked her lines and permitted the schooner to escape without endangering her own safety. The result proved that she could have done this, and she might have done it many minutes before she did. It was her duty, after she became entangled, to render all the assistance in her power without hazard to herself. And yet the vessels were together for half an hour, or thereabouts, and during this time every appeal was made, and every argument used, to induce her to slack her lines, but in vain. Even after the Moonlight had her line out on the west pier, the Godfrey held on till parties on the pier commenced throwing her lines off.

It is argued that had the lines been thrown off before the schooner was made fast, the latter would have crowded the barge up the river and onto the west pier. It is by no means certain that this would have been so. If she had cut loose before the foremast fell and while the Moonlight's sails were still set, the tendency would be—the wind blowing across the piers—to force the schooner's bow directly away from the Godfrey the moment she was released. If done after the sails were down, the Godfrey, being the lighter boat, would surely drift faster. But the Godfrey was not required to cut loose; she could have slacked her lines and drifted up the river for some distance without any serious danger of being forced from her moorings. She might also have secured the services of the tug which was present and thus have escaped all the dangers which it is now argued she would have encountered. The duty which the law imposed upon her was not performed by lying securely at her moorings while a distressed vessel was likely to sink under her very bows for want of a few feet in which to swing clear.

The result of my examination is that the accident was occasioned by the fault of both vessels,—the one, in negligently entering the piers; the other, in occupying an improper position, in view of the time and the condition of the elements, and in maintaining it, even if originally a proper one, after it became evident that disaster could only be averted by a change. In the case of *The North Star*, 106 U. S. 17, [S. C. 1 Sup. Ct. Rep. 41,] the district court found one of the vessels alone in fault, it being a collision case. The circuit court adjudged both vessels guilty of negligence, and rendered a decree in favor of the one which suffered most, for so much of the damage as exceeded one-half of the aggregate damage sustained by both vessels. This decree was affirmed by the supreme court.

To quote from the learned and exhaustive opinion of Mr. Justice BRADLEY:

"If we go back to the test of the law, in the rules of Oleron, followed in the laws of Wisbuy and other laws, we find it expressed in substantially the same manner. The case is supposed of a ship coming into port negligently managed and striking a vessel at anchor in an improper position, so that both vessels are in fault and both are damaged. The rule says: The damage ought to be appraised and divided half and half between the two ships."

Here, then, the precise case developed by this evidence is stated hypothetically as furnishing the very best example for the operation of the rule just stated. That this rule is wise and equitable, and far in advance of the harsh principle of the common law which permits the slightest contributory negligence to defeat the action, can hardly be doubted.

There should be a decree providing for a reference to ascertain what the damages were which each vessel sustained after the Moonlight fouled the Godfrey, and dividing the aggregate amount so found between them.

THE ANCON *v.* THOMPSON and others.[1]

(Circuit Court, D. California. October 16, 1882.)

1. COLLISION.
   Where a steamer and schooner came into collision, the schooner having been seen approaching a mile and a half distant, the steamer was *held* to be in fault and liable.
2. FOG OR HAZE AND SMOKE.
   The night being foggy or hazy, or both, it was the duty of the steamer to moderate her speed and blow her whistle.
3. INEXCUSABLE NEGLIGENCE.
   If the schooner was seen from the steamer at a distance of a mile and a half, the negligence on the steamer in not keeping out of the way was inexcusable.
4. FOG.
   In the condition of the atmosphere in this case there was no fault in the schooner in not discovering the steamer at an earlier period of time.
5. NO FAULT IN SCHOONER.
   Under the circumstances in this case, it was not a fault in the schooner to put her helm hard a-port at the time she did, nor was she in fault in other respects.

FINDINGS OF FACTS.

1. On the morning of September 15, 1878, the side-wheel steamship Ancon, on a voyage from Portland, Oregon, to San Francisco, California, came in collision with the schooner Phil. Sheridan, whereby the latter was wholly lost. The collision occurred between 20 minutes and 15 mimutes before 5 o'clock in the morning of that day.

[1] From 8th Sawyer.

2. The collision occurred in the Pacific ocean, at a point therein to the northward and westward of the entrance to the Umpqua river, from six to seven miles distant from the shore at the mouth of said river.

3. The speed of the steam-ship at the time of the collision was, and for some hours before had been, by steam, about eight miles per hour; and, in addition, it had the advantage of a current in its favor of one mile or one and a half miles per hour. From 4 o'clock A. M. till the lookout of the steamer saw the schooner, and first ordered a change of the helm shortly before the collision, the course of the steam-ship had been due south.

4. On the fourteenth day of September, A. D. 1878, and up to 6 o'clock in the afternoon of that day, the schooner had been, and was, lying at anchor a short distance from land, the Umpqua river bearing north-east, about two miles distant. She was at that time bound from San Francisco to said river.

5. At 6 o'clock in the afternoon of the fourteenth day of September, A. D. 1878, the schooner got under way, and with the wind N. N. W., stood off shore, close-hauled, on the starboard tack, and continued on this course till 12 o'clock midnight.

6. At 12 o'clock midnight the schooner changed her course, went about on the port tack and close-hauled, with the wind still N. N. W., occasionally varying from a point to a point and a half, stood in towards the land on a course N. E. by N.

7. At 12 o'clock midnight, and up to the time of the collision, the speed of the schooner was and had been from two to three miles per hour—not exceeding three miles.

8. The schooner from 12 o'clock midnight, and up to the time of the collision, had all the lights required by law properly set and brightly burning.

9. The schooner, from 12 o'clock midnight, and up to the time of the collision, had a lookout, properly stationed and attentive to his duties as such.

10. From 4 o'clock A. M. till the collision, the wind, with slight variations from time to time, was W. N. W., and the schooner, up to a point of time immediately before the collision, where the change in the helm hereinafter stated occurred, was sailing by the wind on a course N. E. ½ N.

11. From and after 10 minutes past 4 o'clock A. M. of September 15, 1878, up to the time of the collision, a fog prevailed in the track of the schooner of such density as to obstruct the view and largely tend to prevent the steam-ship and its lights from being seen from the schooner, and a fog-horn was sounded on the schooner at regular intervals of not more than five minutes.

12. At about 20 minutes before 5 A. M. the man at the wheel on the schooner heard the sound of the paddle-wheels of the approaching steam-ship, and thought it was the sound of the surf breaking on

the shore. His orders had been to keep a good lookout for the shore. He thereupon gave his wheel one turn to port, and fixed it in that position by means of a diamond screw, the object being to enable him to go off quickly in case he should prove to be near shore, and then ran forward to where the man on the lookout stood to ascertain whether his supposition was correct. The sound at about the same time attracted the attention of the lookout, who also thought it was the breaking of the surf, and both were looking to see if breakers were near, when immediately the loom of the approaching steamer appeared close upon them, on the port bow, not more than three ships' lengths distant, coming head on. This was the first known of the approaching steamer on board the schooner. The loom of the steamer first appeared, and afterwards the light at the masthead was seen. The man on the lookout immediately commenced hallooing to attract the attention of those on the steamer, and he heard the order on the steamer to put the helm hard a-starboard; the helmsman at the same time seized the fog-horn, gave a blast upon it, and then hastened back towards the wheel, where he saw the captain already at the wheel. The captain, being in his cabin and hearing the hallooing and the fog-horn, rushed on deck, and, seeing the steamer close on him, seized the helm and put it hard a-port; and very soon thereafter the steamer struck the schooner on the port side just before the rigging.

13. It was the captain's watch on the schooner from 4 o'clock A. M., and he was called at that hour. Upon looking out, and finding the sea not rough, he lighted his pipe and sat half dressed smoking in his cabin, near the steps, close by the wheel, till he heard the noise upon deck made by the lookout and helmsman, when he rushed out and put the helm hard a-port, as stated in finding 12.

14. There was no officer on the deck of the schooner during the half hour preceding the collision other than the man at the wheel, who was competent for the position, the cook, and the man on the lookout; but the latter was a competent lookout, and was at his proper post during all that time.

15. There was a torch on the deck of the schooner, but it was not lighted or shown in the manner required by the act of congress; and there was no time to light or show the torch after the discovery on board the schooner of the approaching steamer and before the collision. Had a lighted torch been exhibited after a discovery of the steamer it could not have prevented, or contributed to prevent, the collision. The schooner and its lights had been seen by, and its position was known to, the officer in charge of the steamer, as is shown by claimant's testimony, several minutes before the steamer had been discovered by those on and in charge of the schooner.

16. The general facts, as stated in findings 12, 13, 14, and 15, are clearly and satisfactorily shown by the testimony of the libel ants, to which there is no contradictory evidence, except as to the

prevalence of fog and certain inferential evidence upon the question as to whether the schooner changed her course at an earlier point of time than that indicated in these findings, and upon the question of the fogginess of the weather. I think the greater weight of evidence goes to establish the existence of considerable fog. The testimony for the claimant is that the sky was overcast and the atmosphere thick, smoky from fires in the mountains, and hazy without fog, and that a vessel could be seen two or three miles. I think from all the evidence that there was considerable fog along the path of the schooner just prior to and at the collision. The steamer itself encountered fog and blew its whistle for some minutes soon after. It was either smoky and hazy, or foggy, or both; probably in some degree both. I am also satisfied that the finding states the facts as to the maneuvering of the helm of the schooner prior to and down to the collision.

17. The steam-ship, from 4 o'clock A. M., had all her proper lights set, lit, and burning, and at and previous to the collision, also, had her second officer, Douglas, a man of long experience at sea, on deck, and a competent man at the wheel.

18. The testimony of Douglas, the second officer of the ship, and the officer of the deck, at the time of the collision, given on behalf of the claimant, is to the following effect: At about half-past 4 o'clock A. M., a short time before the collision, the special lookout of the steamer left the deck, with the permission of Douglas, the officer of the deck, to get a cup of coffee, and thereupon the officer of the deck acted as lookout for the steamer, and in so doing stood on the hurricane or upper deck of the steamer and in the most forward part of said deck, and in a position where his view was unobstructed, and while said officer of the deck was thus on the lookout he saw the schooner in question some eight minutes before the collision, and at the distance of a mile and a half the schooner being first seen; but very soon after showing her green light only, something more than a point off the starboard bow of the steamer. As soon as the schooner was seen by the officer of the deck on the steamer, he ordered the man at the wheel of the steamer to starboard his helm, which order was instantly obeyed by the man at the wheel, and thereby the course of the steamer was changed two points more to the port side, or shoreward. When the green light came into view the schooner was about a mile distant. Very soon after the green light appeared both lights came into view, "so instantaneous" that it "confused" the officer, the schooner being then about three-quarters of a mile distant. The two lights were in sight but an instant, not more than half a minute, when the green light disappeared.

Immediately after seeing the two lights Douglas walked aft to a point about 10 feet behind the pilot-house, notified the quartermaster at the wheel that he must look out, as he had lost the lights, then walked forward and looked at the compass; then looked out for

the schooner again, and saw her coming very near, and seeing the red light only, ordered the helmsman to stop the ship, to blow the whistle in order to alarm the passengers, and to put his helm hard a-starboard, all of which was immediately done. When he thus saw the red light the schooner was off the steamer's starboard bow and about 250 yards distant, and he at once gave the order to stop her. The schooner was under the observation of Douglas with lights and no lights about eight minutes; and during this period after he saw the green light there was a period of about three minutes, probably less, during which she was not under his observation at all. It was the period when he went aft to give orders to the man at the wheel. The schooner, as stated by Douglas, when her green light was first discovered, was running on a line parallel with the course of the steamer, one point to the starboard of the steamer, and had the courses of the two vessels thus continued they would have passed with a space of about a quarter of a mile between them, while the change of the steamer's course two points further to port by starboarding her helm would have carried them all of a mile apart when they passed.

Another witness who was below at the starboard port says he heard the order to starboard the helm given by the officer on deck, and looking out of the port saw a green light. He went on deck and there saw a red light. He judges it was four or five minutes after he thus saw the green light before the collision. The man at the wheel of the steamer, notwithstanding the order given him, did not see the schooner, or either of her lights, till she came close alongside, after the order to stop was given. This is the substance of the testimony given on the part of the claimant.

19. If I am wrong in the twelfth, thirteenth, fourteenth and fifteenth findings, then the facts as testified to and stated in the eighteenth finding, present the case on those points in the strongest light for the claimant and appellant.

20. The steamer being heavily loaded and running at a speed of eight miles per hour could not be stopped and backed within a less distance than one-half a mile.

21. No order was given to stop and reverse the engine of said steamer, nor was the same stopped and reversed, nor was the speed of the steamer slackened at any time till about one minute or less before the collision, and when it was too late in that mode to avoid said collision.

22. From 4 o'clock on the morning of said fifteenth day of September the steam-whistle of the steamer was not sounded until after the lights of the schooner were discovered, nearly ahead of the steamer, at the time when the signal to stop was given, and not more than one minute before the collision—probably not so long—and when too late to avoid the same.

23. From half-past 4 A. M. till the collision there was no lookout

on the steamer other than the second officer, Douglas, who acted as lookout in the absence of the special lookout, while getting his coffee, as in these findings before stated.

24. In the condition of the atmosphere and the state of the fog, there was no fault on the part of those on the schooner in not discovering the steamer at an earlier point of time than that at which it was discovered.

25. When the approach of the steamer was first discovered from the schooner it was too late for those in charge of the latter to avoid the collision.

26. Immediately after the approach of the steamer was discovered from the schooner the helm of the latter was put hard a-port, but owing to her low rate of speed this could have affected her course but little prior to the collision, and this was the first maneuver on the schooner after a discovery of the steamer. This, under the circumstances, was not an improper maneuver. At about the same time the helm of the steamer was put hard a-starboard. Had it been put hard a-port the probability is that the vessels would have gone clear.

27. At the time when the approach of the steamer was discovered from the schooner the course of the steamer was either S. two points E., or due S., and that of the schooner N. E. ½ N.

28. At the time the helm of the steamer was ordered hard a-starboard the steam-whistle sounded, and the engineer was signaled to stop and back the steamer,—all of which orders were promptly executed. It was too late to avert a collision by those movements, but it is probable that had the helm been put hard a-port instead of hard a-starboard the collision might have been avoided.

29. The fair value of the schooner was $11,000.

30. The value of the money and other property lost by John Bott, the captain of said schooner, for which he is entitled to recover, is $440.

CONCLUSIONS OF LAW.

1. The steamer was in fault under the circumstances shown by the claimant's own testimony, taken in the most favorable light for claimant, in not blowing its whistle to attract the attention of the schooner and warn it of the steamer's approach.

2. Those in charge of the steamer at the time were also in fault, even upon their own showing, in not stopping the steamer or checking its speed in time to avert the collision; and especially so since the schooner was in plain view for a distance of a mile and a half, and for a period of from at least five to eight minutes, and since the officer in charge was still confused and uncertain as to the movements of the schooner in ample time to have stopped the steamer, or diminished its speed, until the maneuvers of the schooner could be definitely ascertained.

3. That the schooner was not in fault.

4. That the collision arose in consequence of the fault in the navigation of the steamer.

Let a decree be entered in favor of the libelants for $11,000, the value of the schooner, and interest at 6 per cent. per annum from September 15, 1878; and in favor of the libelant Bott for the sum of $440, and interest thereon from the same time and at the same rate, and for costs.

Milton Andros, for libelant and appellee.

Hall McAllister, for claimant and appellant.

SAWYER, J. In this case I have examined with great care the voluminous testimony, and considered it in all its bearings.

After examining the record I find that I am compelled to concur with the district judge, and that the decree of the district court must be affirmed. For opinion of district judge, see 6 Sawy. 118.

The facts as I have written them out in the findings are as follows: [The findings are set out in the statement.]

I shall not attempt to go over and discuss the large mass of testimony in the case at any length. I shall only state some of the salient points. One point is as to the maneuvers of the schooner. I see no reason to doubt, from the testimony of those on board the schooner, as to its movements. The testimony seems to be fair and unprejudiced. There is no direct testimony to the contrary. So far as the testimony is given at all it is concurred in by all those on the schooner—three or more witnesses—as to what took place at and immediately before the collision. The position of the schooner on the night previous, the object of running off and then running in for the purpose of making the river, would not call for any other changes in the movements of the schooner than those shown by the testimony of those on board to have taken place.

They were running, according to the testimony, upon a course that we should naturally expect them to be running, without any cause for changing the course, unless they had seen the steamer and changed the course for that reason. The testimony of the three witnesses on the schooner was that they did not see the steamer until the time mentioned in the findings,—that is, until she had got within about three ships' lengths of the steamer,—although they were on the lookout, and there was a good lookout. The helmsman himself, as well as the regular lookout, was also on the lookout, because he had instructions to keep a sharp lookout for the shore, and they were on the lookout for the shore. I think there is no doubt about the rate of speed at which the schooner was going, which did not exceed three knots, and was probably considerably less.

That being so, they were running directly on their proper course until the helmsman first heard the sound of the paddle-wheels of the steamer, which he supposed was the surf breaking upon the shore. He then immediately gave his wheel one turn to port, fixed

it in that position with a diamond screw,—the object being to be able to go about quickly should it prove to be necessary,—and ran forward in haste to see whether his suppositions were correct or not. About the same time the lookout himself also heard the sound of the steamer's paddle-wheels. He was on the lookout to see what it was, and he also supposed it was the surf breaking on the shore. This place, as I understand it, is not the track in which the Oregon steamers generally go. They frequently go there when there is particular occasion for it, such as winds or currents; and they seem on this occasion to have been in-shore further than usual, for the purpose of getting the advantage of the current. The steamer's approach was not noticed, although there was a lookout, and the helmsman himself was also on the lookout, until after the sound of the paddle-wheels was heard. The helmsman and lookout first discovered the loom of the steamer. Immediately on the discovery the lookout began to halloo, to attract the attention of those on the steamer; and the other man blew the fog-horn and then ran aft to his wheel again. The captain, hearing the noise on deck,—being close by and being partially dressed,—sprang on deck, seized the wheel, and seeing the steamer coming directly head on, put her helm hard a-port; and that is the first maneuver on the schooner after the discovery of the steamer, and it was then too late to avoid the collision by any movement the schooner could make.

On the question of fog, the testimony of all the parties, both those on deck and those below, was that soon after the 4 o'clock watch came on deck a fog came up. The helmsman said he thereupon passed the fog-horn forward to the lookout to blow, and he testified that the lookout did blow it at intervals, not exceeding five minutes, from that time until the collision. The lookout testifies to the same thing. The cook was on deck, and also testifies to the same facts. The captain, though below, also testifies to hearing the fog-horn blown; so that unless these four witnesses all testify to what they must absolutely know to be false, there must have been a fog; otherwise, also, there would be no occasion for blowing the horn. They testify that there was a fog, and that the horn did blow at regular short intervals.

There were a good many witnesses on the steamer, being passengers, who testify that there was a fog, and the crew, or quite a number of them, testified that there was a fog came on soon after the accident. Some witnesses, employes on the steamer, though not so many, testified that there was no fog at the time of the collision; but they also testify that the atmosphere was overcast, or dark, and was smoky or hazy, resulting from fires upon the land. Immediately after the collision they began to rig a line on the steamer to enable the lookout, instead of the man at the wheel, to sound the fog-whistle. That indicates that there must have been some fog, or they certainly would not so soon have been rigging that line; and all the tes-

timony is that soon after they started, they being detained from 20 minutes to half an hour, and after they got under way, they ran into a fog-bank, then blew the whistle by means of this line which had been rigged while they were picking up the passengers who had been on board the schooner.

I think the great weight of testimony is that there was either a fog or smoke or haze, one or the other, or both, along the track of the schooner, which would be very likely to obscure the view of the steamer's lights. The testimony on board of the schooner is that they first saw the loom of the steamer before seeing the light, and very soon after that they first saw the light at the mast-head. The lookout of the steamer also testified that he first saw the schooner from a mile and a half to two miles off, and before seeing her lights. I have taken a mile and a half as the distance. He says he first saw the schooner, and soon after he saw the green light, when he got within about a mile, so that he saw the schooner first. Several credible witnesses—and among others was the captain, who is certainly a reliable witness and an experienced man—said that in a fog of that kind, or smoke, he would be likely to see the loom of a vessel before seeing the lights. That may be so, but at all events I should suppose that without a mist or smoke or fog, when it is simply dark, the lights of the vessel could be seen before an object which is also black or dark. My conclusion, therefore, is that there was considerable fog, mist, or smoke; probably both. The testimony indicates that there were fog-banks from time to time. I find, therefore, from those general facts that the course of the schooner was as I have stated in the findings, and that there was a fog or mist or smoke, or both, sufficient to obscure the view of an approaching vessel and excuse the schooner for not seeing the steamer in time. It is very manifest that after the steamer's approach was seen, and when the first maneuver on the schooner was made, it was too late to avoid a collision by any action on board the schooner.

The statute requires the court to make findings of fact. In an admiralty or equity case there is difficulty sometimes in stating specifically in brief terms the facts. It is somewhat difficult to specify satisfactorily the ultimate facts, or even to determine what they are, without argument; and I state them rather in the alternative, giving the claimant the benefit of the strongest statement of facts in his favor as made by Mr. Douglas, the mate, who was in fact the only one who testifies to anything on behalf of the steamer, as to the leading material facts, except so far as he is confirmed by the man who was looking out of the port. He testified to seeing the green light, and that he soon afterwards saw the red light from the deck. If Douglas saw the schooner a mile and a half or two miles off, as he says he did, the schooner being then a point off his starboard bow, he, having full control of the steamer's movements, certainly ought to have been able to avoid a collision; and it was inexcusable negli-

gence not to have done so. Considering the rate of speed at which they were going, and the distance and time, I do not see, if he is correct in his statement of facts, how it was possible for the schooner to get in the track of the steamer so as to come into collision, even if it had made the attempt.

He, Douglas, says it was a mile and a half off when he first saw the schooner, a point off his starboard bow. A mile distant is the nearest point that he locates the schooner at the time he first saw the green light; and immediately upon seeing the green light he put his helm a-starboard, whereupon the steamer went off two points more to port, which would make three points. It seems to me if that was the position of these vessels, and the steamer continued in that course, whatsoever course the schooner could have possibly taken she could not have brought herself into collision with the steamer even if she had tried to do so. The witness, Douglas, testifies that one point off would carry the vessels a quarter of a mile apart, and that two points more would carry them at least a mile apart. If the steamer then ran on that course, which he says she was, going at the rate of eight miles an hour by steam, accelerated one mile by the current, and the schooner's speed not exceeding three miles per hour, before the schooner could possibly intersect the line of the steamer's course at any point, it seems to me that the steamer would have been a mile or two past, or at least a long distance past, the point of intersection. Had the schooner turned and run directly at right angles she would have had a mile to sail to intersect the steamer's path. While she was running that mile the steamer would have run three, and been two miles past, as they were but a mile apart at the start. Had the schooner run in any other direction she would have had more than a mile to run to intersect the steamer's track, and the steamer would have been still further off. Some allowance must doubtless be made for the time it would take the steamer to change her course after putting the helm a-starboard, but not enough to render a collision possible. There is some confusion in the testimony of Douglas. It is very remarkable, too, that the man at the wheel did not see the steamer, although it was not his business to act as lookout, because his attention was called to it twice,—first, when he was directed to put his helm to starboard the first time, when the vessel was at least a mile off, and then again when the two lights came into view and the steamer was three-fourths of a mile off. At that time the mate walked back—left his post and walked back abaft the wheel-house—and told the man at the wheel that he had lost the lights of that vessel, and to be careful and be upon the lookout. Even after that warning, when he would be very likely to look out, the man at the wheel did not see the schooner; and he never saw it until the last order was given to put his helm hard a-starboard, signal the engineer to stop the steamer, and blow his whistle to alarm the passengers; and then the steamer

was coming directly down close on the port bow of the schooner. The officer in charge certainly should either have put his helm long before he did hard a-starboard, or he should have ported his helm when he saw the schooner was changing its course, and, in either event, he had ample time to escape a collision. If he had ordered the helm a-port when he saw the green light and the red, or hard a-starboard, or stopped or slowed down the steamer, as he might have done, he would have gone clear. If he had done either when she was three-fourths of a mile off, as he could have done when he saw the green light disappear and the red light come into view, or both lights come into view, and then both lights disappear, the collision would not have occurred.

I am taking this testimony as Douglas gave it, and as corroborated by the man at the port below; and that is the most favorable position according to his own statement. If it was smoky or hazy or foggy, or both, then he was at fault in running at full speed without blowing his whistle from time to time. The whistle was never blown, while the vessel was all the time going at full speed. While I do not propose to say that Douglas' testimony is willfully false, yet the inclination in my mind is to think that in his confusion—as he evidently was confused, and so states in his testimony—the probability is that he did not see the schooner so soon as he supposes, or until he was close upon her, (that is the most favorable view that could be taken, according to the probabilities,) and that then it was too late, by that maneuver at least, to avoid the collision. He saw the red light, and he should have ported his helm, in the condition he was in, instead of putting it starboard. He could have done his best, at least, to check the speed of the steamer in time; and if he did not see it in consequence of fog or smoke, which is highly probable, then he was in fault in running at full speed, and in not blowing his whistle from time to time to give notice to any approaching vessel. If he saw the schooner changing her course three-quarters of a mile off, as he says he did, he certainly should have blown his whistle and done something at once more vigorous and decisive to avert the accident.

I can come to no other conclusion than that the collision was the result of fault in the navigation of the steamer.

I have also examined the testimony to see if there is any reasonable ground for dividing the loss, but I find none.

I see no good reason for reaching a conclusion different from that attained by the district court as to the value of the schooner. The libel alleges the loss sustained by the libelant Bott to be $440, and prays a decree for that amount. A larger amount is, therefore, not within the issues or the prayer for relief. The decree will be limited to that amount.

HAZARD *v.* VERMONT & C. R. CO. and others.

(*Circuit Court, D. Vermont.* September 15, 1883.)

1. UNITED STATES COURTS—STATE LAWS AND DECISIONS.
   On questions touching rights of property under the laws of a state, those laws, and the decisions of the state courts construing them, are of binding force, and govern in the federal courts.
2. SAME—VERMONT CENTRAL RAILROAD COMPANY—LEASE—MORTGAGE—CONSOLIDATED RAILROAD COMPANY OF VERMONT—ISSUE OF BONDS—COMPROMISE.
   The Vermont Central Railroad Company, of which the Vermont & Canada Railroad Company was an extension, leased the whole line of road, and subsequently an agreement was made that, upon default in payment of rent for four months, the Canada Company might enter upon both roads, and take the whole income of them until the rent should be paid up, when the Central Company might resume control. The state court, in construing this lease and agreement, held that the Vermont Central became the owner of the whole line, including the two roads, subject to certain rights and interests in the property of its mortgage bondholders, and the rent claims of the Vermont & Canada road, and that the Vermont & Canada road held and owned the right to a fixed annual rent, as a first charge on the income, arising from the use of said lines of road, and a right to compel the application of such income to the extinguishment of such rents, if in arrear. Subsequently the roads consolidated as the Consolidated Railroad Company of Vermont, which issued $7,000,000 of bonds, secured by mortgage of its roads and property to the American Loan & Trust Company, as trustee for the bondholders, to further secure which a mortgage was executed by the Canada Company, and the bonds delivered to the same trustee; $1,000,000 of which, as a compromise, it was agreed should be accepted by the security holders of the Canada road in place of all claim for rent, past and future. *Held*, that the mortgage executed by the Canada Company was a mortgage of the rent charge only, and that, as it had the right to deal with the rent, it had the right to change the security by the issue of the bonds as proposed; and, as it appeared to be for the benefit of the stockholders that such compromise should be carried out, the delivery of the bonds of the Consolidated Company to the stockholders of the Vermont & Canada Company would not be restrained.

In Equity. Motion for preliminary injunction.

Wilder L. Burnap and *Elias Merwin*, for orator.

Benjamin F. Fifield and *George F. Edmunds*, for Vermont & Canada and Consolidated Railroad Companies.

Henry D. Hyde, for American Loan & Trust Company.

WHEELER, J. This is a motion for a preliminary injunction to restrain the defendant the American Loan & Trust Company from delivering $1,000,000 of bonds of the defendant the Consolidated Railroad Company of Vermont to the stockholders of the defendant the Vermont & Canada Railroad Company, and has been heard on bill and answers. According to the bill the property and franchises of the Vermont Central Railroad Company primarily, and those of the Vermont & Canada Railroad Company ultimately, were subject to $5,357,000 of liabilities, which the property of the Canada Company, after exhausting that of the Central Company, was more than sufficient to pay. The Consolidated Railroad Company of Vermont has succeeded to the property, franchises, and liabilities of the Cen-

tral Company, and issued $7,000,000 of bonds, secured by mortgage of its roads and property to the American Loan & Trust Company as trustee for the bondholders, to further secure which a mortgage of the roads and property of the Canada Company has been executed and the bonds delivered to the same trustee, to be used, $5,357,000 of them to retire the liabilities mentioned, $1,000,000 of them in exchange for the stock of the Canada Company, which amounts to $3,000,000, at one-third its par value, and the balance—$643,000—of them for purposes not disclosed, contrary to the interest and rights of the stockholders of the Canada Company, of whom the orator is one.

The answers set forth that the property and franchises of the Central and Canada Companies are subject to a further liability of $643,000 to the Central Vermont Railroad Company; that interest overdue on the $5,357,000 amounted to $2,300,000, making in all $8,300,000, which was more than the value of the property, and subsequently to an annual rent of $240,000 to the Canada Company, of which $2,640,000 was overdue, and that, by way of concession and compromise the security holders had agreed to forego the interest due them, and exchange their securities for these bonds at par, and leave $1,000,000 of the bonds for the Canada stockholders, equal to one-third of the par value of the stock, in place of all claim for rent, past or future; which was agreed to by the Canada Company in its corporate capacity, and stockholders individually, of $2,700,000, out of the $3,000,000 of stock; and that the mortgage of $7,000,000 was as large as the property would bear, and the arrangement advantageous instead of detrimental to the Canada Company and stockholders; and that a surrender of the stock in exchange for the bonds was an essential requirement for carrying out the compromise, and not any substantial part of its consideration. Those parts of the answers that show the consideration of the bonds and mortgages, their adequacy to the value of the property, and the purposes for which the bonds are intended to be delivered to the stockholders of the Canada Company, are directly responsive to those parts of the bill that charge want of consideration in part, an excess of property belonging to the Canada Company, and a fraudulent purpose towards the interests of that company and the minority of the stockholders, and must be taken to be true upon this motion, while those parts in avoidance are not to be so taken.

The question raised on this motion is not affected in any way by the bonds themselves, for they are the bonds of the Consolidated Company only, and the Canada Company is not a party to them; nor by the mortgage of the Consolidated Company, which covers only its own property, but relates only to the validity of the mortgage of the Canada Company as against the rights of its stockholders as security for this $1,000,000 of bonds intended for them. It is claimed to be invalid on the ground, principally, that it is outside of the corporate

power of the Canada Company, as granted to it by its charter and the laws of the state.

The road of the Canada Company was an extension of the line of the Central Company, and the lease of it to the latter was made before it was completed, and was perpetual, without clause of re-entry for non-payment of the rent. At that time there was no statute dispensing with a stipulation for re-entry in ejectment for non-payment of rent, as there is now first enacted with the General Statutes of 1863. Comp. St. p. 286, § 14; Gen. St. p. 339, § 14; Rev. Laws, § 1259. The lease was held operative and the road passed in perpetuity to the Central Company; and while matters so remained, the Canada Company had nothing in respect to the road but the right to recover the rent of the Central Company. Afterwards an agreement was made that, upon default in payment of rent for four months, the Canada Company might enter upon both roads and take the whole income of them until the rent should be paid up, when the Central Company might resume possession. This agreement was held operative to entitle the Canada Company to the income of the roads, but not to their possession, for the payment of its rent, to be reached by receivers of the court. *Vermont & C. R. Co.* v. *Vermont Cent. R. Co.* 34 Vt. 1.

Thus, as said by BARRETT, J., in the same case, before the court on petition of the receivers to sell the roads to pay the accumulated expenses of the receivership, (50 Vt. 500:)

"Virtually and practically under the lease both roads became a single one, in the permanent and perpetual proprietorship of the Vermont Central Railroad Company, and under the permanent possession and control of the Vermont Central Railroad Company, subject to the first right of the Vermont & Canada to the net income, to pay rent four months and more overdue."

—And by REDFIELD, J., in *Langdon* v. *Vermont & C. R. Co.* 54 Vt. 593:

"The Vermont & Canada Railroad and the Vermont Central, each having its corporate entity and franchise, were so bound together by mutual and perpetual covenant that they had become one road. The Vermont Central road was the owner of the whole line including the two roads, subject to certain rights and interests in the property of its mortgage bondholders, and the rent claims of the Vermont & Canada road. The Vermont & Canada Railroad held and owned the right to a fixed annual rent as a first charge on the income arising from the use of said line of roads, and a right to compel the application of such income to the extinguishment of such rents in case they were in arrear. The property of the Vermont Central Railroad was, its roads and incidents, subject to certain fixed burdens. The property of the Vermont & Canada was a leasehold estate, and susceptible of valuation and alienation like other property."

On questions like these, touching rights of property under the laws of the state, those laws, and the decisions of the state courts construing them, are of binding force, and govern in the federal courts. Rev. St. § 721; *Nichols* v. *Levy*, 5 Wall. 433. Under these

decisions of the state courts, which this court is so bound to respect. the Vermont & Canada Company had no railroad to mortgage, or to be affected by its mortgage, either separated from or connected with the road of the Vermont Central, now of the Consolidated Company. The latter company is the proprietor of the whole of this line of railroad property, and the Canada Company, the proprietor of the rent charge upon, or what Judge REDFIELD calls the leasehold estate in, the income of the whole line. The roads and their property are covered wholly by the mortgage of the Consolidated Company; the rent charge only is covered by the mortgage of the Canada Company. The question, therefore, is not whether the Canada Company had corporate power to mortgage its road to raise money to pay rent due to itself for its stockholders, or to pay them for their stock, but whether it has power to deal with this rent by exchanging it for other securities of less amount, but greater value, for its stockholders. The disposition of the rent and the claim for it in future is the principal thing, for that represents substantially the corporate assets of the Canada Company; and when that is gone the transfer or surrender of the stock would be a mere nominal formality. Power to deal with the rent is implied in the power to make the lease and reserve the rent, which it was held the corporation had. *Vermont & C. R. Co.* v. *Vermont Cent. R. Co.* 34 Vt. 1. And powers necessarily implied from those expressly granted are as well granted as the express powers. *Nat. Bank* v. *Graham*, 100 U. S. 699. Power to lease would include power to fix the rent in money or money securities, which might be done from time to time by modifying it in amount, or by changing it from one security to another. This is what is attempted in effect here.

Again, power for this purpose may be found in another direction. When the Canada Company was in danger of losing its charter, by failure to comply with its conditions, the legislature made provisions for its continuance, but provided, also, that the original charter, and all its amendments, should be subject to the control of the general assembly, and might be altered, amended, or repealed as the public good might require, and for the acceptance of this act. Laws Vt. 1859, p. 85, § 3. The company proceeded under the act and became subject to it, as it did to the law authorizing leases of railroads, passed after the charter was granted, under which this lease was held valid. *Vermont & C. R. Co.* v. *Vermont Cent. R. Co.* 34 Vt. 1. This brought the company within the reach of the act of 1882, which provides that "when two railroads are incumbered by a lien or liens upon the two roads, the company owning either road may issue bonds" "for the purpose of extinguishing such lien or liens and compromising disputes," secured by mortgage or mortgages of both roads, "by vote of the stockholders of the companies owning said roads." Laws Vt. 1882, p. 46, § 2. The rent of the Canada Company was a lien upon the income of both roads, which incumbered the roads themselves. It was due to the company as trustee for the stock-

holders. These bonds were to extinguish this lien, and the mortgage to secure them is directly within the terms of the act, if it can operate as a mortgage upon any property at all.

When the rent is extinguished this property represented by the stock will be practically extinguished, as before alluded to, so far as railroad interests will be concerned. Its transfer to the Consolidated Company would not transfer the corporate powers of the Canada Company over any railroad to that company, nor extend or curtail the control of the franchises of either, and is not within the principle that one railroad company cannot extend its franchises and privileges by purchasing the stock of another and controlling it. The stock of the Canada Company represents a moneyed security of the roads; the bonds are to extinguish the securities as such, and not for the purchase of the stock as such. The original lease provided for an absolute grant and release of the road in perpetuity at any time after 20 years, subsequently changed to 50, upon payment of an amount sufficient to pay to such stockholder the par value of his stock. The plan now sought to be carried out is in line with this provisions, and not a new scheme to crush out any rights of a minority of the stockholders. The corporate powers of the company should be exercised with due regard to the just rights of all the stockholders, and not for the purpose of sacrificing the interests of the minority for the advantage of the majority. This plan does not appear to be prosecuted for any such purpose, but presents the aspect of an honest and fair endeavor to save to these stockholders a remnant of their property, as mentioned by Judge REDFIELD to be so desirable in *Langdon* v. *Vermont & C. R. Co.*, before cited. When this scheme for settlement was begun there were, besides the holders of this debt of $5,357,000, of which $4,357,000 was bonded, and $1,600,000 was floating, and the Central Vermont's receiver's claim of $643,000, and the Canada stock already mentioned, the first-mortgage bondholders to the amount of, originally, $2,000,000, and second-mortgage bondholders to the amount of, originally, $1,500,000 of bonds, on all of which the interest had long remained unpaid, and each class was contending for priority. In the plan some concessions were made by all, and some provision was made for all. That it was at large just and fair is shown by its general acceptance. The considerations for its acceptance by each was its acceptance by the others. When the orator commenced proceedings, the Consolidated Company had been formed by the mortgage bondholders, the Canada rent had been reduced to a nominal sum, the mortgages had been made and delivered, and the bonds had been delivered to the loan and trust company and some of them to the security holders entitled to them, so that the scheme could not be abandoned and the *status* restored. The Vermont & Canada stockholders all stood together in interest, with the advantage over bondholders and single creditors of having

the power of corporate action. Such as has been taken by the orator's associates, does not now appear to be likely to deprive him of any of his legal or equitable rights.

The motion is denied.

FARMERS' LOAN & TRUST CO. *v.* CENTRAL R. CO. OF IOWA.

(*Circuit Court, D. Iowa, S. D.* 1883.)

[INTERVENTION OF A. MCKAY AND JAMES NOLAN.]

1. RECEIVER OF RAILWAY—SALE—ORDER OF CONFIRMATION.
   Where a railway receiver was discharged, and the sale of the property confirmed to a newly-organized corporation, with the provision in the order of confirmation that the new company should pay all the debts of the receiver, and all claims or liabilities pending in the foreclosure case, *held*, that the new company could not be permitted, after accepting the property, to question the validity of the order.
2. SAME—EQUITY—PAYMENT OF DEBTS OF RAILWAY.
   It is a proper exercise of the chancery power of the court to surrender the trust property to the purchaser, retaining jurisdiction of the original case, and retaining the authority to enforce the payment of the debts and liabilities incurred by the court's receiver in the operation of the railway.

In Equity.

A. McKay and James Nolan recovered judgments for injuries received by them as employes of the receiver of the Central Railroad Company of Iowa. They each filed their petition of intervention in the original foreclosure proceeding in which the receiver was appointed, asking that their judgments be made liens upon the railway. Both cases were by agreement submitted and argued together.

John F. Lacey, for intervenors.

H. E. J. Boardman, *J. H. Blair*, and *A. C. Daly*, for the Central Iowa Railway Company.

MCCRARY, J. The Farmers' Loan & Trust Company, trustee, foreclosed, by proceedings in this court, a mortgage upon the property and franchises of the Central Railroad Company of Iowa. Receivers were appointed to manage the property and operate the road pending the litigation, which was protracted. There was a decree of foreclosure rendered in 1875, but as the case went to the supreme court on appeal with *supersedeas*, it was not until some time in 1879 that there was a sale under the decree, and an approval and confirmation of the same by the court. In the decree confirming the sale, and directing the delivery of the property to the purchaser, the Central Iowa Railway Company, the following order appears:

"And it is further ordered that the lawful debts contracted by the receiver during the litigation, and the costs and expenses of such litigation,

do constitute and are hereby made a first and paramount lien upon all said property, money, credit, and all additions thereto, to all other liens, and to the title acquired by the purchaser at the foreclosure sale, and by the conveyance to the Central Iowa Railway Company. And since it is not desirable to further continue said property under the control of the receiver, for the purpose of making net earnings for the payment of said debts, costs, and expenses, and the creditors having been notified, and making no valid or satisfactory objection thereto, it is further ordered and decreed that all said claims, and all claims pending in this court, debts, and liabilities, including the claims of attorneys and others, heretofore referred to special master Rogers, and reported on by him, and still pending on exceptions, shall be presented to the said Central Iowa Railway Company for adjustment and settlement, and the said Central Iowa Railway Company are ordered and directed to pay the said debts, costs, and expenses, and the creditors entitled thereto are hereby required to accept payment thereof, with interest at the rate of 7 per cent. per annum in one year from the date hereof. And for the purpose of enforcing the payment thereof, if need be, this court will and does retain jurisdiction of said cause for the purpose of enforcing said payment, and the lien herein provided for, without other action or independent proceeding."

Undoubtedly this order is broad enough to protect the rights of the present plaintiffs, who had then pending in the foreclosure proceeding their several claims for damages resulting from personal injuries caused by the alleged negligence of the receivers. It might be doubtful whether their claims were covered by the words "lawful debts contracted by the receivers," used in the first clause of the order above quoted, but the second sentence of the order includes "all claims pending in this suit, debts, and liabilities," and retains jurisdiction of the cause for the purpose of enforcing payment thereof. These plaintiffs had then filed their claims in the foreclosure suit, so that they are clearly within the terms of the order. By the statutes of Iowa they were entitled to liens upon the railroad for the amount of their damages from the time of recovering judgment. It is evident that the court was unwilling to permit a sale of the property under the decree of foreclosure, so as to deprive them of all remedy before they could have a hearing. The purpose of the above-quoted order was to turn over the railroad to the new company and permit them to take its management into their own hands, but without prejudice to the rights of these plaintiffs and others who were then in court, seeking in the foreclosure suit to enforce claims as against the property in the hands of the receivers. They were to have just such rights as against the property then in the hands of the receiver, and in the custody of the court, as they would have had if the court had declined a decree or order of sale in advance of the hearing upon the claims of all the parties to the suit. It was to oblige the purchaser, the present respondent, that a sale and delivery were ordered in advance of the settlement of the rights of some of the parties to the suit. The court had taken control of the railroad property and franchises, and had appointed receivers to manage the business and operate the road. These receivers, through their agents, had by negligence injured some persons, and had by contract become indebted in their official capacities to

others. They were not personally liable, but the property in their hands was liable, and could be reached by suit in form against them. That property the court was asked to turn over to the purchaser in advance of the adjustment and settlement of those claims. It would have been inequitable in the extreme if this had been done without any provision for the protection of the rights of the claimants; and it would be a strange result if we were obliged now to hold that the effort to protect such rights by the order above quoted had proved futile, and that the court had, by turning over the property, deprived the claimants in advance of a hearing of the means of enforcing their judgments when obtained.

It is, however, insisted by respondent's counsel that the *original* decree of foreclosure made no provision for these claims, and that it was not within the power of the court to embody the above-quoted order in the decree confirming the sale and ordering a delivery of the property to the purchaser. In other words, it is insisted that the order relied upon is void. It may have been voidable, but it is clearly not void. The court had jurisdiction of the parties and of the property, with power to make a conditional order of confirmation. The court was not bound to confirm the sale and relinquish control of the property without making provision for pending claims. It had full authority to make such provision. Whether it was necessary to file a supplementary bill and allege the fact of the filing of these claims subsequently to the rendition of the decree of foreclosure, if such was the fact, is a question of no consequence now, for it is not one of jurisdiction, and the most that could be maintained is that the court erred in that respect. The respondent did not raise the question at the proper time. No appeal was entered. The order was acquiesced in by the respondent. It accepted the property; took its title under the very decree it now calls in question. It cannot now be heard upon questions of mere form, and which go only to the regularity of the proceedings.

Decree for complainants.

LOVE, J., concurs.

MATTHEWS *v.* MURCHISON and others.[1]

(*Circuit Court, E. D. North Carolina.* June Term, 1883.)

1. MARRIED WOMEN—ESTOPPEL—CONTRACT.

A married woman may be bound by an estoppel, even where she has no power to bind herself by a contract, but a married woman, who is under a disability to contract, cannot be estopped by anything in the nature of a contract. To estop a married woman from alleging a claim to land, there must be some pos-

[1] Reported by J. W. Hinsdale, Esq., of the Raleigh, North Carolina, bar.

itive act of fraud, or something done upon which a person dealing with her, in a matter affecting her rights, might reasonably rely, and upon which he did rely, and was injured.

2. SAME—ACQUIESCENCE.
Acquiescence or assent is tantamount to an agreement or implied contract, and requires for its validity the power to contract; and where a married woman could not make a valid contract in regard to her property, acquiescence cannot affect her rights therein.

3. SAME—DISPOSITION OF PROPERTY—HUSBAND'S CONSENT.
In North Carolina a married woman's disability to dispose of her property without her husband's written consent, extends to indirectly disposing of it by binding it by her contract.

4. SAME—MANAGEMENT OF PROPERTY—COSTS.
But a married woman may manage and control her property under the laws of North Carolina without making her husband her bailiff, and may, in doing so, incur and render her separate estate liable to such charges as are proper to its management, and may sue by herself with respect to her separate estate, and control such suit, or enter into a valid compromise or settlement of her claim therein involved.

5. CONTRACT—ABILITY OF PARTY—FORM OF CONTRACT—WHAT LAW GOVERNS.
The ability of a party to contract depends upon the law of the domicile, when the question is one of personal ability or disability; as to the form of entering into the contract, the law of the place where the contract is made must control.

6. MARRIED WOMEN—CONTRACT—LAW OF NEW YORK.
In New York there is no statute requiring the written consent of the husband to contracts to charge the wife's separate property, and a married woman can bind her separate property either by making a contract for its benefit, or by expressly charging it in the contract.

7. STOCK—OWNERSHIP BY ANOTHER CORPORATION—LAW OF NORTH CAROLINA.
In North Carolina, by statute, any railroad company within the state may own and vote upon stock in any other railroad company in the state.

8. REPEAL—QUESTION OF INTENTION.
Whether a statute has been repealed is a question of intention. Where a legislature held a summer session, adjourned *sine die*, and the same legislature was convened again in the winter of the same year, the laws of the two sessions being published in separate volumes, and always referred to as acts of different sessions, it is clear that, by an act of the next legislature repealing all acts of the "last session" upon a certain subject, there is no intention to repeal any act of the first session, (known as the summer session.)

9. EQUITY—REMOVAL OF TRUSTEES.
To justify the removal of trustees for a breach of duty, their acts must be such as to endanger the trust property, or to show a want of honesty, or capacity; and where the failure in duty, as the evidence would seem to show in this case, has proceeded from a misunderstanding, the court will refuse to discharge them.

10. EVIDENCE REVIEWED—AGENCY NOT SHOWN—PRAYER REFUSED.
As the preponderance of testimony is very strong against the claim made by plaintiff that she is the owner of the railroad bonds, either in law or equity, the prayer of the bill that the holders of such bonds be declared trustees, as having purchased the same as her agents, is denied.

In Equity.

John F. Dillon, McRae & Strange, and *Russell & Ricaud,* for complainant.

E. Randolph Robinson, George Davis, Merriman & Fuller, Edward Patterson, D. J. Devane, and *Stedman & Lattimer,* for defendants.

SEYMOUR, J. This action was commenced in the month of Febru-

ary, 1882, in the superior court of New Hanover for the state of North Carolina, and was in July, 1882, on plaintiff's petition, removed to this court.

It is sought to declare void the present organization of the Carolina Central *Railroad* Company; to have the second and third mortgage bonds of the company canceled; and to enforce and carry into effect, by specific execution, a plan of organization which plaintiff claims to have been adopted by the first-mortgage bondholders of the Carolina Central *Railway* Company on the eighteenth day of May, 1880. It also seeks the removal of the trustees who now hold the stock of the new company, and the appointment of new trustees and of a receiver. It further claims, as against the defendant Murchison and the defendant corporation, the Seaboard & Roanoke Railroad Company, that they be declared trustees for the plaintiff of 615 of the second-mortgage bonds of the new company, with stock annexed. This claim is made upon the condition that these bonds were purchased by Murchison as plaintiff's agent, and by him sold to the defendant corporation, with notice. It is an alternative claim, set up as a right only in case the court shall refuse to annul the present organization of the Carolina Central Railroad Company. The plaintiff is a married woman, domiciled in the state of New York.

We merely notice the fact that the bill is multifarious, in that it seeks inconsistent remedies, and is founded upon two conflicting theories. The parties appear to have desired to settle both in one action, and as no real difficulty has arisen, the court will not of its own motion make one.

The Carolina Central Railway Company, a corporation existing under the laws of North Carolina, owned in the spring of 1880 a continuous line of railroad from Wilmington to Shelby, a town in North Carolina, some 60 miles west of Charlotte. Its property was subject to two mortgages, upon both of which it was in default. An action was pending in the superior court of New Hanover county for the foreclosure of the first of these mortgages, and receivers appointed in said action were in possession of the road.

On the fifteenth of March a decree was rendered ordering a sale. At this date the plaintiff was owner of 1,194 of the 3,000 first mortgage bonds, and 2,550, or about nine-tenths, of the second mortgage bonds, of the company, each of the par value of $1,000.

The plaintiff had owned more than a majority of the first-mortgage bonds, but had, in December, 1879, sold 500 of these bonds to R. A. Lancaster & Co.

She had, at the same time and as a part of the same transaction, hypothecated 500 more of her bonds to F. O. French "and associates" for $175,000, and had given to French and Andrew V. Stout and Arthur B. Graves a power of attorney, embracing the 500 bonds hypothecated, and 500 other bonds.

The power constituted them her attorneys to represent her with

respect to one 1,000 first-mortgage bonds of the company, and was declared to be irrevocable for five years.

It was made, however, upon this condition: "That the said French and associates shall severally consent to and approve the plan of reorganization of said railway, on the basis named in the schedule hereto annexed and marked 'A.'"

This agreement left the plaintiff the ownership of 1,194 bonds, subject to the power of attorney, embracing 1,000 of them. By virtue of their purchase and power of attorney, French and his associates controlled one-half of the bonds upon which the foreclosure suit was pending, subject to the condition of the power of attorney.

The plaintiff's endeavors were, of course, directed to the protection, in so far as she could protect them of her seconds. But it seems that it was impossible to obtain the consent of the first-mortgage bondholders to plan, Schedule A. All interests in the road were suffering under the disorganization and the receivership. In February, 1880, Mrs. Matthews consented to a second proposed plan of reorganization. This plan is also marked "A," p. 68. (The bound volume, containing the pleadings and affidavits on the motion for a receiver, is referred to, as it will be hereafter, by its red-ink paging, which runs continuously through the book.) Plaintiff's consent is evidenced by Exhibit E, p. 71. This plan failed to be acceptable, and on the fifteenth of May, 1880, Mrs. Matthews signed a paper, (Exhibit B, p. 62,) whereby she agreed that Francis O. French might designate a new plan for the reorganization of the road.

In the mean while, and on the twelfth of May, an agreement was signed by the owners of $2,717,959 in value of the first-mortgage bonds, including, of course, the plaintiff. This is marked "Exhibit A," p. 57, and has been called in the argument "the bondholders' agreement." It provided for a purchase and reorganization of the road, and appointed Francis O. French, David R. Murchison, Arthur B. Graves, and James L. Wheedbee, with power to add a fifth, (and A. V. Stout was shortly after chosen by them as the fifth,) "a committee to represent and act for us, and for each of us, in all matters concerning the collection of the said bonds of the Carolina Central Railroad Company, and the foreclosure and sale of the property mortgaged to secure said bonds. * * * In case a vacancy shall at any time occur in the said committee by death, resignation, or otherwise, such vacancy may be filled by the other members of said committee, or a majority of them, by the selection and appointment of a substitute, being a bondholder."

The second article authorizes the committee to purchase the road at the foreclosure sale.

The third reads as follows:

"*Third.* In case the said committee shall make the said purchase, * * * and when the same shall have been fully completed, they shall prepare and submit to the subscribers a plan or plans for the reorganization of

the said Carolina Central Railway Company, or for the reorganization of a new company, and any plan or plans, when so submitted and approved, and signed by subscribers hereto holding two-thirds in amount of said bonds, shall be binding on all of the subscribers; and the said committee shall have full power and authority to carry such plan or plans into effect."

On the eighteenth of May thereafter, before the time designated in the above paragraph, French drafted a plan of reorganization, Exhibit C, p. 63. This plan was circulated among the bondholders, and more than two-thirds, in the value of their securities, of the holders of "firsts" signed the following statement annexed to it:

"We, the undersigned, holders of Carolina Central bonds in amounts set opposite our names, respectively, hereby authorize the construction committee to carry out the foregoing plan of reorganization."

It is this plan that the plaintiff demands shall be specifically executed. By it there were to be issued two million of new first-mortgage bonds, and one million five hundred thousand seconds, which were to be income bonds. The holders of the three million old trusts were to receive 60 per cent. of the face of their bonds in new firsts, and 40 per cent. in new seconds; the remaining firsts and seconds to be held in the treasury for construction, equipment, etc.

The holders of the old firsts were also to receive three millions of stock, "to be held by the reconstruction committee"—that is, the committee created by the bondholders' agreement—"for five years from November 1, 1879, in trust for the holders of new first-mortgage bonds; * * * but the same may be issued sooner, when full interest upon second mortgage shall have been paid, upon request in writing of two-thirds in amount of the first-mortgage bondholders." There were also to be one million five hundred thousand new third-mortgage bonds, to be given to the holders of the old seconds, after paying in such new thirds a note held by plaintiff. These were, like the seconds, to be income bonds, and not cumulative.

On the thirty-first of May, 1880, the reconstruction committee bid off the road at the foreclosure sale for $1,200,000. The sale and bid were duly confirmed, and on the twenty-ninth of June a deed was made by the commissioners.

After the purchase had been fully completed, the defendant French, on the ninth of July, 1880, reported a new plan of reorganization, and this plan was adopted at a bondholders' meeting held in New York on that day. A vote of $2,471,600 is reported as having been given for this plan, but of this amount 1,000 bonds were those of the plaintiff, and were voted upon by French. This plan is the one under which, with some variations, the company actually reorganized. Exhibit F, p. 71.

The amount of the various mortgage bonds, and their distribution, is the same as in plan, Exhibit C; the change made was in reducing the amount of the stock to one million five hundred thousand and annexing it to the new seconds. This plan gave the plaintiff the

same proportion of the whole stock that she was to have received under the former plan. The nominal amount was less; or, to speak accurately, her 1194-3000 of the stock of the road was represented by a smaller number of shares than before. There was also this change made in the definition of the term "income," viz., an addition of these words: "All questions of expenditures within discretion of the board of directors." The stock was to be held, as before, by the committee for five years. A stockholders' meeting held at Weldon, on the fourteenth of July, adopted this new plan, with an addition to the definition of "income." By it, the term "income" was to include the cost of purchasing from time to time such real and personal property as might be deemed requisite for the more convenient management of the road. It was also provided that, in case of a dispute as to what charges were proper to be deducted from gross earnings in ascertaining net income, the decision of the board of directors should be final. After this reorganization, the company, with the co-operation of plaintiff, procured the passage of an act through the legislature of North Carolina, ratified a few days after the next meeting of that body. Chapter 5, Laws 1881. This act declares the Carolina Central *Railroad* Company a lawfully organized company. The name of the old corporation was the Carolina Central *Railway* Company.

These preliminary facts are necessary to an understanding of the contentions of the parties to the action. They are undisputed ones, as we believe. Other facts, about which there is controversy, can be more conveniently stated hereafter. This case was fully argued before us at Wilmington, in November last, upon a motion for a receiver. It was again fully argued at this term, and, at the last argument, we reheard matters that we had already passed upon in our decision denying the motion for a receiver. As our opinions remain unchanged upon these points, in the case heretofore decided, we will not incumber this opinion by a discussion of those propositions discussed in the opinion already filed by the circuit judge, (15 FED. REP. 691,) but will simply refer to them as adjudicated. It has been decided by us, among other things, that Mrs. Matthews has acquiesced in the present organization of the road, and that she is not now entitled to ask for a reconstruction of the corporation. There is, however, one view of the case strongly pressed upon us, in the learned and able brief filed by Messrs. McRae & Strange, which was not entered into in our opinion, and although we, in effect, decided against it, when we held that the plaintiff was bound to the new organization by her husband's conduct, yet we wish now to state why we cannot assent to it. It is the proposition that the plaintiff stands in a different relation in this controversy than she would otherwise have done, by reason of her *status* as a married woman. We will here correct one misapprehension of counsel. It was assumed that we held, in our opinion, that Mr. Matthews was the real owner of the

securities of the Carolina Central Railway Company now in litigation. We are not in a position to determine the merits of the action now pending in New York between the assignee in bankruptcy of Edward Matthews and Mrs. Matthews and others, in which that question is raised; nor is its determination at all necessary to the decision of this action. We have expressed no opinion upon the subject. We stated that this action could be discussed as if Mr. Matthews was the plaintiff, because we held that he is so fully the plaintiff's attorney that whatever he does or says binds her. He alone has done all that has been done in plaintiff's behalf in the reorganization, and she has only appeared at rare occasions, and in his presence, to ratify any act of his requiring her signature. But the plaintiff's contention is that, even assuming Mr. Matthews to have been the plenary agent of the plaintiff, yet, that (1) a married woman is not the subject of the law of either laches or estoppel; * * * (2) that the subject of this controversy is properly situated in North Carolina, and the reorganization of the road is a North Carolina contract, and that, by the law of North Carolina, a married woman can create no charge upon her property without the *written* consent of her husband.

We think that the argument is stronger against acquiescence than against estoppel. It is undoubted law that a married woman may be bound by an estoppel, even where she has no power to bind herself by a contract. "The cases all concur," says RODMAN, J., in *Towles* v. *Fisher*, 77 N. C. 437, "that a married woman, who is under a disability to contract, cannot be estopped by anything in the nature of a contract. To estop a married woman from alleging a claim to land, there must be some positive act of fraud, or something done upon which a person dealing with her, in a matter affecting her rights, might reasonably rely, and upon which he did rely and was injured." But we have put our decision on the ground of acquiescence.

Acquiescence—that is, assent—is tantamount to an agreement. It is an implied contract, and it requires for its validity the power to contract.

"A *feme covert* is *sui juris* as regards property settled to her separate use in possession, where there is no restraint against anticipation. Whether the separate estate of a married woman, who is restrained anticipation, can be affected by her acquiescence, appears at present unsettled." Lewin, Trusts, 777.

By the North Carolina decisions, however, (*Frazier* v. *Brownlow*, 3 Ired. Eq. 237; *Knox* v. *Jordan*, 5 Jones, Eq. 175, 177,) the English doctrine, that a married woman was *sui juris* as to her separate property, was, as it has been in most of the states, limited, and the law here was that, to bind her separate estate, she must expressly contract with reference to her separate property, and her trustees must assent. Of course, she could not by any contract bind herself personally.

The constitution of North Carolina of 1868 gave married women a legal estate in their separate property. It left them, as before, incapable of binding themselves personally by their contracts, and a married woman is still compelled, in order to affect herself, to in some way charge her separate property.

The words of the present constitution are that "the real and personal property" of the wife "shall remain her separate estate, * * * and may be devised and bequeathed, and, with the written assent of her husband, *conveyed*, by her as if she were unmarried." The act of 1871–2 (Battle's Revisal, *c.* 69, § 17) reads: "No woman during her coverture shall be capable of making any contract to affect her real or personal estate without the written consent of her husband."

Since the new constitution, it has been held that a married woman's separate property is not bound by her bond as surety for her husband, even though the husband's assent be expressed in writing, when there is no specific attempt to charge such property on the bond. *Pippen* v. *Wesson*, 74 N. C. 437.

It has also been held that a married woman could not bind her separate property in any form without the written consent of her husband. *Harris* v. *Jenkins*, 72 N. C. 183. In the case last cited we assume that Mrs. Harris had specifically charged her separate property, as otherwise the case would fall directly under the principle in *Pippen* v. *Wesson*, and the bond would have been inoperative, even with the husband's written consent.

Harris v. *Jenkins* is direct authority for the proposition that in North Carolina a married woman's disability to dispose of her property without her husband's written consent extends to indirectly disposing of it by binding it by her contracts. But there are two cases in which she may seek to bind it,—one when the charge is not for the benefit of her separate estate. It is to such a case only that the authority of *Harris* v. *Jenkins* applies. There is no decision on the other case of a contract made by her for the benefit of her separate estate without her husband's written consent.

We should be inclined to say that any legislative restriction upon her right to contract in managing her property would be a restriction of the right of separate property given her by the constitution. The supreme court of North Carolina, in *Kirkman* v. *Bank of Greensboro*, 77 N. C. 394, has decided that the restriction of article 10, § 6, of the constitution of North Carolina, does not operate to prevent married women from receiving and reducing to possession their property without the written consent of the husband; and READE, J., in the case expressly declines to consider the power of the legislature to restrict the wife's rights in property under the constitution, because, as he says, the constitution and the statute mean the same thing.

We are of the opinion that a married woman may manage and control her property under the laws of North Carolina without making her husband her bailiff, and may, in doing so, incur and render

her separate property liable to such charges as are proper to its management.

In equity a married woman could only sue by a next friend, and the reason was that there might be some one responsible for costs. Now, in North Carolina she may sue by herself with respect to her separate property, and it would seem that she would by so doing charge her separate property with the costs. However this may be, the case of *Manning* v. *Manning*, 79 N. C. 293, is direct authority for the right of a wife to sue alone. In that case she successfully maintained ejectment against her husband for her land. If she has the right to sue, she has the right to control the suit. Our conclusion is that had the plaintiff been a resident and domiciled in North Carolina she would have had, by virtue of her ownership, the right to manage and control her Carolina Central bonds. She would have had the right to sue upon them. The right to sue would have included the right to control the suit. She could in good faith have compromised it. She could have made any terms to arrange its results, and she could have not only consented to one plan of reorganization, but to any plan that she thought advantageous as a substitute for it; and this, although it might change the form of her securities, or lessen their nominal amount and value. But, while the *locus* of the property is in North Carolina, the domicile of the plaintiff is in New York.

The North Carolina law must govern as to the construction of the contract, for it is the place of solution,—the place with a view to whose law it was made. It must govern as to the form of the remedy, for the law of the forum controls that. But as to the ability of the party to contract, that depends upon the law of the domicile, when the question is one of personal ability or disability; and as to the form of entering into the contract, the law of the place where the contract is made must control; that is, in the last two points the law of New York is to be looked to. *Kent* v. *Dawson Bank*, 13 Blatchf. C. C. 237; *Pritchard* v. *Norton*, 106 U. S. 124; [S. C. 1 Sup. Ct. Rep. 102.] In New York there is no statute requiring the written consent of the husband to contracts to charge the wife's separate property, and a married woman can bind her separate property, either by making a contract for its benefit, or by expressly charging it in the contract. *Yale* v. *Dederer*, 22 N. Y. 450.

We pass to another branch of the case. The first prayer of the complaint asks for the removal of the trustees, and that the bondholders be allowed to appoint new trustees. By the bondholders, we suppose the plaintiff to mean the old firsts. These bondholders are not, as such,—many of them are not in any capacity,—before the court; and we have no power in their absence to do what the prayer demands. But assuming that, under the general prayer for relief, we might grant whatever relief the case warrants, we shall consider whether the plaintiff is entitled to the appointment by the court of new trustees.

Neither the laborious research of plaintiff's counsel, nor what labor we have been able to bestow on the case ourselves, has brought to light any case similar to that of the trust that we are called upon to enforce,—a trust for five years, to be exercised by a portion of the *cestuis que trustent*, with power to appoint successors from the *cestuis que trustent* upon resignation.

Three years and a half of the term has expired. Nearly the whole of it will have expired before this suit can be possibly determined in the supreme court; and the result of removing the present trustees would necessarily be, if it granted the relief desired by the plaintiff, to take the railroad in controversy for a few months at most out of its present control, which is that of a majority of its stockholders, and then at the end of those months return it to its present management; for, if the court stopped short of such return, it would do injustice, and would leave the recovery of the road by those who must ultimately be its possessors, to the end of a long and expensive suit.

Counsel for plaintiff, in their argument at this term, called our attention to the fact that on this point in the case its decision would practicably be final. The suggestion could not but turn our minds to a consideration of evils that would ensue were we, without any possibility of remedy by appeal, to change for so short a time the entire management of a long line of railroad, its officers, and other employes, its policy and connection, and unsettle, with no possible permanent good results, an important factor in the business interests of the state. Were this an action for the possession of land for a short unexpired term, we would doubtless be bound, upon the finding of a jury, to follow that finding as of strict right. But the parties to this action are in a court of equity,—a court bound to look carefully to the whole result of its discretionary action.

The relief given against a breach of trust is twofold: it is retrospective, in order to remedy the mischief already done; and, secondly, prospective, with a view to the prevention of further injury. Hill, Trustees, [*522.] Under the first head comes the following of property illegally disposed of, and capable of being followed *in specie*, account with trustees, charging them with interest, etc.; and in this the court enforces strict equitable rights, exercising discretion only in the question of interest.

Under the second head comes the removal of trustees and the appointment of new ones; and this depends upon the exercise of legal discretion. It is not every act amounting to a breach of trust which will induce the court to remove a trustee. The acts must be such as to endanger the trust property, or to show a want of honesty or capacity; and when the failure in duty has proceeded from misunderstanding, the court has refused to discharge them. Hill, Trustees, (*524.)

An attempt has been made to show to the court that the present

management is such as to endanger the trust fund. Perhaps what we have already said about the shortness of time to which the remedy sought would apply, would be a sufficient answer to this claim of the plaintiff; but, as a matter of fact, we have not been convinced by any legal proof that the present management is engaged in wrecking the road. It would be very difficult to come to a conclusion of this kind upon the results of a management that has had so short a time to develop itself in, as has the present one of the Carolina Central. Certainly, we ought to require something more definite than the comparison of one year's receipts with those of a preceding one. Too many elements enter into the annual receipts of a railroad to make such a test for any short period a safe one, and the present case is complicated by the fact that the road has just come out of the hands of a receiver, with road-bed, track, and rolling stock all to be renewed.

It is said by one of plaintiff's witnesses that the Seaboard system is a competing, and necessarily hostile, line as to that position of the Carolina Central between Hamlet and Wilmington. This may be so, and yet it may be a proper connecting and feeding line for the largest part of its mileage. However this may be, and whatsoever might be our opinion had we the power to legislate upon the question of allowing one railroad system to run another, which might be properly a competing line, we are not at liberty to legislate, and we cannot say that that shall not be done which the legislature of the state allows.

The act of August 15, 1868, § 4, allows any railroad company within the state to purchase stock in any other railroad company in the state. We cannot assent to the claim that a company allowed to purchase stock cannot vote upon that stock.

An ingenious argument has been made to convince us that the act of August 15, 1868, has been repealed. The power to purchase referred to is given in an act making an appropriation to a railroad company. It was passed at what is well known in North Carolina as the summer session of 1868. That session adjourned without day in the month of August, 1868, and the same legislature met in November the same year, and held what is also well known as the winter session of 1868–9. In the following year—1869 and 1870—the legislature repealed all the acts passed at the *last session* of the legislature making appropriations to railroad companies. The argument of counsel is that the summer session of 1868 and the winter one of 1868–9 were parts of one session. But the question is one of intention. The legislature did not mean by its act (Laws 1869–70, *c.* 71) to repeal any acts of what was always styled the summer session. The laws of the two sittings were published in separate volumes, and are always referred as the acts of the different sessions.

We hold the act of August 15, 1868, to be in force, in so far as it has not been declared unconstitutional by the supreme court of North Carolina, and that section 5 of that act is still the law of the land.

To hold that the control of one railroad company by a majority of its stock owned by another railroad company is ground for taking away that control, would be not to enforce but to nullify the law. Beyond the argument that it is to the interest of the Seaboard & Roanoke system to wreck the Carolina Central, and therefore it is wrecking it, and therefore the court ought to appoint a receiver or new trustees, we see very little in this branch of plaintiff's case. We can see that the management of the road takes less cotton to Wilmington, and that it is very probable that the road is run less in the interest of Wilmington than under the Murchison management; but we are not satisfied, by any evidence before us, that there is any attempt to run the road against its own interest. No system of charges for freight that would indicate this—no giving an unfair percentage to the other lines on the freight carried over both—is shown. The most that is claimed is that the great bulk of the cotton carried from the west is shipped north at Hamlet over the Raleigh & Augusta Air-line instead of being shipped at Wilmington. We cannot say that this is necessarily against the interest of the Carolina Central Railroad. We cannot say that the Carolina Central Railroad earns less by this arrangement than it would by the other, because we cannot tell whether or not the cotton could be profitably sent to Wilmington rather than to Norfolk. We do not know how the shipments would naturally be made by shippers. We cannot measure the inducements offered by rival lines.

It is a question of railroad policy that the evidence does not enable us to determine, and that in its nature must be almost beyond the reach of courts. The evidence that would induce a court to interfere in the control of a railroad corporation on the ground that it is not run in its own interest, must be clearer than that offered in this case.

We pass to the alleged breach of trust on the part of the former trustees involved in their resignations and appointment of successors. The original trustees have all, with the exception of Murchison, who is dead, resigned. Their successors have been appointed, in strict conformity with the terms of the trust, from among the new second-mortgage bondholders. The original trustees were also large holders of second-mortgage bonds, with the stock annexed. They pooled their bonds and sold them to Murchison & Co., and as a part of the sale they agreed to resign and allow Murchison to name their successors. The sale was a sale of a majority of the stock in the road, *and* of the control of the road, and the sale of the control immediately enhanced the price received for the bonds. They might have sold stock and control, and received a consideration for the control, had there been no trust.

Concede, for the sake of the argument, that the arrangement was a breach of trust, they being trustees and not mere bond and stockholders. The same process was repeated when Murchison sold out.

The Murchison trustees resigned, and the Seaboard & Roanoke trustees came in. Now, the question of what the court ought to do is not to be necessarily answered by conceding that there has been a violation of duty on the part of the trustees. We recur to the law extracted from Hill on Trustees: "The acts must be such as to endanger the trust property, or to show a want of honesty or capacity; and when the failure in duty has proceeded from misunderstanding, the court has refused to discharge them." Two sets of trustees have resigned. We have been shown nothing to indicate a want of capacity or honesty in the present trustees. As to the original trustees, if there has been a failure of duty, and it has arisen out of misapprehension or a misunderstanding of the trust, it would be no ground for their removal, and therefore no ground for the removal of their appointees.

Was the trust so clearly written as to make a transfer of the trust to the purchasers of a majority of the stock a plain breach? A trust so unusual as to be, as far as we know, without a precedent, expressed in terms so meager as simply to say that a certain committee should hold certain stock for five years, without one word about whose interests they are to protect, or how, and with such unrestrained powers of substitution, may well have been the subject of misapprehension on the part of the trustees.

It is evident that Edward Matthews did not originally suppose that the control of the road could not be turned over to a purchaser of a majority of its stock. In his letter of August 18, 1880, (p. 339,) he says to John M. Robinson, the president of the Seaboard & Roanoke Railroad Company:

"I beg to confirm in writing what I said to you in Paris, that I would reduce my offer for the sale of 7,600 shares of stock from $350,000 to $300,000: but, in regard to the other two offers, I wish you to consider them as my *ultimatum*, and under no circumstances can I make one dollar's reduction, as in either offer you get in stock what is intrinsically worth more than you pay, and the *control* of the *road* will really cost you nothing. * * * Our road is the natural outlet of the air-line company's line, and I am confident that sooner or later they will realize it, and be glad to make some running arrangement, if not to purchase, unless I sell the control to you."

In the letter of September 16, 1880, (p. 341,) to Mr. Robinson, Mr. Matthews says:

"At any rate, I would sell you a majority of the stock, and would *give* you a *control* of the road, and those who refused to sell before would be glad to sell after they knew that it had passed under your control, as they would not wish to own a minority when another road or roads control."

In his letter to Robinson of November 26, 1880, (p. 348,) he says: "I made you, when here, a definite offer to sell you the control, and the $1,500,000 new third-mortgage bonds for $600,000;" and on December 4th, (p. 350,) he restates the same offer, and says: "If you do not buy the third mortgage, I should want assur-

ance that the road would be run in the interest of the Carolina Central Railroad. * * * If you buy the third mortgage I shall require no condition, because you will be interested."

The defendant trustees say that it was only after they had discovered that Matthews was trying to sell a control to Robinson that they pooled their stock with that of others, so as to effectively prevent Matthews from doing so, and it was after that discovery that they sold to Murchison & Co. How Matthews could have delivered control for the ensuing few years, even had he secured a majority of the seconds, it is hard to say. The majority did pass the control by a change in the trustees. We do not think that, even if they did what the trust did not allow, they did it with such dishonesty as to brand them as incapable of holding positions of trust; and *a fortiori* we do not think such incapacity attached to the third set of trustees, who, at the most, merely accepted the positions left vacant by their resignations. We hold that the case, at the most, comes under the head of misunderstanding, and this we are the more inclined to do, as we have ourselves experienced great difficulty in understanding the trust. We do not know what may have been the purposes of the different parties to the creation of the trust. The plaintiff's agent may have expected to protect his third-mortgage bonds by it; the other bondholders may have devised it to protect themselves against the plaintiff, and prevent her from obtaining an immediate control of the road. But if we look only at the terms of the trust itself, meagerly as it is expressed, there is enough in it to show that it was so *written* as to make a trust for the benefit of the holders of the new second-mortgage bonds, and of them only. This clause, the only one indicating the purpose of the trust, shows it: "But the same may be distributed sooner, when full interest upon second mortgage shall have been paid," upon request, and so forth. The purpose indicated is that there should be no separation of the stock from the second-mortgage bonds for five years, so that the direction of the road should be determined by the holders of those bonds, with a view to the road being so controlled as to earn income for this class of bonds. The fact that the trust might be determined by two-thirds of the second-mortgage bondholders when interest should be earned upon that mortgage, no reference being made to earning income for the third, seems very strong evidence of the correctness of this view of the trust,—the one presented by Mr. E. R. Robinson in his brief.

The plaintiff's last contention is a claim that she is the equitable owner of the 615 bonds sold by the pool to Murchison & Co., and by D. R. Murchison to the Seaboard & Roanoke Railroad Company. Her prayer is that the latter corporation or Murchison be declared her trustee for these bonds, with the annexed stock. To this claim the defendant pleads an estoppel of record.

On the twenty-ninth of October, 1881, the present plaintiff brought an action in the supreme court of the city and county of New York

against the firm of Murchison & Co. for the bonds in question. By her complaint in that action she demanded judgment against defendants for the possession of said bonds, or damages. A final judgment, stated on its face to be upon the merits, dismissing the action, was rendered on the twenty-sixth of January, 1882.

It is contended by the plaintiff that the New York action was an action at law of the nature of an action of *detinue*, and that it is no bar to the relief demanded in this bill in equity; that the former action asserted a legal and this an equitable title to the bonds; that Mrs. Matthews might not be the legal owner of the bonds, and so might not be entitled to maintain an action at law for them, and yet might be entitled to sue for them in chancery; and that, therefore, a judgment for plaintiff in this court upon the present cause of action might well stand with the judgment against her in the New York court.

As one of the members of this court entertains this view, and as we agree that the plaintiff has no right upon its merits, either at law or equity, to the bonds in question, we prefer to put our decision on the ground on which we stand together. The burden of proving that Murchison & Co. purchased the 615 bonds for the plaintiff rests upon her. Such a purchase is evidenced by not a scrap of writing; and Mr. D. R. Murchison's claim, that "if there had been any such arrangement we should surely have had it in writing," seems reasonable.

It is difficult to conceive that Murchison & Co. agreed to bind themselves to undertake a liability of upwards of half a million of dollars without any writing which would bind the plaintiff, and without any security for the money to be disbursed. It would take convincing evidence to satisfy us of this, and there is no such evidence. None exists in the correspondence. There can be no doubt but that Murchison & Co. had undertaken to purchase for plaintiff a number of bonds in aid of her effort to secure a controlling interest in the road.

On the second of April, 1881, Matthews wrote to Murchison: "Our only way is to buy 85 second-mortgage bonds. I am willing to buy one-half of them, or all." On the thirtieth of April, Murchison wrote: "If you will keep quiet, others can no doubt buy the bonds; think we can." On the twenty-sixth of June he wrote to Matthews that all the holders of seconds had combined, and that they would accept 110 for 600 seconds. As late as July 13th he wrote: "If the pool breaks, we will buy the fifty bonds at once;" meaning, as we suppose, for the plaintiff. When it became evident that it was impossible to buy any small number of bonds, that undertaking necessarily fell through. This was evident in July, 1881. We know of nothing to have prevented Murchison & Co. from buying the pooled bonds for themselves. It is evident that if they had not done so, Robinson would. Certainly, Murchison & Co. would not have been authorized, under a

commission, to buy enough bonds to make, with what plaintiff then had, a majority—to buy 615 bonds. This would have required, instead of say fifty, over five hundred thousand dollars. If they were ever employed to buy these, it was at the meeting of the second of July, 1881. The previous correspondence is irrelevant to what then happened. The whole evidence upon that subject is in brief compass. Edward Matthews swears that on that day W. F. Sorey, of the firm of Murchison & Co., asked him whether, "if they could not buy part of the bonds without buying all," affiant would take all, and affiant replied that he would. Price, it is stated, was mentioned, but it is not stated that then, or at any other time, anything was said about raising the large sum required for the purchase. Watson Matthews (p. 149) confirms this statement, and Mr. Roberts, (p. 160.)

We should find it difficult from this to find that concurrence of mind that makes a binding contract. But against it stands the denial of Sorey, the testimony of Murchison that he had just told Matthews that he should act solely and entirely for his firm in buying the bonds, the improbability of so large a transaction being so loosely undertaken, and the letters of Edward Matthews, which seem inconsistent with the existence of such an undertaking. On the twenty-ninth of July, 1881, Murchison & Co. wrote to Matthews that they had purchased the 616 bonds on their own account. It is natural to look to Matthews' reply to see whether he immediately claimed the bonds as his. He wrote on the 30th:

"I supposed that I was to have part of the purchase. I think you ought, under the circumstances, to treat me frankly, and inform me what you paid, and who is associated with you in the purchase, if any one, and inform me what your plans are."

On the next day Watson Matthews wrote to his brother, Edward:

"I do believe that you will be called on sooner or later to buy these bonds, at a considerably higher price than Murchison & Co. paid for them, or they will be sold to other parties; but you can do nothing."

On the thirtieth of July, Matthews writes to Murchison & Co. a letter, introduced in Sorey's affidavit, which is also clearly inconsistent with any claim to the bonds. We think the preponderance of testimony is very strong against the claim that the plaintiff is the owner of the 615 bonds, in either law or equity.

The pleadings and evidence in this suit are voluminous; the printed arguments submitted to us have been even more extended than the record.

This opinion is longer than we would wish it, but we have endeavored to cover all the material points in the case. If any have been omitted, it has not been through any failure on our part to examine the whole of the immense mass of papers presented to the court.

BOND, J., concurs.

MITCHELL and another *v.* ROBERTS, as Assignee, etc.

(*Circuit Court, E. D. Arkansas.* April Term, 1883.)

1. MORTGAGE OF NOTES—PLEDGE.
   A mortgage of personal property is a sale of the property by way of securing a debt, with a condition that if the mortgagor pays the debt the sale shall be void; a pledge contains no words of sale, but an authority, if the debt is not paid, to sell the pledge for that purpose. In the former case the title passes to the mortgagee; in the latter, the title remains in the pledgeor, although possession is given to the pledgee.
2. SAME—TENDER AT COMMON LAW.
   At common law a tender of the debt on the law-day satisfies the condition of the mortgage, and discharges the property from the incumbrance as effectually as payment, but the debt remains, and may be recovered by action at law.
3. SAME—TENDER AFTER BREACH OF CONDITION.
   The general rule is that at common law a tender of the debt after breach of the condition does not operate as a discharge of the mortgage. But this rule is not uniform, and in New York, Michigan, and New Hampshire a tender of the debt after maturity has the same effect as a tender on the law-day, and releases the lien of the mortgage.
4. SAME—TENDER AFTER MATURITY—EFFECT ON LIEN.
   A tender of the debt after its maturity extinguishes the lien on personal property pledged to secure its payment, and the pledgeor may recover the pledge or its value in any proper form of action, without keeping the tender good or bringing the money into court; and the pledgee may have his action for the debt.
5. DEBT PAYABLE IN MONEY—EFFECT OF TENDER.
   A debt payable in money is never discharged by a tender. It is only where a debt is payable in specific articles of personal property that a tender operates as a satisfaction of the demand.
6. PLEDGE FOR DEBT OF ANOTHER.
   Where the owner of property pledges it for the debt of another, he is to be treated as standing in the relation of a surety.
7. SAME—TENDER BY PRINCIPAL DEBTOR—DISCHARGE OF SURETY.
   If the principal debtor, after the maturity of the debt, tenders the amount due to the creditor, and he refuses to receive it, the surety is discharged.
8. SAME—WHEN CONSIDERED A SURETY.
   When property of any kind is mortgaged or pledged by the owner to secure the debt of another, such property occupies the position of surety, and whatever will discharge a surety will discharge such property.

The plaintiff B. E. Mitchell was the payee and owner of two negotiable promissory notes executed by one A. H. Blythe, each for the sum of $1,000, which he indorsed and delivered to the Commercial Bank of Texarkana for collection. Subsequently his brother, S. T. Mitchell, borrowed $500 on his own account from the bank, for which he executed his note, and to secure its payment assumed, as agent for B. E. Mitchell, to pledge the two Blythe notes belonging to the latter, and then held by the bank for collection. S. T. Mitchell tendered payment of his note after its maturity, and afterwards, as agent for B. E. Mitchell, demanded the surrender of the pledged notes. The defendant declined to accept the tender or deliver the notes, upon the ground that B. E. Mitchell was liable to the bank upon his indorsement of the note of one H. M. Beidler for $350; and afterwards advertised the notes for sale to pay the note of S. T. Mitchell and the

Beidler note. Thereupon the bill in this case was filed, setting up the tender, and praying for an injunction to restrain the sale of the pledged notes, and for a decree requiring the defendant to surrender the same to the plaintiff B. E. Mitchell. The tender was not brought into court, and the bill does not offer to pay the S. T. Mitchell note. The answer admits the tender of the amount due on the S. T. Mitchell note, and alleges it was not accepted and the pledge surrendered because B. E. Mitchell was indebted to the bank in the further sum of $350 on his indorsement of the Beidler note. The tender was not refused because it was coupled with any condition, but because it did not include the amount of the Beidler note.

Joyner & Byrne, for plaintiffs.

O. D. Scott and *J. M. Moore*, for defendant.

CALDWELL, J. The authority of S. T. Mitchell to pledge the Blythe notes, belonging to his brother, as security for his own note of $500, is not open to contestation. The original bill expressly admits his authority to do so; and the amended bill admits it by implication and ratifies the act, and pleads the tender of the amount due on the S. T. Mitchell note in extinguishment of the lien of the pledge.

It is equally clear the Blythe notes were not pledged as security for the Beidler note discounted to the bank by B. E. Mitchell. The answer alleges that Mitchell's liability as indorser of this note was fixed by due presentment for payment and notice of non-payment. This is denied by the replication, and there is no proof to support the answer. It is clear, therefore, upon the case as it stands, that the assignee had no right to retain the Blythe notes as a pledge for the payment of the Beidler note, because it is not shown that the bank or its assignee had any claim against B. E. Mitchell on account of his indorsement of that note or otherwise. The following, then, are the facts upon which the case must turn: The debt due the bank was the debt of S. T. Mitchell. The notes pledged to secure its payment were the property of B. E. Mitchell. The debtor, S. T. Mitchell, tendered to the defendant, who is assignee of the bank, the full amount of the debt after its maturity, and as the authorized agent of B. E. Mitchell demanded the return of the notes pledged as security.

Upon these facts is the plaintiff B. E. Mitchell entitled to recover the notes belonging to him, and which were pledged to secure the payment of the debt of S. T. Mitchell, without paying the latter's debt? This question is of easy solution, both upon principle and authority. The transaction was not a mortgage, but a pledge, and must be tested by the rules applicable to that class of bailments. This distinction is important. Mr. Parsons says: "The difference between a pledge and a mortgage has not until lately been strongly marked. In recent times, however, and in this country, this distinction is assuming a new importance. In all our commercial cities the pledging of personal property, especially of stocks, has been very common, and recent cases have established, or at least affirmed, rights

and liabilities peculiar to such contracts, and quite different from those which attend a mortgage." 2 Pars. Cont. 112; Jones, Chat. Mortg. § 7.

In a late work the difference between a mortgage and a pledge of stocks is concisely stated. "A mortgage," says the author, "is a sale of the stock by way of securing a debt, with a condition that if the mortgagor pays the debt the sale shall be void; a pledge contains no words of sale, but an authority, if the debt is not paid, to sell the pledge for that purpose. In the former case the title passes to the mortgagee; in the latter, the title remains in the pledgeor, although possession is given to the pledgee." Dos Passos, Stock Brokers, 658.

At common law a mortgage was a conveyance to the mortgagee, to be void upon condition the mortgagor paid the debt at the specified day, and to become absolute on failure so to pay. The mortgagee was invested with the legal title. It was not necessary to the validity of the mortgage that the possession should pass to the mortgagee, though the right of possession was in him. The mortgagee acquired the title of the property, and the mortgagor parted with the title as in the case of sale, reserving only the right to defeat the transfer and reacquire the property by paying the debt on the day named. If the mortgagor paid the debt or made a legal tender of it at the specified day, the condition of the mortgage was satisfied, and the property forever discharged from the incumbrance; but upon default of payment according to the condition, the absolute title, at law, vested in the mortgagee.

A pledge is a bailment of personal property as a security for some debt or engagement. It is completed by a delivery of the property; it does not transfer the title; it only gives the pledgee a lien upon the property for his debt, and the right to retain the possession until his debt is paid. But the non-payment of the debt, even after it is due, does not work a forfeiture of the pledge; the title remains in the pledgeor until it is divested either by a foreclosure in equity or by a sale on due notice. Story, Bailm. §§ 286, 287, 308–310; Edw. Bailm. §§ 245, 279.

Where the thing pledged is a chose in action, the term "collateral security" is now most commonly applied to the transaction, and is the term used by the parties in this case; but this change of name has worked no change in the law.

At common law a tender of the mortgage debt on the law-day satisfies the condition of the mortgage, and discharges the property from the incumbrance as effectually as payment; but the debt remains, and its payment may be enforced by an action at law against the mortgagor. And in pleading a tender on the law-day in discharge of the condition of a mortgage, the mortgagor is not required to allege continued readiness to pay, nor need he bring the money into court. The tender, when made, discharged the incumbrance, not conditionally, but absolutely and forever.

"If A. borroweth a hundred pound of B., and after mortgageth land to B. upon condition for payment thereof, if A. tender the money to B. and he refuseth it, A. may enter into the land, and the land is freed forever of the condition, but yet the debt remaineth, and may be recovered by action of debt." Harg. Co. Lit. [209*b*,] § 338. And upon this point the current of authorities is unbroken from Lord COKE's time to the present. Jones, Mortg. §§ 886, 891, and cases cited; *Schearff* v. *Dodge*, 33 Ark. 346.

But the general rule is that at common law a tender of the mortgage debt after breach of the condition does not operate as a discharge of the mortgage. The ground of this rule is that upon failure to pay at the specified day, according to condition of the mortgage, the mortgagee's title at law becomes absolute, and he cannot be required to accept the tender and restore the property. It is true that after breach of the condition the mortgagor has in equity a right to redeem, but the only effect of a tender after that time is to stop interest and protect from cost so long as it is kept good. Jones, Mortg. §§ 9, 892; Jones, Chat. Mortg. § 632; Whart. Cont. § 972; *Rowell* v. *Mitchell*, 68 Me. 21; *Erskine* v. *Townsend*, 2 Mass. 493; *Currier* v. *Gale*, 9 Allen, 522; *Holman* v. *Bailey*, 3 Metc. 55; *Shields* v. *Lozear*, 34 N. J. Law, 496; *Storey* v. *Krewson*, 55 Ind. 397; *Perre* v. *Castro*, 14 Cal. 519; *Himmelmann* v. *Fitzpatrick*, 50 Cal. 650.

But upon this point the authorities are not quite uniform. In New York, Michigan, and New Hampshire a tender of payment, after maturity of a debt, has the same effect as a tender on the law-day, and releases the lien of a mortgage given to secure it. Whart. Cont. § 972; Jones, Mortg. § 893; *Kortwright* v. *Cady*, 21 N. Y. 343; *Edwards* v. *Ins. Co.* 21 Wend. 467; *Moynahan* v. *Moore*, 9 Mich. 9; *Potts* v. *Plaisted*, 30 Mich. 149; *Swett* v. *Horn*, 1 N. H. 332; *Robinson* v. *Leavitt*, 7 N. H. 73.

The ground of this ruling, in the states last mentioned, is that a mortgage is no longer what it was originally at common law—a conveyance to the mortgagee, defeasible only upon payment at the specified day; but that it is merely a security for the debt to the mortgagee, creating a lien on the property analogous to that created by a pledge of goods as a security for a debt, and that a tender after breach of the condition has the same effect as a tender made in case of a pledge of personal property. In Jones, Mortg., it is said the New York rule in regard to the effect of a tender after breach of the condition does not apply in that state, nor in other states, except Michigan and Oregon, to chattel mortgages; which, it is held, do not create a lien merely, but vest the legal title in the mortgagee. Jones, Chat. Mortg. §§ 634, 637.

But whether a mortgage is to be regarded as retaining all its common-law incidents, or as a mere security for a debt, and whether a tender of the debt after its maturity does or does not discharge the lien of the mortgage, need not be decided.

In the case at bar the question is whether a tender of the debt, after its maturity, extinguishes the lien on personal property pledged to secure its payment. Upon this question there is no conflict in the authorities. The rule is settled that a tender of the debt, for which the property is pledged as security, extinguishes the lien, and the pledgeor may recover the pledge, or its value, in any proper form of action, without keeping the tender good or bringing the money into court; because, like a tender of the mortgage debt on the law-day, the tender having once operated to discharge the lien it is gone forever. This rule accords with justice and fair dealing. It would be an exceeding great hardship on the debtor if the creditor had the right to refuse to accept payment of the debt after it was due, and at the same time retain the debtor's property or a lien upon it for the debt. Advantageous sales would be prevented, collections delayed, and credit lost by the inability of the debtor to free his property. In many cases debtors would be ruined before they could obtain relief by the slow process of a bill in equity to redeem. And on a bill to redeem a debtor would have to pay interest and costs down to the decree, unless he had kept the tender good. Thus the debtor, in order to protect himself against interest and costs, would be deprived of both his property and the use of his money at the pleasure of his creditor, or until the end of a chancery suit could be reached. On the other hand, a creditor who refuses to receive payment of his debt when lawfully tendered, cannot complain at the loss of his security for that debt, "because it shall be accounted his own folly that he refused the money when a lawful tender of it was made unto him."

A debt payable in money is never discharged by a tender. It may operate to discharge liens and sureties, and deprive the creditor of all collateral securities, but the debt remains. It is only where a debt is payable in specific articles of personal property that a tender operates as a satisfaction of the demand. In such cases, a tender properly made discharges the debt, and the articles tendered become the property of the creditor, and afterwards are kept at his risk and expense. *Barney* v. *Bliss*, 1 D. Chip. (Vt.) 399; S. C. 12 Amer. Dec. 696; *Sheldon* v. *Skinner*, 4 Wend. 525; S. C. 21 Amer. Dec. 161; *Lamb* v. *Lathrop*, 13 Wend. 95; S. C. 27 Amer. Dec. 174, and note.

The pledgee may, therefore, notwithstanding the tender, have his action at law against the debtor for his debt; for while the tender extinguishes the lien and renders the further possession of the pledgee tortious, it does not relieve the debtor from personal liability to pay the debt. Bacon's Abr. tit. "Bailment, B;" Edw. Bailm. § 230; Story, Bailm. § 341; Jones, Mortg. § 893; Jones, Chat. Mortg. § 7; *Kortwright* v. *Cady*, 21 N. Y. 348; *Moynahan* v. *Moore*, 9 Mich. 9; *Potts* v. *Plaisted*, 30 Mich. 149.

The same rule applies to mechanics' liens for work and labor bestowed on personal property. Upon a tender of the amount due, the lien is discharged and the owner may recover his property, or dam-

ages for its detention, and the bailee who bestowed the labor must resort to his action to recover his money. Phil. Mech. Liens, § 511; *Ball* v. *Stanley*, 5 Yerg. 199; *Moynahan* v. *Moore*, 9 Mich. 9.

There are other grounds upon which the plaintiff B. E. Mitchell is entitled to the relief which he seeks. Where the owner of property pledges it for the debt of another, he is to be treated as standing in the relation of a surety. Edwards, Bailm. § 302; *King* v. *Baldwin*, 2 Johns. Ch. 554; S. C. 17 Johns. 384; *Strong* v. *Wooster*, 6 Vt. 536; *Ingalls* v. *Morgan*, 10 N. Y. 178; *Eddy* v. *Traver*, 6 Paige, 521. And it is well settled that if the principal debtor, after the maturity of his debt, tenders the amount due to the creditor and he refuses to receive it, the surety is discharged. Brandt, Suretyship, § 295; *Sears* v. *Van Dusen*, 25 Mich. 351; *Joslyn* v. *Eastman*, 46 Vt. 258; *Curiac* v. *Packard*, 29 Cal. 194. And when property of any kind is mortgaged or pledged by the owner to secure the debt of another, such property occupies the position of surety, and whatever will discharge a surety will discharge such property. Brandt, Suretyship, §§ 21, 22; *Christner* v. *Brown*, 16 Iowa, 130; *Rowan Sharps' Rifle, etc., Co.* 33 Conn. 1; *Union Bank* v. *Govan*, 10 Smedes & M. 333; *White* v. *Ault*, 19 Ga. 551.

There is nothing in the decisions of the supreme court of the state in conflict with the conclusions reached. In *Schearff* v. *Dodge*, 33 Ark. 346, the court affirm the doctrine that a tender of the debt on the law-day discharges the mortgage, but hold that a tender of the money due on a contract for the purchase of land, where the vendor retains the legal title, does not discharge the vendor's lien, and that he cannot be divested of the legal title except upon actual payment of the purchase money. In *Hamlett* v. *Tallman*, 30 Ark. 505, defendant was entitled to a landlord's lien, under the statute, on the crops, consisting of cotton, for the rent, and was in possession of the cotton, but had not commenced proceedings under the statute to enforce his lien. The rent, which was payable in money, was tendered by the purchaser of the crop from the tenant, and the landlord refusing to accept the tender the purchaser brought suit to recover the cotton, and obtained a judgment below for its value, without deduction for the rent, and without bringing the tender into court. In the opinion in the case, the difference between the effect of a tender on a creditor's right afterwards to recover his debt, and its effect on a lien to secure the debt, is not adverted to, and the decision seems to be rested solely on the well-understood rules applicable in the former case, viz., that a tender is not equivalent to payment of the debt, and that its only effect is to stop interest and protect from costs so long as the tender is kept good. It is undoubtedly true that a tender does not operate as a satisfaction of a money debt, but it is equally true that it does in many cases have the effect to discharge liens and deprive the creditor of all collateral securities, and for this purpose it is the exact equivalent of payment. The case decides that the landlord's lien given by statute

is not discharged by a tender of the rent, but the reasoning by which that conclusion was reached is not given, and is not very obvious, and for that reason the case as an authority must be restricted to cases on all-fours, as was the case of *Bloom* v. *McGehee*, 38 Ark. 329, where *Hamlett* v. *Tallman* was followed without inquiry or discussion.

The authorities supporting the conclusions reached in the case at bar are not cited or referred to, and it is extremely plain the court did not intend to overrule them or dispute their authority.

Let a decree be entered requiring the defendant to deliver to the plaintiff B. E. Mitchell the two Blythe notes, pledged to secure the payment of the note of S. T. Mitchell.

A pledge differs from a chattel mortgage in three essential characteristics: (1) It may be constituted without any contract in writing, merely by delivery of the thing pledged; (2) it is constituted by a delivery of the thing pledged, and is continued only so long as the possession remains with the creditor; (3) it does not generally pass the title to the thing pledged, but gives only a lien to the creditor, while the debtor retains the general property. But, as regards choses in action, the distinction that a mortgage is a transfer of the title, while a pledge is a mere lien without a transfer of title, does not hold good; for, in most cases, a pledge of choses in action can only be made effectual by a transfer of the legal title. Thus, in a pledge of negotiable paper, the title necessarily passes by a delivery of the paper if this does not require indorsement, or if it does require indorsement, then by delivery after such indorsement. To make the pledge an effectual security, it is necessary that the pledgee should have the legal title. The same is true in general as to other transfers of choses in action, such as transfers of corporate stocks. A transfer of the title to such incorporeal property is generally an essential part of the delivery of it in pledge. An absolute transfer of such property as security for a debt, is a pledge and not a mortgage. The general property may be regarded as remaining in the debtor, though the legal title be transferred to the creditor. A transfer of such property by an assignment which is not in form or substance a mortgage, will constitute a pledge of it.[1]

It is true that there may be a mortgage of a promissory note or other chose in action, but to constitute a mortgage of it the conveyance must be made substantially in the form of a mortgage; that is, it must be a conveyance upon a condition or defeasance expressed in the instrument of conveyance, or by a separate instrument which would be construed as part of the conveyance. Thus, if a policy of insurance be assigned, and the instrument of assignment or a separate defeasance provides that the assignment shall be null and void upon the payment of the debt secured, but otherwise shall continue in full force, the transfer constitutes a mortgage and not a pledge. "The purport and substance of the contract, and the intention of the parties, as disclosed by the language they have made use of to express it, clearly indicate a sale or mortgage rather than a pledge."[2] An assignment, absolute in form, of a promissory note, or other contract, as collateral security, is a pledge rather than a mortgage of it. The fact that the title passes in form, does not make the transaction a mortgage. A transfer of title is necessary in order that the creditor may have full control of the contract, and the means of promptly enforcing it.[3]

[1] Wilson v Little, 2 N. Y. 443; Dewey v. Bowman, 8 Cal. 151.

[2] Durgan v. Mut. Ben. Life Ins. Co. 38 Md. 242, per MILLER, J.

[3] Gay v. Moss, 34 Cal. 125.

A tender of the amount due on a debt for which property is held in pledge, or for which collateral security has been given, at the time the debt is due, or afterwards, wholly discharges the lien of the pledge, and revests the title to the thing pledged in the pledgeor, so as to entitle him to maintain trover or replevin therefor.[1] In this respect a tender is equivalent to actual payment. A tender of a part of the amount of the debt will not have the effect to revest the title to any part of the property pledged;[2] the debt must be paid as a whole, and the tender, to be effectual, must be co-extensive with the whole debt secured.[3] In one respect a tender is not equivalent to payment; for, although the lien is discharged by either, the debt is not discharged by a tender, but the pledgee may still maintain his action for this.

A creditor, by refusing a tender properly made of the amount of a debt secured by a pledge, converts it to his own use. He makes it his own so far as to run the chance of any depreciation that may afterwards occur. He cannot sue for and recover the debt without making a proper allowance for the value of the pledge as it was at the time of the tender in reducing or satisfying the debt.[4] If in such case there be a surety of the debt, he is released; for the surety is entitled to have the security delivered up to him upon his paying the debt; and when the creditor has, by his own act, destroyed the security or rendered it valueless, or put it out of his power to give the surety the benefit of the substitution, the latter is discharged.[5]

Upon the pledgee's refusal of a tender of the whole amount of the debt secured, the debtor may maintain trover for the property, and he is entitled to damages to the full value of the property, without any abatement for the amount for which the property was pledged. The creditor must resort to an action to recover the debt. The refusal of the tender discharges the lien upon the property, and places the parties in relation to the property in the same position as if the debt has been paid, and no pledge had ever existed.[6]

A tender, to have the effect of discharging the lien of a pledge, must be absolute and unconditional, and must in all other ways conform to the general rules relating to the mode of making a tender. The money need not be actually produced, if the debtor has it ready and offers to pay it, but the creditor dispenses with the production of it in any manner; as, for instance, by expressly saying to the debtor that he need not produce the money, as he would not accept it.[7] But a bare refusal to receive the sum offered, and a demand of a larger sum, are not enough to excuse an actual tender of the money. Thus, where a debtor met his creditor for the purpose of redeeming stock held in pledge, and the amount due upon it having been agreed upon, the debtor's agent and broker was about to fill up a check for the amount, when the creditor requested that the business should be postponed to the next day, and demanded the whole value of the stock, amounting to much more than the sum liquidated, under the pretense that he was responsible as surety for the debtor, on another and separate account, the tender was held to be ineffectual.[8]

A tender, accompanied with a demand for a receipt, or a discharge of a lien, or a return of securities, is not an unconditional tender. A tender should not be accompanied with a demand for anything more than the production and delivery of any negotiable paper representing the debt which is

[1] Ratcliff v. Davies, Cro. Jac. 244; S. C. 1 Bulstr. 29; Coggs v. Bernard, 2 Ld. Raym. 909; S. C. Holt, 528; Ryall v. Rowles, 1 Atk. 165, 167; Haskins v. Kelly, 1 Rob. (N. Y.) 160; S. C. 1 Abb. Pr. (N. S.) 63; Ball v. Stanley, 5 Yerg. (Tenn.) 199; McCalla v. Clark, 55 Ga. 53.

[2] Appleton v. Donaldson, 3 Pa. St. 381.

[3] Bigelow v. Young, 30 Ga. 121.

[4] Griswold v. Jackson, 2 Edw. (N. Y.) Ch. 461; affirmed, 4 Hill, 522; Hathaway v. Fall River Nat. Bank, 131 Mass. 14; Hancock v. Franklin Ins. Co. 114 Mass. 155.

[5] Griswold v. Jackson, supra.

[6] Ball v. Stanley, 5 Yerg. (Tenn.) 199.

[7] Thomas v. Evans, 10 East, 101; Kraus v. Arnold, 7 Moore, 69; Hancock v. Franklin Ins. Co. 104 Mass. 155.

[8] Dunham v. Jackson, 6 Wend. (N. Y.) 22.

sought to be paid.[1] Moreover, the tender must at all times be kept good; that is, the debtor must constantly keep on hand the money tendered, separate from his other money, ready to pay over to the creditor whenever he might be ready to take it, and must bring the money into court.[2]

A tender need not include interest upon the debt if none was contracted for, and none has accrued by way of damages after a demand. Thus, upon a pledge of a watch by way of a sale of it for $82, with an agreement that the seller should have it again in 30 days, upon the payment of $87, a tender of the latter sum was held sufficient, the five dollars bonus being regarded as in lieu of interest.[3]

Upon the tender of the amount of a debt for which an accommodation note is held as security, the maker of such note, being in effect a surety, is discharged. The creditor, by a tender from the principal debtor, has in his hands the means of payment, and by his refusal to accept it discharges the surety; and in an action by the creditor upon the collateral note, the maker of that need not plead the tender, or bring the amount into court.[4]

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[1] Cass v. Higenbotam, 27 Hun, (N. Y.) 406; Brooklyn Bank v. De Grauw, 23 Wend. (N. Y.) 342.

[2] Cass v. Higenbotam, supra.

[3] Hines v. Strong, 46 How. N. Y. Pr. 97; affirmed, 56 N. Y. 670.

[4] Appleton v. Donaldson, 3 Pa. St. 381.

STAFFORD NAT. BANK *v.* SPRAGUE and others.

(*Circuit Court, D. Connecticut.* September 15, 1883.)

1. UNRECORDED DEED—ATTACHING CREDITOR—CONNECTICUT STATUTE.
   By the law of Connecticut an unrecorded deed is ineffectual, as against attaching creditors of the grantor, unless they had notice of such conveyance.
2. SAME—POSSESSION OF GRANTEE—NOTICE.
   As a general rule, open, notorious, and exclusive possession by the grantee, under an unrecorded deed, is sufficient to raise a legal presumption of notice, to an attaching creditor of the grantor, of the existence of such conveyance; but the testimony in regard to the notorious possession must be clear and certain, and such as to make the inference of notice to the creditor beyond serious question.
3. SAME—NOTICE OF TENANCY.
   In such a case notice of a tenancy will not, it seems, amount to constructive notice of the lessor's title.
4. DEED FOR BENEFIT OF CREDITOR—DESCRIPTION OF PROPERTY.
   By the law of Connecticut, where the only description of property conveyed by a deed of mortgage is all the property of the grantors, real and personal, in certain towns in that state, named in such conveyance, the description is insufficient, and the deed conveys no title to the Connecticut lands.
5. SAME—TRUSTEE TO CARRY ON BUSINESS—NON-ASSENTING CREDITORS—FRAUD.
   By the law of Connecticut, where assignments, intended for the benefit of all the creditors, place the entire estate of the debtor beyond the reach of non-assenting creditors, in the hands of a trustee, who is empowered and directed to carry on an extensive and hazardous manufacturing business for an indefinite period, and thus subject the property of the non-assenting creditors to the hazards and uncertainties of such business, the conveyances will be held fraudulent in law, so far as they attempt to convey lands in Connecticut as against non-assenting creditors.

In Equity.

Ratcliffe Hicks and *J. Halsey*, for plaintiff.
Charles E. Perkins, for defendants.

SHIPMAN, J. In the year 1880 the plaintiff recovered judgment for $6,479.50 in this court in an action at law against Amasa Sprague and William Sprague, having attached as the property of said defendants, at the commencement of the suit on October 1, 1878, the real estate which is the subject of this bill in equity. On June 10, 1880, the plaintiff, to secure this unpaid judgment, filed its certificate of lien upon the attached real estate, in accordance with the statute of Connecticut, whereby a statutory judgment lien was placed upon the land described in the certificate, which lien can be foreclosed or redeemed in the same manner as mortgages upon the same estate. Fifteen pieces of land were described in the certificate. The first seven pieces and the fifteenth piece are in the town of Sterling. For sufficient reasons the plaintiff has abandoned its claim to the seventh piece, and also to the eighth piece, which is in the town of Canterbury, and the facts hereinafter stated in regard to the attached lands will have no reference to those two pieces. The ninth piece is in Scotland, the tenth, eleventh, twelfth, and thirteenth pieces are in Windham, and the fourteenth piece is in Franklin. All the lands now claimed by the plaintiff, except the tenth and thirteenth pieces, were originally conveyed to the defendant Amasa Sprague. Said two pieces were originally conveyed to the defendant William Sprague. All the lands except the thirteenth piece were conveyed to said grantees prior to August 9, 1865. The thirteenth piece was conveyed to William Sprague on September 28, 1866.

On or about August 9, 1865, the A. & W. Sprague Manufacturing Company was formed, its capital stock consisting in general of the property of the firm of A. & W. Sprague. This firm was originally composed of Amasa Sprague, who was the father of the defendants Amasa and William, and William Sprague, Sr. Each of the original partners had died, leaving a widow and children. The estate of neither had been settled, the partnership had not been wound up, and its affairs had not been adjusted; but the business had continued under the same name, with new partners and the acquisition of new property, until in 1865 the firm consisted of said defendants. For the purpose of an ascertainment and adjustment of the rights of all the heirs of the two senior Spragues, and the distribution of the interests of these parties in the common property, the A. & W. Sprague Manufacturing Company was formed, and stock was distributed to the heirs, or the assignees of the title of the heirs, in proportion to their respective interests. For the purpose of vesting in the corporation the property which was held and managed by A. & W. Sprague, except that known as the Quidnick Company property, the defendants Amasa and William, with the representatives of Amasa,

Sr., and William, Sr., and the guardian of the minor children of the deceased daughter of William Sprague, Sr., conveyed all their right and title, whether derived as heirs at law or personal representatives of the said Amasa Sprague and William Sprague, both deceased, or however derived, in possession, action, reversion, or remainder, which the grantors had in and to the property, real, personal, and mixed, wheresoever situated and in whatsoever name any record titles thereof stood, "in the possession of, and held, managed, and controlled by, the firm of A. & W. Sprague," saving and excepting certain specified exceptions, and also excepting the property, rights, credits, and assets at any time heretofore held and managed by the firm of A. & W. Sprague, which had been charged to the grantors, said Amasa and William, either jointly or severally, on the books of said property so charged." This deed was not recorded in the land records of either of the towns in this state where any attached real estate was situate, and the only deed or conveyance by said Amasa or said William of any of said claimed and attached lands which was ever lodged for record, or was recorded in the records of any of said towns, was the trust deed of December 1, 1873, to Zechariah Chafee, which is hereinafter mentioned and which was recorded in the land records of Windham, Sterling, and Scotland.

On or about November 1, 1873, the A. & W. Sprague Manufacturing Company became deeply insolvent. Its stockholders—Amasa Sprague, William Sprague, Mary Sprague, widow of William, senior, and Fanny Sprague, widow of Amasa, senior—were also severally liable for the debts of the corporation. The property of the corporation and of the individuals, estimated to be worth some $19,000,000, was widely scattered, and largely consisted in factories. In this state of things, by advice of a committee of their creditors, the A. & W. Sprague Manufacturing Company—William Sprague and Amasa Sprague, as individuals and as copartners under the firm of A. & W. Sprague, Mary Sprague, and Fanny Sprague—mortgaged to Zechariah Chafee all property, real, personal, and mixed, not exempt from attachment by law, which the grantors, or either of them, had in certain specified towns in Rhode Island, (the property in Rhode Island being also more particularly described,) Massachusetts, Maine, and other named states, and "in the following towns of the state of Connecticut, viz., Sterling, Sprague, Scotland, and Windham," but excepting from the conveyance all shares of stock in any corporation belonging to any of the grantors, the same to be transferred to the grantee, upon his request in writing, by way of pledge to secure the performance of the condition of the deed. This mortgage was to secure the notes of said corporation in divers sums, but together amounting to $14,000,000, payable to the order of A. & W. Sprague, and by them indorsed, payable three years from January 1, 1874, with interest from said date at the rate of 7 3-10 per cent. per annum, payable semi-annually, all which notes were placed in the hands

of said Chafee, "to be by him used and applied in the payment or retiring of such of the present outstanding indebtedness and liabilities aforesaid as the holders thereof shall, within nine months from the date of these presents, bring in and surrender and discharge, or agree to extend for the term, and according to the provisions of said notes, as so issued by said trustee, to be countersigned by him." Said property was to be held by said Chafee in trust, but subject to the condition that if the grantors paid the debts which should be brought in under the deed, the expenses of the trust, and the said notes that were issued by the trustee, then the deed was to be void, and until default was made in the performance of the conditions, or until sale under the trusts, or until entry by the trustee, the grantors were to retain the possession and use of the granted premises: "Provided, and it shall be lawful for said trustees or trustee for the time being, at any time, or from time to time, before such default or breach, and with or without previous entry, in their or his discretion, to sell at public or private sale any part or parts of said granted estates and property, and to execute and deliver such deed or deeds as may be necessary or proper to vest in the purchaser" a good title: "and provided further, that said trustees or trustee for the time being may at any time, or from time to time, before default or breach, as well as after, enter upon said granted estates and property, or any part or parts thereof, and take and assume the full and absolute possession and control of the same, and in their or his discretion to continue to run and operate, or to close, the mills or print-works of said manufacturing company, or any or either of them, as said trustees or trustee for the time being shall deem for the best interests of the creditors." The trustee was to apply the purchase moneys (1) to the payment of the expenses of the sales and of said trust; and (2) to the payment of all the debts of the grantors which should be brought in under the deed, and of all the notes that should be issued by the trustee under the deed, accounting to the grantors for any surplus that might remain after the full payment of the debts and issued notes. The trustee was not to be answerable for any loss which might happen to the trust estate unless it should occur by his own neglect or default.

On April 6, 1874, the A. & W. Sprague Manufacturing Company, A. & W. Sprague, Amasa Sprague, and William Sprague, at the request of a large creditor of said corporation, severally executed grants or assignments in fee-simple to Mr. Chafee of his or their "right, title, and interest, legal or equitable, in or to all the property of the grantor described or referred to in the trust deed of mortgage," dated November 1, 1873, "and in or to any and all estate, real, personal, or mixed, of whatever name and nature, wherever situate, not exempt from attachment by law," in trust, to sell the same at public or private sale, and convert the same into money, and the proceeds thereof to apply, first, to the payment of all claims against the grantor provided for in the

mortgage of November 1, 1873, which had been, or should within nine months from said date be, brought in and extended for the time provided in said mortgage, with authority to the trustee to make earlier payments than in three years; and, secondly, the residue of the proceeds to apply to the payment of all the creditors of the grantor. The trustee was authorized to run the mills, or either of them, or to allow the grantor to run the same, if for the best interest of the creditors, the profits to be received by the trustee for the purposes above named, and he was not to be liable personally for the expenses or losses arising from running the mills, but the same were to be charged to the trust fund. Neither of these deeds was recorded in the towns of Sterling, Windham, Scotland, or Franklin. The plaintiff did not assent to either of said deeds, whether of mortgage or of assignment, and did not acknowledge in any manner their validity, did not present any claim to the trustee, and has not received any notes, dividend, or payment.

The bill prayed, among other things, in addition to a prayer for a foreclosure of the judgment lien, that the trust deed and assignments might be decreed void and of no effect as against the plaintiff, and as against its rights and said judgment lien.

The position of the plaintiff is founded upon two statutes of Connecticut, and upon what it alleges to be the established course of the decisions of the supreme court of errors of the state in the construction of those statutes, and in regard to the effect of non-compliance with the recording system of the state on the titles of real estate, and upon the principle that the federal courts are bound to follow the course of decisions of the highest court of the state in the construction of its statutes, if the course has been uniform. *Townsend* v. *Todd*, 91 U. S. 452; *Chicago City* v. *Robbins*, 2 Black, 428; *Grafton* v. *Cummings*, 99 U. S. 100.

These statutes are as follows:

"No conveyance shall be effectual to hold lands against any other person but the grantor and his heirs, unless recorded on the records of the town in which the lands lie."

"All fraudulent conveyances, suits, judgments, executions, or contracts, made or contrived with intent to avoid any debt or duty belonging to others, shall, notwithstanding any pretended consideration therefor, be void as against those persons only, their heirs, executors, administrators, or assigns, to whom such debt or duty belongs."

The last statute, "in substance, is pursuant to the statute of 13 Eliz. c. 5, and must receive a similar construction." *Benton* v. *Jones*, 8 Conn. 185.

By the law of Connecticut the unrecorded deed of August 10, 1865, was ineffectual as against attaching creditors of the grantor unless they had notice of such conveyance. *Carter* v. *Champion*, 8 Conn. 548; *Wheaton* v. *Dyer*, 15 Conn. 307; *Orvis* v. *Newell*, 17 Conn. 101; *Bush* v. *Golden*, 17 Conn. 600; *Theall* v. *Disbrow*, 39 Conn. 318. The

defendants do not claim that there was actual notice, but insist that the plaintiff had implied notice of the conveyance, and of the title of the Sprague Manufacturing Company, from the fact that it had been in possession from 1865 to the date of the trust deed.

The question has not arisen before the supreme court of this state, but probably here, as in other states, as a general rule, open, notorious, and exclusive possession by the grantee under an unrecorded deed is sufficient to raise a legal presumption of notice, to an attaching creditor of the grantor, of the existence of the conveyance. *McMechan* v. *Griffing*, 3 Pick. 149; *Weld* v. *Madden*, 2 Cliff. 584; *Pomroy* v. *Stevens*, 11 Metc. 244. The remarks of BUTLER, C. J., in *Theall* v. *Disbrow*, *supra*, apparently recognize the doctrine. But the testimony in regard to the notorious possession of the Sprague Manufacturing Company is meager, whereas it should be clear and certain, and should be such as to make the inference of notice to the creditor without serious question. *Pomroy* v. *Stevens*, *supra*.

Mr. Guild, the book-keeper or assistant book-keeper of the corporation from November 1, 1867, to October 1, 1873, and since then in the employ of Mr. Chafee, in the same capacity, says that the attached lands have been entered upon the real estate accounts of the company ever since its organization, and that the expenses and taxes of the lands have been paid by the company and charged as a part of its expenses, and that these lands were treated by the company in all respects as were its other lands. The Sterling town clerk testified that the Sterling land was farming land, and that in 1880 the Williams farm "was occupied by a foreman and gang of hands, quarrying and farming," and that the lands described in Exhibits 6 and 8 were occupied by a tenant. The Scotland land is farming land, and in 1880 "was used for farming purposes." This is the entire testimony on the subject, and shows that the corporation deemed these lands to be its own, and treated them as such, but shows nothing of the character of the possession, whether palpable or consistent with the possession of the Spragues, and nothing in regard to the knowledge or notoriety in the respective communities where the land was situate, of the fact that the corporation was in possession, and shows no facts in regard to the acts of ownership by the company from which such knowledge can be inferred. The point to be proved is notice of the unrecorded conveyance to the attaching creditor. Express notice cannot be shown. Notice can be sufficiently inferred by proof of possession of the land by the grantee, which is visible, and accompanied by such manifest acts of ownership as will naturally be observed by others, and impart knowledge that the party in possession is the owner. If, after 1865, there was no manifest change of possession, and there were no acts by which the public, or so much of the public as was conversant with the lands in question, could infer that the corporation, and not one of the Spragues, was the real owner, then the rule which raises an inference of ownership from apparent possession does not

apply to the case; and from the absence of testimony on this point—an absence which is not due to thoughtless or careless preparation—I am led to believe that the apparent ownership was quite consistent with the ownership upon the land records. Some of those lands, perhaps all, were occupied by tenants; but the mere fact that a tenant occupied, without knowing to whom he paid rent as his landlord, is not important. "Notice of a tenancy will not, it seems, affect a purchaser with constructive notice of the lessor's title." Sugden, Vendors, 745; *Flagg* v. *Mann*, 2 Sumn. 486.

The Connecticut decisions are definite that the mortgage deed to Chafee conveyed to him no title to the Connecticut lands in question. Whether assenting creditors can take advantage of this defect of title need not be considered in this case. The only description in the deed of those lands was, all the property of the grantors, real and personal, "in the following towns of the state of Connecticut, viz., Sterling, Sprague, Scotland, and Windham," and it is not denied by the defendants that the deed was, in legal effect, a mortgage. A general description like the foregoing is held in Connecticut to be clearly insufficient in the case of a mortgage. The decisions are founded upon the necessity of strict adherence to the policy of the legislation of the state in regard to the records of titles of land.

In *Herman* v. *Deming*, 44 Conn. 124, the court says:

"It is a fixed principle of our law that mortgage deeds should give subsequent creditors of the mortgagor definite information as to the debt due to the mortgagee, and as to the particular property pledged for its payment. It is only by knowing what the property is that they can learn its value, and it is as important to them to know its value as to know the amount of the debt for which it is mortgaged; and they are entitled to the assistance of the law of registration in obtaining this information. To be told that the mortgage covers all the real estate which the grantor owns in the town of Hartford is to impose upon them the examination of many thousand pages of records; for it is to be borne in mind that the grantor himself may have received his titles by the same general description, and from many different grantors. The recognition by the courts of such a mortgage as valid would be equivalent to the abrogation of the recording system, so far as mortgages are concerned."

This decision was affirmed in *De Wolf* v. *Sprague Manuf'g Co.* 49 Conn. 283, in regard to the deed which is now under consideration, the court, through Judge HOVEY, saying:

"The deed of the A. & W. Sprague Manufacturing Company and others of November 1, 1873, tested by the rule thus established, (in *Herman* v. *Deming*,) does not contain a sufficient description to convey to the defendant Chafee any title to or interest in the premises sought to be foreclosed by the plaintiff, unless it is to be regarded as an assignment, and not as a mortgage or a deed of trust in the nature of a mortgage."

In general assignments to trustees for the benefit of creditors, a general description of the land conveyed is sufficient, and the objection on account of the insufficiency of the description in the mortgage deed does not, probably, apply to the unrecorded assignments of April

6, 1874; but by the decision in *De Wolf* v. *Manuf'g Co., supra,* the assignments, so far as they attempt to convey lands lying in Connecticut, are fraudulent and void as against non-assenting creditors.

The mortgage deed and the assignments, taken together, attempt to convey the entire title of the grantors in the conveyed property to a trustee for the benefit of the creditors of the corporation, and of Amasa and William Sprague, individually and as a copartnership, and of the other stockholders, giving a preference to those who should, within nine months from November 1, 1873, extend the time for the payment of their debts for three years from January 1, 1874. The trustee is authorized to run either or all of the mills and print-works which belonged to the corporation, or to allow the grantor to run the same, the profits being receivable by the grantee, and the expenses to be chargeable to the trust fund. Thus the property, which was a fund for the payment of debts, having been placed beyond the reach of non-assenting creditors, is further subjected for an indefinite time to the hazard of the losses resulting from the running of the mills, and the manufacturing expenses are chargeable to the entire fund, as well that derived from the individual property of the Spragues as from the corporate property. The intent of the mortgage and the assignments was not only, by a set of conveyances professedly for the benefit of all the creditors, to put the entire estate into the hands of a trustee for a period not necessarily definite and determined, but also to subject the property against the will of non-assenting creditors, for a like indefinite time, to the hazards of a business exceedingly extensive, and of uncertain pecuniary profit. "No debtor has a right thus to postpone or put in peril the rights of his creditors without their consent, and a conveyance which attempts so to do, or which is executed for the purpose of depriving creditors of their right to enforce their just claims against the property of their debtor by placing it beyond their reach or control for an unlimited, indefinite, or uncertain period, is, in conscience, as well as in law, fraudulent." *De Wolf* v. *Sprague Manuf'g Co., supra.*

This legally fraudulent character is apparent upon the face of the deeds, and parol evidence is of no avail that both the grantors and the majority of the creditors thought that the arrangement was for the best interest of all the creditors, and that the experiment would be a success, because neither the grantors nor a majority of the creditors have a legal right, in an assignment for the benefit of all the creditors, to subject the property of the assignor for an indefinite time to the hazards of enterprises which are not only far more extensive than those incidental to the winding up of the business, but are a continuation of the business of the debtors to its full extent. The cases which justify the carrying on of a manufacturing business by a trustee until the stock is exhausted, or the purchase of new materials to enable the stock to be worked up, have no analogy to this case, in which the deeds contemplated the carrying on by the trustee

of a vast business. Notwithstanding the motive of the debtors and the assenting creditors was not tinged with bad faith, the deeds were of such a character that the law pronounces them to be fraudulent towards non-assenting creditors, and refuses to lend its aid to the coercion which would compel them to enter into a business which they disapproved.

The *De Wolf Case* was decided upon demurrer to the bill, and the court held the mortgage to be void, because it appeared upon the face of the deed that the property of the corporation was to be applied to the payment of the debts of the Spragues individually. In this case parol evidence has been given of the reason for turning the property of the corporation and all its stockholders into a common fund upon one trust for the payment of all the debts of the grantors. I therefore do not think that the De Wolf decision upon that point can be regarded as of binding authority in a case in which other facts are shown than those stated in the bill and admitted by the pleadings.

The defendant insists that the lands were held by the Spragues from 1865 to 1873 in trust for the corporation, and that the mortgage deed was a transfer of the lands to the corporation for the benefit of its creditors, and was, therefore, simply an execution of the trust, and that thereafter those lands were not subject to be appropriated at the instance of the individual creditors for their debts.

As between the corporation and the Spragues, the latter were trustees for the former; but as between the Spragues and their creditors the lands were permitted to be subject to attachment for the debts of the legal owners from 1865 to 1873. If, prior to any action by a creditor, the lands had been conveyed by a sufficient deed, they would no longer have been open to attachment, but the transfer by the mortgage deed, being governed by the rules pertaining to mortgages, and being operative only as a mortgage, did not convey the title to the Connecticut land to Chafee, and it is not material that, if it had been some other kind of a deed, it would have conveyed a valid title. The deed attempted to transfer the lands to Chafee by way of mortgage, and if it was inoperative to vest a title in him, the lands still remained liable to attachment.

Let there be a decree for foreclosure, and that the trust deed and assignments are not valid to vest a title in Chafee to the lands in question as against the plaintiff, a non-assenting and attaching and judgment creditor.

UNITED STATES v. DAUBNER.

(District Court, E. D. Wisconsin. May 21, 1883.)

1. MAKING AND PRESENTING FALSE CLAIM—FALSE AFFIDAVIT TO PROCURE PENSION—REV. ST. §§ 5438, 4746—NOT FELONY—CHALLENGE OF JURORS.
   The offenses described in sections 5438 and 4746 of the Revised Statutes are not felonies, and a party indicted therefor, is not entitled, under section 819 of the Revised Statutes, to challenge more than three jurors.
2. SAME—REV. ST. § 819—WAIVING CHALLENGE—PRACTICE.
   In the trial of such a case the district court is governed by section 819 of the Revised Statutes, and under that section each party will be entitled to three peremptory challenges; and when the calling of a new juror is necessitated by the challenge of either party, the other party has a right of challenge as to such juror, although he may have previously passed the list, provided he has not already exhausted his three peremptory challenges.
3. NEW TRIAL—MISCONDUCT OF JUROR—VERDICT.
   The mere circumstance that a juror in a criminal case rode from the court-house with a witness for the prosecution, and boarded at the same place with such witness during the trial, without some further evidence that the circumstance operated prejudicially to the defendant, is not ground for disturbing the verdict.
4. SAME—SPEAKING OF CASE.
   The fact that two of the jurors spoke of the trial, and the length of time consumed therein, and one of them exhibited a memorandum book in which the names of the witnesses were written, will not be ground for setting aside the verdict when it does not appear that anything as to the merits of the case was discussed in the conversation.
5. IMPEACHING VERDICT—AFFIDAVITS OF JURORS.
   The affidavits of jurors as to what transpired in the jury-room, and their understanding of the verdict they rendered, or were to render, and of the ruling of the court in relation to the evidence of a certain witness, cannot have the effect to impeach the verdict.
6. NEW TRIAL—INSUFFICIENCY OF EVIDENCE.
   While the court should set aside a verdict which is clearly against the evidence, and while greater latitude is allowed in the examinations of motions for a new trial, on the ground of the insufficiency of the evidence, in criminal than in civil cases, it should be well satisfied of the insufficiency of the evidence to convince the judgment, reason, and conscience of the jurors of the correctness of the verdict; and as the circumstances which properly influence the jury are so various, and so often impossible to be known to the court, there should be greater hesitation before the verdict will be disturbed when the evidence is conflicting.
7. SAME—MOTION DENIED.
   As, upon examination of the rulings of the court as to the admission and exclusion of evidence, and the instructions as to the effect thereof, no error appears, and the verdict of guilty on the first and third counts, and acquittal on the second and fourth, are not inconsistent, and the verdict is sufficiently supported by the evidence, the motion for a new trial is denied.

The indictment in this case was based upon sections 5438 and 4746 of the Revised Statutes of the United States. Section 5438 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 person in the civil * * * service of the United States, any claim upon or against the government of the United States, knowing such claim to be false, fictitious, or fraudulent, or who, for the pur-

pose 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, knowing the same to contain any fraudulent or fictitious statement, * * * shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars." Section 4746 provides that "every person who knowingly or willfully in anywise procures the making or presentation of any false or fraudulent affidavit concerning any claim for pension or payment thereof, * * * shall be punished by a fine not exceeding five hundred dollars, or by imprisonment for a term not exceeding three years, or by both." The indictment contained four counts. The first two counts alleged offenses under section 5438, and the last two stated offenses under section 4746. * * * The jury found the defendant guilty on the first and third counts, and not guilty on the second and fourth counts. A motion for a new trial was then made and argued.

G. W. Hazelton, for the United States.

Geo. B Goodwin and *James G. Jenkins*, for defendant.

DYER, J. The motion is based on various grounds.

1. When the jury was impaneled the defendant claimed the right to challenge peremptorily any number of the jurors to the extent of 10, under section 819 of the Revised Statutes. He asserted such right on the ground that the offenses with which he was charged were felonies. The court ruled against him on the point, and allowed him but three peremptory challenges. Section 819 referred to, is as follows:

> "When the offense charged is treason, or a capital offense, the defendant shall be entitled to twenty and the United States to five peremptory challenges; on the trial of any other felony, the defendant shall be entitled to ten and the United States to three peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges."

What offenses, under the laws of the United States, constitute felonies, as that term is used in section 819, is, perhaps, a close question. It was contended at the bar, by counsel for the defendant, that whether or not an offense named in the federal statutes is a felony, depends on the character of the punishment affixed to the commission of the offense, and where such punishment is imprisonment at hard labor, the offense is a felony. On the part of the prosecution it was argued that an offense, to be a felony, must be one expressly declared such by statute, or one that at common law would be a felony. I shall not attempt a discussion of the question, since it has been so well considered in the case of *U. S.* v. *Coppersmith*, 4 FED. REP. 198. In that case Judge HAMMOND decided that the clause quoted from section 819 may operate in other than capital cases to give a defendant 10 challenges, in the following classes of cases: *First*, where the offense is declared by statute, expressly or

impliedly, to be a felony; *second*, where congress does not define an offense, but simply punishes it by its common-law name, and at common law it is a felony; *third*, where congress adopts a state law as to an offense, and under such law it is a felony. In this statement of what constitutes a felony under the laws of the United States I concur; and no argument is needed to show that the offenses charged in this indictment do not come under either of the categories named.

In *U. S.* v. *Yates*, 6 FED. REP. 861, it was held that the crime of passing counterfeit trade dollars is not an infamous crime, within the meaning of the fifth amendment of the constitution of the United States, and that such an offense may be prosecuted upon information filed by the district attorney. In his opinion Judge BENEDICT makes an observation applicable to the case at bar. He says:

"By the statutes of many states any crime punishable by hard labor is a felony; but no such test is furnished by the statutes of the United States. Indeed, a provision declaring that 'a felony under any law of the United States is a crime punishable with death, or by imprisonment at hard labor,' and that 'every other crime is a misdemeanor,' submitted by the revisers of the statutes in their draft, was rejected."

If punishment by hard labor were the test of a felony, it might even then be doubted whether the offenses here charged would come within the rule; because section 4746 does not impose as a punishment for its violation imprisonment at hard labor. The punishment under that section may be by a mere fine, or by simple imprisonment, or by both, while the penalty imposed by section 5438 may be a fine or imprisonment at hard labor.

In *U. S.* v. *Baugh*, 1 FED. REP. 784,—a case which, I think, was not referred to on the argument,—it was held that a state statute which declared all offenses to be felonies which are punishable by confinement in the penitentiary, does not apply to criminal cases in the federal courts; that the rules of procedure in those courts in such cases are derived from the common law; and that under the federal laws nothing is felony unless expressly so declared to be by congress, with the exception of capital offenses. Judge HUGHES further observes that it has always been the policy of congress to avoid, as much as possible, the multiplication of statutory felonies; citing 1 Greenl. Ev. § 373, and 1 Whart. Crim. Law, § 760.

It was said on the argument, by one of the counsel for the defendant, that because the indictment charges that Daubner feloniously made, or caused to be made, presented, or caused to be presented, a false and fraudulent claim for a pension, and false and fraudulent affidavits in support thereof, the offenses charged should be treated as felonies. But to predicate of an act that it is felonious, is simply to assert a legal conclusion as to the quality of the act; and unless the act charged of itself imports a felony, it is not made so by the application of this epithet. This was distinctly held in *Matthews* v. *State*, 4 Ohio St. 539, 542. Touching the point under considera-

tion, the conclusion of the court is that the offenses here charged are not felonies, and therefore that the defendant was entitled to only three challenges.

2. When a jury was called to try the case, the list was passed alternately to the district attorney and to counsel for the defendant, according to the usual practice. The attorney for the government exercised his right of peremptory challenge once, and counsel on the part of the defendant then exercised their right of peremptory challenge three times. Up to the time that the last challenge was made on the part of the defendant, the district attorney had twice passed the list of jurors without strking any names therefrom; but when the last juror was called, after the defendant had exercised his right to challenge the third time, and upon the list being passed to the district attorney, he struck from the list the name of such juror, and another was called in his place. This was objected to at the time by the defendant's counsel, but the court held that the prosecutor had the right of peremptory challenge when he so struck the name of such juror from the list, although he had previously passed the list before that juror was called. The defendant, although he had already exercised his right of peremptory challenge three times, thereupon asked leave generally to strike the name of another juror from the list. This application was denied. He then asked permission to strike from the list the name of one of the jurors called since he had made his third peremptory challenge, and this request was refused by the court, for the reason that the defendant had exercised the right of peremptory challenge three times, and had, therefore, exhausted his right of challenge.

Although the method thus pursued in organizing the jury was, as the court understands it, in accordance with the practice as it has always prevailed in this court, it is contended that it was error to permit the district attorney to peremptorily challenge a juror after he had challenged once, and twice passed the list without challenge. It will not be overlooked that the defendant was given and had three peremptory challenges, and that the district attorney struck but two names from the list. Before his last challenge he had twice passed the list without challenge,—that is, he declared himself content with the jury *as it then stood;* but after that the defendant's counsel exercised his right a third time, which necessitated the calling of a new juror, and it seemed to the court that the prosecutor's right to peremptorily challenge that juror was undoubted, because each party under the law was entitled to three peremptory challenges.

It is claimed, however, that when the district attorney twice passed the list he twice waived the right of challenge, and that by each such waiver he lost a right of challenge; and the provisions of section 2851 of the Revised Statutes of Wisconsin have been called to the notice of the court. That section provides that "each party shall be entitled to three peremptory challenges from a full panel of jurors

called in the action. The challenges shall be made alternately by the parties, one at a time, the plaintiff beginning, and when either party shall decline to challenge in his turn he shall be deemed to have waived each time one challenge." If this statute were applicable here, the objection made to the course of procedure in organizing the jury would seem to be well taken; but clearly this court must be controlled by section 819 of the Revised Statutes of the United States, and that section declares absolutely that each party in such a case as this shall be entitled to three peremptory challenges, and when the calling of a new juror was necessitated by the challenge of either party, I think the other had a right of challenge as to such juror, although he may have previously passed the list, provided he had not already exhausted his three peremptory challenges. It is argued that by the course pursued the district attorney in effect was enabled to exercise his right as to 13 jurors, while the defendant was limited in the exercise of his right to 12; but the calling of the thirteenth juror was made necessary by the defendant's last and third peremptory challenge, and the court cannot perceive any good reason for denying to the prosecutor the right to challenge that juror, although he had declared himself content with the jury as it previously stood, when the fact was that he had exercised his right of peremptory challenge but once before the thirteenth juror was called. In other words, I do not think, under the practice in this court and the statutes of the United States, the prosecutor waived his right to make the peremptory challenge objected to by previously passing the list as he did without challenge.

3. It is further urged that the findings of the jury are inconsistent, in that they find the defendant guilty on the first and third counts of the indictment, and not guilty on the second and fourth counts, and therefore that the verdict cannot stand. It seemed to the court, on the argument, that there was much force in the point made by the district attorney, that the first and third counts are sufficient in law to warrant a verdict; and that a verdict of not guilty on the second and fourth counts cannot, in any event, vitiate a verdict of guilty on the first and third. But an analysis of the counts, I think, shows that the findings of the jury upon the different counts are not so inconsistent as to affect their verdict. While the second count does, in its preliminary statements, refer to the defendant's claim for a pension, and characterizes it as false and fraudulent, it is evident that the count is really based upon Daubner's affidavit of April 21, 1879, and that that affidavit constitutes the gist of the count; and, upon careful examination of the affidavit, and its particular subject-matter, I think a finding that its statements are true is not necessarily inconsistent with a finding that certain material statements contained in the declaration for a pension, set forth in the first count, and in the affidavit set forth in the third count, are not true. The same may be said of the affidavit of Cunderman, which forms the

basis of the fourth count; and this was the view of the court when it submitted the case to the jury, and instructed them with reference to their right to find upon the different counts. The affidavit of Daubner set forth in the second count relates entirely to his condition of health before enlisting in the service; to his health and the medical treatment he received after his discharge; to his occupation, and physical ability to perform labor and engage in business; while the affidavit of Cunderman merely states that he never heard of Daubner being sick until he went into the army; that he took care of Daubner in some of his sickness in the service, without stating what the sickness was; that since his discharge Daubner has labored under a disease which he claims to be catalepsy, contracted in the service; and that he is so afflicted, and is unable to follow his business, and has been so since his discharge. All this may have been true, and yet certain vital statements of fact in the declaration for a pension, and in other affidavits set out in the third count, may have been false. I conclude, therefore, that the objection of inconsistency made against the verdict is untenable.

4. In connection with the declaration for a pension, and the affidavits set out in the different counts of the indictment, the prosecution offered in evidence the discharge of the defendant from military service granted to him April 8, 1863, and the surgeon's certificate of disability upon which it was claimed the discharge was granted. No objection was made on the part of the defendant to the introduction of the discharge in evidence; but when the surgeon's certificate of disability was offered, it was objected to, and the court overruled the objection. This ruling is assigned as error on the present motion. The discharge recites, among other things, "that George H. Daubner, a private of Capt. John A. Williams' Company A, twenty-eighth regiment of Wisconsin volunteer infantry, who was enrolled on the twenty-first day of August, 1862, to serve three years, is hereby discharged from the service of the United States, this eighth day of April, 1863, at Helena, Arkansas, by reason of disability, as per surgeon's certificate," and purports to have been signed by H. M. Lyons, post surgeon. The certificate of disability is in the prescribed form, and the post surgeon, H. M. Lyons, therein certified that he had carefully examined the said George H. Daubner, of Capt. Williams' company, and found him incapable of performing the duties of a soldier, because of chronic inflammation of the left hand, causing the *anchylosis* of the joints of the first and second fingers in such a position as to render the organ useless, together with a cataract of the right eye, and that in the opinion of the surgeon Daubner could not be rendered fit for service by any treatment. This certificate bears the same date as that of the discharge, namely, April 8, 1863, and was admitted in evidence by the court on the ground that it was part of the record or history of Daubner's connection with the service; that it was essentially part of the discharge from service. But when it was admitted, the

court ruled that the defendant was not bound or affected by statements in the certificate, of the character of his disability, by the surgeon, without proof connecting him with the making or execution of the certificate.

In its instructions to the jury the court said:

"There has been put in evidence the discharge of the defendant from the service, and in connection therewith the surgeon's certificate of disability, and there has been some discussion concerning the competency and effect of this certificate as a piece of evidence in the case. You may take that certificate into consideration as showing that the defendant was not discharged for catalepsy, but that he was discharged on the alleged grounds therein stated. It does not prove that the defendant did not have catalepsy. It is only evidence to the extent indicated, and will only be considered to that extent by you."

Upon mature consideration the court is satisfied that its ruling upon the admission of the surgeon's certificate in connection with the discharge, and its instruction to the jury in relation thereto, were right. The discharge and the certificate bear the same date. They were executed at Helena, Arkansas, by the same person. The discharge refers to the surgeon's certificate, and it was evidently intended that in ascertaining the character of the disability which constituted the grounds of the discharge, the certificate should be looked into as containing a statement of such disability. In effect, the surgeon's certificate was made part of the discharge, and the discharge and certificate together constituted the record, forming the basis of the action of the post surgeon in relieving Daubner from the further performance of military duty. The court, in its instructions to the jury, endeavored to state with care the extent to which this certificate was competent as evidence in the case; that is, that it might be taken into consideration as showing that the defendant was not discharged for catalepsy; but that it was not proof that in fact he did not then have catalepsy. It does not seem to the court, after reflection, that this was error; but, on the contrary, that as part of the record of the discharge the certificate was competent proof that Daubner was not discharged for catalepsy. And as it was necessary to show, as a step in the proofs on the part of the government, that the defendant was discharged from the service, it was entirely proper to show the grounds on which he was discharged, when the discharge itself in terms referred to the surgeon's certificate of disability.

5. Mr. Cushman K. Davis was called as witness on the part of the defendant. He testified among other things that he was a member of the twenty-eighth regiment of Wisconsin volunteer infantry, and accompanied the regiment to Helena, Arkansas; that after a certain expedition, known as the Yazoo Pass expedition, he saw the defendant in the post hospital at Helena; that Dr. Lyons was the surgeon in charge; that he, the witness, saw defendant lying on a cot, apparently unconscious; that after some conversation with Surgeon Lyons about the defendant, he interested himself somewhat in

procuring his discharge; that he called upon one Pierce, and urged him to see that Daubner got his discharge; and that he did this because of what he saw of the defendant, and of what Surgeon Lyons had told him. The witness was then asked this question by counsel for the defendant: "At the time you saw the defendant in a fit at the post hospital, what did Dr. Lyons state with respect to the disease, and what did he state with respect to his ability thereafter to continue in the service?" This question was objected to by the district attorney, and the answer of the witness was taken under objection, which was finally sustained by the court. The question was then repeated, and counsel for the defendant said that they offered to show that Dr. Lyons was in attendance upon the defendant as post surgeon at the time of this fit at the hospital, and that, while the defendant was in the fit, he stated to the witness that the defendant was in a cataleptic fit, and that he never would be able to serve efficiently as a soldier, and would always be subject to such fits, and recommended his discharge on that ground, and that ground alone. This proposed testimony was objected to, and was received under the objection, which was ultimately sustained and the testimony excluded. It is now contended, in support of the motion for a new trial, that the court erred in not permitting this testimony of the witness Davis to be considered by the jury. When the testimony by which it was proposed to show a conversation between the witness and the surgeon was offered, the court thought, and is still of the opinion, that it was hearsay, and was incompetent. It was not shown that the alleged statements of the surgeon accompanied or were part of any act of his in connection with the discharge of the defendant from the service. It was not shown that they were contemporaneous with the making of the discharge and the certificate of disability. The conversation which it was proposed to prove was had at a time prior to the discharge. As the testimony of Mr. Davis shows, his talk with Lyons was concerning the future discharge of defendant. To make it competent, in the judgment of the court, it was essential that the statements of Lyons should be shown to have accompanied the act of discharging Daubner from the service, otherwise it was hearsay.

6. Another point urged in support of the motion for a new trial is this: One Coates, who was a member of the same company as that to which the defendant belonged, was a witness for the prosecution, and was examined at length. He testified generally with reference to the defendant's connection with the service, the state of his health while he and his company were in Arkansas, and during the time the regiment was on the White river expedition,—an expedition concerning which much testimony was given on both sides,—and as to the truthfulness of such of the statements in the defendant's declaration for a pension as related to his service and health at the time and place when and where the defendant claims he contracted

catalepsy. In the course of the examination of the witness it was shown that he had interested himself somewhat actively in the original investigation of the case, and, on cross-examination by defendant's counsel, he was asked whether he did not accompany the special pension examiner who had charge of the examination when that officer visited parties whom it was thought might be witnesses, and in reference to an interview with Dr. McMiller concerning the execution and contents of his affidavit, which is set out in the third count of the indictment. Undoubtedly the primary object of this examination was to show the interest and feeling of Coates in the case. In answer to questions put to him on the cross-examination, the witness testified to statements he made to McMiller about the latter's affidavit, and to certain statements McMiller made in reply, touching the same; among other things, that the witness told McMiller he was mistaken in some of his statements in the affidavit. On re-examination, the court permitted the district attorney to inquire further about that conversation with McMiller, and the witness gave further statements of McMiller, made in the conversation, which tended to impeach his affidavit, and to the effect that the affidavit which he, McMiller, signed, contained representations about the defendant which he did not understand were in it when he signed it. Then, on recross-examination, the witness further testified to other statements which he made to McMiller at the time of their interview in relation to the contents of the affidavit. The questions put to the witness by the district attorney, on re-examination, and by which he sought to draw out more fully the conversation between the witness and McMiller in relation to the affidavit, were objected to; and it was very earnestly insisted by counsel for the defendant that what McMiller told Coates in that conversation, in relation to his affidavit, was not evidence which could be received to show the falsity of the affidavit, and should therefore be rejected. The court permitted the evidence to stand as it was given by the witness, and, when the case was submitted to the jury, the point was renewed in the form of a request to instruct the jury, in substance, that the affidavit of McMiller could not be impeached by that evidence; and now, on this motion, it is again urged that the court erred in allowing the evidence to go to the jury.

Although the primary purpose of defendant's counsel in examining Coates with reference to his interview with McMiller was to show that Coates had interested himself in the case, and was, therefore, not an impartial witness, the court was at the time and is still unable to perceive how that circumstance could deprive the district attorney of the right on re-examination to call out the entire conversation between those parties. A part of the conversation having been developed by the cross-examination of defendant's counsel, the prosecution was entitled to the whole of it, and the entire conversation

having been testified to by the witness, the court, in its opinion, could not properly limit the application of the evidence to the single question of Coates' interest in the prosecution of the case, or his credibility; nor declare what weight or effect it should have in the case. It was competent testimony, made so by the fact that the defendant had opened the door for its introduction. The defendant could not, as it seemed to the court, take the position that that testimony, in the circumstances under which it was called out, might be used to affect or impair the credit of the witness, but not in any manner to prejudice the defendant. Touching this point the court entertains the same opinion now that it did on the trial; and in this connection it may be remarked that much of the testimony offered generally in the case to show the alleged falsity of the defendant's declaration for a pension, bore upon the question of the truthfulness or falsity of the McMiller affidavit.

7. Various affidavits have been submitted to the court in support of the claim that there was misconduct on the part of some of the jurors as another ground of the present motion. Two of the jurors have made affidavits to the effect that while the jury were deliberating on the case their foreman told them, in the presence of the jury, that he knew two of the witnesses for the prosecution, namely, Coates and Carlson, and knew them to be men of honor and truth, and that their statements as witnesses could be relied on. One of them also states in his affidavit that the foreman told the jury in effect that one of the counsel for the defendant had taken special pains to discredit Coates and Carlson in his cross-examination of them, and in his comments upon their testimony; also that it was understood in the jury-room that the court had by its instructions taken all of the testimony of the defendant's witness C. K. Davis out of the case; and, further, that it was understood by jurors that if Daubner did not have a fit on the White river then he must be guilty. The other juror referred to, states further, in his affidavit, that he intended to return a verdict of not guilty on the charge in the indictment in relation to the affidavit of Arthur Holbrook, and that he understood that the jury intended to acquit the defendant upon that charge. Still another of the jurors makes an affidavit that it was his understanding that the defendant was acquitted of the charge against him so far as it related to the Holbrook affidavit; also that he supposed and understood that the greater part of the testimony of C. K. Davis was "thrown out" by the court, and was not to be considered by the jury; and that that part of the witness Davis' testimony wherein he testified in substance that he saw the defendant in a fit at the post hospital in Helena, Arkansas, was discarded by the court, and was not, therefore, to be considered by the jury. The affidavit of one Schmidt is also submitted, in which he states that, while the trial of this case was in progress, he met at the hotel two gentlemen, who informed him in conversation that they were jurors in the Daubner case; that

the deponent remarked to them that the trial was lasting a long time; and that thereupon one of these persons took from his pocket a small pass-book and opened it, and exhibited written therein the names of some or all the witnesses that had been sworn in the course of the trial; "that deponent noticed that there were notes or writing of some kind in said pass-book, in connection with the names of witnesses therein, but what said writing was, or what said notes were, deponent does not know;" that directly afterwards the two jurors sat down together, and, with the pass-book still open before them, began to converse together, as the deponent believes, about matters connected with the trial, but about what particular matters he did not know. The defendant has made an affidavit in which he states that during the trial he twice saw one of the jurymen get into a buggy with one Carlson, who was a witness on the part of the government, and saw him ride away from the court-house building with Carlson. He further states that he is informed and believes that this juror and Carlson boarded at the same place in the city of Milwaukee during the trial.

It seems very clear to the court that nothing contained in these affidavits, which the court can rightfully consider, furnishes any ground for setting aside the verdict. Surely, the mere circumstance that one of the jurors rode from the court-house in a carriage with a witness for the prosecution, and that they boarded at the same place, is wholly insufficient as a ground for disturbing the verdict, without some further evidence that the circumstance operated prejudicially to the defendant. As to the affidavit of Schmidt, it is not shown that the two jurors mentioned therein had any conversation with him about the merits of the case, nor does it show that the notes or writing in the pass-book of one of the jurors related to the case. Indeed, Schmidt says that he does not know what the writing was; nor does he know what the conversation between the two jurors was about, after they left him in the manner stated in the affidavit.

Within the settled rules of law on the subject, the affidavits of the three jurors who testified to what transpired in the jury-room, and to their understanding of the verdict they rendered, or were to render, and of the ruling of the court in relation to the evidence of the witness Davis, cannot have the effect to impeach the verdict. In relation to the testimony of Davis, the court, in its instructions to the jury, distinctly said this:

"In the course of his testimony the witness Davis testified to a conversation he had with the post surgeon at Helena relative to the defendant, and his condition and discharge. This testimony was objected to at the time, but was admitted subject to the objection. The court has since held that testimony incompetent, and now withdraws it from your consideration. You will understand that this ruling applies only to that particular part of the testimony of the witness wherein he stated the conversation with the post surgeon. All the remainder of the testimony of the witness Davis is to be considered by you, as you consider any and all other testimony in the case."

Of the Holbrook affidavit it may be said that it is one of the affidavits set out in the third count of the indictment, the McMiller affidavit being the other. Together they constituted one count. The count is an entirety; and the jury could not render a verdict of guilty as to part of the count, and not guilty as to another part of it. In other words, if they found the charge as to the McMiller affidavit sustained, of necessity their verdict would be guilty on that count, whatever might be their conclusion as to the Holbrook affidavit.

In *Folsom* v. *Manchester*, 11 Cush. 334, it was held, on a review of the authorities, that jurors cannot be allowed to testify what one of their number stated to his fellows, after they had retired for deliberation, concerning the character of the parties to the suit.

In Hil. New Trials, 240, the law is thus stated:

"It is now the general rule that the affidavit of a juror will not be received to impeach his verdict, more especially to show what may have transpired among the jury in the jury-room while considering the case and agreeing upon their verdict. Such affidavit has been called 'an after-thought of the jurors,' and the rule is justified upon the ground that it might sometime happen that a juryman, being a friend to one of the parties, and not being able to bring over his companions to his opinion, might propose a decision by lot, with a view afterwards to set aside the verdict by his own affidavit, if the decision should be against him. So, also, it is said, one might testify one way; another, differently. This would open a novel and alarming source of litigation, and it would be difficult to say when a suit was terminated. * * * It might be the means, in the hands of a dissatisfied juror, to destroy a verdict at any time, after he had assented to it. * * * So, in a late case, it is remarked: 'It is a rule founded upon obvious considerations of public policy, and it is important that it should be adhered to, and not broken in upon to afford relief in supposed hard cases.' * * * So, affidavits are not admissible that one or more of the jurors misunderstood the charge. * * * Nor will the affidavit of a juror be received that he misunderstood the evidence, or disregarded the evidence and the charge, even in a capital case."

Many cases are cited in the notes to Mr. Hilliard's chapter on this subject in support of the text. In some of the cases the courts have, perhaps, adopted too strict a rule, and one not entirely supported by other adjudications; but I am clearly of the opinion that the affidavits submitted here contain matters which bring them without doubt within the rule established by authorities not to be questioned. And, on the whole, my conclusion is that the verdict cannot be disturbed for any reasons alleged in support of the charge that there was misconduct on the part of the jury or of individual jurors.

* * * * * * * * *

S. Arthur Holbrook, who was the first lieutenant of the company to which the defendant belonged, and the person who made one of the affidavits set out in the third count of the indictment, was examined as a witness for the government. He identified the affidavit referred to, and stated that he signed it at the instance and request of the defendant; further, that he knew nothing of any sickness of the defendant at St. Charles, in Arkansas, nor of a snow-storm at that place;

that he was not on the White river expedition, but left the regiment before that expedition, and knew nothing that transpired in relation to the defendant, after he left the regiment. He was then asked the following questions, and made the following answers, against the objection of defendant's counsel:

"*Question.* Is the following language in the affidavit [meaning the affidavit of the witness mentioned in the third count of the indictment] true, as applicable to any disease contracted by the defendant on the White river expedition, or afterwards, to-wit: 'That subsequently, and during the month of January, 1863, said Daubner was attacked with a disease, and as he had been theretofore exposed to a severe snow-storm, his sickness was supposed to be the result of the same.' *Answer.* It is not true, as so applicable, so far as I know. *Q.* Was the declaration for a pension shown to you, or known to you, at the time of making the affidavits? *A.* No, sir."

Clearly, the questions thus put to this witness were proper. The declaration for a pension alleged that at St. Charles, Arkansas, in January, 1863, the defendant took a severe cold, from exposure to a snow-storm, and was suddenly attacked with a sickness, which prostrated him, and rendered him senseless, etc., and that he, on that attack, remained in an insensible condition for about eight hours; that he was treated on the hospital boat Imperial, in the White river, and immediately afterwards at the hospital in convalescent camp at Helena. As we have seen, the affidavit of Holbrook stated that he was attacked with a disease in January, 1863, and refers to his exposure to a snow-storm, and to sickness as the result of the same. And it further states that Dr. McMiller was second surgeon of the regiment, and was surgeon in the hospital in which the defendant was placed after his attack of sickness. Now, confessedly, the affidavit of Holbrook was procured in support of the defendant's claim and declaration for a pension, and the indictment charges that the affidavit was false, in that it was calculated and intended by Daubner to support his declaration for a pension touching his exposure at St. Charles, Arkansas, on the occasion of the White river expedition, in January, 1863, whereas, in fact, Holbrook had no knowledge whatever of the White river expedition, and was not with the regiment at the time mentioned in Daubner's declaration for a pension; the contents of said declaration not having been communicated to him, and not being known by him when he made his affidavit. It was not claimed by the attorney for the government that Holbrook intended to make a false affidavit; indeed, it was shown, so far as Holbrook was concerned, that when he made his affidavit he understood that he was referring to a condition of things existing while the regiment was in Kentucky, and before he, Holbrook, had left the regiment. But it was claimed in behalf of the prosecution that the defendant procured Holbrook's affidavit in support of his declaration for a pension, which located the place of his alleged sickness and condition of insensibility at St. Charles, and when the regiment was on the White

river expedition, for the purpose of satisfying the department of the truth of the allegations of his declaration. So it became a material question, under the allegations in the indictment, as the court in its charge subsequently said to the jury, whether the affidavit of Holbrook was to the defendant's knowledge false, as an affidavit intended to support his declaration for a pension; that is, whether the defendant intended to mislead and deceive by the use of an affidavit true on its face, but false when applied to such a state of facts as was alleged in the declaration for a pension. Did the defendant intend to deceive the commissioner of pensions by presenting an affidavit appearing on its face to relate to the same state of facts as that set forth in the declaration, but, in fact, and in the mind of the person who made the affidavit, having reference to another and different state of facts? These being pertinent and substantial points of inquiry, bearing upon the defendant's understanding and intent in the transaction, the questions put to the witness Holbrook, which were objected to, were undoubtedly competent.

9. It was in proof that in 1875, and subsequently, the defendant was treated for catalepsy by Dr. N. A. Gray, and that he continued his treatment until the defendant applied for a pension. The defendant testified that Dr. Gray told him finally that his disorder was incurable. The following questions were then put to the defendant, which were objected to by the district attorney, and the objections were sustained, namely:

"*Question.* What, if anything, did Dr. Gray at that time advise you with reference to your right to have a pension for that disability? *Question.* When were you advised, and when did you first know, that you were entitled to a pension from the government on account of this disease of catalepsy?"

The last question was then repeated, and the defendant offered to show that he first knew his disease was a subject for an application for a pension within a few days of the date of the application, and then first learned the same from his physician, Dr. Gray. The court refused to permit the defendant so to testify. It will be observed that the court allowed the defendant to state everything which the physician said to him in relation to his disorder, and as to its alleged incurableness. Concerning the disorder the physician was of course competent to speak, and any information he gave to the defendant which pertained to the disease itself, it was proper to show, and the court permitted it to be shown. But it will be noticed that, in the additional questions put to the defendant, counsel sought to go further, and to show statements which it was claimed the physician made to the defendant in relation to the latter's right to claim and to obtain a pension. This was outside such statements or communications as could be properly called professional. The law fixed the rights of the defendant with reference to a pension, and the statements of the physician to him on that subject were no more admissible than would be the statements of any other person on that subject,

made under the same circumstances. The fact that the defendant may then have been suffering from catalepsy, did not of itself make him a subject for a pension. His right to a pension depended, among other things, upon whether he contracted the disease while in the military service. The questions objected to did not call for any opinion given by the physician to the defendant, which it was competent for him to give as an opinion within the line of his profession; and I can have no doubt that the questions were objectionable.

* * * * * * *

10. The court has been very strongly urged to grant a new trial on the ground that the verdict is not warranted by the evidence. Appreciating fully the force of the argument made by counsel to the court, on the merits of the case, I have endeavored with the utmost care, and not without anxiety,—*First*, to ascertain within what limits the court may act in exercising the power of granting or refusing a new trial in a case of this character; and, *secondly*, by weighing and considering the testimony adduced on both sides, to determine whether the verdict is just and ought to stand. The authorities are not in entire harmony in their statements of the rule which should control the court in exercising the power of granting new trials in criminal cases. In Hil. New Trials, at page 114, it is said:

"A new trial may be granted in case of conviction upon insufficient evidence; but in criminal as well as civil cases a verdict will always have great weight with the court, and a new trial will not, of course, be granted, because the court is not satisfied beyond a reasonable doubt, from the evidence in the record, of the guilt of the defendants."

And authorities in support of this proposition are cited in the author's notes. In the same work, at page 480, cases are referred to in which it has been held that a new trial will be granted in criminal cases where circumstances of guilt are slight, or where the testimony preponderates against the verdict. So, where the court was satisfied that the facts were involved in too much doubt and uncertainty to warrant the conviction, or where the jury in a trial for murder had not, in the consideration of the evidence, given the prisoner the benefit of every doubt. Again, on page 448, it is said:

"Courts should rarely take it upon themselves to decide upon the effect of evidence. Were they so to act they might with truth be charged with usurping the privileges of the jury. If the verdict is clearly wrong, we must do so. If we only doubt its correctness, we must let it alone. * * * A mere difference of opinion between the court and jury does not warrant the former in setting aside the finding of the latter. That would be, in effect, to abolish the institution of juries, and substituting the court to try questions of fact."

In *Waller* v. *State*, 4 Ark. 88, it was held that, in a criminal case, the presumption of law is in favor of the verdict; unless the record affirmatively overthrows this presumption, it will not be disturbed; and it must do this in such manner as to show that manifest injustice and wrong have been done in the premises.

In *Kirby* v. *State*, 3 Humph. 304, it was said:

"It is not to be understoood * * * that the verdict of the jury in a criminal case weighs nothing with this court, and that a new trial will be granted if, upon the evidence certified in the bill of exceptions, we are not convinced, beyond a reasonable doubt, of the guilt of the party. On the contrary, the jury are the exclusive judges of the credit of the witnesses, and in all cases much must occur before the court and jury, properly calculated to act upon their minds, which cannot be transferred to paper. A verdict, therefore, in all cases, must have great weight with this court."

In *People* v. *Goodrich*, 3 Parker, Crim. Cas. 518, it was held that the power to grant new trials ought not to be exercised, except in cases where it was the duty of the court to advise the jury to acquit the defendant, or to inform them that it was unsafe to convict upon the evidence before them; and that in cases of doubt, where the evidence is conflicting, and the credibility of the witnesses is in question, and no error has been committed by the court, a new trial will generally be denied. In this case a new trial was refused, although the court said that it would have been better satisfied with the action of the jury if they had acquitted the defendant.

Perhaps the correct rule on this subject is as well stated in the case of *State* v. *Elliott*, 15 Iowa, 72, as in any other. It was there held that while the court should set aside a verdict which is clearly against the evidence, and while greater latitude is allowed in the examination of motions for a new trial on this ground in criminal than in civil cases, it should be well satisfied of the insufficiency of the evidence to convince the judgment, reason, and conscience of the jurors of the correctness of the verdict. In the opinion of the court in this case it was said, as may be well said here, that in the consideration of the testimony much depended—

"Upon the character of the witnesses, their means of knowledge, their relation to the parties, their demeanor upon the stand, the agreement or non-agreement of their statements with the facts otherwise established, and many other matters not necessary to refer to in detail; and while a jury is not justified in arbitrarily disregarding the testimony of a witness, the circumstances which properly influence them are so various, and so often impossible to be known by this court, that, in case of conflict, there should be great hesitation before their conclusion should be disturbed. * * * It was the duty of the jury to be satisfied of the guilt of the accused, beyond all reasonable doubt, and this doubt is removed when they have arrived at that certainty 'which convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it,' (*Com.* v. *Webster*, 5 Cush. 320;) and while we recognize the duty of the court to interfere with an unjust verdict, it should, nevertheless, be well satisfied, when the testimony is conflicting, of its insufficiency to convince the judgment, reason, and conscience of the triers before setting aside the conclusion arrived at, as it must be presumed, after the requisite patient thought and attention."

The inquiry would seem to be, therefore, not alone whether the court, upon a consideration of all the evidence, might come to a different conclusion from that arrived at by the jury, but whether it is

clear, from the insufficiency of the evidence itself, that the jury have not rendered such a verdict as in reason and justice ought to have been rendered. In other words, the court should be able to say, this is such a verdict as cannot stand. Its injustice is manifest, because of the insufficiency of the evidence to sustain it. And where the credibility of witnesses is involved, so that it becomes necessary for the jury, in arriving at a conclusion, to determine who of the witnesses they will believe and who they will not believe,—who are corroborated and who are not,—and thus ascertain where lies the weight of credible evidence upon a given point, it is the duty of the court to exercise exceeding care lest it usurp the necessary functions of the jury, while at the same time it sees to it that an unjust conviction is not brought about with its sanction or concurrence.

Now, as the court stated to the jury, the oral proofs on the part of the prosecution consisted—*First*, of the testimony of persons who were members of the twenty-eighth regiment, the object of which was to establish the government's claim that the defendant was not, while in the line of his duty at St. Charles, in consequence of exposure to a snow-storm, attacked with a sickness which rendered him senseless, or which resulted in catalepsy, or any kindred disease; that he did not contract catalepsy while in the service, and was not treated in hospital, on the boat Imperial, or elsewhere, for any such disease. *Second*, of testimony relating to the performance of manual labor by the defendant, and his ability to perform such labor since he returned from the service. *Third*, of medical testimony concerning the disease known as catalepsy. *Fourth*, of testimony in support of the claim that certain relatives of the defendant, in the ancestral line, had what had been spoken of as fits and sinking spells, and that the defendant's alleged disorder was inherited. And, *fifth*, of testimony tending to show the circumstances under which certain of the affidavits set forth in the indictment were prepared and executed.

The evidence on the part of the defendant was addressed to, and was intended to meet the evidence of the prosecution upon these subjects of inquiry; the testimony on both sides embracing within its scope, numerous incidental points.

The testimony which the court and jury were required to consider was voluminous. Upon various points it was conflicting, as might well be expected in a case of this character. Listening to it attentively, as the court did when it was delivered; observing the witnesses as they testified, and the various points in their examination indicative of strength or weakness of recollection concerning the facts about which they testified,—when finally a conclusion was reached, and a survey could be taken of the whole case in its general features and in all its details, the mind of the court was impressed with the conviction that the stain of fraud rested upon the claim which the defendant had made and successfully prosecuted for the allowance of a pension. Subsequent reflection has not removed this belief. With-

out going into an analytical examination of the evidence, it must suffice to say that the case was peculiarly one involving questions of the credibility of witnesses, and the accuracy of their recollection of facts and events; and it is impossible for the court to say that the jury exercised a perverted or mistaken judgment upon those questions. Of course, it cannot be said of the case made against the defendant that it is devoid of all doubt. Rarely can this be said of any case. At the same time it cannot be successfully maintained, I think, that the evidence is insufficient to sustain the verdict, or that the conclusions of the jury are not consistent with an honest, reasonable, and fair consideration of the evidence; and, applying to the case the rules of law which adjudications of undoubted authority declare should govern the court in determining the question here in judgment, I am of the opinion that the verdict should stand.

DUNHAM *v.* KIMBALL and others.

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

PATENTS FOR INVENTIONS—INFRINGEMENT.

Claims 1, 2, and 3 of patent No. 184,281, granted to Henry Dunham, August 18, 1874, for an improvement in machines for driving nails in boots and shoes, are infringed by the nailing machine made by J. E. Kimball, but the fourth claim in said patent is not infringed by said machine.

In Equity.

Charles H. Drew, for complainant.

James E. Maynadier, for defendants.

Before LOWELL and NELSON, JJ.

LOWELL, J. The plaintiff is the owner of three patents for improvements in machines for driving nails in boots and shoes, invented by her husband, Henry Dunham, two of which are relied upon in this suit. Dunham conceived the idea of a machine to drive nails with heads by combining parts of two old machines. There were old and well-known machines for driving nails into separate pieces of leather, called tack-leathering machines; and other machines for feeding and pegging soles automatically with nails or pegs which had no heads. Dunham united the feeding and nail-driving devices of one class of machines with the devices for delivering and centering nails with heads which were found in the other class. He made no substantial change in the several devices. This is the patent, No. 154,129, dated August 18, 1874. He soon after made improvements in the machine, and obtained the second patent, No. 184,281, dated November 14, 1876, but applied for August 10, 1874. The chief value of the improvement described in the first patent seems to be in

the idea of combining the two old machines. As a working nail-driving apparatus, the machine described in the second patent is much better; and we are of opinion that a reasonably liberal construction should be given in favor of the person who both originated the idea and made, for the first time, a good machine; but that it is better to apply this construction to the second patent, which describes the commercially successful result. The specification of No. 184,281 declares that the improvement consists of—

"A rotary shaft, with a cam, for the raising of the driver, and a spring for the purpose of forcing of the driver downward onto the nail; in combination with an automatically operating nail reservoir, and automatically moved ways on which the nails are conducted to a side opening in the lower part of a stationary tube, through which the driver descends as soon as the nail has entered the tube. The side opening in the aforesaid stationary tube is closed by an automatically moved picker as soon as the nail has entered the stationary tube, and a pair of elastic springs on each side of the stationary tube serve for the purpose of centering the nail previous to its being driven."

The description of the machine and its operation, so far as we are concerned with it, may be thus given:

A reservoir supplies nails to an inclined nailway, or track, of a form already well known, consisting of two parallel rails upon which the nails slide by their heads, called nailways (plural) in the patent. These ways have an adjustable cover, said to be new, which has two functions, to assist in holding and guiding the nails in their course down the ways, and to close the end of the nailway during a part of the operation. The ways reciprocate in and out of the throat of the nail tube. The operation of driving a nail is this: The ways move forward into the nail tube; at this time, the lower or springing end of the cover is lifted, and a thin blade of iron is thrust between the lowest nail and the others; the ways are drawn back, and the lowest nail is left in the tube and is driven by the driver. As the ways recede, the lower part or end of the cover is released and snaps over the nails.

The defendant J. E. Kimball was formerly in partnership with Dunham, and had an interest in the patents. Since their separation, he has made a nailing machine, which, in his opinion, does not infringe the plaintiff's patents. The other defendant, Merritt, is not now interested in the case, and is a witness for the plaintiff.

The opening general description of Dunham's specification would nearly describe the defendant's machine. There are certain differences upon which the question of infringement turns. The defendant has a mechanism for feeding the leather which differs from that of the plaintiff; but both are old. He has stationary inclined ways, which extend to an opening in the side of the nail tube. These ways are met by what he calls a fork, which is a piece of iron, divided in the middle, like a section of the nailways. This fork reciprocates in and out of the nail tube in the opposite direction from the reciprocating nailways of the plaintiff. When a nail has slid down upon this fork, a thin blade moves forward and separates it from the body of nails; the fork then recedes, and leaves the nail in the tube to be driven.

The plaintiff contends that the part which the defendant calls a fork is really a portion of the nailways; and that it reciprocates for the same purpose, and with the same effect as the whole track or way reciprocates in the patent; and that, in truth, the mode of operation of the two machines is substantially similar.

The defendant insists upon the differences between the two organizations, which all depend upon the fact that the defendant's machine has no spring to stop or protect the end of his nailway. In all other respects the machines are alike. The piece called a fork is one with the nailway, and a part of it when the nail is delivered into the throat of the nail tube; the separator acts in the same way to divide the lowest nail from the others; the fork, which, when at rest, was a part of the nailway, recedes, and the nail is driven in the same way as in the plaintiff's machine. The difference is that the nailway is cut in two and the lower end moves in the opposite direction from that in which the plaintiff's nailway moves. The part of the cover which acts as a stop is not needed, and is not present in the defendant's machine. We doubt its being an essential part of the plaintiff's machine. At any rate it is distinctly and separately described and claimed. We agree with the plaintiff that the fair construction of his patent will cover the defendant's machine.

The fourth claim, which contains, as an element, the stop, or springing end of the cover, is not infringed. Claims 1, 2, and 3—which are for combinations, (1) of the nailway and nail tube, (2) of the nail tube with an opening in its side, and the picker (or separator) and nailways, and (3) the ways and the adjustable cover—are infringed.

Decree for the complainant.

NAT. PUMP CYLINDER CO. *v.* GUNNISON.

(*Circuit Court, W. D. Pennsylvania.* September 4, 1883.)

PATENTS FOR INVENTIONS—CLAIM IN REISSUE REPEATING CLAIM IN ORIGINAL PATENT.

Where the claim in a reissue, while differing verbally from the claim in the original patent, is substantially and in legal effect a mere repetition of that claim, the claim in the reissue may be sustained.

Gage v. *Herring* 2 Sup. Ct. Rep. 819; *Schillinger* v. *Greenway Brewing Co.* 17 FED. REP. 244, followed.

In Equity. *Sur* demurrer to bill.

John K. Hallock, for demurrer.

Mr. Taylor, contra.

ACHESON, J. The *first, second,* and *third* grounds of demurrer go to the entire bill of complaint, and, if sustained, would require the court to hold that the reissued letters patent are void *in toto* by reason

of the alleged unwarrantable expansion of the claim. But it has been authoritatively decided that the invalidity of a claim in a reissue does not impair the validity of a claim in the original patent which is repeated and separately stated in the reissued patent. *Gage* v. *Herring*, 23 O. G. 2119; [S. C. 2 Sup. Ct. Rep. 819;] *Schillinger* v. *Greenway Brewing Co.* 24 O. G. 495; [S. C. 17 FED. REP. 244.] Now, in the present case, the second claim of the reissue, while differing verbally from the first claim of the original patent, is, it seems to me, substantially, and in legal effect, a mere repetition of that claim; and therefore, under the authorities cited, such second claim may be sustained. The *fourth* ground of demurrer is conceded.

And now, September 3, 1883, the fourth ground of demurrer is sustained, but the first, second, and third grounds of demurrer are overruled, and leave is granted the defendant to answer within 30 days.

THE MARY N. HOGAN, etc.

(*District Court, S. D. New York.* August 10, 1883.)

1. NEUTRALITY LAWS—FORFEITURE OF VESSEL—ADMIRALTY RULE 11.
   The eleventh rule in admiralty, authorizing the bonding of vessels arrested, is not imperative in all cases; it is designed to apply in suits to recover pecuniary demands, and should not be applied where it would defeat the object of the suit.
2. SAME—REV. ST. §§ 5283, 4189—BONDING VESSEL.
   Section 5283 of the Revised Statutes is designed to prevent hostile expeditions altogether by the seizure and forfeiture of the vessel engaged in them; not to set a price, by releasing the vessel on bond, upon the violation of international obligations; and no interpretation of the admiralty rules should be permitted which would admit of that result.
3. SAME—CASE STATED.
   Where the steam-tug M. N. H. was seized for forfeiture under sections 5283 and 4189, on a libel charging, upon responsible authority, that she had been fitted out for, and was about to depart upon, a hostile expedition against Hayti, and was registered under a false certificate of ownership, and application was made by the alleged owner, under rule 11, for appointment of appraisers for the purpose of bonding the vessel, *held*, that rule 11 was not designed for such a case, and that the vessel should not be released on bond, and the application for appraisers was denied.

In Admiralty.

Elihu Root, U. S. Atty., for libelant.

Weekes & Forster, for claimant.

BROWN, J. The steam-tug Mary N. Hogan being in the custody of the marshal, under arrest upon process issued for her forfeiture to the United States, application is made in behalf of John H. McCarthy, her alleged owner, for the appointment of appraisers to determine her value, preliminary to giving bond for her release from custody. The application is opposed by the district attorney on the ground that the

claimant is not, in this case, entitled to bond the vessel. The proceedings for the forfeiture of the vessel are instituted under sections 5283 and 4189 of the Revised Statutes. The former section subjects to forfeiture any vessel "furnished, fitted out, or armed within the limits of the United States with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace." The libel charges that the Mary N. Hogan, on or about the fifteenth of July, 1883, was furnished, fitted out, or armed within this district, with the intent that she should be employed in the service of certain rebels in the island of Hayti, to cruise or commit hostilities against the subjects, citizens, or property of the island of Hayti, with which the United States are at peace.

By section 4189, also, every vessel is made liable to forfeiture whose certificate of registry "is knowingly and fraudulently obtained;" and the libel charges that John H. McCarthy, on or about the fifteenth day of July, 1883, knowingly and fraudulently procured the registry of said vessel in his name as sole owner, upon oath that there was no subject or citizen of any foreign prince or state directly or indirectly interested in her, whereas, in fact, a foreign citizen was part owner.

The proceedings for the forfeiture of the vessel are proceedings in admiralty, and governed by the admiralty rules. The appointment of appraisers and the bonding of the vessel are claimed under rule 11 of the supreme court rules in admiralty, which provides that "where any ship shall be arrested, the same *may*, upon the application of the claimant, be delivered to him upon due appraisement to be had under the direction of the court, upon the claimant's depositing in court so much money as the court shall order, or upon his giving stipulation with sureties," etc.

In the great majority of cases suits are brought, and the arrest of the vessel is made, for the purpose only of securing payment of some pecuniary demand. In such cases the object of the suit will be fully secured by permitting a good bond, with sureties, to be substituted as security in place of the vessel during the pendency of the litigation; and thereby not only is the great expense of keeping the vessel in custody for a considerable period avoided, but the vessel is also allowed in the mean time to be engaged in the pursuits of commerce. Rule 11 is clearly designed for this purpose. It is not in form imperative in all cases of the arrest of vessels, but provides only that the vessel "*may*" be delivered, etc.; thus leaving to the court a discretion which may be rightly exercised under peculiar circumstances; and, as it seems to me, the rule clearly should not be applied in those cases where the object of the suit is not the enforcement of any money demand, nor to secure any payment of damages, but to take posses-

sion of and forfeit the vessel herself, in order to prevent her departure upon an unlawful expedition, in violation of the neutrality laws of the United States. Such, by the statements of the libel, appears to be the sole object of this suit; and to permit the vessel, as soon as arrested, to be bonded by the very persons alleged to be engaged in this unlawful expedition, and bonded presumably for the purpose of immediately prosecuting it, would be to facilitate in the most direct manner the unlawful expedition, and would practically defeat the whole object of the suit, and render the government powerless by legal proceedings to prevent the violation of its international obligations.

No section of the statutes other than section 5283 fully meets the circumstances of this case. That section is rightly invoked to enable the government to preserve itself from large possible liabilities through a violation of its treaty obligations to Hayti. It is clearly not the intention of section 5283, in imposing a forfeiture, to accept the value of the vessel as the price of a hostile expedition against a friendly power, which might entail a hundred-fold greater liabilities on the part of the government. No unnecessary interpretation of the rules should be adopted which would permit that result; and yet such might be the result, and even the expected result, of a release of the vessel on bond. The plain intent of section 5283 is effectually to prevent any such expedition altogether, through the seizure and forfeiture of the vessel herself. The government is, therefore, entitled to retain her in custody, and rule 11 cannot be properly applied to such a case.

Upon the papers submitted it appears that the proceedings are promoted at the instance of responsible officers of the Haytian government; and there is no evidence before me tending to show that the proceedings are in bad faith, or malicious, or on insufficient *prima facie* grounds; and the application for appraisers for the purpose of bonding should, therefore, be denied.

As the vessel is in custody, either party, under the rules of the court, is entitled to an immediate trial. No term for the trial of calendar causes being in session at this time, upon the consent of the United States attorney, already given in open court, the claimant, upon filing his answer to the libel, may have an immediate order of reference to the clerk to take the testimony in the cause; and when completed the case may be submitted, and will be at once disposed of.

The New Champion.

(*District Court, S. D. New York.* July 15, 1883.)

1. Admiralty—Lien—Supplies—Presumption.
   Necessary supplies furnished to a vessel in a foreign port are presumptively furnished upon the credit of the vessel as well as of her owners, and a lien on the vessel therefor will be sustained, unless the evidence is sufficient to rebut this presumption.
2. Same—Owner's Agreement.
   The lien will not be affected by an agreement between the owners and the captain that the latter should find the crew and provisions, where the seller had no knowledge or notice of the agreement.

In Admiralty.

Alexander & Ash, for libelants.

J. A. Hyland, for claimant.

Brown, J. The supplies for which this action is brought were provisions furnished at Bergen Point, New Jersey, to the steward, in accordance with the master's orders; and all belong to the class of necessaries. The captain was running the barge on an agreement with the owners that he should have $60 per month and find the crew and provisions. The libelants, who kept a grocery store at Bergen Point, had no knowledge or notice of this arrangement, as in the case of *The Wm. Cook*, 12 Fed. Rep. 919, and hence were not bound by it. *The John Farron*, 14 Blatchf. 24, reversing 7 Ben. 53; *The S. M. Whipple*, 14 Fed. Rep. 355; *The India*, Id. 476.

The libelant testified that the supplies were furnished on the credit of the vessel; and upon all the circumstances I do not think there is sufficient evidence to rebut this testimony, or the legal presumption that the supplies, being furnished in a foreign port, were furnished upon the credit of the vessel, as well as of her owners. *The Secret*, 15 Fed. Rep. 480; *The Plymouth Rock*, 7 Ben. 448; *The E. A. Baisley*, 13 Fed. Rep. 703; *The E. A. Barnard*, 2 Fed. Rep. 712, 714; *The Grapeshot*, 9 Wall. 129, 136.

The libelants must, therefore, have judgment for the value of the goods furnished, amounting with interest to $33.45, with costs.

VAN DOLSEN *v.* MAYOR, ETC., OF NEW YORK, and others.

(*Circuit Court, S. D. New York.* August 30, 1883.)

JURISDICTION—LEASE OF REAL ESTATE TO CONFER—TITLE TO WATER FRONT.

The owner of certain dock property, who derived his title from the British crown through a grant of land bounded by the "water side," in anticipation of the action of the defendants, leased the same to plaintiff, who was a citizen of another state. Defendants, who derived their title also from the crown, attempted, under authority of the laws of the state of New York, to fill into the water, and build a new water front before the landing place, and cut it off from the water. *Held* that, as defendants were grantees of the crown, they were limited as if they had made the grant the crown had made, and could not grant land bounded on a way, and afterwards remove the way without compensating the parties injured. *Held, further*, that, although the principal motive in making the lease was to enable the plaintiff to sue in the circuit court of the United States, as it did not appear that the lease was not real and effectual to pass the title of the term to plaintiff, the suit involved a controversy properly within the jurisdiction of the court.

In Equity.

James W. Gerard, for orator.

James C. Carter, for defendants.

WHEELER, J. This cause has been heard upon pleadings and proofs, from which it appears that while the whole proprietary interest in all the land and water now in question was vested in the British crown, Sir Edmund Andross, royal governor of the province of New York, granted, in 1676, to Gabriell Curtessee a tract of land on the east side of Manhattan island, bounded south-east by the river, and in 1677 to David Deffore another tract adjoining this, bounded "by ye water side." These lands, between now Forty-ninth and Fifty-first streets, on the water front of which there has been, and been used for many years, a landing place, are the property of Gerard and James W. Beekman, who leased the front to the orator for two years from November 11, 1880. The defendants are attempting, under authority of grants from, and laws of, the state of New York, to fill into the water and build a new water front before this landing place, and cut it off from the water. This bill is brought to restrain such action, and for an account of damages. The owners have been accustomed to lease these premises for dock purposes before. They apprehended such action as has been begun by the defendants, and a controlling reason for making this lease was the fact that the orator is a citizen of another state, and could, as was supposed, proceed against the defendants in this court for any inteference with his rights. It is objected that this controversy is really between the lessors and the defendants, who are citizens of the same state, and not between the orator and the defendants, and that, therefore, the suit does not really involve a controversy properly within the jurisdiction of this court, and should be proceeded with no further, but dismissed, under section 5, act of

1875, (1 Supp. Rev. St. 175.) If the lease was real and not fictitious, the wrong, if any, during the term would be to the orator, and not to the lessors. Nothing is involved now except what occurred during that time. No right can be passed upon but his. If he has none, and the lessors are merely using his name to try their rights, the suit should be dismissed under the provisions of that act. It would not seem that the fact that he acted in view of the remedies afforded him by the laws of the land, and of all remedies under all the laws, could deprive him of any of the benefits or remedies of any of the laws of either jurisdiction. *McDonald* v. *Smalley*, 1 Pet. 620. The question in a case like this seems to be the same as before the act, and to be, as stated by Chief Justice MARSHALL in that case, whether the transaction was real or fictitious, although dismissing the bill without proceeding further may be more summary. Upon this question the evidence, although full as to the motive, is that the lease was real, or, at most, does not show that it was not real and effectual to pass the title of the term to the orator. There is, therefore, no good ground apparent for dismissing the orator's case without passing upon his rights involved in it.

The original grants are shown by entries and are not set forth at large; and there are several breaks in the chain of title in the public records, but the chain is perfect since very ancient times, and references are made from subsequent to prior grants, and from thence to the original grants, so as to be traceable throughout, and, in connection with peaceable possession shown beyond memory, the title from the crown by the grant of the royal governor down to the orator satisfactorily appears. *Mayor of Kingston* v. *Horner*, Cowp. 102; *Roe* v. *Ireland*, 11 East, 280; *Read* v. *Brookman*, 3 Term R. 159; *Fletcher* v. *Peck*, 6 Cranch, 87; 1 Greenl. Ev. § 45. The defendants, the mayor, etc., of New York, derive their title from the charter of Thomas Dongan, royal governor in 1686, granting all the lands about the island to low-water mark, reserving prior grants made within 20 years, and from subsequent grants from the crown and state extending further out under water. The rights of the crown at the revolution became vested in the state. *Martin* v. *Waddell*, 16 Pet. 367. Thus what was granted to Curtessee and Deffore in 1676 and 1677, in respect to the front of this land, has come to the orator during his term, and what remained to the crown after those grants has come to the defendants. The river by which the grant to Curtessee, and the water by the side of which the grant to Deffore were bounded, is the East river, through which the tide ebbs and flows, and which is a great highway for all people with all kinds of water-craft. The shore at this place was so steep that there was little or no difference, laterally, between high and low water, and vessels could always land there without artificial docks or wharves. The owners, and others by their permission, could and did pass freely from the land on to the river, and from the river on to the land; and could always do so while the river should remain

where, in the grants, it was described to be. There is no question but that the grants stopped at high-water mark, and left the right to the soil under water beyond in the crown, subject to the right of the public to the river as a highway over it. Bract. bk. 1, *c.* 12, p. 5; *Rex* v. *Smith*, 2 Doug. 441; *Com.* v. *Charlestown*, 1 Pick. 180; *Martin* v. *Waddell*, 16 Pet. 367. This highway was a way to this land when the successive grantees took it, and when the orator took his lease of it. So far as the defendants could have any right to it, or to the soil under it, the original grantor, the crown, had the same right. The crown, after *Magna Charta*, could not grant land bounded on a way, and afterwards, without compensation, remove the way, any more than an individual could. The defendants, as grantees from and under the crown, are limited as if they had made the grant which the crown made. They could not grant land to a way on land and afterwards remove the way. *Story* v. *New York Elevated Ry. Co.* 90 N. Y. 122. The title to the land under the way in that case came from the same source as the title to the land under this water-way, and in the same manner. If the authority of the state and city was not equal to the obstruction of that way, it is not apparent how they can be adequate to the total removal of this one. That is the latest decision, so far as is now known, of the highest court of the state upon the subject, and, to the extent of the principles involved there, must be considered to be the law of the state. The right of a land-owner to enjoy the way over navigable water adjoining his land seems to have been several times fully recognized by the supreme court. *Dutton* v. *Strong*, 1 Black, 25; *Railroad Co.* v. *Schurmier*, 7 Wall. 272; *Yates* v. *Milwaukee*, 10 Wall. 497. In the latter case Mr. Justice MILLER expressly states the proposition to have been decided in the two former. And in delivering the opinion of the court he further says:

"This riparian right is property, and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessary, that it be taken for the public good, upon due compensation."

This doctrine does not appear to have been overruled.

In *Weber* v. *Harbor Com'rs*, 18 Wall. 57, Mr. Justice FIELD, in the opinion of the court, says:

"It is unnecessary for the disposition of this case to question the doctrine that a riparian proprietor, whose land is bounded by a navigable stream, has the right of access to the navigable part of the stream in front of his land, and to construct a wharf or pier projecting into the stream, for his own use, or the use of others, subject to such general rules and regulations as the legislature may prescribe for the protection of the public, as was held in *Yates* v. *Milwaukee*, 10 Wall. 497. On the contrary, we recognize the correctness of the doctrine as stated and affirmed in that case."

Barney v. *Keokuk*, 94 U. S. 324, was an action of ejectment, and involved the right of soil, and not a right of way, and what is there

said appears to have been said in that view. This seems to be the English doctrine now. *Lyon* v. *Fishmonger's Co.* L. R. 1 App. Cas. 662; 35 Law T. Rep. (N. S.) 569. In this case the lord chancellor appears to have said: "I cannot entertain any doubt that the riparian owner on a navigable river, in addition to the right connected with navigation to which he is entitled as one of the public, retains his rights as an ordinary riparian owner, underlying and controlled by, but not extinguished by, the public right of navigation;" and Lord SELBORNE: "For the purpose of a riparian proprietor, lateral contact with a stream is, *jure naturæ*, as good as vertical right. It is true that the bank of a tidal river, of which the foreshore is left bare at low water, is not always in contact with the flow of the stream, but it is in such contact for a great part of every day, in the ordinary and regular course of nature, which is an amply sufficient foundation for a natural riparian right." The defendants are not proceeding to take such rights for public use upon making compensation, but are proceeding arbitrarily in denial of the existence of any such rights. These cases and principles seem to entitle the orator to relief. There are numerous cases which, standing alone, would support the claims of the defendants. *Lansing* v. *Smith*, 4 Wend. 9; *Gould* v. *Hudson River R. Co.* 6 N. Y. 522; *Furman* v. *The Mayor, etc.*, 10 N. Y. 567; *Stevens* v. *Paterson, etc., R. Co.* 5 Vroom, 532; 10 Amer. Law Reg. 165. They are not considered to be controlling, in view of the later cases referred to.

The orator's title has expired now, but had not at the commencement of the suit nor at the time of hearing. The delay would not take away any right to relief which he then had, although his right to continued relief might cease. He has no occasion now for the continuance of an injunction, but may be entitled to an account for damages.

Let there be a decree for the orator accordingly, with costs.

See *Fountain* v. *Town of Angelica*, 12 FED. REP. 8, note, 10.

CHEWETT *v.* MORAN.

(*Circuit Court, E. D. Michigan.* September 18, 1883.)

1. EQUITY—SUBJECTING REAL ESTATE IN HANDS OF HEIRS TO DEBTS OF ANCESTOR.
   A bill in equity will lie to subject real estate in the hands of heirs to the payment of the debts of their ancestor.
2. SAME—PROCEEDINGS IN PROBATE COURT—LACHES.
   It is not an absolute bar to the maintenance of such bill in a federal court that the estate of the ancestor was administered in the probate court of the state; that commissioners were appointed to audit claims against the estate; that a time was limited within which all claims must be presented; and that

plaintiff did not appear before such commissioners or offer to make proof of her debt, notwithstanding a law of the state declared that all claims against such estate not so presented should be forever barred. *Held, further*, that the failure to present such claim was evidence of laches, and that the burden was upon the plaintiff to excuse the same.

3. SAME—DEBT SECURED BY MORTGAGE—PAYMENT OF INTEREST.

It appearing that the debt was secured by mortgage; that the interest upon such mortgage was regularly paid by the mortgagor during his life-time, and by his administrator after his death, until the estate was closed and turned over to the heirs; that the mortgage was thereupon foreclosed and the property sold, and that the claim was for a deficiency upon such sale,—it was *held* that the mortgagee was not bound to prove her claim before the commissioners, and that her delay was sufficiently excused.

In Equity. On demurrer to bill.

This was a bill in equity on behalf of complainant, and all other creditors who might come in and contribute to the expense of her suit, against the heirs of Peter Desnoyer, to charge his estate with the payment of a balance remaining due upon a mortgage after sale of the property. The bill set forth that Desnoyer and wife in 1875 mortgaged to complainant certain lands in Sandwich, in the province of Ontario, to secure the payment of $4,000. The mortgage contained a covenant that the mortgagor would pay the money thereby secured. Desnoyer and his wife died in 1880, and William B. Moran was appointed administrator. After payment by the administrator of two installments of interest, default was made, the mortgage was foreclosed, and the property sold for $2,100, leaving a balance due of $1,550. The bill further alleged that Desnoyer left real estate to the value of $58,000, now in the hands of the defendants, upon which complainant claimed an equitable lien.

A. H. Fleming and *S. M. Cutcheon*, for complainant.

Isaac Marston, for defendants.

BROWN, J. This is in substance a bill to charge certain real estate in the hands of heirs with the mortgage debt of their ancestor. While it would seem that an action at common law will lie against an heir for breach of an express covenant of the ancestor, contained in a sealed instrument, provided the ancestor expressly bound himself "and his heirs" by the obligation, and provided the heir has legal assets by descent from the obligor, there can be no doubt of the jurisdiction of a court of chancery to entertain a bill on behalf of a creditor and all others who may choose to make themselves parties, to charge the real estate in the hands of the heirs with payment of the ancestor's debts. Story, Eq. Pl. 99–102; Adams, Eq. 257; *Skey* v. *Bennett*, 2 Younge & C. 405; *Stratford* v. *Ritson*, 10 Beav. 25; *Ponsford* v. *Hartley*, 2 Johns. & H. 736; *Riddle* v. *Mandeville*, 5 Cranch, 322; *Payson* v. *Hadduck*, 8 Biss. 293.

The chief difficulty in this case arises from the fact that proceedings to settle the estate in the probate court were taken, commissioners to receive proof of claims appointed, a time limited within which creditors should present their claims, the estate closed, and the administrator discharged before the filing of this bill. Complainant did

not offer to prove her claim before the commissioners, and allowed the time limited by law for the proof of claims to expire before any proceedings whatever were taken.

It is conceded that, under the federal authorities, complainant was not bound to appear before the probate court, but was at liberty to take the proper proceedings for the collection of her debt here. The jurisdiction of the federal court cannot be ousted or impaired by any provision of a state law requiring creditors to appear before a state court and present their claims. *Suydam* v. *Broadnax*, 14 Pet. 67; *Hyde* v. *Stone*, 20 How. 170; *Union Bank of Tennessee* v. *Jolly's Adm'rs*, 18 How. 503; *Payne* v. *Hook*, 7 Wall. 429.

It is claimed, however, that complainant has been guilty of laches in not proving her claim before the probate court, or at least in not instituting proceedings here within the time limited by statute, and before the estate was settled and the administrator discharged. We are referred to the case of *Board of Public Works* v. *Columbia College*, 17 Wall. 521, in support of the proposition that a court of equity will not exercise its jurisdiction to reach the property of a debtor applicable to the payment of his debts, unless the debt be clear and undisputed, and there exist some special circumstances requiring the interposition of the court to obtain possession of and apply the property. In this case, the debtor had died in 1861, leaving a will which was insufficient to pass real property, but sufficient to pass personal estate. His estate was administered in the orphans' court, but complainant's demand was never presented to it for allowance. In 1867 its bill was filed against the executor, heirs at law, and legatees, to reach the real property of the deceased which did not pass under the will, but which vested in his heirs. The object of the bill was to charge the executor for the assets which came into his hands, which he had distributed to the legatees under a decree of the supreme court of the district, on the ground that he was informed of the debt of the complainant, and failed to bring it to the notice of the court, directing a distribution, and to compel the legatees to refund the amounts received by them. In their answer defendants claimed that the distribution under the decree of the court afforded a complete protection to the executor and legatees. Upon the argument, the only question really controverted was the liability of the legatees to refund the amounts received by them to be applied on the demand of the complainant. The court held that to sustain a bill of this description the debt should be clear and undisputed, and that some satisfactory excuse should be given for the failure of the creditor to present his claim in the mode prescribed by law to the representatives of the estate before distribution. I think this case disposes of defendant's claim that this court has no *jurisdiction* to entertain a bill by reason of a failure of complainant to present her claim to the commissioners for allowance, or to prosecute this suit before the time allowed by law for the presentation of such claims had expired.

By Comp. Laws, § 4424, the probate court must allow from 6 to 18 months for the proof of claims against the estates of deceased persons, which time, by section 4425, may be extended to two years, but no longer; and by section 4433 it is provided that creditors who shall not exhibit their claims within the time allowed by the court for that purpose shall be forever barred from recovering them in any action whatever. It does not appear from the report of the above case whether a similar practice obtained in the orphan's court in the District of Columbia; but it does appear that auditors were appointed, who advertised for persons having claims against the estate to present them, and that the complainant did not in any way appear, or make its claim before such auditor. Decree was then entered, directing a distribution among the legatees. From the fact that the failure of complainant to present its claim before the auditors was not treated by the supreme court as an absolute bar to its bill, but only as evidence of laches, requiring explanation and excuse, we are led to infer that the limitation contained in these acts was not considered applicable to non-resident creditors, or pleadable as an ordinary statute of limitations in the federal courts. This inference is strengthened by a reference to the earlier cases of *Suydam* v. *Broadnax*, 14 Pet. 67, and *Union Bank of Tennessee* v. *Jolly's Adm'rs*, 18 How. 503, although the question was not squarely presented in either case. The whole tenor of these decisions is inconsistent with the idea that foreign creditors are limited in their choice of a forum, or subject to other limitations of the act. We think the whole enactment should be read together, and that if a non-resident creditor is not bound to prove his claim before the probate court, he is not restricted by the other provisions of the act requiring all claims to be proved within a limited time. In other words, the limitation is applicable only to such claims as are required to be proven in the manner pointed out by the act.

We think, too, that this ruling may be justified upon the broader ground that courts of equity are bound by statutes of limitation in general only by analogy, and may relieve against them in cases of manifest injustice. Thus, in Story, Eq. Jur. § 1521, it is said:

"Courts of equity not only act in obedience and analogy to the statutes of limitation in proper cases, but they also interfere in many cases to prevent the bar of the statutes, where it would be inequitable or unjust. Thus, for example, if a party has perpetrated a fraud, which has not been discovered until the statutable bar may apply to it by law, courts of equity will interpose, and remove the bar out of the way of the other injured party. *A fortiori*, they will not allow such a bar to prevail by mere analogy, to suits in equity, where it would be in furtherance of a manifest injustice."

Instances of the application of this doctrine are not unknown even in this state. Thus, in *Michigan Ins. Co.* v. *Brown*, 11 Mich. 265, it was held that a remedy by foreclosure of a mortgage in equity was not lost by an action at law upon the debt becoming barred by

the statute of limitations. In delivering the opinion Mr. Justice CAMPBELL said:

"The statute of limitations is confined to actions or suits to enforce payment of the contract as a personal demand. Equity follows the analogies of the law in all cases where an analogous relief is sought upon a similar claim. But where the relief sought is in its nature one of equitable and not of legal cognizance, and the remedy is of a purely equitable nature, equity follows its own rules. * * * In regard to mortgages, equity, although raising presumptions from lapse of time, has not made these presumptions conclusive. * * * The rule fixing such presumptions at twenty years was adopted, undoubtedly, in accordance with the limitations of real actions in the common-law courts, but it differs from that in not being an absolute bar to the remedy." See, also, *Powell* v. *Smith*, 30 Mich. 451.

The case of *Johnston* v. *Roe*, 1 McCrary, 162, [S. C. 1 FED. REP. 692,] presents features very similar to those of the case under consideration. This was a bill to subject certain property in the hands of the heirs of a debtor to the payment of the plaintiff's demand. It was contended by the defense that the statute of Missouri, concerning the administration of estates of deceased persons, required the presentation of all claims against the estate within two years from the time of the publication of a notice of the administration to creditors, and declared that all demands not thus exhibited should be forever barred. It was held that the federal court, sitting in equity, was not bound by this statute, inasmuch as the court, in the exercise of the chancery jurisdiction conferred by the constitution and laws of the United States, was not governed by the state practice. It was averred in the bill that certain entries, showing the payment of the notes in suit had been fraudulently made, and that in fact the notes had been paid. The court held that the statute in question was no bar to the prosecution of the demand. So, in the recent case of *Tice* v. *School-dist. No. 18*, 16 Chi. Leg. News, 1, [S. C. 14 FED. REP. 886,] it was held that the federal court, sitting in Nebraska as a court of equity, was not bound by a state law requiring all petitions for new trials to be filed in one year from the date of the judgment.

As no question is made regarding the validity of complainant's debt in this case, it only remains to consider whether she has been guilty of laches in not filing this bill before the estate was settled. It appears from the bill that the mortgagor, Desnoyer, died in March, 1880; that in June of the same year an administrator was appointed and commissioners designated to receive proof of debts, six months only being allowed to creditors within which to present their claims for examination and allowance. The commissioners reported prematurely in October, 1880, and in April, 1881, the probate court allowed the final account of the administrator, discharged him, and closed the estate. In August, 1880, and January, 1881, the administrator paid two installments of interest upon the mortgage, and the mortgagee was thereby led to believe that the mortgage would be assumed by

the administrator and heirs of the estate. On demand being made for a further installment in June, 1881, the administrator wrote the mortgagee that the heirs were in possession of their interests. In March, 1882, after due notice, and in accordance with the statutes of Canada, the mortgagee caused the property to be sold under a power of sale contained in the mortgage. Upon such sale the property realized but $2,100. This bill was filed in July, 1883. As the mortgage contained a personal covenant of the mortgagor to pay, the debt might undoubtedly have been proven against his estate. Yet the custom is to look to the land as the primary fund, and to resort to the personal responsibility of the mortgagor only in case of a deficiency after a sale of the premises. Indeed, under our statute, it is by no means certain that if the mortgagee had sought to prove her debt, the court would not have required her to exhaust her remedy against the land. *Clark* v. *Davis*, 32 Mich. 154, 159. But whether the common-law rule, which treats the personal estate as the primary fund for the satisfaction of debts, be changed by statute or not, it seems to me that complainant is not chargeable with laches in delaying this suit until a sale was had and the amount of the deficiency was ascertained.

The demurrer must be overruled.

BRYANT and another *v.* WESTERN UNION TEL. CO.

(*Circuit Court, D. Kentucky.* May 2, 1883.)

GRAIN GAMBLING—COMMISSION—RIGHT OF TELEGRAPH COMPANY TO REMOVE "TICKER" FROM A "BUCKET-SHOP."

The complainants were dealers in grain and produce. They never bought or sold for present delivery, but always dealt in futures and upon margins. Whenever the required margin was placed in their hands, they would buy or sell, for customers desiring them so to do, grain and produce at the last quotation of the Chicago Board of Trade. Such purchases or sales were always for the next or succeeding month's delivery, and the deal was taken by the complainants themselves. The customer was always required to keep his margin good, and that without notice; and if, at any time before the date fixed for delivery, the market in Chicago went against the customer to the extent of his margin, the trade was closed, the complainants taking the margin and the customer not being held personally liable, the extent of his loss being his margin. If, however, the market went in favor of the customer, he could call for a settlement any time and without regard to the maturity of his contract, and he was then paid the difference between the then market price and the price at which he bought or sold, less a sum which was called by the complainants "commission," which sum was one-fourth cent per bushel of grain alleged to be bought or sold. *Held*—

(1) That this was gambling of a most pernicious and demoralizing species, which a court of equity would not protect by enforcing contracts or otherwise.

(2) That the alleged commission was not commission at all, but was really the odds which the customer gave the complainants in the wager on the future of the market; because the complainants always took the deal themselves, and did not pretend to buy or sell to others for the account of the customer.

(3) Complainants being in the business of gambling, equity will not compel a telegraph company to furnish to them, by means of a telegraph machine known as a "ticker," quotations of prices ruling upon the Chicago Board of Trade, and this even though complainants were members of that board.

In Equity.

Arthur Carey and *A. P. Humphrey*, for complainants.

Rozel Wissenger, for defendant.

BARR, J. This cause is here by removal from the Louisville chancery court, and is now submitted on the motion of the defendant to dissolve the injunction granted by the chancellor. This injunction was granted upon the *ex parte* motion of complainants, and cannot have the same weight with me as if granted upon notice and a hearing. The state practice seems to be to grant injunctions without notice, and almost as a matter of course, if the petition sets out sufficient *prima facie* grounds. The particular thing complained of by complainants is the removal of a "ticker" in their office, and a consequent withdrawal of the reports of the daily transactions which take place on the Chicago Board of Trade. The Chicago Board of Trade is a private corporation, and can give or withhold from the public its transactions. It may give these transactions to the public through such agents or upon such conditions as the board may deem advisable. The defendants, through their agents, were and are reporting the daily markets upon this board. This is done by the permission of the board, and not as a right which it has without such permission. The defendants, therefore, in regard to these reports of the daily prices on the board, obey the properly expressed will of the board of trade. The duty of a telegraph company to the public in its business of telegraphing is not in this case. Neither is the question of whether or not a telegraph company can go into the business of news-gathering, and, having gathered news, which is common to the public, in the sense that all have a right to gather it, and then transmit it by means of its telegraph lines to some, and refuse it to others who are willing to pay the same rate and be governed by the same regulations as those who receive the news, before me for consideration.

The relations which telegraph companies bear towards the public may be such as to prevent any discrimination in the distribution of such news. Upon this subject I express no opinion, but it seems to be quite clear that a merchant, or a number of merchants and dealers organized into a corporation, can give to a reporter the terms of their private transactions; to be transmitted to others, upon any conditions they may choose to impose, even to the extent that these transactions shall not be transmitted to others dealing in the same goods or commodities. These transactions on the board of trade are private transactions, in the sense that the general public are not entitled to them, except by the permission of the board. The directors of the board of trade, in November, 1882, made the permission to defendant to be on

the floor of the board, and to report the current transactions of the board, conditional. This condition was that these current reports would not be published to or for the use of any person or organization in the city of Chicago, or elsewhere, that would publicly post the said quotations with a view of making transactions with other persons, based upon such quotations. The notice given defendant by Mr. Randolph was not in the language just quoted, but prohibited the defendant furnishing, after the first of January, 1883, the current quotations of the board to those who carried on the trade or business known as "bucket-shops." If the statement of Mr. Randolph gives truly the action of the board of trade, the complainants are of the prohibited class, as the affidavits of both sides concur in stating that they "publicly post their quotations with a view of making transactions with other persons, based upon such quotations." The notice, however, names those who carry on "bucket-shops" as the persons who are not to be furnished with these market quotations; hence it is material to inquire whether complainants carry on such a business. The complainants exhibit a form of contract which they use in these trades, and insist that it is legal, and that they do a legitimate business and do not carry on a "bucket-shop." The defendant, however, insists that the form of the contract exhibited, if legal, is a cover; and complainants' business is really that of betting and taking bets upon the fluctuations of the market prices of grain, produce, etc., and that they do carry on what is commonly known as a "bucket-shop."

There is filed with one of the affidavits a pamphlet issued by complainants, explaining their business and urging the public to deal with them. From this pamphlet and the affidavits filed by the parties I find that complainants' course of dealing is about this:

The complainants never buy or sell for present delivery, but always deal in futures and upon margins. Whenever the required margin is placed in the hands of complainants, they will buy or sell, as customers desire, grain, etc., at the last quotation of the Chicago Board of Trade. This is always for the next or succeeding month's delivery, and the deal is taken by the complainants themselves. The customer must always keep his margin good, and that without notice, and if any time before the time fixed for the delivery the market in Chicago goes against the customer to the extent of his margin, the trade is closed and the complainants take the margin and the customer is not personally liable, the extent of his loss being his margin. If, however, the market should go in favor of the customer, he may call for a settlement at any time and without regard to the maturity of his contract, and he is then paid the difference between the then market price and the price at which he bought or sold, less a sum which is called by complainants "a commission." This sum, which is one-fourth of a cent on each bushel of grain which is alleged to be bought or sold, is not a commission, as the complainants always take the deal themselves, and do not pretend to buy or

sell to others for the account of the customer, but is really the odds which the customer gives them in the wager on the future of the market.

It is perhaps true that if the customer keeps his margin good, so that he cannot be closed out, and does not exercise his right to settle upon the basis of the difference in the prices of the grain, etc., he can demand a compliance with the contract and a delivery, but if the course of business between the complainant and their customers is to settle their alleged contract by a payment of the differences in the market rates, the fact that a customer may, under certain circumstances, require an actual delivery, does not relieve the complainants from the charge of carrying on a "bucket-shop." It is the general course of a man's business which defines and classifies it. If "bucket-shop" means a place where wagers are made upon the fluctuations of the market prices of grain and other commodities, then I think the evidence shows the complainants keep such a "shop," and are of the class which defendants are prohibited from furnishing the market quotations of the Chicago Board of Trade. This is gambling, and a very pernicious and demoralizing species of gambling, which a court of equity should not protect even if the board of trade had not taken the action it has. It is true that this kind of gambling has not yet been made criminal by the statute law of the state, still if a case of wager is made out none of the state courts will enforce such contracts. *Sawyer* v. *Taggart, etc.*, 14 Bush, 727. Gambling on the fluctuation in the market prices of stocks, grains, etc., is against the public policy of the state, though it may not be a crime punishable by fine or imprisonment.

The complainants, in the bill which they have tendered, allege another ground for this injunction, and that is their membership of the Board of Trade of Chicago. I am inclined to the opinion that if the complainants' rights as members of the board have been violated, they must seek a remedy against that corporation, and have none against the defendant. But, if wrong in this, I do not think this ground will avail, because this record does not show that their rights as members of that board have been infringed or violated. The complainants were furnished the reports of this board by means of a "ticker" at their place of business in this city, not as members of the board of trade, but as any other person would be furnished them. The board of trade do not furnish or cause to be furnished these reports to its members, and the right to them does not in any way pertain to the membership of the board, and is entirely distinct from it.

The injunction should be dissolved; and it is so ordered.

May a board of trade, or other similar association, lawfully discriminate in furnishing quotations of its ruling prices? Judge BARR, in deciding the principal case, seems to imply that it may so discriminate. "The Chicago Board of Trade," says he, "is a private corporation, and can give or withhold

from the public its transactions. It may give these transactions to the public through such agents or upon such conditions as the board may deem advisable."

It may be true that that board "can give or withhold from the public its transactions," or that "it may give these transactions to the public through such agents or upon such conditions as the board may deem advisable;" but it is doubtful whether its right so to do results from its *status* as a private corporation. Private corporations are not, simply because they are private corporations, exempt from performing their duties to the public in a lawful and proper mode, any more than private individuals are. For example, the law prohibits one who carries for the public from discriminating unjustly as to whom he will carry, or as to the prices he will charge for the service. This rule of law is as compulsory upon private corporations—for example, railway companies, who are common carriers—as it is upon private individuals. All are equally within its meaning. It is obvious, therefore, that the duty of the Board of Trade of Chicago, or of any similar institution, as to disseminating its quotations of prices, cannot be determined by reference merely to its *status* as a private corporation.

Perhaps it will aid somewhat in determining the rule of law governing the board of trade in distributing its quotations of prices to examine the nature of the service it performs, and to settle definitely, if possible, for whom that service is rendered.

The service consists in placing within reach of almost every one in the business world the quotations of prices that rule upon the markets of the board. By telegraphing these quotations far and wide, the board informs farmers what prices they may get for their wheat, corn, and grain, where such prices will be paid, and by whom. By the same means the board informs consumers where they may buy wheat, corn, flour, and grain; what the supply on hand is; how much must be paid for a given quantity; and who has it to sell. The board stands as a middle-man between the producing and the consuming public. It serves both classes of the public by furnishing each with the information it desires. Nor is this service gratuitous. The board is paid for it in the profits which accrue to its members from their purchases from producers and their sales to consumers. A moment's reflection makes clear that a service is rendered, viz., the furnishing of information, and that it is rendered for somebody, viz., for the public.

There being a service performed for the public, the next question is, what rule of law governs the performance of that service? Unquestionably there must be some rule, else the conduct of the board in performing the service may be purely arbitrary, and subject only to regulation by its own caprice or will, with or without regard to right or wrong—a condition of things hardly to be credited. There is undoubtedly a rule. It is the same rule that governs every service performed for the public, namely: All services which any person, natural or artificial, undertakes to render the public must be performed impartially for all, and without undue preference or unjust prejudice towards any. In support of this rule see the American cases in note.[1] The principal English cases are also in the note.[2] In England and in many of the

[1] McDuffee v. Railroad, 52 N. H. 448; N. E. Ex. Co. v. M. C. R. Co. 57 Me. 188; Bennett v. Dutton, 10 N. H. 481; Sanford v. Railroad Co. 24 Pa. St. 378; C., B. & Q. R. Co. v. Parks, 18 Ill. 460; Audenried v. P. & R. Co. 68 Pa. St. 370; C. & N. W. R. Co. v. People, 56 Ill. 365; Messenger v. Penn. R. Co. 7 Vroom, 407; Cumberland Valley Co.'s Appeal, 62 Pa. St. 218; Camblos v. P. & R. R. Co. 4 Brewst. 563, 622; Vincent v. C. & A. R. Co. 49 Ill. 33; Shipper v. Penn. R. Co. 47 Pa. St. 338; Stewart v. Erie & W. T. Co. 17 Minn. 372; McCoy v. C., I., St. L. & C. R. Co. 13 Fed. Rep. 7; Hays v. Penn. Co. 12 Fed. Rep. 309; Express Co. Cases, 10 Fed. Rep. 210, 869.

[2] Pickford v. G. J. R. Co. 10 Mees. & W. 399; S. C. in Equity, 3 Eng. R. & C. Cas. 538; Baxendale v. G. W. R. Co. 14 C. B. (N. S.) 1; Baxendale v. G. W. R. Co. 16 C. B. (N. S.) 137; Sutton v. G. W. R. Co. 3 H. & C. 800; Baxendale v. L. & S. W. R. Co. L. R. 1 Exch. 137; S. C. 4 H. & C. 130; Palmer

states this rule has been enacted in the form of statutes regulative of railways, but such statutes are declaratory merely of the common law.

There must be, in performing public services, no unjust, unreasonable discrimination between persons. This is the rule governing all who serve the public, no matter what may be the nature of the service they render, nor what may be the political or legal *status* of the servant. He may be a private person or a public person, a natural person or a corporation. The question to be answered is: Is the service rendered for the public? If it is, it must be performed alike for all who are similarly situated. Governments themselves in the United States cannot discriminate unequally and unreasonably among their citizens. Still less may corporations, which are but the creatures of government, so discriminate.

It results from these principles that the Chicago Board of Trade, or any other similar association undertaking to serve the public with information, cannot lawfully single out one person or firm and unreasonably deny to them the information which it holds itself ready to furnish to all the rest of the business world.

These views derive some support from a decision by Chancellor TULEY, of Chicago,[1] who said:

"The board of trade does not profess to be engaged in a moral reform movement, nor is its action aimed solely at the 'bucket-shops,' as the preamble to this resolution passed by its managers shows its grievance to be that 'market quotations, to the injury of our members, are furnished parties no way contributing to the support of the board.' It is competition, not immorality, which the board of trade is seeking to put down.

"It is evident that if the managers can dictate that the quotations shall not be furnished this complainant, they may cut off from receiving the same every merchant, commission house, broker, banker, or other persons outside the board, and might, if they thought proper, dictate that only one man in New York city—Jay Gould or Keene—should be permitted to receive them by telegraph. In such case there would be but little difficulty in obtaining a monopoly in the dealing in and brokerage of grain and other commodities.

"What forestalling of the market might take place, and what gigantic monopolies might be built up in commercial centers, where values are determined by the ruling prices on the Chicago Board of Trade. Neither the establishing of monopolies nor the destroying of competition is looked upon with favor by the courts.

"The corporation known as the Chicago Board of Trade was organized more than a quarter of a century ago, by a few merchants of this city, for their own convenience in the transaction of their business. By reason of the wonderful development of the country tributary to Chicago as a commercial center,

v. L. & S. W. R. Co. L. R. 1 C. P. 588; West v. L. & N. W. R. Co. L. R. 5 C. P. 622; Palmer v. L. B. & S. C. R. Co. L. R. 6 C. P. 194; Parkinson v. G. W. R. Co. L. R. 6 C. P. 554; Baxendale v. G. W. R. Co. 5 C. B. (N. S.) 309; Id. 331; Nicholson v. G. W. R. Co. 5 C. B. (N. S.) 366; Garten v. G. W. R. Co. Id. 669; Garten v. B. & E. R. Co. 4 H. & N. 33; 6 C. B. (N. S.) 639; Bennett v. M. S. & L. R. Co. Id. 707; Nicholson v. G. W. R. Co. 7 C. B. (N. S.) 755; Ransome v. E. C. R. Co. 8 C. B. (N. S.) 709; Garten v. B. & E. R. Co. 1 B. & S. 112; Baxendale v. B. & E. R. Co. 11 C. B. (N. S.) 787; Branley v. S. E. R. Co. 12 C. B. (N. S.) 63; Baxendale v. L. & S. W. R. Co. Id. 758; Parker v. G. W. R. Co. 7 M. & G. 253; Crouch v. L. & N. W. R. Co. 14 C. B. 255; Crouch v. G. N. R. Co. 9 W. H. & G. 556; Finnie v. G. & S. W. R. R. 2 Macqueen, H. L. Cas. 177; S. C. 34 Eng. L. & E. 11; Crouch v. G. N. R. Co. 11 H. & G. 742; Barker v. M. R. Co. 18 C. B. 46; Parker v. G. W. R. Co. 6 E. & B. 77; Caterham R. Co. v. L. B. & S. C. R Co. 1 C. B. (N. S.) 410; Barrett v. G. N. R. Co. 1 C. B. (N. S.) 423; Ransome v. E. C. R. Co. Id. 437; Oxlade v. N. E. R. Co. Id. 454; Marriott v. L. & S. W. R. Co. Id. 499; Beadell v. E. C. R. Co. 2 C. B. (N. S.) 509; Painter v. L., B. & S. C. R. Co. Id. 702; Baxendale v. U. D. R. Co. 3 C. B. (N. S.) 324; Harris v. C. & W. R. Co. Id. 693; Jones v. E. C. R. Co. Id. 718; Baxendale v. E. C. R. Co. 4 C. B. (N. S.) 63; Ransome v. E. C. R. Co. Id. 135; Cooper v. L. & S. W. R. Co. Id. 738; Piddington v. S. E. R. Co. 5 C. B. (N. S.) 111.

[1] Public Grain and Stock Exchange v. W. U. T. Co., Circuit Court of Cook county, May, 1883.

the business done upon the floor of this board of trade has become a great and controlling factor in fixing the prices or value of grain, meats, and other commodities, not only throughout the United States, but to some extent in Europe. Millions upon millions of property, consisting principally of wheat, corn, and meats, the common necessaries of life, are affected in value daily and hourly by the transactions had upon the floor of this board of trade. So widely extended and important has the influence of the business there transacted been upon the price of grain and provisions, so much is the public interested in knowing and in ascertaining the results from hour to hour of that business, that I cannot bring my mind to the conviction that this business, and these market quotations,—if they are the property of the board,—are not 'affected with a public interest,' whereby they cease to be private property only, within the principles so clearly and forcibly laid down in the Munn and Scott warehouse case. *Munn* v. *Illinois*, 94 U. S. 113.

"This market on the floor of the board of trade stands in 'the gateway of commerce.' The members on the floor of the board of trade take 'toll,' by way of commission, upon four-fifths of the wheat and other products of the great north-west—an empire in itself. These products—such is the course of trade—must, whether the owners desire it or not, pass through the board of trade market. A membership of the board, which confers the privilege of participating in the taking this 'toll,' is worth $10,000. It can make no difference in principle whether this 'toll' is taken by the corporation or by the members, the result to the public is the same.

"It may be true that neither the courts nor the legislature can interfere with its control of its own floor, or with the right of the board to discipline its members. But I am clearly of the opinion that the business transacted upon the floor of the board of trade is 'affected with a public interest' to an extent which would authorize the legislature, and the courts in the absence of legislation, to prohibit the board of trade exercising any discrimination as to who shall receive from the telegraph companies these market quotations, or as to what telegraph companies shall be allowed facilities for distributing the information to the public. It is opposed to the very spirit of its charter that it become a monopoly or a close corporation."

This is not denying to the board of trade the right to keep its transactions entirely secret from the public, if it choose to do so. Whether or not this may be done may be questionable; but it is not necessary to discuss the point, since the board desires, not secrecy, but discrimination. Nor is it even saying that the board may not make a just discrimination as to who shall be furnished with its prices. It is only unjust, unreasonable discrimination which is within the prohibition of the law. Just and reasonable discrimination is proper. A railway company must furnish transportation equally for all; but it may eject or refuse to carry one who persists in gambling on the train, just as it may put off or decline to take a man with the small-pox; and if it be clearly established that a business man or firm uses quotations furnished by the board for a gambling purpose exclusively, the board might justifiably and lawfully refuse to furnish him its prices, as was commendably decided in the principal case.

The criterion by which it is to be determined whether the transaction is gambling or not, is the intention of the parties. If they intend an actual *bona fide* sale and delivery it is a lawful transaction, and this although a settlement may be made finally by a payment of differences. But not so if they in fact intend merely to bet upon the turns of prices. Then the transaction is gambling, and as such all acts and contracts in furtherance of it are illegal.[1]

[1] That this is the law, see Cobb v. Prell, 15 Fed. Rep. 774; Melchert v. Am. U. Tel. Co. 11 Fed. Rep. 193; Bruce's Appeal, 55 Pa. St. 94; Smith v. Bonvier, 70 Pa. St. 325; Maxton v. Gheen, 75 Pa. St.

But in the light of an Indiana decision it may even be doubted whether the fact that the "ticker," or the information it conveyed, was to be used for gambling or other immoral purposes, would warrant the telegraph company in removing it. In *W. U. Tel. Co.* v. *Ferguson*[1] it was decide dthat the telegraph company could not refuse to transmit a message to "send me four girls" on the ground that the girls were intended for purposes of prostitution. "We know of no provision of law," said the court, "which would authorize the appellant, or any of its agents, to inquire into or impugn the motives of any one who might desire to transmit a message, couched in decent language, over the appellant's telegraphic lines; and certainly we are not aware of any law which makes the appellant or any of its employes, a censor of public or private morals, or a judge of the good or bad faith of any party who may seek to send a dispatch over the appellant's lines."

Another point may be suggested. A telegraph company is a public corporation, exercising public franchises,—*e. g.*, eminent domain,—and serving the public in all ways for which it is competent. It is an agent of the public. As a part of its business it collects, in the various cities and places to which its lines run, information of ruling market prices. This information it transmits over its lines, and sells it to such of the public as desire to buy it. Now, when the board of trade admits the reporters and operators of a public agent to its rooms, and allows them to take and transmit quotations of prices, does not the board make a publication of its prices to the public, which entitles the public to use them without restriction? Is not the giving of such prices to an agent of the public a publication of them for the benefit of the public? If it publishes its prices to the world, can it say that certain persons shall not avail themselves of them? The publication is not copyrighted. Can the board restrict the use of published quotations by the public any more than an author who has no copyright can, after publication, restrain the subsequent publication of his work by all who choose to print it?

Again, the telegraph company is a "public servant."[2] It is like a common carrier. As a public servant and as a common carrier, can it say that it will not carry for A. because B. does not desire it to do so? Can it avoid performance of its duties as a public servant by a contract with somebody not to perform them? The decisions appear to answer these questions negatively. In *State ex rel.* v. *Bell Telephone Co.*[3] it is decided that "a public servant cannot avoid the performance of any part of the duty it owes to the entire public by any contract obligation it may enter into, even with the patentee of an invention."[4]

Judge BLODGETT, of the United States circuit court, northern district of Illinois, holds views somewhat variant from the foregoing. "The material question, as it seems to me," says he, "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

166; Swartz's Appeal, 3 Brewst. 131; Fareira v. Gatell, 89 Pa. St. 89; North v. Phillips, 89 Pa. St. 25; Gheen v. Johnson, 90 Pa. St. 38; Ruchizky v. De Haven, 97 Pa. St. 202; Porter v. Viets, 1 Biss. 177; In re Green, 7 Biss. 338; Clark v. Foss, 7 Biss. 540; Rumsey v. Berry, 65 Me. 570; Noyes v. Spaulding, 27 Vt. 420; Sampson v. Shaw, 101 Mass. 145; Bigelow v. Benedict, 70 N. Y. 202; Story v. Solomon, 71 N. Y. 420; Harris v. Tunbridge, 83 N. Y. 95; Lyon v. Culbertson, 83 Ill. 33; Gregory v. Wendell, 39 Mich. 337; Barnard v. Backhaus, 52 Wis. 593; Sawyer v. Taggart, 14 Bush, 727; Wilheim v. Carr, 80 N. C. 294.

[1] 57 Ind. 495.

[2] State ex. rel. v. Bell Telephone Co. 11 Cent. Law J. 350.

[3] *Supra.*

[4] See, also, New England Exp. Co. v. M. C. R. R. 57 Me. 188, 198; McDuffee v. Railroad 52 N. H. 455; Sandford v. R. R. Co. 24 Pa. St. 378

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 the 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."[1]

These views are, in some respects, unsound. As previously pointed out, the duty of the board of trade, or any other person or company, in dealing with the public, cannot always be determined solely by reference to the *status* of the person or company as being private or public. It is true that duties to the public may result from the public character of the company or person, but it is equally true that such duties may be imposed upon a person or company that is private; witness the duty not to discriminate unjustly laid upon private companies, and even individuals, who are engaged in common carriage. It is the nature of the service, and the fact that it is rendered for the public, and not the political or legal *status* of the servant, that brings him or it within the rule of law prohibiting unjust discrimination, and it cannot be concluded that because "the board of trade is a private corporation," possessing no power of eminent domain, and exercising no public franchise, "that no such duties are charged upon it toward the public as have heretofore been

[1] Met. Gr. & St. Exchange v. Board of Trade, 15 Fed. Rep. 850.

held by the courts to characterize or distinguish a public from a private corporation." If the board of trade performs a service for the public, it must perform it in the manner directed by the public, no matter whether it is a private or a public corporation. In such a case the public or private quality of the company is immaterial.

Nor is the dissemination of its prices a matter of compliment indulged in by the board. It is a matter of business,—a service rendered to the public which is productive of ample profit to the board, accruing from the purchases and sales made by its members,—transactions to which the dissemination of its prices is highly essential.

Further, it is not true that to allow an expelled member of the board to receive quotations by telegraph is to give him "all the benefits of a membership from which he has been excluded by, perhaps, his own misconduct." He is still deprived of his right to buy and sell in the markets of the board from which he is excluded; a privilege worth many times more than the information as to the ruling prices is worth.

The better view appears to be that the board of trade may keep its proceedings entirely secret, if it chooses; but if it undertakes to make them public it must serve all alike, and impartially, in giving information of them.

Can a telegraph company lawfully refuse to furnish a person with an instrument known as a "ticker," by means of which these quotations are disseminated?

The custom of the board of trade has been to allow reporters and operators of the telegraph companies upon the floor of its business apartments during business hours, in order that they may ascertain the ruling prices and telegraph them wherever the telegraph reaches. If the telegraph company and its reporters and operators be considered in the light of agents of the board, their duty as to distributing this information is undoubtedly the same as the duty imposed by the law upon their principal. They cannot discriminate unjustly any more than the board itself. But if the telegraph company and its employes be considered apart from the board, an interesting question presents itself.

Is it the duty of a telegraph company to collect and transmit information? On this point Judge BLODGETT says: "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 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."[1] And Judge MAXWELL, in *Bradley* v. *W. U. T. Co.*,[2] says: "It appears that the defendant has been engaged in collecting these quotations and furnishing them to parties carrying on business in different places, at a stipulated price. These quotations are known in the trade as commercial news. This business of collecting and furnishing commercial news is separate and distinct from the business of the defendant as a common carrier. The defendant, as a common carrier, can properly only receive messages from one person to be transmitted over its wires to another; and, acting as a bailee in collecting this commercial news and furnishing it to customers, it is in the same position as a private person would be who buys and sells goods. One is tangible and the other intangible, but there is no difference in principle. This business being in its nature private and not public, the defendant could furnish commercial news to any person it pleased, and withhold it from any person it pleased, and is not under any such obligation as it is in its relations to the public as a carrier of messages for hire. That being so, and this contract not

[1] Met. Gr., etc., v. Board of Trade, 15 Fed Rep. 850. [2] Cincinnati Com. Gaz., April 8, 1883.

having been made for any definite length of time, the court cannot compel the defendant to continue furnishing the news to the plaintiff. If the plaintiff has been injured, he has an adequate remedy in an action at law for his damages."

It may be true that it is not the duty of a telegraph company to collect information—to become a public collector of news; and it may also be true that it is their privilege to withdraw entirely from such a business. But it is not withdrawing from the business to refuse to furnish one person with information collected for and furnished to all others of the public who desire it. This is discrimination in business, not retirement from it; and if the telegraph company undertake that duty at all, it is difficult to see why it should not perform it in the manner prescribed by law; and admitting that the telegraph company stands in the position of a private person who buys and sells goods, it may be questioned, in the light of the well-known Granger decisions,[1] whether it would have a right to discriminate, without reason or justice, as to the person to whom it will sell the information it collects. Can a person engaged in seling goods to the public so discriminate? Suppose there was but one depot of supplies of fuel within reach of a community; that it was owned by a store-keeper, who, while holding himself out ready to serve all who might apply for goods, should, because of some personal dislike, refuse to sell supplies to A. Would A. be compelled to remain without fuel, although ready to buy and pay for it, and although all of his neighbors were sold to without objection?

These questions may seem almost absurd to one accustomed to regard property subject absolutely to the control of the owner. But with modern capital and facilities for combination, many staples are passing into the control of men who, as corporate bodies, deal with the public as a single individual. For example, the entire oil product is monopolized by the Standard Oil Company. The manufacture of tacks is entirely controlled by the Central Tack Company. Wall paper is also monopolized by a pool. There is hardly a branch of business but has its monopoly, of whom the public must buy or go without supplies. It can hardly be admitted that the common law is so deficient in principle as to leave the public without remedy in case of a refusal of these monopolies to supply it, without unjust discrimination and upon reasonable terms. The business of telegraphing, and all its incidents, is also in the hands of a monopoly. In dealing with the public it must obey the same rules as are applied to railway companies and other public servants.

It may be conceded that telegraph companies are not strictly common carriers because they do not have tangible possession of goods to be carried.[2] But their employment is of a public nature, and they are bound by the same rules applicable to other public servants, including common carriers.

Finally, may be noted the case of *State ex rel.* v. *Bell Telephone Co.*[3] There one of the defendants, a telegraph company, refused to supply complainant, another telegraph company, with a telephone, having agreed with the patentee and licensor (also a defendant) thereof not to lease the instruments to other telegraph companies.

It was decided that, notwithstanding this agreement with the patentee, and notwithstanding his monopoly of the invention patented, it having been leased by him for public purposes to a telegraph company, that company must furnish instruments for the use of whoever desired them, it being a public servant, and, as such, possessing no right to discriminate unreasonably as to whom it would provide with its instruments. This appears to be the correct view.

Chicago. ADELBERT HAMILTON.

1 Munn v. Illinois, 94 U. S. 113 *et seq.*

2 Baldwin v. U. S. Tel. Co. 1 Lans. 137; 54 Barb. 505; 6 Abb. Pr. (N. S.) 405; Leonard v. N. Y., etc., Tel. Co. 41 N. Y. 544; Aiken v. Telegraph Co. 5 S. C. 353; Grennell v. W. U. Tel. Co. 113 Mass. 299; Breese v. U. S. Tel. Co. 48 N. Y. 132.

3 36 Ohio St. 480.

MEAD *v.* PLATT.

(*Circuit Court, S. D. New York.* August 16, 1888.)

BANKRUPTCY—DISMISSAL OF APPEAL—COSTS.

Where an appeal from the disallowance of a claim by the district court is dismissed for want of jurisdiction, docket fees or other costs are not taxable.

In Bankruptcy.

Coleridge A. Hart, for appellee.

Black & Ladd, for appellant.

WHEELER, J. This appeal from the disallowance of a claim by the district court in bankruptcy is dismissed for want of jurisdiction. The appellee claims costs of the motion, admitting that he is not entitled to costs of the cause, and that no costs but for a docket fee are taxable on the motion. The language of the supreme court upon this subject is uniform and decisive. In *Inglee* v. *Coolidge*, 2 Wheat. 363, Mr. Chief Justice MARSHALL said: "The court does not give costs where a cause is dismissed for want of jurisdiction." In *McIver* v. *Wattles*, 9 Wheat. 650, he said again: "In all cases where the cause is dismissed for want of jurisdiction no costs are allowed." And in *Strader* v. *Graham*, 18 How. 602, the court said: "This court cannot give a judgment for costs in a case dismissed for want of jurisdiction." *Hayford* v. *Griffith*, 3 Blatchf. 79, cited for the appellee, does not appear to have been dismissed for want of jurisdiction entirely, but for want of security. This fee is taxable only in cases where by law costs are recoverable in favor of the prevailing party, under section 983, Rev. St., and as a part of such costs. *Goodyear* v. *Sawyer*, 17 FED. REP. 2. This court had no jurisdiction by this appeal of any cause in which to render judgment for costs. If there were other costs on the motion which could be allowed, this fee would not be taxable in addition to them, for they would not be taxable in the cause on a disposition of it on the merits. *Dedekam* v. *Vose*, 3 Blatchf. 77, 153. And, further, this appeal is a case at law, as distinguished from cases in equity and admiralty, and in cases at law the allowance of such a fee is provided for only on trial by jury, when judgment is rendered without jury, and when "the cause is discontinued," except in some special proceedings different from this. Rev. St. 824. Here is no jury trial, no judgment rendered, no cause to render judgment in, and none to be discontinued; and consequently nothing on which the docket fee is taxable.

Motion for costs denied.

UNITED STATES v. BLACKMAN.[1]

(*Circuit Court, E. D. Missouri.* September 21, 1883.)

CRIMES — POSTAL SERVICE — DETAINING AND OPENING MERCHANDISE — REV. ST. § 3891.

It is a criminal offense, under section 3891 of the Revised Statutes, for any one in the employ of any department of the postal service to unlawfully detain, delay, or open any mailable packet of merchandise which has come into his possession, and which is intended to be conveyed by mail.

Indictment under Rev. St. § 3891.

William H. Bliss, U. S. Atty., for the Government.

Mason G. Smith, for defendant.

MCCRARY, J. The indictment charges that the defendant, "on this twenty-second day of March, in the year of our Lord one thousand eight hundred and eighty-three, at said district, being then and there a person employed in a certain department of the postal service of the United States, to-wit, a postal clerk in the railway mail service of the United States, unlawfully did detain, delay, and open a certain packet then and there containing tea, which said packet had then and there come into the possession of him, the said Blackman, and which said packet was then and there intended to be conveyed by mail, contrary to the form of the statute," etc.

The question to be determined is whether there is any statute of the United States which provides for the punishment of the offense here charged.

Section 3891 of the Revised Statutes provides for the punishment of any one employed in any department of the postal service "who shall unlawfully detain, delay, or open any letter, packet, bag, or mail of letters intrusted to him or which has come into his possession, and which was intended to be carried by mail," etc.

The language is taken literally from the act of June 8, 1872, § 146, (17 St. 202,) and it was there copied from the act of March 3, 1825, § 21, (4 St. 107.)

It is insisted that the offense here described is that of detaining, delaying, or opening a packet of letters, and that the statute does not provide for the case of the detention or opening of a package or packet of merchandise sent through the mails. In support of this view it is said that at the time the original act was passed (1825) there was no law authorizing the sending of merchandise by mail, and that, therefore, congress could not have intended to provide for such a case. There would certainly be great force in this argument if the act of 1825 had remained in force and the indictment had been found under its provisions. But that act is expresly repealed by the act of 1872, and the latter is enacted as a new, independent, and original

[1] Reported by Benj. F. Rex, Esq., of the St. Louis bar.

statute. I am therefore of the opinion that the meaning of the words "letter, packet, bag, or mail of letters" must be determined by reference to the provisions of the law defining mailable matters which was in force when the latter act was passed—by section 130 of the act of 1872.

Mailable matter is divided into three classes, and in the third class is included "samples of merchandise not exceeding twelve ounces in weight." This definition of mailable matter is found in the same act which punishes the detention or opening of "any letter, packet, bag, or mail of letters," and I am therefore of the opinion that the construction contended for by defendant's counsel is too narrow and technical. If the statute had provided for mailing only letters, then we should have understood that the packet referred to was a packet of letters; but since the statute authorized the mailing of packets of merchandise, I hold that such packets were likewise included in the criminal provision under consideration. To hold otherwise would be to assume that congress intended to provide for mailing packets both of letters and of merchandise, but did not intend to punish employes for tampering with the latter. The more reasonable construction is that the word "packet" in the statute in question means any packet which is mailable.

The judgment of the district court is accordingly affirmed.

GRAMME ELECTRICAL CO. *v.* ARNOUX & HOCHHAUSEN ELECTRIC CO. and another.

(*Circuit Court, S. D. New York.* August 29, 1883.)

1. PATENTS FOR INVENTIONS—ACT OF 1870—FOREIGN PATENTS—EXPIRATION.
   Under the act of 1870 a patent takes effect from the time when it is granted, and cannot be antedated. The meaning of section 25 of the act is, that a United States patent shall expire at the same time with the foreign patent having the shortest time to run, which was granted before the United States patent was granted, and not that it shall expire at the same time with the foreign patent having the shortest time to run, which was granted before the time when the application for the United States patent was made.
2. SAME—DURATION—EXPIRATION.
   A capacity of being prolonged so as to have a duration of 15 years is not equivalent to having a term of 15 years, when the patent is granted for one year, and then is prolonged so as to expire at the end of 10 years.
3. SAME—SECRET AUSTRIAN PATENT.
   The question of secrecy or publicity in an Austrian patent cannot, under section 25 of the act of 1870, affect the question of the duration of the foreign patent in this country.
4. SAME—EXPIRATION OF PATENT NO. 120,057—MAGNETO-ELECTRIC MACHINE.
   As the foreign patent has expired in this case, patent No. 120,057, granted to Zenobe Theophile Gramme and Eardley Louis Charles D'Ivernois, October 17, 1871, for an improvement in magneto-electric machines, no longer continues to exist.

In Equity.

Solomon J. Gordon, for plaintiff.

Charles H. Knox and *Henry E. Woodward*, for defendants.

BLATCHFORD, Justice. This is a suit in equity, brought for an infringement of letters patent No. 120,057, granted to Zenobe Theophile Gramme and Eardley Louis Charles D'Ivernois, October 17, 1871, for 17 years from that day, for an "improvement in magneto-electric machines." It is set up as a defense, in the answer, that the patentees obtained a patent in Austria, December 30, 1870, for the same invention as is covered by No. 120,057; that the Austrian patent has expired; and that, therefore, No. 120,057 has expired. The Austrian patent, and sundry documents pertaining to it, and the Austrian statute, are in evidence. The patentees took out a patent in France for the same invention, for 15 years, on the twenty-second of November, 1869. On the thirtieth of May, 1870, they made oath in Paris, France, to their application for No. 120,057. The application and the oath recited the date and the term of the French patent. The application was filed in the United States patent-office, August 17, 1870, with a specification, drawings, and model, and the proper fee was paid. On the third of October, 1870, they filed in Austria an application, dated September 30, 1870, for a patent for the same invention for the period of one year. On the thirtieth of December, 1870, "an exclusive patent" was issued to them in Austria "for the duration of one year" for the invention, "under all conditions and with all effects stated in the supreme patent law of August 15, 1852." An amended oath to the United States application was sworn to by the patentees at Paris, June 26, 1871, and filed in the patent-office July 12, 1871. It referred to the French patent, and stated its date and term, but it did not mention the Austrian patent. The final fee for No. 120,057 was paid October 2, 1871. The Austrian patent was extended nine times, year by year, each extension being for one year, and till December 30th in each year, and it finally expired December 30, 1880. The bill in this suit was filed in July, 1881. It is agreed that the Austrian patent applied for and granted was for the same invention that is claimed in No. 120,057.

The Austrian patent law of August 15, 1852, requires that the applicant for a patent shall state in his petition the number of years for which he demands a patent, which number cannot exceed 15, except by special grant of the crown. The tax must be paid in advance, and is in proportion to the duration of the privilege. The exclusive privilege secures to the patentee the exclusive use of his invention "for the number of years mentioned in his privilege." A patentee whose privilege has been granted for a short period may claim its prolongation for one or more years during the fixed longest period, provided he demands such a prolongation before the privilege has become extinct, and pays in advance the tax for the required term of prolongation.

No. 120,057 was granted under the provisions of the act of July 8, 1870, (16 St. at Large, 198,) and its validity and duration must be tested by those provisions. By section 22 of that act (p. 201) every patent is to be granted for the term of 17 years. By section 25 (p. 201) it is provided as follows:

"No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid by reason of its having been first patented or caused to be patented in a foreign country: provided, the same shall not have been introduced into public use in the United States more than two years prior to the application, and that the patent shall expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term; but in no case shall it be in force more than seventeen years."

It is contended for the defendant that, under the foregoing provisions, No. 120,057 expired, either on December 30, 1871, or on December 30, 1880, the date of the expiration of the Austrian patent, accordingly as that patent is to be regarded as a patent for one year or for ten years. To this the plaintiff replies that the application for No. 120,057 was filed before the application for the Austrian patent was filed. But the date of the application for No. 120,057 cannot affect the question. Under the act of 1870 a patent takes effect from the time when it is granted, and cannot be antedated. The meaning of section 25 of the act of 1870 is that the United States patent shall expire at the same time with the foreign patent having the shortest time to run, which was granted before the United States patent was granted, and not that it shall expire at the same with the foreign patent having the shortest time to run, which was granted before the time when the application for the United States patent was made. *Bate Refrigerating Co.* v. *Gillett*, 13 FED. REP. 553.

It is also contended for the plaintiff that the Austrian patent, though granted "for the duration of one year" on its face, was really a patent for 15 years. It might have been prolonged, year by year, or otherwise, for five years beyond December 30, 1880. But it was not prolonged beyond that date, and, at most, it cannot be regarded as a patent which, when granted, had a longer term to run than till December 30, 1880, even if it could be considered as a patent having, when granted, a longer term to run than one year. A capacity of being prolonged so as to have a duration of 15 years, is not equivalent to having a term of 15 years when the patent is granted for one year, and then is prolonged so as to expire at the end of 10 years. At latest, the Austrian patent expired December 30, 1880, and it is not necessary to decide whether the term for which it was granted was or was not a term of only one year.

It is also contended, for the plaintiff, that the Austrian patent was a secret patent, and therefore not a patent, within the meaning of section 25 of the act of 1870. The Austrian statute provides that the petition for a patent must contain a statement whether the in-

vention is to be kept secret or not; that special care is to be taken for the observation of the required secrecy, and due precautions are to be adopted against any possible violation of the secret; and that specifications as to which secrecy is demanded are not open to the public, or for the taking of copies, until the patent is extinct. In the present case the petition for the Austrian patent stated that it was desired that the description be kept secret. But the Austrian statute also provides that an exclusive privilege secures to the patentee the exclusive use of his invention, as laid down in his specification, for the number of years mentioned in his privilege. The Austrian patent in the present case states on its face that it is an exclusive patent, for the duration of one year, for the improvements in question, "in consonance with the description deposited," "under all conditions and with all effects stated in the" Austrian statute. In view of these facts, however far the Austrian patent might have come short of being a prior public foreign patent sufficient to defeat a patent granted here to another inventor for an invention made after the granting of such prior foreign patent, it is not perceived how the question of secrecy or publicity in the foreign patent, granted prior to the granting of the patent here, can affect, under section 25 of the act of 1870, the question of the duration of the patent here. The Austrian patent conferred on the patentees an exclusive privilege. It was the manifest intention of section 25 of the act of 1870 that the exclusive privilege under the patent here should expire with the exclusive privilege granted abroad to the same inventor, having the shortest term. *De Florez* v. *Raynolds*, 17 Blatchf. C. C. 436, 450; [S. C. 8 FED. REP. 434.]

As the Austrian patent expired at the latest on December 30, 1880, and before this suit was brought, and No. 120,057 continued to exist no longer, there was no ground for this suit in equity when it was brought, whatever ground there may have been for a suit at law against these defendants for infringement. *Root* v. *Ry. Co.* 105 U. S. 189.

The novelty of the invention patented is attacked, and it is also contended that the patent is invalid because it was issued for the term of 17 years and not for a shorter term. But the consideration of these questions is unnecessary, and the bill is dismissed, with costs.

FETTER and another *v.* NEWHALL.

(Circuit Court, S. D. New York. August 29, 1883.)

1. PATENTS FOR INVENTIONS—ASSIGNMENT BY MARRIED WOMAN OR INFANT—STATES LAWS.

A married woman, an infant, or a person under guardianship, may be an inventor or the assignee of an inventor, and when such, the right to the patent

would vest in them, and when so vested as patentee or assignee, all that the act of congress requires is that if they assign the patent such assignment shall be in writing, so as to be recorded; but the ability to make the instrument must be found in the laws of the states, where all such rights are regulated.

2. SAME—LAW OF NEW YORK.
In New York a married woman may take by assignment, and by writing assign a patent, and may sue in her own name for an infringement of her rights.

3. SAME—CLAIMS IN REISSUE.
The invalidity of a claim in a reissue does not impair the validity of a claim in the original patent, which is repeated and separately stated in the reissue.

4. SAME—INFRINGEMENT—PART OF INVENTION.
It is not necessary to take the whole invention to constitute an infringement.

5. SAME—LICENSE.
Where an infringer is not acting under a license, but in defiance of the patent and outside of the license, it will not protect him.

6. SAME—PATENT No. 110,839—REISSUE 8,121.
Reissued letters patent No. 8,121, dated March 12, 1878, granted to David Fetter, assignor, for an improvement in drive screws, the original of which was No. 110,839, dated January 10, 1871, *held* valid as to the first claim, and infringed by defendant.

In Equity.

Amos Broadnax, for orators.

William Bakewell, for defendant.

WHEELER, J. This suit is brought upon reissued letters patent No. 8,121, dated March 12, 1878, and granted to David F. Fetter, assignor, for an improvement in drive screws, the original of which was No. 110,839, dated January 10, 1871. The assignee of the inventor assigned the patent to the oratrix, Mary B. Fetter, wife of the inventor, a resident of the state of New York, and she by her sole deed assigned an interest in it to one Lewis, who assigned the same to the orator the Fetter Drive Screw Company. The original patent was for a drive screw for driving into wood like a spike, but to be removed only by turning out; the threads being square on the side towards the head, and tapering from that side towards the point, which was as large as the circle of the outer edges of the threads where it commenced, and tapered in conoidal form to the end, so that the smooth point would divide the fibers of the wood and make room for the threads. There was one claim which was for "a drive screw having an angular thread of the character shown, and a conoidal point, the base of which is of the same diameter as the lower end of the shank with which it immediately connects." From the specification it is understood that what is meant as the shank in the claim includes the threads, so that the diameter of it extends to the outer edges of the threads. In the specification of the reissue it was said that the point might be made conoidal, its base being of the same diameter as the lower end of the shank, and another claim was added which was for "(2) a drive screw having an angular thread of the character shown, and a point which extends by a gradual taper from its base to its extremity."

The defendant operated under a license from the inventor, approved by the owners of the patent, until April, 1880, and procured to be made and sold screws according to the specifications of the

original patent, the points being oval in taper, and paid a commission on the sales. Since then he has repudiated the license and continued the use of the same style of screws, except that the points have a straight conical, instead of an oval conoidal, taper.

The defenses are that the assignment to Mary B. Fetter, a married woman, vested the right to the patent in the husband; that if not, her assignment to another was void; that the original patent was void for want of novelty; and that, if not, the reissue is for a different invention, and therefore void; that the style which he now uses is not an infringement; and that he is protected from a suit for infringement by the license.

It may be that at common law a patent-right granted or assigned to a married woman would be such personal property that her husband could, by virtue of his marital right, reduce it to possession and make it his own. Hindmarch, Patents, 35. It is argued that, this being so, the titles to patents are out of the reach of the laws of the states, and that as congress has passed no law changing the rights of married women, the common law must prevail, and that the husband should have been a party to the bill, either alone in his own right or with her, if he would leave the patent in her right; and that there is a misjoinder as to the orator the corporation because it has no right.

The laws of congress, however, of which patents are creatures, give the right to a patent to the inventor, whether *sui juris* or under disability, and to the assigns of the inventor. Rev. St. §§ 4886, 4895. They are assignable by instrument in writing. Section 4898. This is the whole requirement. A married woman, an infant, or a person under guardianship, might be an inventor, or the assignee of an inventor, of a patented invention. It would seem that, when such, the right to the patent would vest in them; and that, when vested in them as patentees or assignees, all that congress has required is that, if they would assign, the assignment must be in writing, so as to be recorded; but that the ability to make the instrument, or the aids to the disability, must be found in the laws of the states where all such rights are regulated. If an infant or other person under guardianship should have a patent to be assigned, the instrument in writing would have to be made to comply with the law of congress, and have to be made by guardian; but there are no federal guardians for such persons, and resort for the guardian would have to be made to the laws of the state. The laws of New York free married women from disability to make such instruments, and make their property distinctly their own. The oratrix could undoubtedly take by assignment, as married women by the common law always could. She could make the instrument in writing by the laws of the state, and when she had made it, it fulfilled the requirements of the laws of the United States. Thus the drive screw company took by her assignment what she attempted to assign to them; and she could sue in

her own name in this form, for infringement of her rights. This was expressly adjudged in this court by BLATCHFORD, J., in *Lorillard* v. *Standard Oil Co.* 17 O. G. 1506; 18 Blatchf. 199; [S. C. 2 FED. REP. 902.] Of course, she could join with another for an injury to their joint rights.

As to the want of novelty, the evidence does not satisfactorily show that such screws with either conical or conoidal points, equal in diameter at the base to the shank, including the threads, had been known or used by others at the time of this invention.

It may be that the second claim of the reissued patent enlarges its scope beyond that of the original patent. If it does, it is doubtless void to the extent of that claim. *James* v. *Campbell*, 104 U. S. 356. The invalidity of that claim would not impair that of the claim in the original patent separately reproduced in the reissue. *Gage* v. *Herring*, 2 Sup. Ct. Rep. 819, cited and applied by BLATCHFORD, J., in *Schillinger* v. *Greenway Brewing Co.* 24 O. G. 495; [S. C. 17 FED. REP. 244.] The reissued patent, as to that claim, is not for any invention different from that shown in the specification and drawings of the original patent. The first claim appears, therefore, to be valid.

Upon the question of infringement it is to be noticed that this invention, as patented, is not, as has been argued, of an improvement consisting merely of the conoidal point. The essential feature of it is the enlargement of the base of the point to the size of the circle of the outer edge of the threads, and in this the novelty consists. The point is described as conoidal, but the degree of the oval taper is not specified; it might be more or less, and so little as to be hardly distinguishable from a straight taper. The straight taper would, with the enlarged base, be the equivalent of the oval taper for separating the fibers of the wood to admit the threads, and this change merely colorable. If, as has been claimed, the original patent covered no screws but those having oval points, still, as it covered the enlarged base of the point also, it might be infringed by the use of that feature without the oval point, for the patent gives exclusive enjoyment of the whole patented invention, and taking one feature is an infringement *pro tanto*. It cannot be necessary to take the whole invention to constitute an infringement. *Sharp* v. *Tifft*, 18 Blatchf. 132; [S. C. 2 FED. REP. 697.] As this case is now considered, the defendant infringes the first claim by taking the point with the enlarged base. In doing this he is not acting under the license, whatever its terms are, which are in dispute, but is acting in defiance of the patent and outside the license. Under these circumstances the license is no protection against suit for infringement. *Hartell* v. *Tilghman*, 99 U. S. 547.

Let there be a decree for the orators for an injunction and account, with costs.

URNER v. KAYTON.

(Circuit Court, S. D. New York. August 16, 1883.)

PATENTS FOR INVENTIONS—INFRINGEMENT—COSTS.

Where, in an accounting for profits and damages for infringement of a patent, the orator has recovered on the merits, and the defendant has not prevailed upon any issue upon any distinct item in the case, the costs will not be apportioned, but defendant held liable for the whole amount.

In Equity.

Mr. Comstock, for orator.

Mr. O'Callaghan, for defendant.

WHEELER, J. The defendant, on accounting for profits and damages for infringement of patent, has, under order of court, paid the master's fees, and moves for an apportionment of costs on the final decree for the orator for $100 profits. The orator has a substantial recovery on the merits for the wrongful invasion of his rights by the defendant. The defendant has not prevailed upon any issue upon any distinct item made in the case, so far as is made to appear. The costs are all the consequence of his wrongful acts for which the orator has recovered, and should be borne by him.

Motion for apportionment denied.

GODDARD v. WILDE and others.

(Circuit Court, D. Rhode Island. May 10, 1883.)

1. PATENT—CONTRACT TO SELL.

Until a contract is set aside a party thereto may be restrained, at the instance of the other party, from selling his patent in violation of the terms of such contract, though the court may be unable to enforce a specific performance of it.

2. SAME—ADEQUATE REMEDY AT LAW.

As the equitable remedy is more practical and efficient to the ends of justice in such cases, an injunction may be granted, although plaintiff has a remedy at law.

3. SAME—REVOCATION OF AUTHORITY.

Such an instrument is a contract and not a power of attorney, revocable at the pleasure of the maker, and is good until set aside upon a proper proceeding.

In Equity. Motion for a preliminary injunction.

Wm. A. Macleod, for complainant.

Chas. A. Wilson, for defendant.

COLT, J. The plaintiff in this case claims the exclusive right to sell within the United States the Wilde patent button, under a contract under seal with the defendant Wilde, the patentee. Subsequent to the date of the contract, Wilde sold a half interest in the patent

to the defendant Bowen, and entered into partnership with him for the manufacture and sale of the button. Goddard now asks that Wilde and Bowen be restrained from selling the button until a full hearing can be had upon the merits of the case.

It is urged in defense that Goddard was guilty of fraud in obtaining the contract. According to the affidavits of Wilde and his wife, this contract was to have no force and effect, but was signed merely to show the good faith of the contracting parties. They claim that the real contract agreed upon was essentially different from this, and that Goddard agreed to have the real contract drawn up and sent to Wilde the next day, when this one was to be returned.

Without expressing any opinion upon the merits of the controversy at this stage of the proceedings, we think the plaintiff is entitled to protection under his contract until it is set aside, and that he may fairly claim that Wilde and his partner should be restrained from selling the button in violation of the terms of an existing contract. *Singer Manuf'g Co.* v. *Union Button-hole & Embroidery Co.* 6 Fisher, 480; S. C. 1 Holmes, 253.

The objection is also urged that the complainant has a plain and adequate remedy at law, but the equitable remedy is often invoked in cases of this character as more practical and efficient to the ends of justice. *Hill* v. *Whitcomb*, 1 Holmes, 322; *Wylie* v. *Coxe*, 15 How. 415.

Nor is it true that Wilde can revoke the authority to sell. An instrument of this character is a contract, and not a power of attorney revocable at the pleasure of the maker. It is good until set aside upon a proper proceeding, *Burdell* v. *Denig*, 92 U. S. 716.

Nor is the objection sound that, because the court may not be able to decree a specific performance in this case, an injunction will not lie. In *Singer Manuf'g Co.* v. *Union Button-hole & Embroidery Co.*, before cited, this question was carefully considered by Judge LOWELL, and the conclusion reached that the court can restrain a party from selling in violation of his agreement, though it may be unable to enforce a specific performance of it. When speaking of the agreement as the grant of an exclusive license to sell the patented machine, the court observes: "And it has never yet been doubted that the court could restrain all persons, whether they were acting with or without notice, and whether bound by contract or not, from trespassing on such a title."

Injunction granted.

THE STATE OF ALABAMA.

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

1. ADMIRALTY—COLLISION—RULE 21—MODERATE SPEED—FOG.
   The moderate speed required of steamers in a fog by rule 21, is something materially less than the vessel's ordinary full speed; it has reference to all the circumstances affecting the steamer's ability to keep out of the way, including her own power in backing, and requires a *reduction* of speed according to the density of the fog. Whenever the fog is sufficient to increase materially the dangers of navigation, a given speed may be moderate for a swift vessel, which would be excessive for a slow one having less power to stop and back quickly.
2. SAME—PROMPT BACKING.
   Where there is danger of collision, prompt backing, as well as stopping the engines, is incumbent on the steamer, and any delay in ordering the engines reversed is at her risk.
3. SAME—MISTAKE OF SAILS—ERROR OF JUDGMENT.
   An erroneous order to change the helm, owing to the lookout's mistaking the main try-sail for the head-sails when first dimly seen through the fog, the mistake being corrected as soon as it could be perceived, *held*, error of judgment and not a fault.
4. SAME—OVERTAKING VESSEL.
   An overtaking vessel is one coming up astern of the proper range of the leading vessel's colored side-lights; *i. e.*, more than two points aft of abeam.
5. SAME—FLASH-LIGHT—REV. ST. § 4234.
   The American law (section 4234, Rev. St.) requiring a flash-light to be exhibited to an overtaking vessel is not applicable, as the law of the forum, to a collision between vessels belonging to two different foreign nationalities, neither of which requires such a light, according to its own maritime law.
6. SAME—LIGHT—ENGLISH LAW.
   No stern-light or flash-light was formerly required by the English regulations; and the maritime law, as construed by the English courts previous to the new rules of 1880, did not make the exhibition of such a light indispensable, but only one of various signals which might be adopted by the leading vessel to warn an overtaking vessel of her whereabouts. *Semble*, the French law is similar.
7. SAME—SIGNALS BY HORNS SUFFICIENT.
   Where a fog was such that a steamer used her fog-whistles, and a brig her fog-horn, *held*, the latter's blowing three fog-horns continuously from the time the steamer was observed, was a sufficient compliance with the former English and French maritime law as a signal to an overtaking steamer, if the latter were in fact astern of the range of the brig's lights.
8. SAME—CHANGE OF COURSE IN EXTREMIS.
   Where a brig luffed less than half a minute before a collision, which seemed to be instantly impending amidships, in order to save her small boats, *held*, a change *in extremis*, and not a fault, though the change was useless and erroneous.
9. SAME—EVIDENCE—CREDIBILITY OF WITNESS.
   Where the great preponderance of testimony showed the mode and conditions of the collision to be such that the steamer could not have been astern of the range of the brig's red light, if properly set and burning, and no red light was seen by an alert lookout on the steamer, or by her officers, who were all watching the brig, and a change of helm was made by the steamer upon a mistake of the brig's course, which mistake could not have been made had the red light been seen, and the evidence being also unsatisfactory as to the trimming and proper adjustment of the brig's colored lights, no screens being used, but the poop-rail used instead, *held*, that though most of the brig's witnesses testified that the red light was burning brightly, superior credit should be given to the steamer's witnesses that no red light was visible, and the brig was held in fault.

10. SAME—CASE STATED.

Where a collision occurred between the English steamer State of A. and the French brig M. & G., on the high seas, about 30 miles east of the Grand Bank, on a night which was foggy or hazy below, and bright moonlight above, and the steamer was previously going W. S. W., about eight and one-half knots, her ordinary full speed, and the brig about one or one and one-half knots, on a course from S. to S. W., close-hauled and by the wind, which was variable, both vessels previously using their fog signals; and the brig, on discovering the steamer's white and green lights somewhat aft of abeam, about three or four minutes before the collison, set three horns a blowing and rang the bell, but showed no stern or flash light; and the steamer, from two to three minutes before the collision, having observed the dark loom of the brig nearly ahead on her starboard bow, but seeing no light, at once ordered her helm hard a-port and engines stopped, and afterwards, when the brig's sails first became indistinctly visible, about one-half or three-fourths of a minute before collision, ordered her helm to starboard, through the brig's main try-sail being mistaken for the head-sails, but corrected the error by the time the helm had run amidships, and again put the helm hard a-port, and at the same time ordered her engines full speed astern, and the brig luffed at about the same time, changing two points to westward, and the collision happened about a half minute after, by the steamer's striking the brig nearly at right angles, about nine feet from her stern, and the brig was sunk,—*held*, that the steamer was in fault for not having reduced her running speed in the fog, and also for not more promptly reversing her engines after the brig was discovered. *Held, also*, that the brig necessarily bore at least one and one-half points off the steamer's starboard bow when discovered, and could not have been sailing further west than S. by W. or S. S. W., and that her red light ought to have been seen on the steamer; that it was not seen through no fault on the steamer's part, but because it was either dim or improperly set; and that for this fault of the brig she could recover but half her damages.

In Admiralty.

Coudert Bros. and *Edward K. Jones*, for libelants.

Evarts, Southmayd & Choate, for claimants.

BROWN, J. The libel in this case was filed by the owners, master, and crew of the Marie & Gabrielle, a French brig of about 240 tons burden, to recover for the loss of the brig, the cargo, and the men's personal effects, through a collision with the State of Alabama, about 30 miles off the eastern end of the Grand Bank of Newfoundland, between 11 and 12 P. M. on the night of June 1, 1879. The port quarter of the brig was struck nearly at right angles either by the stem or the bluff of the bow of the steam-ship. A part of the brig's stern was carried away, including the rudder, and the brig was soon after abandoned by her master and crew, as in a sinking condition.

The brig was engaged in the cod fishery with a crew of 17 men, and was returning from the Grand Bank towards St. Pierre de Miquelon. On the evening of the collision there was a hazy fog low down upon the water, varying from time to time with denser drifts; but clear, with bright moonlight, above. The wind was very light from the westward, and variable; the sea was smooth, but with a heavy swell from the west. The brig was sailing by the wind, close-hauled, upon her starboard tack, on a general course of about S. S. W., but varying at times from S. to S. W., and making from a knot to a knot and a half per hour. During an hour or two preceding the collision her fog-horn had been blown every two or three minutes;

she had two seamen on the lookout forward, another amidships, and the mate, salter, and wheelsman on the poop. From three to five minutes before the collision, the white and green lights of the steamer were seen somewhat aft of abeam, on the port side, making apparently for about amidships of the brig. Immediately those on the brig set three horns blowing continuously, and rang the bell, to which, as the steamer approached, shouts and calls were added. The noise and confusion aroused the watch below, bringing nearly all of them on deck, as well as the captain, who was reading in the cabin. He came on deck some three minutes before the collision; immediately saw the steamer's white and green lights about abeam, and nearly in line, as he says; from which he judged the steamer was coming towards him nearly end on. All say they did not see her red light before the collision.

Shortly before the collision, and to prevent, as the captain says, the steamer from striking amidships and smashing his small boats, he ordered the helm hard a-port, causing the brig to luff a few points, (*quelques quarts,*) or one or two points, to the westward, and her sails to shake. Two other of her witnesses say she luffed two points. The steamer soon after struck the brig nearly perpendicularly, says the captain, on the port quarter, about nine feet from the stern, cutting off and carrying away her stern, from a point about nine feet from the taffrail, on the port side, obliquely across to about one foot from the taffrail on the starboard side, and extending down to within about a foot of the water line. The red side light, which was placed six feet from the stern, and the rudder were carried away, and the wheel demolished; the rear of the cabin was in part laid open; and the vessel soon made water so rapidly, and took such a list to port, that she was believed to be in a sinking condition and was abandoned by the captain and crew. The latter took to their small boats, with which they reached the steamer that lay by at some distance in the fog. Before leaving her the captain had tried to bring the brig to; but he was unable to do so through the loss of the rudder, and she went off to the south-eastward in the fog, under all sail, and has not since been reported.

The State of Alabama is a British iron steamer of about 2,000 tons burden, and 350 feet long. At the time of the collision she was making one of her regular trips from Glasgow to New York, upon a course of W. S. W., and going from 8 to 8½ knots an hour, and was in charge of the first officer. During the afternoon, her witnesses say, it was somewhat hazy, with increasing fog in the evening; and from 6 P. M. the fog-whistle was blown at intervals. Towards the time of the collision the testimony is that the fog-whistle was blown every two or three minutes. No whistle, however, was heard by those on board the brig till after the collision; nor were the horns or bell or shouts on the brig heard by those on board the steamer until they

were within 100 yards of the brig, too late to be of any service. There were two able seamen on the lookout, close to the stem of the steamer. One disappeared soon after arrival, and his testimony could not be obtained. The other, O'Neill, who was on the starboard side, testified that the brig was first indistinctly observed by him through the fog about a point or half a point on the starboard bow; that no light upon the brig was visible, and that he so reported in answer to the inquiry of the first officer. The latter, inferring from this that he was following the brig astern and out of range of her lights, at once ordered the helm hard a-port and the engines stopped. These orders were immediately obeyed, 30 to 40 seconds being required, according to the testimony, to get the helm hard over.

About a minute afterwards, as the sails of the brig came dimly into view, the lookout mistook her main try-sail for her head-sail, and supposing from this that the brig was going northwards, sung out, "Hard a-starboard, or we'll be into her." The order to starboard was given instantly; but in a few seconds, according to the testimony of the steamer's witnesses, and by the time the helm had run amidships, and before it had gone to starboard at all, the first officer, having been able by the use of his glass to see the sails distinctly enough to correct the mistake, countermanded the order, and the wheel was again put hard a-port as quickly as possible, and so remained until the collision, which was within about a half minute after. At the time the last order to port was given, and not before, the engines were ordered and put full speed astern. The first officer testifies that when he thus made out the sails distinctly, the brig seemed to be directly ahead, going southward, at right angles to the steamer, and that the steamer had then veered about two points under her port wheel. This change of two points would have brought the steamer heading due west. The quartermaster thought that up to the time of the collision the steamer had veered two to three points, but he did not look at the compass; the first officer says that as they passed the brig the steamer headed W. N. W., which would be a change up to that time of four points in the steamer's course. This officer was 100 feet from the bows, and the effect of the collision and going this distance would probably deflect the steamer's head at least half a point, so that $3\frac{1}{2}$ points would seem from the steamer's evidence to be the outside limit of change in her course up to the moment of collision.

The steamer's witnesses testify that the brig was struck only by the bluff of the steamer's port bow, about 25 or 30 feet from the stem, where a streak of green paint two to three feet long was found rubbed upon the steamer's black paint,—the only mark of the collision which the latter exhibited. The position of the two witnesses who testify to this was not well suited for observing accurately, and the officers were so far from the bow as not to be able to observe the blow at all. The united testimony of the witnesses on the brig, that the latter was

struck on her port quarter about nine feet from her stern by the stem of the steamer, is, I think, more probably correct.

The libelant's counsel contends that the steamer's speed was unchecked, or nearly so, at the time of the collision. But there is no evidence to sustain this. The entry in the engineer's log gives the same moment, 11:45, for the "stop-bell," and "engine full speed astern." This shows upon its face that the entry was not made with exactness, since "full speed astern" could not be got till some considerable part of a minute at least after the stop-bell. The entry was not the original entry, and the assistant who made it was not a witness. The testimony of the first officer, of the quartermaster and others must, therefore, be accepted, showing that the engines were ordered stopped when the first order to port was given, and that the order was obeyed. From that time the steamer was diminishing her speed for nearly two minutes, when she was put full speed astern, nearly a half-minute before the collision, which must, altogether, have reduced her speed one-half. Had not her speed been thus reduced, and had not the stem struck the brig nearly at right angles, or at least not more than a point forward of a right angle, the brig must, I think, have been run over and cut through to the water-line, instead of her stern being shoved to starboard, allowing the steamer to pass astern, with only the smashing obliquely of the brig's port corner.

Upon these facts three principal faults are alleged against the steamer: (1) Going at too great speed in the fog; (2) not reversing at once on discovering the brig; (3) incompetence and carelessness in navigation in giving contrary orders to port, to starboard, etc., when either one, properly adhered to, would have avoided the brig.

The respondents deny any fault in the steamer, and contend that the collision is chargeable solely to the fault of the brig: (1) In showing no stern light to warn the steamer in time; (2) in luffing and coming into the wind, so as to check her own speed, whereas otherwise she would have gone clear; (3) insufficient or improperly set regulation lights.

1. As to the speed of the steamer. The abstract from the steamer's log states her speed at eight and a half knots. The patent log was hove 15 minutes before the collision, and the testimony is that this showed seven and three-quarters knots only. The engineer's log, with hourly entries, shows all the conditions affecting the speed to have remained the same from 1 P. M. down to the time when the engines were stopped, a few minutes before the collision, and that the average speed was eight knots. From eight to eight and a half knots may, therefore, be taken as her rate of speed at this time.

There is no direct and satisfactory testimony as to the steamer's ordinary full speed. The individual statement of one witness on cross-examination mentions 10 knots as her full speed; but whether that refers to favorable conditions of wind and sea, or not, does not appear. At this time the steamer had a light wind and a heavy swell

ahead. The first officer testified that usually in a fog the captain ordered the engineer to "stand by," *i. e.*, to diminish the pressure, which would reduce the speed; and he supposed that had been done in this case. But the engineer's log shows no reduction of pressure or speed after 1 P. M. preceding; and the captain and engineer, though both of them were witnesses, do not testify to any order to "stand by," or to reduce speed, during that night or afternoon. If the steamer was going at reduced speed the burden lay on her to show that fact in her own justification; and she could doubtless have done so by some direct and proper evidence. As none such was offered on her part, and in view of the foregoing circumstances also, I must assume that there was no reduction, but that the steamer was going at her ordinary full speed, which, under the existing circumstances, was about eight or eight and a half knots per hour.

The failure to slacken speed in this fog must be set down as one fault in the steamer. Although the fog was not dense, it was nevertheless evidently such a fog as materially to interfere with the timely observation of other vessels, and therefore increased materially the dangers of navigation. To go at full speed in such a fog is not a compliance with rule 21, which requires steamers in a fog to go at moderate speed.

Moderate speed, as often stated, is not a fixed rate for all vessels or for all occasions. It has reference to all the circumstances which affect the ability of the steamer to keep out of the way, not merely, therefore, to the circumstances external to the ship, but also to the power and ordinary full speed of the steamer herself; because a fast vessel with powerful engines can be handled more quickly, stop sooner, back faster, and get out of the way quicker, going at a given rate, than a steamer of less power going at the same rate. Eight knots might, therefore, be a moderate speed for a steamer whose ordinary rate was fifteen knots, and not at all moderate for another whose maximum speed was but eight. The evident design of rule 21 is to make a steamer's means of quickly avoiding danger the greater in proportion as the means of an early discovery of the danger are diminished. Slower speed must make compensation for the greater risk of collision. No steamer's speed is moderate in the sense of rule 21 so long as she is going at her ordinary full speed. She is required to moderate and reduce her speed according to the density of the fog and the increased difficulty of discovering danger, and of adopting timely means to avoid it. In *The Pennsylvania*, 19 Wall. 125, the court say: "The purpose of this requirement being to guard against collision, very plainly the speed should be *reduced* as the risk of meeting vessels is increased." Pages 133–4. In *The City of New York*, 15 FED. REP. 628, this court held that the moderate speed required by rule 21 is something materially less than the steamer's ordinary full speed which is allowable when there is nothing to increase the ordinary risks of navigation.

The burden of proof was upon the steamer to show compliance with this rule. She has not done so. In several cases a less speed than eight knots has been held excessive. *The Pennsylvania*, 19 Wall. 125; 23 Law T. (N. S.) 55; *The Monticello*, 1 Holmes, 7; *The Blackstone*, 1 Low. 485; *The Hansa*, 5 Ben. 501; *The Java*, 6 Ben. 245; *The Pottsville*, 12 FED. REP. 631. But these were in cases of dense fog. In the case of *The Oder, infra*, 11 or 12 knots was held not excessive; but that was not a case of fog at all. Without determining whether 8 or 8½ knots would or would not be a moderate rate for vessels of much higher ordinary speed in so light a fog as prevailed on the night of this collision, I must hold it not moderate for this steamer, because not moderated or reduced from her ordinary speed. This fault evidently contributed to the collision, since, if her speed had been less, the brig would plainly have gone clear.

2. The evidence on the part of the steamer, moreover, shows that she was in fault, also, for not more promptly reversing her engines. According to the testimony of the first officer and others, the order to reverse was not given until the steamer was within about 100 yards of the brig, about a half minute only before the collision. The brig had been reported some two minutes at least earlier, and the order was then given to stop the engines, but no order to reverse. The testimony of the engineer, and the entry by his assistant, who was not sworn, cannot prevail against the testimony of the other officers for the reasons previously stated.

The brig, when first reported, was, as I find, about 1½ points on the steamer's starboard bow, and as her lights were not seen, the first officer rightly inferred that she was going to the southward. But in porting, the steamer was directed knowingly towards the brig's path; and though the first officer doubtless expected to go astern of the brig, his ability to do so depended entirely on her distance from him. In the night, in fog, and with no light seen, the distance was manifestly uncertain. There was, therefore, evident danger of collision from the moment the brig was reported and the helm put a-port, and the engines should have been reversed at once. The only reason, apparently, for not reversing them at once, was that the fog proved "deceptive," and the brig was supposed to be a half mile or more distant; much farther off than she really was. But it is impossible to hold an erroneous estimate of the distance of another vessel in a fog to justify delay in giving the orders necessary to avoid a collision, and which, if given, would effectually have avoided it. Rule 21 requires that the steamer "shall, if necessary, stop and reverse." That it was in this case necessary to reverse at once, as well as to stop, the result proved. When, as in this case, the danger of collision is evident, delay in reversing, like delay in adopting promptly and seasonably any other practicable means of averting peril, is at the risk of the steamer. No other rule can possibly consist with safety. *Nelson* v. *Leland*, 22 How. 48, 55; *The America*, 92 U. S. 432, 437; *The Grand*

Republic, 16 FED. REP. 424; *The Frankland*, L. R. 4 P. C. 529; *The Love Bird*, 6 Prob. Div. 83. On this additional ground, therefore, the steamer must also be held in fault.

3. The change of the helm under the temporary order to starboard does not seem to me to be proof of negligence, or of careless or incompetent navigation. The lookout was alert and active, as was necessary. When the brig first came dimly into view, the fog being lighter above, he mistook the brig's main try-sail for the head-sails,—a mistake which might naturally happen to the most careful and skillful seaman; the emergency called, or appeared to call, for instant action; and the order made would have been the proper and necessary one. The mistake was discovered as soon as it was discoverable, and at once corrected. Navigation must necessarily be according to observation at the time. The observations made in this case, both in the mistake and in the correction of it, were, so far as I can judge, as quick, active, and accurate as the circumstances at the moment admitted. The error was one of judgment in the interpretation of what dimly met the eye, and not, under the circumstances, evidence of either carelessness or incompetency. An analogous error as to the light, and porting thereon, in the case of *The Oder*, 13 FED. REP. 285, was held not to be imputed to the steamer as a fault.

It remains to be considered in what respects, if any, the brig was in fault.

1. Assuming that the steamer was coming up astern of the brig, and out of the range of her red light, the claimant contends that the brig was bound by the general maritime law to exhibit a stern or flash light to the steamer, to apprise the latter of the brig's proximity. The libelants contend that there was then no such maritime obligation, and that the brig gave all the signals required. There can be no doubt that the exhibition of such a stern light would have prevented this collision. The light could not have failed to be seen on the steamer much sooner than the dark looming of the brig through the haze, and more time and space to avoid the brig would have been had. Such a light would also have made known the course of the brig, so that the mistaken order to starboard would have been avoided. If, therefore, the exhibition of such a light was a strict obligation on the brig under the maritime law, then the absence of it in this case is clearly material. It is only where it is entirely clear that the exhibition of a light could have made no difference, and conveyed no additional or earlier information to the other vesel, that the failure to show a required light is held immaterial. *The Margaret*, 3 FED. REP. 870; *The Excelsior*, 12 FED. REP. 203, and cases there cited; *The Pennsylvania*, Id. 914; *The Narragansett*, 11 FED. REP. 918 and note; *The Breadalbane*, 7 Prob. Div. 186; *The Love Bird*, 6 Prob. Div. 83.

By the act of 1871 (Rev. St. § 4234) a flash-light is made obligatory, and this is part of our maritime law. But no such regulation was adopted by France or England, to which these two vessels

belong, until after this collision took place. By article 11 of the new international regulations, which went into effect September 1, 1880, (L. R. 4 Prob. Div. 246,) a white light, or a flare-up light, is for the first time required to be exhibited to an overtaking vessel; *i. e.*, a vessel coming up astern of the range of the regulation lights of the vessel ahead. *The Franconia*, L. R. 2 Adm. Div. 8.

If there were a diversity between the law of England and of France in respect to the exhibition of such a light, then, as neither vessel could claim the benefit of its own law exclusively, the law of this country, as the law of the forum, might possibly be applicable in the present suit. *The Scotland*, 105 U. S. 29–31; *The Sarmatian*, 2 FED. REP. 911.

Assuming that by the French law the exhibition of a stern light was not required, the English decisions seem to me to show clearly that by the maritime law, as understood and applied in England also, such a light was not strictly obligatory, but was at most regarded as only one of various different signals, which, under circumstances of manifest danger, the vessel ahead might be bound to give to an overtaking vessel which is astern of the range of the former's lights. The regulations of 1863, to which France and England were parties, provided (article 2) that no other lights than those mentioned in the articles should be carried; and those articles contained no provision for exhibiting a stern or flash-light to an overtaking vessel. The only allusion to a flash-light is in article 9, which provided that "fishing vessels and open boats shall not be prevented from using a flare-up light in addition if considered expedient." There was no evidence that it was usual or customary for foreign vessels to exhibit a stern or flash-light under circumstances like the present.

In the cases of *The Anglo-Indian* and *The Earl Spencer*, 3 Asp. Mar. Cas. 1, 4; S. C. 33 Law T. (N. S.) 233, 235, it was held that under exceptional circumstances, and when there is manifest danger of collision, it "may be the duty of the vessel ahead to give some warning to the overtaking ship, not necessarily by exhibiting a light, but by some signal, such as the firing of a gun, the showing of a light, or otherwise, which will indicate her whereabouts to the overtaking ship, and call the attention of that ship to the danger of a collision."

In the case of *The Oder*, 13 FED. REP. 272, where a collision under such circumstances occurred in a dark, overcast night, without fog, between a German steamer and a Norwegian bark, and the vessel ahead knew the overtaking vessel was out of range of her lights, BLATCHFORD, J., says: "The leading vessel was bound to indicate her presence. The exhibition of a light would have done so. Other means might have done so. Any proper means used seasonably would have arrested the course of the steamer and enabled her to avoid the bark;" and the bark was held in fault, because, though knowing the steamer to be coming up astern and out of range of her

lights, she "did not show a light or give any other warning, etc., in time," etc.

In the case of *The Earl Spencer*, L. R. 4 Adm. & Ecc. 431, which was affirmed on appeal,—33 Law T. (N. S.) 235,—Dr. LUSHINGTON, in 1875, held that the leading vessel was under no obligation to show a stern light; he says that to hold so, before new regulations were adopted, would lead to confusion and danger, and that the following vessel had no right to expect such a stern light; and in 1876, in the case of *The City of Brooklyn*, 1 Prob. Div. 276, the same general doctrine was reaffirmed on appeal in the Privy Council. In the case last cited no signal at all was given to the overtaking steamer; and yet the other was held exempt from fault, because it was supposed the steamer would go to leeward, and when the danger was perceived it was too late to give any useful signal. In the case of *The Oder*, *supra*, the leading vessel was held liable, because, though she perceived the danger, she did nothing to avert it.

In the present case there is no evidence that those on the brig supposed their red light could not be seen. The inference is to the contrary. Moreover, they did all that they could to notify the steamer, except to show a stern light, at least three to four minutes before the collision. Considering that the use of a fog-horn is all that was required by the rules and regulations then existing, applicable to French and English ships, to apprise vessels of their proximity to one another in a fog, and that there is no evidence that the exhibition of a stern light was usual or customary, or that the brig had any other means of signaling, it seems to me that the blowing of the three horns, as was done in this case, a light not being strictly obligatory, was a compliance with all that the British maritime law demanded under the rules then existing as a signal to the overtaking steamer. See *Leonard* v. *Whitwill*, 10 Ben. 638. The steamer, moreover, had notice of the brig in season to avoid her, had the steamer at once reversed her engines. So far as I can perceive from the evidence, no other signal than a light would have given any earlier or more precise knowledge of the brig's presence or whereabouts; and if not, then, as a stern light could not be insisted on, the giving of any of the other signals permissible was, in fact, immaterial in this case, since they would have conferred no earlier or better information than the steamer in fact possessed. In view of this fact, therefore, and that the brig gave such other signals as were within her power, a light not being indispensable, the failure to exhibit a stern light, even if the steamer was known to be astern of the range of her lights, was not such a breach of the brig's obligations, according to the law then existing, as renders her on that ground chargeable with fault.

2. Repeated consideration of all the testimony, however, has led me to the conclusion (1) that the steamer, at least when the order to starboard was given, was not two points aft of the brig's beam; (2) that the brig's red light ought to have been seen from the steamer;

(3) that it was not seen because it was either dim or improperly set, and not by reason of any inattention or fault of those on the steamer, and that the brig is in that respect chargeable with fault.

By the international regulations the colored side-lights are required to show two points abaft of abeam. Whether the steamer was within that range or not depended partly upon the bearing of the brig from the steamer, but still more upon the heading of the brig herself. Every variation of direction by the brig would change the range of her lights. The bearing of the brig is stated by the steamer's witnesses at a half point or point on her, the latter's, starboard bow. This, as we shall see, is too little; it must have been at least a point and a half. The brig's course, had it been fixed and constant, would have been easily determined from the testimony of her own witnesses; and that would have fixed the range of her lights. But her course was not fixed. She was sailing by the wind, close-hauled, and the wind was variable. Her own witnesses placed the wind at all points from W. S. W. to N. W., and the brig, says the captain, would sail "within six or six and one-half points of the wind, but that night was not sailing very close,—six, seven, or eight points off;" and he places her course as variable from S. to S. W. The helmsman and second mate give her course as S. S. W.; but the second mate expressly says he did not look at the compass after the steamer's lights were seen, nor does it appear that the helmsman did so; and the course given seems to refer to her general or average course. The master, who was in immediate control some three or four minutes before the collision, states that her course was variable from S. to S. W., with nothing more definite.

Had the bearing of the steamer's lights from the brig been given with any definiteness, that, also, would have determined the range of the brig's red light as respects the steamer. The testimony on this point, however, is very indefinite; but it agrees better with the steamer's being within the range of two points abaft the beam, than with her being astern of that range. Speaking of the time when her lights were first seen, the captain says "she bore abeam of us;" Douett says, "she was heading for our beam;" Michel says, "towards our beam;" Blanchet says, "pointing abeam of us—I mean pointing to hit amidships;" Michel and Robin say her lights were "on the port beam;" Douett and Mignon say they "were abeam;" Beon says they "were abeam to leeward, coming from the eastward." Had the steamer, when first seen, been due east, she would soon have come fully within range, even if the brig had been going S. S. W. None of these descriptions of the steamer's bearing indicate that she was more than two points aft of abeam. The libel states that she was approaching "a little abaft her beam," which, to my mind, would indicate less than two points abaft rather than more. But the fact that not one of the brig's witnesses speaks of the steamer as seen at any time off the brig's port quarter, as they would naturally have

done if she had been observed when a third of a mile distant, more than two points abaft of abeam, is strong evidence that she was not so much aft as two points. None of the diagrams of the brig's witnesses of the positions of the vessels before the brig luffed, show the steamer more than two points aft. The captain, also, when he came on deck and saw the lights "abeam," at once looked at his red light, as he says, "to make sure it was lighted;" evidently because he supposed the steamer was in range and would see it. None of the expressions of her witnesses, or of the master in his protest and letters, indicate that they did not suppose the steamer to be within range and able to see the brig's light aft; their complaint is that the steamer did not keep a proper lookout.

The natural inference from this testimony is strengthened by other established facts, which show conclusively that the steamer must have been less than two points aft of the brig's beam; because (1) the brig bore at least one and one-half points off the starboard bow when first reported, otherwise the collision could not have happened at all in the manner it did; and with that bearing, even if the brig were then sailing S. S. W., the steamer would in a few moments have come fully in range of the brig's red light; (2) because the necessary conditions of the collision show that the brig was sailing more southerly than S. S. W., viz., S. by W., if not due south, before she luffed, and either of these courses would have put the steamer in range of the red light.

Among the established facts of the case must be included (*a*) the steamer's course, W. S. W. or S. W. by W. $\frac{1}{2}$ W., and her speed at 8 to $8\frac{1}{2}$ knots; (*b*) the brig's course somewhere from S. to S. W., and her speed from one to one and a half knots; (*c*) the order to hard a-port as soon as the first officer was told that no lights were seen on the brig, and the helm got hard over in 30 to 40 seconds afterwards, *i. e.*, within a minute or somewhat less after the brig was reported; (*d*) the order to stop the engines, and their being stopped by the time the helm was hard a-port; (*e*) that under a hard a-port wheel the steamer would make a circle of half a mile diameter, *i. e.*, change one point in going every 300 feet; (*f*) that the brig luffed about two points before the collision; and, lastly, that when the steamer struck the brig their courses were nearly at right angles. The last is a controlling fact. The best witnesses on both sides all agree in that particular. The captain of the brig says she struck "end on, almost perpendicularly." The first officer of the steamer says "at right angles." The diagrams vary on each side of perpendicular. The captain's diagram makes the steamer point not over one point forward of a right angle. I adopt that, not merely as the result of all the direct testimony, but also because, if the steamer, when she struck, had been heading forward more than one point, she could not have shoved the brig off so as to clear her by going astern of her as she did, but would have gone across her and cut her through. The steamer, at

the time she struck, was, therefore, heading at least seven points west of the brig's heading, or nine points west of the brig's course before she luffed.

From the above conditions it follows (1) that the steamer under her port wheel changed at least three points; for even if the brig were previously sailing south, and afterwards luffed two points to S. S. W., the steamer heading, when she struck at least seven points west of that, would be going W. by N., *i. e.*, three points from her former course; (2) that the steamer must have gone at least a quarter of a mile after the brig was reported up to the collision, and occupied in so doing at least two and one-half minutes; for if her port-helm had been uninterrupted, she would have traveled 900 feet in changing three points, according to the master's testimony as to her rate of change, to which must be added at least 600 feet, passed over in three-quarters of a minute, before she was much under the influence of her port helm, as well as 100 or 200 feet more from the interruption of her port-helm: even if the master was very inaccurate, which is hardly probable, in testifying that the steamer would make a circle of a half-mile diameter under a hard-a-port-helm, and only one-third, or as much as two-thirds, of a mile, were the true statement, still a change of three points would make a difference of only about 300 feet either way in the distance above given; (3) that the steamer could not have changed more than five points, *i. e.*, to N. W. by W.; for there is no evidence that in the few minutes preceding the collision the brig's course before she luffed was further west than S. S. W.; and other considerations will show that the steamer could not have changed over four points.

If, now, a diagram be made of the courses and positions of the vessels, adopting the course of W. S. W. for the steamer, (which is the one most favorable to the brig,) and several different curves be drawn, on a scale representing a quarter of a mile radius, tangent at various points of the steamer's course, which points may be adopted to represent different intervals of time after the brig was first reported and when the steamer may have come fully under her hard-a-port-helm, then these curves will indicate very nearly the path of the steamer, under her hard-a-port-helm, from either of these tangential points. Such a drawing will immediately show conclusively that the brig when first reported must have been more than one point off the steamer's starboard bow; for there is no point near or distant on the line of such a bearing where the brig can be placed, (giving time and space for the steamer to have changed three points,) that the brig, going at the rate of one or one and one-half knots, would not have got considerably to the southward of the steamer, and wholly out of her way by the time the steamer had changed even two points. The steamer would then be heading due west, and any further change under her port wheel would carry her still further astern of the brig.

The libelant contends that there was a great deflection of the steamer to the south of the path of the curve given, through a starboard wheel continued during a considerable time; but even if the concurrent testimony of all the steamer's witnesses, that the wheel did not get to starboard at all, but only to amidships, when countermanded, were disregarded, still an inspection of the drawing, as above indicated, will show that no such deflection by the steamer, with her necessary return, so as to strike the brig nearly at right angles, was possible, for neither the time nor the space necessary for such a deflection and return to nearly right angles can be got in any position consistent with the foregoing conditions. Besides, had any such deflection by the steamer to the southward occurred after the steamer had changed two points, and had come near enough to see the brig's sails, such a change of course would have been plainly seen on the brig, through the changed position of the steamer's lights; and yet all the brig's witnesses say no such change was noticed. The testimony of the steamer's witnesses on that point must, therefore, be accepted as correct.

The statement in the abstract of the log, from which this deflection is argued, is not to be relied on. This abstract is evidently inaccurate in several particulars. The statement of her "canting to clear" the brig was inferential only, as the brig had not previously been distinctly seen; and the fact appears conclusively to have been otherwise, as the steamer's witnesses also distinctly testify. The only effect of the temporary interruption of the port wheel was to move the center of the brig's curve of motion somewhere from 100 to 200 feet due west.

To render the collision possible under the established conditions above specified, it will be found necessary to bring the brig, when first reported, somewhere upon a line bearing at least one and a half points off the steamer's starboard bow,—a variation from the lookout's estimate not incompatible with his intelligence or honesty. But, even upon this line, the brig cannot have been one-third of a mile distant when first reported, because, at that distance, she must have got to the southward, and out of the steamer's way, before the steamer's curve of motion could have intersected the brig's path, whether the latter were going S. or S. W.; and this will be found true though the steamer's curve of motion be interrupted and carried westward 200 feet at the time of the order to starboard, *i. e.*, after a change of about two points.

Moreover, the diagram drawn as above will show that the steamer could not have changed more than four points to the westward, because there is no place which can be adopted for the position of the brig when first discerned, on a line drawn even one and one-half points off the steamer's starboard bow, but that the brig must have got to the southward and well clear of the steamer by the time the steamer could have made a change of four points, with an interruption of a straight course of 100 or 200 feet only. A change of four

points would bring the steamer heading W. N. W., and even before that she would be rapidly diverging to the northward and away from the brig. The result is that the brig, when first reported, must have been between 1,500 and 2,000 feet distant; that the steamer changed between three and four points only,—probably but little over three points,—and that the time between the brig's discovery and the collision was from two and one-half to three minutes; and that the brig, before she luffed, was sailing from S. to S. by W. These results, arrived at independently of any of the witnesses' mere estimates of time and distance, agree well, however, with the account and estimates given by the first officer; and this lends additional credit to his testimony in other particulars. That the brig could not have been sailing S. S. W., before she luffed two points, is manifest, because that would make the steamer, at the time of the collision, head N. W. by W., a change of five points, which the drawing will show is inadmissible. The master of the brig also says the brig sailed away on a "S. E. course, or within a point of that, after falling off four points,—perhaps five or six." This would at most carry her back to S. S. W., or to S. W. by S., and, deducting two points for luffing, we have her course previous as S. or S. by W. as above found.

If the course of the brig were S. or S. by W., her red light should have been in full view at the time the brig was first discovered; if S. S. W., light should have been seen in less than a minute after, and before the order to starboard, if the light was properly set and burning. That it was not seen at all cannot be due to the fog. There was a difference in the height of the brig's red light and the steamer's of only five or six feet; and the steamer's lights were plainly seen from three to four minutes before the collision, when nearly half a mile distant. Nor can the failure to see the brig's red light be reasonably ascribed to any inattention of the men on the steamer. All the evidence shows that they were alert and vigilant. Several witnesses were watching her, and testify that no red light was seen at all. Had the right light been seen, even a minute before the collision, it would have shown conclusively that the brig was going to the southward, and the mistake of supposing she was going north could not have been made, nor the consequent order to starboard the helm have been given. So important an order as the order to starboard, based on the absence of any light, is the strongest confirmation of the truth of the steamer's witnesses that no red light was seen or was visible. The only alternative is that the brig's red light was too dim to be seen, or else was improperly set, so as not to show two points aft of abeam. Most of the brig's witnesses swear, it is true, that the red light was burning and burning brightly. That the brig's witnesses are not very trustworthy, in regard to their observation of the lights, must be inferred from their all agreeing that no red light was seen on the steamer, whereas her necessary line of approach under her port helm, and their own diagrams, show that the steamer's red

light must have been visible some little time before the collision. The concurrent testimony of nearly all the brig's witnesses, that no change in the steamer's course was seen, also shows that their account of what they observed is very little to be relied on, either from the excitement of the occasion, inaccurate observation, defective memory, or suppression of the facts.

The testimony on the part of the brig, both as to the adjustment of the lights, and their being properly trimmed, is, certainly, unsatisfactory. The brig's lights were not arranged according to the regulations, which require screens. The brig had no screens; the bulwarks of the poop were used as a substitute; whether a sufficient substitute or not depended entirely on how the lights were adjusted below the rail; and this was necessary to be shown, for, on every departure from the regulations, the burden of proof is on the vessel to show that any substitute answers the same ends as that which the regulations prescribe. The second mate, by whom alone it was sought to prove that the brig's lights were proper lights, and so adjusted as to show two points aft of abeam, wholly failed to give any satisfactory testimony on that subject. Lepingon, the salter, whose duty it was to trim the lights, if they did not burn brightly, testified that on this night he did not trim them "because they had been trimmed before he came on deck," which was at 10 P. M. But this was only his supposition; for, on cross-examination, he says it was the mate's duty in the other watch to trim them, and that he had not seen the lights trimmed. A. Douett, boatswain of one of the boats, however, testified that he was on the previous watch from 5 till 10 P. M., and put the lights in position that night, and that he thought the *salter* trimmed them before being put in place; from which it is evident that he did not trim them himself. Both mates were witnesses, and neither testified to having trimmed the lights, as would naturally be expected if they had, in fact, trimmed them. Each witness who testifies about trimming supposed some one else trimmed the lights. The natural inference is that they were not trimmed at all.

Under such circumstances of doubt, both as to the trimming and the adjustment of the lights, and the admitted absence of the ordinary screens, the testimony of the brig's witnesses, all of whom are directly interested in the recovery, that the lights were burning brightly, ought not to be held to outweigh the fact that there was no red light fulfilling the office of such a light, and visible two points aft of abeam. The burden of proof in this respect is upon the brig. *The Narragansett*, 11 FED. REP. 918; *The Albert Mason*, 2 FED. REP. 821. If it were strictly a question of veracity between the witnesses from the two vessels, superior credit ought to be given to those who at the time make so important an order as a sudden change of helm based on the absence of such a light. It is, however, not a question strictly of veracity, since, though the light were dim from want of trimming, this defect might not be noticed in the excitement of the occasion; and if

the adjustment was not proper, so as to show two points abaft, the light was defective from this cause, though burning brightly. In departing from the regulations it was the duty of the brig to show an equivalent substitute. She did not do this, and as no red light was seen, when I am persuaded it would have been seen if properly adjusted and burning, I am compelled to find the brig chargeable with fault in this particular. *The Ariadne*, 2 Ben. 472; *The Star of Scotia*, 2 FED. REP. 579, 597; *The Narragansett*, 11 FED. REP. 918; *The Roman*, 14 FED. REP. 61; *The S. H. Crawford*, 6 FED. REP. 906.

As to the question whether the brig luffed only when *in extremis*, and when the collision was unavoidable, or much earlier than that, the testimony of her own witnesses is extremely diverse. Blanchot, who was stationed amidships, says the helm was ported by the captain when the steamer was "about 400 meters" distant. Rochefort, the first mate, says that he came on deck "about two minutes before the collision," and that "when he went on deck he saw how the helm was," *i. e.*, put to port. Beon, the wheelsman, says it was put a-port by the captain's order, when the steamer was "about two ships' lengths" distant. This must have been from 200 to 250 feet, since, though the brig's length is not stated, her width was 21 or 22 feet, and it was 35 feet from stern to mainmast. Bastard, the second mate, estimates the distance at 50 meters only. The captain says that he took the wheel when the steamer was "perhaps 300 meters" distant, and thenceforward kept it; and "when I saw the steamer was close upon us, about 70 meters, I left the wheel, and the shock took place two or three seconds afterwards." He also states that all the rest had previously left the poop. This estimate of 70 meters is very nearly the same as that of the wheelsman. The salter, the only other person on the poop, says that he did not hear the order to port; that he had gone amidships when the steamer was about 100 meters off, but knew the helm was ported, because the brig luffed so that the sails shook, and that this was when the steamer "was close aboard of us."

The master and others of these witnesses say that the brig luffed to avoid being struck amidships and having their small boats smashed. The result shows plainly enough that the change did not contribute to that end. The circumstances, however, lead me to conclude that the estimate of the master and wheelsman is most nearly correct, and that the change was made nearly a half minute before the collision; for as the steamer seemed to be approaching so as to strike amidships when the order was given, and struck some 50 feet further astern, this 50 feet represents mainly the brig's progress in the interval; and that would occupy about a half minute, or a little less, as her speed when going at so slow a rate would not be much decreased during that period of luffing. As the steamer during this time was under reversed engines, she probably approached the brig at an average speed of not over four or five knots, making about 200 or 250 feet

in this half minute, which agrees nearly with the master's estimate of a distance of 70 meters when his order to port was given.

The forward motion of the brig, during this time, could not, I think, have been so much checked, that, but for this change of helm, she would have gone clear. The order, moreover, was evidently given when the collision appeared to those on board the brig to be inevitable, and was given for the purpose only of preserving their small boats,—their last hope and resource if the brig were struck. Even, therefore, though the order to luff was erroneous and useless, as it doubtless was, it was given *in extremis*, under the stress of apparent necessity, and when instant destruction seemed to be impending. In such cases even an error is not imputed as a fault. *The Favorite*, 18 Wall. 598, 603; *The City of Paris*, 9 Wall. 634, 638; *The Farnley*, 1 FED. REP. 631, 637.

If the brig's luff of two points was made, as I conclude it was made, within half a minute of the collision, it affords no explanation of her red light's not being seen from the steamer. If, however, her luffing was what prevented her red light's being seen, then this luff must have taken place much longer before the collision than I have found, and much nearer to the time and distance assigned for its occurrence by Rochefort and Blanchot, viz., two minutes before the collision, and when 400 meters distant. In that case the brig's change of course by luffing would be a change made too early and at too great a distance from the steamer to be treated as a change *in extremis*, (*The City of New York*, 15 FED. REP. 628,) and the brig would be held in fault for violating the rule which required her to keep her course. A drawing of the situation of the two vessels as above indicated, and the necessary conditions of the collision, will show that any luff made sufficiently long before the collision to have hid the brig's red light from the steamer, must have been made at too great a distance to be excused as a change *in extremis*, and at such a distance also as to have checked the brig's speed sufficient to have prevented her going clear of the steamer.

In either view, therefore, the brig is chargeable with fault and entitled to recover but half her damages and costs, for which judgment may be entered, with a reference to compute the amount.

SMALL v. MONTGOMERY.[1]

(*Circuit Court, E. D. Missouri.* September 27, 1883.)

PRACTICE—WAIVER OF OBJECTION TO ILLEGAL SERVICE OF PROCESS.

The appearance of a defendant in a case pending in a state court, for the purpose of filing a petition for removal to a federal court, does not constitute such a general appearance as operates a waiver of defective or illegal service of process, so as to prevent his raising any objection to such service after the removal.

Demurrer to Replication.

This is a case removed to this court from the circuit court of the city of St. Louis, at the instance of the defendant, who is a citizen of the state of Tennessee. After the removal the defendant filed a plea in abatement, in which he stated that prior to the institution of this suit he was indicted in the St. Louis criminal court for obtaining money under false pretenses; that he was arrested, and gave bond to appear and answer to said charge when ordered so to do by the court; that he then returned to his home in Tennessee, and did not come back to Missouri until compelled by an order of said court, when he appeared to answer to said charge; and that while attending court to answer to said charge against him, and immediately after the case against him was dismissed, he was served by a deputy sheriff of the city of St. Louis with a copy of the complaint and summons in this case, though privileged from service of process at the time, and that the service on him was, therefore, illegal and void. The plaintiff, in his replication, stated that the defendant had waived any objection he might have made to said service by appearing before the St. Louis circuit court, and filing a petition for a removal of the case to this court.

M. B. Jonas and *C. H. Krum*,, for plaintiff.

Jamison, Collins & Jamison, for defendant.

TREAT, J. The only question presented is whether the special appearance of defendant in the state court, whence the cause was removed, for the purpose of having said removal to this court, constitutes such a general appearance as operates a waiver of defective or illegal service, so that objection to said service cannot be here raised. Judge DRUMMOND, in the case cited by counsel for defendant, holds that such special appearance is not a waiver of defendant's rights, nor does it operate as a general appearance, nor prevent his objecting in the federal court to the service. *Atchison* v. *Morris*, 11 FED. Rep. 582.

Reference is made to the case of *Sweeney* v. *Coffin*, 1 Dill. 73, decided in 1870 by this court, in which it was held that under the act of 1789 this filing of a motion for removal was a sufficient appearance for

[1] Reported by Benj. F. Rex, Esq., of the St. Louis bar.

that purpose without entering a general appearance in technical form.

The question arose on a motion to remand, because the record did not disclose such general appearance entered at the time of filing the petition for removal, as that act required. That case is clearly distinguishable from the present in many respects. Questions of actual and of constructive service under the state law had also to be considered, and the binding effect of a valid constructive service to bring the defendant into court, although such service was not valid in federal courts. When the case was removed, the original service was held to have the same effect as before removal.

Valid service is as effective as a voluntary appearance. And hence, under the act of 1789, the court ruled that in the case then before it, proper service having been had, the filing of the petition was a sufficient compliance with the terms of that act as to appearance. No question of waiver was presented.

The case of *Werthein* v. *Cont. Ry. & T. Co.* 11 FED. REP. 689, was decided under a rule in the state court which required "all pleas in abatement * * *" to "be filed on or before the opening of the court on the day following the return-day of the writ," which, in that case, was on September 13th, on which day the defendant appeared, but filed no plea in abatement. On September 22d the defendant filed his petition for removal. After the case was removed to the federal court, the defendant filed there his plea of abatement; and the court properly held that he had, by his inaction or failure to comply with the rule stated, waived his privilege. In the case now under consideration, the petition for removal was filed before the time for pleading had expired.

The language of Judge CURTIS in *Sayles* v. *Ins. Co.* 2 Curt. C. C. 212, seems to be broad enough to sustain the views of plaintiff's counsel; but that eminent judge put the appearance for the removal of the cause upon the same footing as pleading to the merits, whereby pleas in abatement are waived. There is, however, a marked distinction between the two procedures. The former is had merely to secure the constitutional and statutory right to have all questions heard and disposed of solely by the federal court; and the latter is by established law a waiver of all authenticated or dilatory pleas, with one exception, so that the party puts himself exclusively upon the merits of the controversy.

The act of 1875 differs from the act of 1789 as to the time of filing the petition, and says nothing as to the formal appearance entered. It has been often held that while a general appearance waives defective service, yet a special appearance, as in this case, has no such effect. We concur fully in the decision of Judge DRUMMOND, *supra*. See, also, *Blair* v. *Turtle*, 1 McCrary, 372; [S. C. 5 FED. REP. 394.]

The demurrer is sustained.

McCRARY, J., concurs.

DENVER & R. G. RY. CO. *v.* DENVER, S. P. & P. R. CO.[1]

(*Circuit Court, D. Colorado.* September 18, 1883.)

1. RAILROADS—LOCATION UNDER ACT OF CONGRESS IN MOUNTAIN GORGES.
The location of railroads in mountain gorges, on the public domain, is subject to the second section of the act of congress, approved March 3, 1875, relating to the use of canons, passes, and defiles by railroad companies, which provides that no company which locates its line through such place shall prevent any other company from the use and occupancy of the same canon, pass, or defile for the purpose of its road, in common with the road first located, or the crossing of other railroads at grade.
2. SAME—CONSTRUCTION OF ACT.
This act bears upon its face the meaning that where there is a canon, pass, or defile so narrow as not to admit of the passage of two roads conveniently, it may be used by two or more railroads; but only in cases of necessity can one company go upon the right of way of another for the purpose of building its road.
3. SAME—CROSS-BILL.
The company having prior right of way may enjoin intrusion thereon by another company, until facts are shown making it necessary for the second company to come on the right of way. Suit for injunction being brought, such necessity may be shown, and the right to enter upon and use such right of way may be enforced on cross-bill. The rights of the parties will be settled upon evidence by final decree, and not in a preliminary way upon motion.

In Equity.

E. O. Wolcott, for plaintiff.

H. M. Orahood and *H. B. Johnson*, for defendant.

HALLETT, J., (*orally.*) The plaintiff in this action located its road and built it under an act of congress approved June 8, 1872.

In *Railway Co.* v. *Alling*, 99 U. S. 463, the supreme court held this act to be subject to the second section of the act of March 3, 1875, relating to the use of canons, passes, and defiles by railroad companies. The act of 1875 provides that no company which shall locate its line through any such place shall prevent any other company from the use and occupancy of the same canon, pass, or defile for the purpose of its road, in common with the road first located, or the crossing of other railroads at grade. This act, although the meaning is not very fully expressed, is evidently understood by the supreme court, and bears upon its face the meaning that where there is a canon, pass, or defile so narrow as not to admit of the passage of two roads conveniently, it may be used by two or more. The supreme court, although they have not discussed the act at very great length, assume that the different companies are not to encroach upon each other's right of way, except there be a necessity for it. They say further:

"Where the Grand canon is broad enough to enable both companies to proceed without interfering with each other in the construction of their respective roads, they should be allowed to do so; but, in the narrow portions of the

[1] From the Colorado Law Reporter.

defile, where this course is impracticable, the court, by proper orders, should recognize the prior right of the Denver & Rio Grande Company to construct its road. Further, if in any portion of the Grand canon it is impracticable or impossible to lay down more than one road-bed and track, the court, while recognizing the prior right of the Denver company to construct and operate that track for its own business, should, by proper orders and upon such terms as may be just and equitable, establish and secure the right of the Canon City Company, conferred by the act of March 3, 1875, to use the same road-bed and track after completion in common with the Denver company."

It is not said in the act of congress that the entire right of way which may be appropriated by one company is subject to be used by another, but only that the first appropriator shall not prevent any other company from the use of the same canon, pass, or defile; and it must be clear from the language used that it is only in cases of necessity that one company can go upon the right of way of another for the purpose of building its road.

Now, whenever a controversy arises between two companies in respect to the existence of such a necessity, the fact that the canon, pass, or defile is such that it is impracticable for the second company to pass through it without going upon the territory of the road first located will enter into the controversy, and it must be settled by the courts. It is perfectly plain that the first company has got a right to object to the intrusion upon its right of way by the second company until that question is settled. If it were true that this act would subject the way to the use of any other company in such a manner that the latter might go in against the objection of the first, it would be also true that the second company could demand of the first the use of its track absolutely without adjudication of the facts in any court; but it seems to me as clear as anything can be that the first company, to locate its road through any such place as is described in this act of congress, may, in the first instance, and without showing any cause whatever, object to admitting any other company into its way until the facts are shown making it necessary for the second company to come on the right of way to build its road. In that view, the circumstance that this suit was brought by the Rio Grande Company against the Denver, South Park & Pacific Company to enjoin it from intruding on its right of way, (the Rio Grande Company having first made its location and constructed its road,) is not material.

As to the right of the defendant to go upon the way of the Rio Grande Company, the controversy is precisely the same as if no such suit had been brought, and upon objection by the Rio Grande Company the other had filed its bill to enforce its right of way under the act of congress; and it is not material that the bill was brought first by the Rio Grande Company to enjoin the other. In any question that arises respecting the right of the defendant to go upon the way of the other company to build its road, the suit is precisely in the same attitude under this cross-bill as if the bill had been first filed by that company as an original bill to enforce and secure to itself the right in these passes

and canons to build its road on the same way with the Rio Grande Company.

The questions that arise in such a bill are various. It may be a question whether the party seeking to enforce such right is to encroach on the right of way of the other the distance of 10 feet or 20 feet, or to lay its road-bed and track immediately parallel with the other, making it substantially a double-track road, or to use the track itself of the other company. It may be a question whether the second track is to be laid above or below the first, immediately contiguous to it, or some distance from it. It must very often be a question whether the second track is to be laid upon the same side of the gulch or defile with the first or upon the opposite side; that is a very material question, for in most of these controversies where the road comes on the opposite side of the defile—upon the opposite wall of the canon—it will not affect the first road in any degree whatever, although it may be upon its right of way; it will not affect the operation or maintenance of the other road in any way whatever; but if the second road is laid above the first, in a place where the snow falls deeply, any one can see that it may affect the first very materially, as in removing the snow from the higher track it must naturally come down upon the other. And so questions that arise in a controversy of this kind, or that may arise, are as difficult of determination and as substantial in their character as any which can be brought into a court of justice. I think they are questions which are subject to adjudication in the ordinary sense. They are questions to be settled by a final decree of court. The matter is to be settled upon evidence, and not in a preliminary way upon motion.

It was suggested by counsel in argument, that it is competent for the court to allow the defendant in this suit to go on constructing this road, subject to such disposition of the matters in issue as may seem to be proper, upon the final hearing and decision of the question upon evidence, or upon whatever may be taken for evidence, but I do not think so: It would be manifestly unjust to the defendant itself to countenance the building of the road now, when it may be that the court will afterwards change its mind in respect to this matter, and require the road to be removed and built somewhere else. What would be said if we should now and here give the defendant permission to go on and build its road as it shall choose, and in six months from this time, on final hearing, declare all of it to be wrong—a mistake from the first,—and that it would be the duty of the defendant to take up its track and put it somewhere else. I do not think that any court can go on in that way. This is a matter for final decision and determination, and as such there are questions which can only be considered upon final hearing.

I do not agree that, after issue has been made in this case, the parties are entitled to the time which is prescribed by rules for taking testimony, because, I think, this case admits of only a certain kind

of testimony, and the court will take the report of commissioners, if we resort to that method of proceeding, as a substitute for testimony ordinarily taken in a cause. It is a method of ascertaining facts which is regarded as more satisfactory, more intelligible, than to call inexperienced persons to testify to matters of which they have no knowledge. The matter in issue between the parties is one which requires the judgment of scientific men; and it is a question which requires the investigation and consideration of such men, and can only be determined by persons, educated as engineers, who go upon the ground and give the necessary attention to the subject.

I think that is about all that it is necessary I should say. What was said by counsel about the hardship that rests upon the defendant may be entirely correct, I suppose it is, but I think it is not a matter for which the court can give relief by preliminary order. The plaintiff in this action has secured this right of way by going upon it and building its road under the act of congress, and I think it has a right to defend that right of way against all who may seek to convert it to their own use, until the condition of things mentioned in this act of congress is shown to exist; and no court has the power to direct any other road to go upon such way until the facts are ascertained. They are to be ascertained according to the usual methods of proceeding in courts of equity. The defendant must wait until the issue is formed upon this cross-bill, and evidence taken. It is competent,—it seems to me now, (I do not wish to prejudge the matter,)—it is competent for the court, after issue joined, to appoint commissioners to go upon the ground and ascertain the facts, and for the court to act upon their report.

If it is sought in the cross-bill to enjoin the Rio Grande Company from doing anything to impede the operations of the defendant in building its road by changing its track, or changing the river, or the like of that, of course that stands upon entirely different grounds. That is in the nature of an application to preserve things in the condition in which they were, until the rights of the parties shall be finally settled; and, if there is any such application as that, after the Rio Grande Company has had a short time to answer the cross-bill, we will hear what you have to say upon it. I understand the amended cross-bill was filed only yesterday. Of course, plaintiff is entitled to defend against it in some form.

FOGG v. ST. LOUIS, H. & K. R. CO. and another.[1]

(Circuit Court, E. D. Missouri. September 24, 1883.)

1. EQUITY—LIMITATIONS.
   Although courts of equity, as a general rule, follow the statute of limitations, they do not do so when manifest wrong and injustice would result.
2. SAME—LACHES—CORPORATIONS.
   Where a corporation conveyed all its assets, except its corporate franchise, to another corporation, and the latter assumed all the grantor's debts and took possession of its assets, and subsequently a creditor of the grantor, whose demand had accrued before said conveyance was executed, and was not yet barred by the statute of limitations, brought suit at law against said grantor, recovered judgment, and had an execution issued, which was returned *nulla bona*, and promptly after said return was made, but more than 10 years after the original demand accrued, instituted proceedings in equity against his judgment creditor and its said grantee to force the latter to pay his demand, *held*, that the claim was neither barred by laches nor the statute of limitations.

In Equity. Exceptions to so much of the answer as set up against plaintiff's demand a bar by force of the statute of limitations and of complainant's laches. The defendants are the St. Louis, Hannibal & Keokuk Railroad Company and the St. Louis & Keokuk Railroad Company.

George D. Reynolds and *James Carr*, for plaintiff.

Smith & Harrison, for defendants.

TREAT, J. The only facts disclosed which are essential to the present inquiry are that prior to May 4, 1870, the plaintiff's demand against the second corporation named was in existence, and could have been pursued and enforced; that no suit was brought on said demand until September 21, 1881; that judgment was recovered in said suit on said demand at law on October 3, 1882; that execution thereon was duly issued and return of *nulla bona* made, March 19, 1883; that on March 4, 1873, the last-named corporation, to-wit, the St. Louis & Keokuk Railroad Company, conveyed to the other defendant corporation all its property and franchises, the latter assuming all the debts, liabilities, and obligations theretofore made or incurred by or legally imposed upon the said St. Louis & Keokuk Railroad Company, for right of way, station grounds, ties, or bridging, and other good and valuable considerations in said conveyance mentioned; that under said conveyance the first-named corporation entered into possession without knowledge of plaintiff's claim, which is alleged to be on a construction account. This suit was commenced May 3, 1883.

There are many other averments and denials looking to possible aspects of the controversy which need not be now noticed. It clearly appears that the last-named corporation conveyed to the former all of its assets and franchises (except its franchise of corporate existence) on March 4, 1873, on the terms stated, and that the latter took

[1] Reported by Benj. F. Rex, Esq., of the St. Louis bar.

possession accordingly, and has enjoyed the same ever since. Under the admitted facts it seems that the grantee assumed all the liabilities of the grantor; but, if that be not so, by the express terms of the conveyance there was devolved on it, in equity, the payment of plaintiff's demand, when established. When one corporation conveys to another all of its assets and franchises, and the latter becomes thereby substantially, if not formally, the legal or equitable successor of the former, it must be held to take *cum onere*. A full consideration of the questions involved in said conveyance might show that it was *ultra vires*, (*Thomas* v. *Railroad Co.* 101 U. S. 71;) but if so, it has been executed, and, so far as the parties thereto are concerned, their respective obligations thereunder, as between themselves, will be permitted to stand. As to third persons, creditors of the grantor, said conveyance may be fraudulent and void. However that may be, it still remains to consider whether, under the facts and circumstances stated, the plaintiff has lost his right to pursue the grantee, through laches or lapse of time.

The general rule is not disputed that courts of equity will follow statutes of limitations in other than exceptional cases, and that creditors at large must reduce their claims to judgment, and have executions issued thereon and returned *nulla bona*, before they have any standing in equity. This follows from the principle recognized by the statutes of the United States, that no case is cognizable in equity when the plaintiff has an adequate and complete remedy at law. Judgment and a fruitless execution furnish the proper evidence that the plaintiff is remediless at law. True, a bill in equity may be upheld for a creditor at large where it shows that the plaintiff's demand rests on a lien or trust, or that an obstruction to his remedy exists which can be removed only by a decree in equity, and that a suit at law would be wholly unavailing.

The cases especially referred to and urged upon the attention of the court are those in 99 and 101 U. S., (*Case* v. *Beauregard*, 119 and 688.) Under the rulings of those cases it is contended that the plaintiff here could, in March, 1873, have maintained his suit in equity against the first-named defendant, and hence, within the meaning of the statutes of limitations, his cause of action against the first corporation named herein should be held to have then accrued, and to have been barred in law and equity at the commencement of this suit, May 3, 1883. On the other hand, it is urged that, inasmuch as the general rule in equity required plaintiff's demand to be first reduced to judgment, whereby a judgment lien would be created and a return of *nulla bona* to follow, the plaintiff's cause of action in equity did not accrue before said judgment had at law, and return of *nulla bona*.

Justice STORY, in his Equity Jurisprudence, § 2121, says that the general rule is that the cause of action accrues when the party might bring suit. If such were the universal rule it would be necessary to

determine whether the plaintiff could have brought this suit before he had reduced his claim at large to judgment. Each case, however, is presented to the chancellor on its own facts and circumstances; and often a demand is held stale where not pursued within a period of time short of that fixed by statute, or held not barred, although at law the statute of limitations would prevail. Although courts of equity, as a general rule, follow the statute of limitations, they do not so do when manifest wrong and injustice would be wrought.

In the case now before the court it is probable that if the plaintiff had entered upon the doubtful ground as to such cases in equity by filing his bill in 1873, being a creditor at large, and the court had held that it had jurisdiction, it would have found an issue for a jury to first determine the validity of the demand, whereby like delay would have ensued. Still, such a proceeding would then have brought home to the defendant notice that such a claim existed.

The ordinary and safer course has been pursued by first reducing the demand to judgment and exhausting the remedies at law, and then filing a bill in equity promptly thereafter. In so doing no laches to bar this action can be imputed to the plaintiff; nor can it be held that he is within the bar of the statute of limitations. Presumably the original claim on which judgment was rendered could not have existed so early as stated, otherwise the action at law would have been barred by the statute.

There are many averments and issues as to ancillary matters touching this question, which, if a different conclusion had been reached on the general facts herein stated, might have required full consideration; such as, the circumstances under which the conveyance was made and its purpose with reference to creditors, the consideration therefor, the relation of the two corporations to each other or their practical identity, etc. It must suffice that independent of such inquiries the bar set up in the answer cannot be upheld, and the exceptions must be sustained.

McCRARY, J., concurs.

HARTLEY *v.* BOYNTON and others.

(Circuit Court, N. D. Iowa, W. D. July Term, 1883.)

1. SERVICE ON DEFENDANTS—PRESUMPTION—ENTRY OF JUDGMENT OR DECREE.
   The entry of a judgment or decree by a court, of necessity presupposes the fact that the court has found that due service has been had or an appearance has been entered.
2. SAME—RECITAL IN DECREE.
   This presumption, however, does not prevent a party from showing, in a proper proceeding, that in fact he had not been properly served, and therefore

is not bound by a given judgment or decree; and this right is not barred by a recital in the decree that the court has examined the service and finds it to be according to law.

3. SAME—SERVICE BY PUBLICATION.
Service of notice by publication is a purely statutory right, and is of such a nature that all of the provisions of the statute must be strictly complied with, and courts will not indulge in presumptions to supply apparent defects or failures to meet the requirements of the statute.

4. SAME—IOWA CODE, § 2618, SUBD. 6—AFFIRMATIVE SHOWING OF NON-RESIDENCE.
To justify the publication of the notice under subdivision 6 of section 2618 of the Iowa Code of 1873, it must appear that the action was of the character described in such subdivision, and that the defendants were non-residents of Iowa, and an affidavit must be filed showing that personal service could not be made on defendants within the state of Iowa; and where it is not shown by the record in a cause in the circuit court of the county from which the case has been removed to the circuit court of the United States, nor by the evidence *aliunde*, nor by the evidence in the case on trial in the United States court, that the defendant was a non-resident of Iowa when service was attempted to be made on him by publication, the decree entered in the case by the state court will be *held* void for want of jurisdiction.

5. SAME—TAX SALE—REDEMPTION—NOTICE TO "UNKNOWN OWNERS"—IOWA CODE, § 894.
As, under the facts in evidence in this case, it does not appear that on the first of October, 1877, the lands in controversy had been taxed for that year, for the reason that the several steps necessary to be completed to perfect the taxation for that year are not shown to have been completed, and the records of the county for the previous year show that such lands were taxed in the name of complainant, he was entitled to be notified, as required by section 894 of the Iowa Code, that the right of redemption would expire and a deed be demanded in 90 days after completed, service of the notice, and a notice by publication to "the unknown owners" of such lands was not sufficient, and the tax deeds executed by the county treasurer after such notice are null and void.

6. SAME—CURATIVE ACT OF MARCH 18, 1874—IOWA CODE, § 3049—REVISION, § 3275.
The Iowa statute of March 18, 1874, was intended to legalize the levy of the special taxes therein specified, the right to levy which had been claimed under section 3275 of the Revision, and the amendment thereto: and the adoption of section 3049 of the Code of 1873 must be deemed to be an amendment to section 3275 of the Revision, within the meaning of the statute, and judgment taxes levied prior to the date of the curative act are legalized thereby.

Bill in Equity.

The complainant, Isaac S. Hartley, is the owner of the record title of certain lands in O'Brien county, Iowa, which were sold at tax sale in 1874 for certain taxes as assessed thereon in 1873. Tax deeds to H. Greve were executed on the third day of January, 1878, by the treasurer of O'Brien county. At the September term, 1879, of the circuit court of O'Brien county, H. Greve brought an action to quiet his title, gave notice by publication, and procured a decree in his favor against complainant herein. The bill in the present cause is against H. Greve and his grantees, and is brought for the purpose of setting aside the decree rendered in the circuit court of O'Brien county, on the ground that the court had not jurisdiction of the cause when the decree was entered, and also to set aside the tax deeds, and to be allowed to redeem from all taxes that are legally due upon the lands in question.

Coolbaugh & Call and *C. H. Clark,* for complainants.

J. H. Swan, for defendants.

SHIRAS, J. 1. The decree rendered in O'Brien circuit court is conclusive upon the rights of complainant herein, provided the court had jurisdiction of the cause when the decree was rendered. There was no personal service of the original notice in that cause, and defendant did not appear therein. Service was made by publication only, and the question is whether this substituted service was made as provided by law, for, unless it was so made, the court had no jurisdiction, and its decree is of no force. The present action was originally brought in the circuit court of O'Brien county, Iowa, and one object of the proceeding was to have the question of the jurisdiction of the circuit court of O'Brien county, in the cause of *H. Greve* v. *Isaac S. Hartley et al.*, determined. The validity of that decree is therefore directly attacked, and is not brought up collaterally. The cause having been removed to this court under the act of congress providing for the removal of causes from the state to the federal tribunal, the questions at issue have to be determined by this court. In the decree rendered by the circuit court of O'Brien county it is recited that, "it appearing to the court upon an inspection of the records that the original notice herein was duly served on the above-named defendants, in time and manner provided by law," etc.

It is claimed, on the part of defendants in the present cause, that this recital shows that the circuit court of O'Brien county heard and determined the question of the proper service of the original notice in that cause, and that the finding as shown by this recital is conclusive upon this court. In all cases before a judgment or decree is rendered, whether it is so recited in the record entry or not, it is presumed that the court, before rendering a judgment or decree, ascertains and determines the fact that proper service has been had, or that there is is an appearance for the party; for unless it appeared that the defendant was in court, no judgment or decree could be properly rendered. The entry of a judgment or decree by a court of necessity presupposes the fact that the court has found that due service has been had, or an appearance has been entered. This presumption, however, does not prevent a party from showing, in a proper proceeding, that in fact he had not been properly served, and therefore is not bound by a given judgment or decree. This right to question the jurisdiction of the court, at the time the decree or judgment against him was rendered, is not barred by a recital in the decree that the court has examined the service and finds it to be according to law. If the defendant was not in fact before the court by being properly served, when the court makes examination in regard to the service, the finding of the court upon that question cannot bind the defendant. The question, therefore, of jurisdiction is open to investigation, notwithstanding the recitals in the decree.

It is admitted that the only service made in the case in O'Brien

county was by publication. Service of notice by publication, being a substitute for actual personal service, is a purely statutory right, and is of such a nature that all the provisions of the statute must be strictly complied with, and courts will not indulge in presumptions to supply apparent defects or failures to meet the requirements of the statute. The Code of Iowa, § 2618, provides for this class of cases, and the circumstances under which notice to defendants may be given by publication. It provides that the "service may be made by publication when an affidavit is filed that personal service cannot be made on the defendant within this state, in either of the following cases: * * * (6) In actions which relate to, or the subject of which is, real or personal property in this state, when any defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding him from any interest therein, and such defendant is a non-resident of this state, or a foreign corporation."

The action brought by H. Greve against Isaac S. Hartley *et al.*, in the circuit court of O'Brien county, comes within the provision of this sixth subdivision of section 2618. To justify the publication of the notice, it must appear that the action was of the character described in this subdivision, and that the defendants were non-residents of Iowa, and an affidavit must be filed showing that personal service could not be made on defendants within the state of Iowa. An examination of the records of the case in question shows that the action was of the character of those included within this subdivision, and the record also shows that the affidavit to the effect that personal service could not be made on defendants within the state was properly filed. There is nothing shown upon the records of the case in O'Brien county, from which it can be inferred that the defendants were at that time non-residents of Iowa,—that is to say, the records of the case fail to disclose the fact of the place of residence of defendants,—and it is not shown that any evidence thereof was submitted to that court, showing that defendants were non-residents of Iowa at that time. Now, unless the defendants were non-residents, service by publication was not permissible under the statute in that action. In the record and evidence submitted to this court I am unable to find any evidence showing that in 1879 Isaac S. Hartley was a non-resident of Iowa.

I do not determine nor rule upon the question whether the record in the original case must show that the defendants were non-residents in order to sustain service by publication only. What I hold is that as it is not shown by the record in that cause, nor by evidence *aliunde*, nor by the evidence in this cause now on trial, that Isaac S. Hartley was a non-resident of Iowa in 1879, when service was attempted to be made by publication, that this court will not presume that he was a non-resident, and that, as it does not appear that he was a non-resident at that time, the service by publication cannot be upheld,

because the statute only permits such service in case that defendant was a non-resident, which fact must be made to appear in some mode if such service is to be sustained. I therefore, without passing upon the other objections urged against the sufficiency of the service in the case of *Greve* v. *Hartley et al.*, hold, for the reason stated, that the service by publication is not sufficient to support the decree of the circuit court of O'Brien county, because it nowhere appears or is shown that Isaac S. Hartley was in 1879 a non-resident of the state of Iowa. It not appearing, therefore, that the service of notice by publication was justified under the provisions of the statute, it follows that no service whatever had been had upon the defendants in that cause, and consequently that the circuit court of O'Brien county was without jurisdiction of the cause when the decree by default was entered in that court. Lacking jurisdiction, of course the decree is not binding, and must be held to be null and void.

2. The next question presented is whether the tax deeds executed to H. Greve, and the title derived thereunder, are valid and binding. It is urged, on behalf of complainant, that these deeds are not valid, for the reason, among others, that no notice to redeem was served upon him as required by section 894 of the Code of Iowa. The only notice to redeem that was given, was by publishing a notice addressed to "unknown owners," the notice containing a large number of pieces of realty which it was stated were sold to H. Greve.

The agreed statement of facts filed in this cause shows that complainant, since 1871, has been the owner of the lands in controversy, unless deprived thereof by the tax deeds under consideration; that the lands in 1875 and 1876, and the year previous thereto, were taxed in complainant's name, and that in 1877 they were taxed as unknown, or at least that no name was carried out upon the treasurer's books opposite the description of the lands. The statute requires the notice to be served upon the persons in whose name the land is taxed; the same to be served personally if the land-owner is a resident of the county, and by publication if a non-resident of the county. The notice was published October 1, 1877, and the question for decision is whether the notice should have been addressed to Isaac S. Hartley, and served either in person or by publication. In other words, the question is whether these lands, on October 1, 1877, were taxed in the name of Hartley, or as unknown. This section 894 of the Code of Iowa, requiring notice to redeem to be given to the owners of realty before applying for a tax deed, is one that must commend itself to all, and its provisions and purpose should not be narrowed by any line of construction that may tend to defeat its beneficent purpose. Parties holding tax certificates should be held to a full performance of all its requirements before they become entitled to demand a tax deed under its provisions. The object of the section in requiring notice to be served upon the person in possession of the land, and also upon the person in whose name the same is taxed, clearly is to provide that

the owner of the land may be notified of the fact that a tax title is maturing in order that he may have 90 days in which to protect his rights and redeem the land. It is therefore made the duty of the holder of a tax sale certificate to give notice to the person in possession, and to the person in whose name the land is taxed, that the right of redemption will expire, and a deed be demanded in 90 days after complete service of the notice. This provision of the statute must be observed in good faith by the holder of the tax certificate before he becomes entitled to demand a tax deed.

In the case now before the court it is shown that the title of the lands in dispute had been in complainant's name upon the records of the county since 1871; and for several years, including 1875 and 1876, the lands were taxed in his name. Now, on the first day of October, 1877, was there any reason why the holder of the tax certificate could not readily ascertain the name of the party to whom notice was to be given? He published notice under the caption of "Unknown Owners," and justifies so doing by claiming that the lands in 1877 were taxed as unknown.

The question for decision is whether, on the first of October, 1877, these lands were taxed to any person by name. It will be remembered that the object of the statute in requiring service upon the person in whose name the land is taxed, is to provide for notice to the probable owner of the land. For the purpose of giving notice under this section of the Code a completed taxation in any one year holds good as a designation of the person to whom notice is to be given until the lands are again taxed at a subsequent time. As I have already said, these lands in 1876 were taxed in the name of Isaac S. Hartley, and thus he was designated as the person upon whom service must be made under the statute, and this designation held good until by a subsequent taxation of the land some other party should be shown to be the person to be notified, or else by being taxed as unknown the necessity of giving notice might be waived. If on the first day of October, 1877, these lands were taxed to unknown owners, then notice to complainant by name would not be required. By the taxation of property is meant the several steps of listing the same, assessing the values, equalizing values by the proper boards of equalization, fixing the rate of levy by the board of supervisors, which is done in September; the completion of the tax-list by the auditor, under section 839; and the delivery of the completed list by the auditor to the county treasurer on or before the first day of November.

It is not claimed or shown that these several proceedings had all been had and completed on the first day of October, 1877, and hence in my judgment it cannot be said that on that day the lands were taxed to "unknown owners." The county auditor has express statutory authority for correcting any clerical or other error in the assessment or tax-book; and hence, it should be made to appear to him that lands entered on the list to unknown owners should be entered and taxed to

A. B., I see no reason why it would not be his duty to make the correction. Hence it does not follow that because lands may be returned on the assessor's list under the head of "Unknown Owners," that when the completed tax-list is delivered by the auditor to the treasurer it will show the lands taxed to unknown owners. That list may show them taxed to the real owner by his proper name. Under the facts in evidence in this cause it does not appear that on the first of October, 1877, these lands had been taxed for that year, for the reason, as already stated, that the several steps necessary to be completed, to perfect the taxation for that year, are not shown to have been completed. Hence, as the records of the county then stood, the lands were taxed in the name of Isaac S. Hartley, and the notice of the expiration of the time for redemption should have been given to him, which it is admitted was not done. Hence it follows that the county treasurer had no legal right to execute the tax deeds of the land in question, because the right of redemption of the owner had not been terminated by the giving of the notice required by the statute.

These deeds must, therefore, be held void.

3. It is claimed, on the part of complainant, that a part of the taxes levied on the lands, and for which the same were sold, are illegal, in that the amount of the levy is in excess of the rate which the board of supervisors could lawfully levy, and that complainant should not be required to pay the amount of these taxes in making redemption from the tax sales. It is admitted by counsel that the legality of the taxes depends upon the question whether the curative act passed by the legislature under date of March 18, 1874, can be held to apply to the levies in question; the point being made that the Code of 1873, which was in force when the levies were made, repealed section 3275 of the Revision, and that the curative act of March 18, 1874, only applies to taxes levied under section 3275 of the Revision and the amendment thereto. Curative acts of the nature of the one in question should be fairly construed. The true intent of this act of 1874 is to legalize the levy of the special taxes therein named; that is to say, taxes levied to pay judgments rendered against various counties, school-districts, and other municipal corporations, the right to levy which had been claimed under section 3275 of the Revision, and the amendments thereto.

In my judgment the adoption of section 3049 of the Code of 1873 must be deemed to be an amendment to section 3275 of the Revision, within the meaning of the act of March 18, 1874, and the judgment taxes levied in O'Brien county prior to the date of the curative act are legalized by that act.

There will be, therefore, a decree in this cause in favor of complainant, holding the decree in the circuit court of O'Brien county, in the cause of *H. Greve* v. *Isaac S. Hartley et al.*, null and void; also setting aside and annulling the tax deeds issued by the treasurer of O'Brien county under date of January 3, 1878, and declaring that

complainant is entitled to redeem the lands from the tax sales made thereof,—said redemption to be made within 90 days from this date; and that if redemption be not made, that the holder or holders of the tax certificates be entitled to demand and receive tax deeds for said lands from the treasurer of O'Brien county, as provided by law; complainant being also entitled to a decree for costs.

MOSHER *v.* ST. LOUIS, I. M. & S. RY. CO.[1]

(*Circuit Court, E. D. Missouri.* September 22, 1883.)

COMMON CARRIER—PURCHASER OF RAILROAD TICKET BOUND TO COMPLY WITH ITS CONDITIONS—AUTHORITY OF CONDUCTOR.

Where A., a railway company, sold a ticket to B., good for a trip from C. to D. over A.'s road and E.'s road, with which A.'s connected, and also good for a return trip on condition that B. should, within a specified time, identify himself to E.'s authorized agent at D., and have his ticket dated and signed in ink and stamped by such agent, and B., in a suit against A. for damages, set forth said facts in his petition, and alleged that within the specified time he presented himself and said ticket "at the business office and depot" of E. at D., before the time of departure of E.'s train for C. which he desired to take, and offered to identify himself and have said ticket stamped, etc., "and in all manner fully complied with the terms of said contract on his part," but that the defendant and E. failed to have an agent present then and there at said office for that purpose at any time between the time the plaintiff so presented himself and his ticket and the arrival of the train for C.; that B. proceeded on said train, however, and explained the said circumstances to the conductor, who agreed to permit him to ride as far as X., an intermediate point, but subsequently, instead of so doing, ejected him from the train,—*held*, on demurrer, that no sufficient excuse for B.'s non-compliance with the conditions of his ticket was given; that said conductor had no power to pass upon B.'s excuses; and that, therefore, the petition did not state a cause of action.

At Law.

E. P. Johnson and *Wm. M. Eccles*, for plaintiff.

Bennett Pike, for defendant.

TREAT, J. The petition avers that plaintiff had a railroad ticket issued by defendant, with proper coupons, for his transportation from St. Louis to Hot Springs within five days, and return at any time within 85 days from date of the ticket, "by identifying himself as the original party to said contract, and purchaser of the ticket containing it, to the satisfaction of, and to the authorized agent of, the Hot Springs Railroad at Hot Springs, Arkansas, within eighty-five days from said date of entering into said contract, and after said contract or ticket had been officially signed and dated in ink, and duly stamped by said agent at Hot Springs, Arkansas, and to be good five days from the latter date to return to said city of St. Louis."

In accordance with the terms of said contract, plaintiff was transported as a passenger from St. Louis to Hot Springs, and within the

[1] Reported by Benj. F. Rex, Esq., of the St. Louis bar.

specified 85 days, desiring to return to St. Louis, "presented himself and said contract or ticket at the business office and depot of said Hot Springs Railroad at said Hot Springs, before the time of departure of its train for St. Louis, and offered to identify himself as the original party to said contract and purchaser of said ticket, to the satisfaction of, and to the authorized agent of, said Hot Springs Rail road at said Hot Springs, Arkansas, for the purpose of having the same officially signed and dated in ink, and duly stamped by said agent, and in all manner fully complied with the terms of said contract on his part; but the defendant and said Hot Springs Railroad failed to have an agent present then and there at said business office and depot of said Hot Springs Railroad, for that purpose, at any time between the time the plaintiff so presented himself and said contract and ticket at said business office and depot at Hot Springs, and the arrival of the train that plaintiff desired to take going to St. Louis," etc.

Plaintiff proceeded on the train, however, and on representing to a conductor the foregoing facts and showing his ticket, the latter agreed to take him on the train to Little Rock, and have said ticket there signed, dated, and stamped by the agent of the defendant, and then transport the plaintiff to St. Louis, but instead of so doing, expelled the plaintiff from the train, refusing to transport him to Little Rock under said contract, by reason of which wrongful acts plaintiff has been damaged to the extent of $10,000.

Such were the important averments of the petition, and they show that the plaintiff was expelled from the car for failure to present the needed ticket. It is evident that he knew the ticket was irregular, and on its face showed his non-compliance with the terms of the contract. The conductor could not substitute himself for the agent named by whom the identity was to be ascertained, etc., nor was it for him to pass upon the sufficiency of the excuse offered. Indeed, the petition itself does not disclose at what time he presented himself with his ticket at the business office and depot of the Hot Springs Railroad for the purpose stated; nor that the time and place were proper and reasonable. It seems that he had not the required ticket, nor did he offer to pay the fare due. There is nothing in the petition to show that he had complied with his express contract, or attempted to do so in a fair and reasonable manner, even if a proper effort on his part would avail. It is evident that he cannot recover on the contract, because he had failed to comply with its terms; and he cannot recover for the alleged trespass, because the conductor rightfully expelled him from the cars for failure to present a proper ticket.

The principles on which this ruling on the demurrer to the petition are based, will be found fully stated and discussed in 6 Amer. & Eng. Ry. Cas. 322 *et seq.* and notes.

Demurrer sustained.

CUNNINGHAM *v.* CHICAGO, M. & ST. P. R. Co.

(*Circuit Court, D. Minnesota.* July 16, 1883.)

1. PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE.
A., in the employ of a railroad company as yardman, while engaged in his occupation as such, attempted to board the switch-engine, with which he was working, by standing in the middle of the track and stepping on the rear foot-board of said engine, which was approaching him, tender first, at a rate of from one to three miles an hour, but, in the attempt, fell, was run over by the engine, and died from the effect of his injuries. The hand-rail on the rear end of the engine, which was approaching the deceased, had been torn off the previous night, and had not been replaced, and the rear foot-board of the engine in question was partly broken at one end. Suit was brought by the administratrix, the mother of the deceased, to recover the sum of $5,000. The jury returned a verdict for $1,000 in favor of the plaintiff. Before the jury left the jury-box a motion was made by the defendant to set aside the verdict. *Held*, that the act of so attempting to board the engine was clearly a case of gross contributory negligence on the part of the deceased, and the verdict should be set aside.

2. SAME—VOLUNTARILY ASSUMING A POSITION OF DANGER.
If a man voluntarily and unnecessarily puts himself into a dangerous position, where there are other positions that he may take, in connection with the discharge of his duty, that are safe, he cannot recover damages for that injury to which he has contributed by his own negligence.

At Law.

This is an action brought by Mrs. Mary Cunningham to recover the sum of $5,000 damages for the death of Thomas McCarthy, the son of this plaintiff, which was caused by his being run over by a switch-engine, while he was in the employ of this defendant as such yardman. Defendant sets up contributory negligence as a defense.

The complaint alleges that the deceased was engaged in the employ of the defendant as yardman, in the city of St. Paul, and that it was necessary for him as such yardman to get on and off cars and engines while the same were in motion; that the engines in use for such yard business are what are called switch-engines, and are usually provided with foot-boards and hand-railings for the use and safety of the employes working around them; that on the first day of December, 1880, while the deceased was so employed, the said engine was so unskillfully, negligently, and improperly constructed and operated by defendant that the said John McCarthy was thrown from and run over by said engine, and received such injuries as resulted in his death on the tenth of December, 1880; that at the time of the accident the rear hand-railing on said engine was wholly broken off, and the rear foot-board on said engine was partly broken; of which defendant had due notice and which was unknown to this deceased. Answering this, the defendant admits the employment of the deceased, and that it was necessary for him as such yardman to ride upon said engine and cars; but denies that it was necessary for him, in the usual course of his employment, to get on or off said cars and engine while the same were in motion, and denies that said

engines are usually provided with hand-railings or foot-boards to enable the yardmen or brakemen to get on and off the said engine while in motion. Defendant admits that deceased, on or about December 1, 1880, while engaged as yardman, attempted to board said switch-engine, and in doing so slipped and fell, and received injuries from which he died on or about the tenth of December, 1880, but denies that deceased was in the proper performance of his duties, or that the engine was improperly or unskillfully constructed or handled. Defendant admits that at the time of the accident the rear hand-rail of said engine was wholly broken off and was absent; also that a small piece of the rear foot-board was and had been broken off for a long time prior to said accident; but alleges that the same was known to deceased, and that in all other respects said engine was in a good, safe, and proper condition. Defendant denies that said accident was owing to any carelessness, omission, negligence, or want of skill on the part of the defendant, and alleges that said accident occurred solely and entirely from the negligence and carelessness of the deceased.

Upon the trial of the case the following facts were uncontroverted: That on the first of December, 1880, the deceased was in the employ of the defendant in its switching yard in St. Paul, as yardman, where his duties were to couple and uncouple and switch cars, and ride to and fro upon the cars and engines as the necessity of the case demanded, being one of a crew of three who worked in the yard with one of the switch-engines of said defendant company; that he came down about 7 o'clock in the morning from the upper to the lower yard in the cab of the engine in question on the main line; that he then coupled the engine to a car on a side track, and on that car being switched onto another side track, rode down on said car, set the brakes on it, and then came onto the track on which the engine was backing towards him, stood in the middle of the track and attempted to board the engine, and in so doing fell between the rails, was run over by the engine, and received injuries of which he died. As to the manner in which he fell there is a dispute in the evidence to which we will refer hereafter. The evidence is that the engine was proceeding at a rate of from one to three miles an hour, but there is no proof that it was carelessly or unskillfully handled by those in charge of it. It is in proof that the switch-engines in use in this yard are fitted with foot-boards at each end, (there being no pilot) about 6 feet long, extending 6 or 8 inches beyond the wheels of the engine, and 8 or 10 inches wide, and reaching about 10 inches from the level of the ground; and said engines are also provided with a hand-rail in front and rear, running the width of the engine or tank,—the hand-rail on the rear part of the engine being, when in position, about 6 inches above the bed of the tank; and that there is the usual iron step and vertical hand-railing on each side of the engine, leading to the cab.

It is conceded that there was no hand-rail on the rear end of the

engine in question, it having been pulled off the night before by the night crew that worked on said engine. It is also conceded that there was a piece broken from one end of the foot-board about 2 inches wide and 18 inches long, running out to a point; but it is in proof that this defect in the foot-board had nothing whatever to do with, and in no way contributed to, the accident to the deceased, for the reason that where he stepped, or attempted to step, the foot-board was unbroken. The engineer of the engine in question stated that he had notified the master mechanic that the rear hand-railing was broken off some four or five days previous to the accident, and also that the foot-board was broken, by message and by letter to that effect. He also stated that the deceased was a skillful and experienced railroad man, and had been three or four months in the yard; that he had not ridden on this particular engine before, but had worked with another engine of the same kind, that was fitted with hand-rails and foot-boards of a like description, in the same yard; and that witness did not notify the deceased that the rail was broken off or the foot-board defective.

The main dispute as to the facts in the case arises between the testimony of the only two men who saw the accident, with regard to how the same happened. Both were on the foot-board, one at each end, when the deceased attempted to get on at the middle. The witness for the plaintiff states that he saw the deceased get on the foot-board with both feet and then reach up to catch hold of the railing, and finding it gone, lost his balance and fell off, and was run over by the rear trucks of the tank. He says:

"We made a switch and threw a car on the side track, and he rode the car in. The engine backed up, and I got on the hind end, and he walked across the track and stood in the center, and when the engine came up he got on to ride, and with both feet, and after he got on he reached to the top of the tank to catch hand-hold, and missed it and fell back. I think the engine was going about a mile and a half or two miles an hour."

On the other hand, the witness for the defendant, who was on the other side of the foot-board, says: "The first thing I noticed him he was going under the foot-board. I noticed he was standing on the track until we got right close to him. I wasn't exactly looking at him, but I noticed him going under. * * * It seems to me he didn't get up onto the foot-board square at all. I don't think he reached his hand up to get hold of any part of the tank. I know if he had got over the foot-board he must have struck the tank in some place; the motion of the engine would have brought him up against the tank. There was no difficulty in seeing there was no hand-rail; any one that looked at the engine at all could see there was no hand-rail." On cross-examination this witness said: "I wasn't exactly looking at him. I can't tell exactly what he did do. I know he didn't come against the tank, because I was right up near the tank; and I know he didn't come that far, because if he came up against

the tank,—I wasn't standing more than a foot and a half or two feet from him,—and I surely should have heard the noise on the tank, or something. I didn't see him slip. About the time I saw him he was going under. I should judge the engine was going about as fast as a person would walk,—about three miles an hour." Both these witnesses state that it was customary to get on engines approaching them in that manner, and that they frequently did so themselves. Two division superintendents were called, who had been engaged in railroading 26 or 27 years, respectively, and they both testified that the practice of boarding an approaching engine in the manner described was extremely dangerous and hazardous, and should never be attempted; while one who was the superintendent of the division of the defendant's road in St. Paul, and had charge of the yards in question, testified that he had always warned the yard-master here to forbid the men boarding an engine in front, coming towards them, and that if he saw any more of it he would dismiss the offenders; but they continued to do it. He further stated there was no general regulation to that effect.

Plaintiff's witnesses, in rebuttal, testified that they had never heard of any such order with regard to boarding an engine from the front, and had never received any such orders or warnings.

W. W. Erwin, for plaintiff.

Bigelow, Flandrau & Squires, for defendant.

MILLER, Justice, (*charging jury.*) The case before you presents two questions of fact to consider. The first is, whether the railroad company exercised due care and diligence in regard to the character of this engine on which the accident occurred. The main question in that respect, I think, turns upon whether there was negligence—carelessness—in starting that engine out, (it having been originally not a very good one,) with the want of this rail that was torn off the night before. It is the duty of these railroad companies, both with regard to passengers and to their own employes, to take due care, to exercise due diligence, to prevent injuries, and injuries of this character; and it is their business to see to it that the usual appliances for safety and security of life shall be furnished in the places and at the times that these persons, whether passengers or servants, have to be employed in their service. I don't know that you will find much difficulty on that branch of the subject. The other branch of the subject is that if you find that the company was negligent in regard to the character of this engine,—that it might have exercised and ought to have exercised more care in the kind of engine that was used,—then you will come to the question, did the plaintiff exercise proper care and diligence? For, although the negligence of the railroad company may be a cause, and probably a principal cause, of this man's loss of life, yet if he was careless himself, if his want of attention to his own safety contributed in any sensible degree to his death, the railroad company is not responsible. And that, as you will see at once,

arises from a philosophical examination of the necessities of the case. These railroad companies furnish a great amount of operative force, all of which is more or less dangerous, and most of which can be subjected and used in a manner which is dangerous to the personal safety and life of the individual, and their operations require that they shall use powerful instrumentalities. You cannot move these cars, you cannot move this immense machinery; you cannot use steam any more than you can use powder, without there being elements of danger in it; you cannot carry these great loads of freight, or transport the produce of Minnesota to the Atlantic ocean, and on its way to Europe, without the use and exercise of a power which, in itself, is naturally dangerous. These railroads do a great deal of good. The good that they do is largely in excess of the ill they bring. They have become a necessity of human life, and modern commerce, and business, and they must employ these dangerous and powerful agencies. The law requires of them to be very careful how they employ these dangerous agencies; it requires them to exercise constant vigilance and care that all their instrumentalities shall be of the proper and best quality; that in the use of them guards shall be taken for the security of limb and person by those who are engaged, who are transported, by them, whether as passengers or employes.

Now, that is the power employed by the railroad, and that is the duty of the railroad; but, for the very reason that the instrumentalities employed by these railroads must be powerful, must exercise very great force, must bring into play numerous elements that are dangerous to human life, it is necessary that those who deal with them should themselves exercise proper caution. A man has no right, because a fire is built in his neighborhood, to put his finger or his clothes into it and burn them, and then say, "I may sue and recover damages." A man has no right to thrust himself forward into a dangerous position and say, "If I am killed somebody will get damages for it;" or, "If I am hurt, I shall go to the hospital and be taken care of and recover damages." He has got to take care of himself, as well as the railroad has to take care of their duties and their employes. These obligations are mutual, and it is the law, and it is your duty to require it, as the law, that if a man voluntarily puts himself into a dangerous position,—does so unnecessarily, when there are other positions in connection with the discharge of his duty which are safe, which he can be placed in,—he cannot recover of the railroad company for damages for that injury to which he has contributed by his own negligence. That is the law. It is your duty to regard it, and you have no right to say that because this railroad company is a great and powerful instrumentality it must pay for this man's life, whether he was negligent or careless, or not.

Now, whether he was negligent or careless is for you to say. And it does not depend upon the opinion of any of these witnesses altogether. Inasmuch as some of them have had large experience and have been

much used to these things, and can see what perhaps you cannot see, their opinion is worth something, but is not necessarily to control you. You are to use the common sense for which you were summoned here as jurors, for yourselves, and say if this man, getting right in front of that machine, which was progressing towards him,—with a capacity to ruin him, to destroy him, to run over him, to kill him,—whether he acted carefully in stepping up upon that eight-inch or a foot-wide board, when, if he fell or slipped or lost his grip, or if there was no grip to take, he went under and was killed, inevitably, whether he exercised prudence when he could have acomplished the same end by getting on at the side, or, in the slow progress the engine was making, by getting on in the rear with perfect safety and perfect immunity, from endangering his life, at all events, whatever else might have happened to him; and if you believe that he did, carelessly and without due regard for his own safety, get upon this engine in a dangerous position, where it was much more probable that he would have been injured than by taking a safer course,—if he did this of his own promptings, and not because anybody told him to do it, then he is not entitled to recover any verdict at your hands.

That is the law of this case, gentlemen. You may take it.

The jury brought in a verdict for the plaintiff for $1,000.

Before the jury were discharged defendant's counsel moved for a new trial on the ground that the verdict was contrary to the law and the evidence, and asked that the motion be then heard.

The Court. I will hear the other side.

Mr. Erwin. I would like to refer your honor to some authorities on the subject of contributory negligence.

The Court. You may read them to the next judge who tries the case. I set this verdict aside. It was as clear a case of contributory negligence as has ever come under my observation, and it is with great reluctance that I refused to instruct the jury to find for the defendant. It is not only a case of clear negligence on the part of the deceased, but a case of stupid negligence on his part.

NEVADA BANK OF SAN FRANCISCO *v.* TREADWAY and Wife.[1]

(Circuit Court, D. Nevada. January 23, 1883.)

1. HOMESTEAD ACT OF NEVADA CONSTRUED.
   A party claiming the benefit of the homestead act must record his written claim or declaration of homestead in the manner in the act prescribed.

[1] From 8th Sawyer.

2. WHEN DECLARATION TAKES EFFECT.
When such declaration is duly made and recorded, the property, from that instant, becomes exempt from forced sale, except for the debts and liabilities mentioned in the constitution and statute of the state.

3. SAME—SALE VOID.
Where declaration of homestead was duly made and recorded *five* days prior to advertised sale of premises, *held*, that such declaration was made and recorded within time; that the premises could not be legally sold; and that a forced sale thereof was void, the debt upon which the homestead was sold not being one of the class of debts enumerated and excepted in the constitution of the state.

4. DEDICATION—WHEN RIGHTS ATTACH.
Homestead rights attach whenever the property is dedicated to such use in the manner by law provided; and if such dedication is made at any time before forced sale, the property becomes exempt and cannot be legally sold.

Action of Ejectment. The facts appear in the opinion.

B. C. Whitman, for plaintiff.

Ellis & Judge and *William Woodburn*, for defendants.

SABIN, J. This is an action of ejectment, brought by the plaintiff, a corporation organized in the state of California, against the defendants, residents of Ormsby county, Nevada, to recover possession of certain lands situated in said Ormsby county, and described in the complaint filed herein.

The action was tried before the court, a jury having been waived. The complaint alleges that on the twenty-eighth day of July, A. D. 1880, plaintiff commenced an action in the district court of the second judicial district of the state of Nevada, in and for said Ormsby county, against the defendant Aaron D. Treadway, to recover the sum of $9,816.50, with interest thereon at the rate of 1½ per cent. until paid; that a writ of attachment was duly issued out of said court in said action at the commencement thereof, which was duly levied upon certain real estate of said defendant A. D. Treadway, and being the property in controversy in this action; that thereafter, on the thirteenth of June, 1881, plaintiff duly recovered judgment in said action against said defendant A. D. Treadway for the sum of $10,184.60 damages, and $108.35 costs; that on the ninth of July, 1881, execution was duly issued out of said court upon said judgment, which was duly levied upon the lands and premises attached, and now the subject of this action; that on the fifth day of August, A. D. 1881, after due and legal notice of the sale thereof, said lands and premises were struck off and sold to plaintiff by the sheriff of said county for the sum of $4,500, and certificate of sale thereof duly issued to plaintiff; that thereafter, on the eleventh day of February, 1882, more than six months from the date of sale (six months being the time allowed by Nevada statute from date of sale for redemption) having elapsed, plaintiff received a sheriff's deed of said lands and premises, which was duly recorded in said county.

Plaintiff alleges ownership and right of possession under said deed. Plaintiff further alleges that, at the date of the levy of the writ of attachment, and at the date of the levy of the execution upon said

lands, the defendant A. D. Treadway was an unmarried man, "not having the care and maintenance of minor brothers or sisters, or either, nor of a brother's or sister's minor children, or any such, nor of a father or mother, or either, nor of grandparent or parents, nor unmarried sister or sisters living in the house with him." Plaintiff further alleges that, on the first day of August, 1881, the defendants intermarried; that on the fifth (first?) day of August, 1881, they filed a declaration of homestead on the premises, and that since that date they have and now claim said premises as a homestead, and withhold the same from plaintiff. Plaintiff demands restitution of the premises, and $500 damages and costs of suit.

Defendants plead a technical denial of the levy of the writ of attachment, before mentioned; the recovery of judgment, levy of execution, and sale thereunder. They deny the ownership by plaintiff of said premises. They plead, affirmatively, that since and including the first day of August, A. D. 1881, they have been, and now are, husband and wife; that since said date they have actually and continuously resided upon said premises as a homestead, and have used and claimed the same as such; that they, or either of them, have not, for more than 20 years last past, had or claimed any other homestead; that the defendant A. D. Treadway has resided upon said premises continuously since the year A. D. 1860, and that he has had residing with him thereon the minor children and grandchildren of his brother; that on the first day of August, 1881, they duly executed and caused to be recorded, on that day, in the proper office of said county, their declaration claiming said premises as a homestead; that they now claim said premises as a homestead; and that the alleged sale thereof by the sheriff of Ormsby county, on the fifth day of August, 1881, was and is void.

The plaintiff offered and read in evidence the judgment roll and record,—in the suit of plaintiff against the defendant A. D. Treadway, commenced July 28, 1880,—the writ of attachment issued therein, and the sheriff's return thereon, showing levy of the same upon the premises in question; the judgment, execution, and return thereon showing the sale of the premises, August 5, 1881, by the sheriff to plaintiff, and the sheriff's deed therefor, dated February 11, A. D. 1882, duly recorded. Also the record evidence of the lawful marriage of defendants at said Ormsby county, on the first day of August, A. D. 1881.

Defendants offered in evidence a declaration of their claim of homestead of said premises, dated and duly executed August 1, 1881, and duly recorded in the proper office in said county on that day. Defendant A. D. Treadway testified that defendants were lawfully married on the first day of August, 1881, and are now husband and wife; that since said date they have actually and continuously resided upon said premises as a homestead; that they had and claimed no other homestead; that he had resided on said premises for the

past 20 years or more; that until August 1, 1881, he was an unmarried man; that for a portion of the time during which he had resided on said premises he had residing with him minor children and grandchildren of a brother, whom he supported and maintained. The above is the substance of the evidence offered by both parties.

The declaration of homestead, offered and read in evidence by defendants, was, in form and substance, a full compliance with the statute of the state relative thereto. Under the facts established by the pleadings and evidence the question decisive of this case is this: Were the premises in controversy subject to forced sale on the fifth day of August, 1881, upon the judgment of plaintiff, recovered June 13, 1881, against the defendant A. D. Treadway?

Section 14, art. 1, of the constitution of the state of Nevada, declares:

"The privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for payment of any debts or liabilities hereafter contracted."

Section 30, art. 4, of the same constitution, further provides:

"A homestead, as provided by law, shall be exempt from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife when that relation exists; but no property shall be exempt from sale for taxes, or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon: provided, the provisions of this section shall not apply to any process of law obtained by virtue of a lien given by the consent of both husband and wife; and laws shall be enacted providing for the recording of such homestead within the county in which the same shall be situated."

This constitution was adopted in 1864, and has not been amended in these particulars.

We need not discuss the justice or expediency of exemption laws, since it is purely a matter of domestic policy of each state, both as to whether there shall be any exemption of real or personal property, or both, from forced sale, and the extent of such exemption. In nearly if not quite all of the states and territories laws of this character prevail, but differing widely as to the extent of the exemption and the manner of the debtor's availing himself thereof. Enacted in the spirit of humanity and beneficence, they have received almost universal approval, and are to be fairly and liberally interpreted to secure the object sought.

The first legislature of the state, which convened after the adoption of the constitution, passed an act, approved March 6, 1865, giving effect to these provisions of the constitution. Comp. Laws Nev. 60. This act provided for the selection and exemption of a homestead, not exceeding in value $5,000.

In 1879 the legislature amended this act and provided as follows:

"The homestead, consisting of a quantity of land, together with the dwelling-house thereon and its appurtenances, not exceeding in value five thousand

dollars, to be selected by the husband and wife, or either of them, or other head of a family, shall not be subject to forced sale on execution, or any final process from any court, for any debt or liability contracted or incurred after November 13th, in the year of our Lord 1861, except process to enforce the payment of purchase money for such premises, or for improvements thereon, or for legal taxes imposed thereon, or for the payment of any mortgage thereon executed and given by both husband and wife when that relation exists.

"Said selection shall be made by either the husband or wife, or both of them, or other head of a family, declaring their intention in writing to claim the same as a homestead. Said declaration shall state, when made by a married person or persons, that they, or either of them, are married, or, if not married, that he or she is the head of a family, and they, or either of them, as the case may be, are, at the time of making such declaration, residing with their family, or with the person or persons under their care and maintenance, on the premises, particularly describing said premises, and that it is their intention to use and claim the same as a homestead, which declaration shall be signed by the party or parties making the same, and acknowledged and recorded as conveyances affecting real estate are required to be acknowledged and recorded; and from and after the filing for record of said declaration the husband and wife shall be deemed to hold said homestead as joint tenants."

There are several other provisions in the act, which need not be given here, as they do not affect the case at bar. The portion of the act as above quoted is the law now in force in this state so far as is pertinent to this case. It will be observed that the statute is silent as to the time when a declaration of homestead must be executed and recorded, in the proper county, to bring the homestead within the protection of the statute. It is a familiar principle governing the federal courts that in giving effect to or in construing the constitution or laws of a state, involving only a question of the domestic policy of that state, they will look to the decisions of the court of last resort of such state for a correct interpretation thereof, and will be guided and controlled thereby. Were we, then, in doubt, under section 30, art. 4, of the constitution of Nevada, and under the statute, as above quoted, as to the time when the declaration of homestead must be executed and recorded to protect the homestead from forced sale, we should look for the rule relative thereto in the decisions of the supreme court of this state, and if such rule has been established by that court, this court would be controlled thereby in giving effect to the homestead law. It is believed that this rule has been established by that court clearly and fully. It should be remembered that the homestead act of 1865 was silent as to the time when declaration of homestead should be filed and recorded. In this respect the act of 1865 and that of 1879 are similar, and they are also similar as to the mode of selecting and recording a homestead claim. In *Hawthorne* v. *Smith*, 3 Nev. 182, the court had occasion to discuss this question of liens upon homesteads, under the act of 1865, which act, in this respect, differs in nowise from the act of 1879.

The facts of the case, as stated by the court, were:

"In the month of March, 1866, appellants (Hawthorne and wife) moved into a house which, with the land attached thereto, is now the subject of litiga-

tion. In September of the same year one Robert Woodburn brought suit against W. A. Hawthorne, (one of the appellants,) and, at the time of bringing suit, sued out a writ of attachment and had it levied on this house and grounds. In December of the same year judgment was rendered in favor of plaintiff, and in the early part of the year 1867 execution was issued, and the property previously levied on under the attachment was advertised for sale. In October, 1866, (after the attachment levied, but before judgment,) the appellants filed a declaration of homestead on the property now in dispute. When the sheriff advertised the property for sale the appellants filed their bill, praying an injunction to restrain the sale, and claiming that the property was exempt under the constitution and homestead act. The district judge issued a temporary restraining order, and required the defendant, Smith, who is sheriff of Ormsby county, to show cause at a certain day why a perpetual injunction should not be granted. At the hearing of this rule the judge refused to grant an injunction, and discharged the restraining order. From this ruling in regard to an injunction the plaintiffs appeal."

The supreme court reversed this ruling of the district judge, and directed the lower court to issue an injunction pending the action, and to "take such further steps as the equity of the case may require."

The court says:

"It is evident the constitution intended that, at all times, the homestead of a family should be exempt from forced sale, except in a few enumerated cases. It is equally evident the legislature intended to carry out this policy of exempting the homestead. If, then, it is the policy of the law to exempt the homestead of insolvent debtors from forced sale, certainly we should not hold that a creditor can defeat that policy by any act of his, unless the statute clearly gives that right, or clearly points out the contingency upon the happening of which the debtor should lose the benefit of the exemption. Here the property was clearly a homestead in fact. If it lacked anything of being such a homestead as the law exempts, it was only the execution and filing for record of a declaration by the husband and wife, or either of them, that they had selected it as such. Upon the filing of such declaration the statute says it shall be exempt. It is hardly claimed by respondent that the existence of debts or the actual insolvency of appellants at the time of filing would have affected their right to select the homestead and claim the exemption. If, then, the prior insolvency of a party will not prevent his claiming the exemption, we see no reason why an attachment should. The law declares property thus selected shall be exempt from execution. It makes no exceptions. It is no greater hardship to exempt it from an attaching creditor than any other creditor. The object of the attachment law is not to allow the creditor to seize property which is exempt from execution, but to secure that which is liable to such process.

"As the law is totally silent as to the time when a selection shall be made of the homestead, declares no penalty for failing to select, makes no reservation in favor of liens acquired before selection, but simply says that when selected it shall be exempt from forced sale, we are forced to the conclusion that, after the selection is made and filed for record, no levy upon or sale of the homestead property can be legally made, except for those classes of debts mentioned in the constitution."

This decision was rendered in 1867. Twelve years thereafter, during which time this decision had stood unquestioned and had virtually become a rule of property throughout the state, the legislature

passed the act of 1879, amending the act of 1865 in some particulars, but not in respect to the time when selection of homestead must be made and recorded. The law was left as it had stood before, and as it had been expounded by the supreme conrt.

The legislature, in 1879, virtually gave its sanction to the ruling of the court, made in 1867, upon this point, from the fact that it made no change therein. It is probable that this non-action of the legislature on this point was something more than accidental. The exemption of the homestead from forced sale—a refuge for the family in time of financial distress—is a matter near to almost every family in the state, and we are not at liberty to suppose that the legislature, in 1879, in amending in some particulars the act of 1865, was careless, indifferent, or ignorant upon this vital point, as to when the declaration of homestead must be filed and recorded, or that it intentionally left so important a matter in doubt. On the contrary, we are compelled to believe that the legislature knew the construction which had been placed upon the constitution and the act of 1865, in this respect, by the supreme court, and which for 12 years had been the settled law of the state; that it was satisfied therewith, and did not wish to, and would not, make any changes therein in this respect. And this is a well-established rule of construction in like cases with the present. In 1880 the supreme court reaffirmed the doctrine established in *Hawthorne* v. *Smith*, quoting, in terms, the latter portion of the opinion in that case, as above given. *Lachman* v. *Walker*, 15 Nev. 425.

The court further decided in this case that a party must file for record his written claim or declaration of homestead, as prescribed in the act of 1879, in order to avail himself of the benefits of the act.

In *Estate of Walley*, 11 Nev. 264, in discussing the probate and homestead acts, the court says:

"Each is intended to exempt the homestead from certain liabilities; but the one—the homestead act—exempts it from liability for the debts of the owner, so long, at least, as he continues to be the head of the family, no matter at what time, after November 13, 1861, the debts may have been contracted,—whether before or after the family relation commenced, or before or after the homestead was dedicated."

These decisions of the supreme court of the state seem decisive of this case, and are binding upon this court. In them it is distinctly held that "after the selection [of homestead] is made and filed for record, no levy upon or sale of the homestead property can be legally made, except for those classes of debts mentioned in the constitution;" and that the homestead is exempt from liability for debts of the owner, "so long, at least, as he continues to be the head of a family, no matter at what time, after November 13, 1861, the debts may have been contracted,—whether before or after the family relation commenced, or before or after the homestead was dedicated."

In the case at bar it is not claimed that the original liability or

debt upon which plaintiff recovered judgment against the defendant A. D. Treadway, June 13, 1881, and upon which this property was sold, comes within any of the classes of debts or liabilities excepted and mentioned in the constitution, and for which a homestead may be sold. Neither is it claimed that this property exceeds $5,000 in value; nor that the declaration of homestead filed for record by defendants, August 1, 1881, was not a full compliance with the statute relative thereto; nor that defendants were not at that time, and now, lawful husband and wife, and living upon said premises as their homestead. From the instant the declaration of the homestead was filed for record, the property in controversy became and was a "homestead as provided by law," and from that instant it came within the protection of the constitution and the statute, and could not be levied upon, or sold for or upon, any debt or liability not excepted and mentioned in the constitution.

It was clearly the intention of the constitution to protect the homestead from forced sale, except for the class of debts mentioned, and the legislature was charged with the duty of giving effect to the provision of the constitution, which it did in the passage of the act of 1865, and the subsequent act of 1879. It prescribed the value of the homestead, and the manner in which it should be selected, and when so selected the homestead rights attached, and it became exempt from forced sale. The constitution nowhere subjects the homestead to sale for debts which the owner may have incurred prior to his marriage, or to liens which may have accrued against it prior to its dedication as a homestead. Can we possibly suppose or presume that the constitutional convention which framed section 30 of article 4, when excepting certain debts and liabilities for which the homestead might be sold, intended also to include other liabilities not enumerated, and which should be left to the shifting decisions of courts to enforce? or can we presume that the legislatures of 1865 and 1879 so intended in the passage of the homestead act and the amendments thereto?

The constitution and the statutes both clearly define the debts and liabilities for which the homestead may be subject and liable, and this limitation of liability is the exclusion of all others. We are not at liberty to add to or take aught from the constitution or statute not necessary to a clear understanding thereof.

It is urged by plaintiff (1) that defendants were not in a condition to avail themselves of the benefits of the homestead act prior to the time when the lien of plaintiff's judgment against the defendant A. D. Treadway attached upon the premises, from the fact that defendants were not married until August 1, 1881, while said judgment was rendered June 13, 1881; and (2) that the lien of that judgment is prior and superior to any homestead rights which defendants may or could have acquired subsequent thereto. The first point is distinctly ruled upon by the supreme court of Texas in the case of

North v. *Shearn*, 15 Tex. 174, and is decided adversely to plaintiff's position in this case.

The same court has also ruled upon the second point in the case of *Stone* v. *Darnell*, 20 Tex. 14. In this case the court says:

"The right of the homestead is placed by the constitution above any claims or liens for the satisfaction of debts. If this were not the rule, no debtor could ever procure a homestead until he discharged all previous judgments, for they are liens upon his lands, or until he had paid all judgments rendered since his purchase of lands, but before he was able to erect a dwelling-house on the portion selected by him for his homestead."

The constitution of Texas is very similar to that of Nevada, in reference to homestead exemption, and the decisions of the supreme court of that state are applicable in Nevada. In addition to the cases above cited, see, also, *Macmanus* v. *Campbell*, 37 Tex. 267.

It is true that, in some of the states, it is held that a lien of attachment or judgment, if acquired prior to the selection or recording of the claim of homestead, takes precedence of the homestead claim, thus virtually defeating the very object of the act. Thomp. Homest. & Ex. § 317 *et seq.*

It is believed, however, that this is not the general rule. Smyth, Homest. & Ex. §§ 176–180, and cases there cited; 16 Cal. 214; 25 Ill. 221; 43 Ill. 297; 53 Ill. 377.

Resting the case at bar upon the constitution and statute of Nevada, and upon what clearly seems to be the weight of authority of the adjudicated cases upon the points in issue in this case, the court is compelled to hold that the sale of the premises in controversy by the sheriff, on the fifth of August, 1881, was and is wholly void, and plaintiff took nothing thereby.

Let judgment be entered for defendants.

UNITED STATES v. RALSTON, Adm'r, etc., and another.

(*Circuit Court, W. D. Virginia.* September, 1883.)

1. REVISION OF ACCOUNTS OF MARSHALS, CLERKS, AND COMMISSIONERS.
   The appropriate comptroller of the treasury at Washington has the right to revise the accounts of United States marshals, clerks, and court commissioners after they have been approved by the judges of the United States courts, and to decide upon their validity; the judges having acted upon such accounts only in a ministerial capacity, and congress having by express statute given this power to the accounting officers of the treasury.
2. TRANSCRIPTS FROM TREASURY BOOKS—EVIDENCE.
   Transcripts from the books of the United States treasury are competent evidence in trials of suits against officers of the United States, brought on their accounts; but they are *evidence* only; and it is in the discretion of courts and juries to give to them what weight they may deem proper in the trials in which the transcripts are used.

3. SERVICE OF WRITS—MILEAGE—REV. ST. § 829—ACT OF FEBRUARY 22, 1875.
Section 829 of the United States Revised Statutes, in those clauses which relate to the mileage to be allowed to marshals for the service of judicial writs, is qualified by the final clause of section 7 of the act of February 22, 1875, (1 Supp. Rev. St. 147,) so that if a writ of arrest is issued in a criminal cause, and a writ of subpœna is issued at the same time in the same cause, for witnesses residing in the same locality with the accused, the marshal is entitled to but one mileage, his service of the subpœna not requiring another "actual and necessary" travel.

4. CRIMINAL CASES—SUBPŒNAS—NAMES OF WITNESSES.
Every subpœna in criminal cases for witnesses for the United States must contain the names of all witnesses in the same cause who reside in the same locality, and can be conveniently embraced in it; this, in order "to avoid unnecessary expense," as provided by section 829.

5. SAME—WITNESSES—REV. ST. § 877.
Under section 877 the witnesses above alluded to must be summoned to testify, not only in the cause in which the subpœna is entitled, but generally for the United States, "before the grand or petit jury, or both."

6. SAME—SUBPŒNAS, HOW ENTITLED—INFORMATION OF ACCUSED AS TO WITNESSES.
But section 877 should not be construed to forbid such subpœnas from being entitled in each cause in which the witnesses summoned under them are to testify; for if such subpœnas are issued generally, without reference to the cause in which the witnesses are especially wanted, the accused person has no means of learning with certainty who are the leading witnesses against him whom he is to confront at his trial, and the guaranty of the sixth article of the amendments to the national constitution is thereby rendered useless to him, in every case in which his ignorance as to who the leading witnesses of the prosecution are to be, works a surprise upon him.

Action for Debt. Decision of the court on the law and facts.

D. S. Lewis, U. S. Atty., for plaintiff.

W. S. Lurty, for defendants.

HUGHES, J. This suit was brought for the sum of $5,939.45, but subsequent allowances have reduced the amount claimed by plaintiff to $1,638.14. The defendants claim that the government owes the estate of the deceased marshal $1,301.70, the deceased having filed vouchers with the department at Washington showing that balance to be due him; but the officers of the treasury rejected items of claim to the amount of $2,940.44, which are set forth in two schedules—A and B—filed in the cause, and thus a balance is brought out against the deceased marshal of $1,638.74. The examination of these disallowed items is now the duty of the court, to whom all questions of fact are submitted by stipulation, as well as of law. Counsel of the government makes no objection to the allowance by the court of some of these items, now that explanations and proofs have been adduced at the trial which prove their correctness. Such items amount in aggregate to $381.97, and the amount really in dispute is, therefore, reduced to $1,256.77.

Before dealing with the items which constitute this sum in dispute, it may be remarked that the accounting officers of the treasury, under the direction of the comptroller, are undoubtedly empowered to revise the accounts of the district attorneys, marshals, commissioners, and clerks of the courts of the United States, and to reject items in

these accounts that have been audited and passed by the district judges of the United States. In passing upon the accounts of the these officers, the judges act merely in a ministerial capacity. Their allowances of such accounts are not judicial judgments, reversible only on judicial appeal. They are but little more than certificates of the regularity and genuineness of the accounts and vouchers, and are made by express law (section 846, Rev. St.) "subject to revision upon their merits" by the appropriate accounting officers of the treasury. This provision of law is not only wise and proper in itself, but benevolent to the judges, who are thus relieved of a very irksome responsibility and labor, which bring them into unpleasant antagonism with the officers of their courts. I will also remark as to the force and effect which are to be given to the transcripts from the books of the treasury department at Washington, which are filed in this and like causes. They are not *prima facie proofs* of the facts and statements which they contain, but are merely "evidence" competent to go before the jury and court for what they may be deemed by court and jury to prove. They are to be presumed to present facts, in the absence of contrary evidence, but are not to be accepted as outweighing evidence given under the two sanctions which constitute true legal evidence, viz., those of an *oath* given under opportunity of *cross-examination*. The language of the law of congress which makes them competent evidence in courts of justice, is, (section 886, Rev. St.:) "Transcripts from books of the treasury department shall be admitted as *evidence*, and the court trying the cause shall be *authorized* to grant judgment and award execution accordingly." The effect of this provision is to require that these transcripts shall be admitted as competent evidence in a trial, to be allowed such weight as the court and jury shall in each cause deem to be due to them.

Coming now to the disallowances which make up the amount claimed of the defendants in this suit, I will treat them by classes. There is a large class which consists of reductions of the number of miles charged by the deputy marshals in the distances traveled by them in serving process of the courts. Nearly all these reductions refer to mileages charged for travel in the counties of Franklin, Patrick, and Henry. I am at a loss to conjecture how as great distances as those claimed to have been traveled in the great majority of these cases could have been traveled. I am at liberty to take judicial knowledge of distances, and from a careful examination of the subject I think the department would have been justified in making even greater reductions of mileage than it has done in nearly all of these cases. The disallowances made of this class aggregate the sum of $340.48, and they must stand against the defendants.

There is a class of disallowances which were made on the ground that the items were put in the marshal's account for 1878, whereas they should have appeared in the accounts for 1877. No other ob-

jection is made to them; and, as such objection is merely technical, it should not avail in the trial of this case on its merits. I figure the amount of this class to be $195.34. They must be credited against the balance sued for in favor of the defendants.

Of like nature is a small amount of $2.90, due the marshal for his costs in a suit of the government on a post-office bond. The account should have been audited and paid by the post-office department, and there is no doubt that it is due. In this trial of the very right, I will allow this amount to the defendants, inasmuch as a jury would undoubtedly do so.

The rules of the department very stringently require the marshals to keep check-books, which themselves shall show the particulars of the marshals' disbursements. This marshal provided himself with the prescribed check-books, at a cost of $5.94, and charged the item in his accounts, which item was disallowed. He procured the books in discharge of an official duty, and I am clearly of opinion that the cost should be credited to the defendants.

There is a class of disallowances, or rather suspensions, of items of fees for services due the marshal in proceedings *in rem*, in cases where the goods seized did not, on being sold, produce funds to pay the costs of the proceedings. These were mere temporary suspensions, and not absolute disallowances. It is proved at this trial that the goods sold brought no funds to meet the costs paid by the marshal; and, inasmuch as he does not serve the government on contingent fees, the costs in such cases are due him, and the defendants here must be credited in the amount of them, which I find to be $42.42.

There is a class of items the allowance of which was suspended by the department until explanations should be made, and these were never made in consequence of the marshal's death. I have gone over them all, and heard and examined the evidence given at the trial in explanation and proof, and find that these explanations and proofs are sufficient to establish items of this class, aggregating $203.78, which sum must be credited to the defendants.

In the discharge of their duties as officers of internal revenue, John Walsh and others performed acts for which they were arrested and imprisoned under process from a state court. Proceedings were taken by the United States district attorney, in pursuance of the laws of the United States, for the release and exoneration of Walsh and his assistants. The marshal, under order of this court, paid the costs of these proceedings, and charged the amount in his accounts, which was $132.80. This item was suspended by the department for explanations. I find, on examination of the facts of the case, that the costs are correct, and that the marshal is entitled, under the law, to be reimbursed. They must be credited to the defendants in this suit.

There is a considerable class of disallowances, of which item 6, for the fall term of 1877, at Lynchburg, is an example. The disallowance is of mileage charged for the guards employed in transporting

prisoners from the place of arrest to the places of trial or imprisonment. The note of the department on this item is in these words:

"Suspended for evidence that the guard was actually so employed in each case; it being represented to this office that the marshal and deputies charge in every case mileage for guard whether actually employed or not."

It was perfectly competent and proper for the department, either on its own surmise or on the representation of others, to suspend these items for the reason assigned; and I have felt bound to consider carefully whether such a practice as that indicated was pursued by the marshal and his deputies. Affidavits and other evidence have been presented at the trial, which I think sufficient to remove the suspicion of fictitious charges for guards. If the practice did ever at any time obtain,—and I very much fear that it did,—I do not think, in view of the evidence presented to me, that it was pursued with respect to the items under consideration; therefore, I feel bound to allow the aggregate of this class of disallowances, which I find to amount to $718.70.

It is unnecessary, for the purposes of the present case, to consider a class of disallowances or suspensions of items made on the ground that the number of guards of prisoners employed by the deputy marshals on those occasions was excessive. In some of the cases the number employed seem to me, at this distance of time, to have been unnecessary; but I do not feel competent to judge with any confidence of that question; especially after the death of the marshal, and in view of the difficulty now of proving facts which occurred five or six years ago. The law, in providing that a necessary number of guards should be employed, seems to leave the determination in each instance to the deputy marshal. But this discretion is liable to abuse; and I think it is perfectly competent for the department to object to payment, and to call for proofs, where the number seems to have been disproportionately large. I pass over this question, as it is not necessary in the present case to render any formal judgment upon it.

I come finally to a large class of disallowances, of which item 46, on page 5 of Schedule A, is an example. It is in these words:

"Forty-two miles to Tazewell county, to serve subpœna in *U. S.* v. *Wallace*, disallowed, the same travel being charged to arrest in the same trip."

This is one of a large class of disallowances of like character shown in Schedules A and B, aggregating $674.12. The facts in this case were that the officer proceeded to Tazewell county, carrying a writ of arrest for Wallace, the accused person, and also a writ of subpœna for the witnesses for the government in the case. He charged mileage for serving the writ of arrest, and also mileage for serving the writ of subpœna; thus, though making but one journey, yet charging for two mileages. It was on this ground that the department rejected the charge of mileage in serving the subpœna. The ques-

tion for the court is whether the double mileage was due, and, more especially, whether the deceased marshal, who paid it in good faith to the deputy, ought to be credited with the rejected mileage in this suit. Up to the year 1875 there was no doubt of the right of the officer to this double mileage, and it was habitually allowed, both by the district judges and the accounting officers of the treasury at Washington. The provisions of law under which this allowance was made (section 829, Rev. St.) were as follows:

"For service of any warrant or other writ, etc., two dollars for each person on whom service is made. For travel, in going only, to serve any process, etc., including writs of subpœna in criminal cases, six cents a mile, to be computed from the place where the process is returned to the place of service, or, when more than one person is served therewith, to the place of service which is most remote, adding thereto the extra travel which is necessary to serve it on the others. * * * And, to save unnecessary expense, it shall be the duty of the clerk to insert the names of as many witnesses in a cause in such subpœna as convenience in serving the same will permit."

On February 22, 1875, congress passed a law aimed at another object, but couched in the following general terms, (Supp. Rev. St. 147:)

"After the first day of January, 1875, no [marshal] shall become entitled to any allowance for mileage or travel not actually and necessarily performed under the provisions of existing law."

In view of this latter statute some question was made in 1876 as to the propriety of charges for doubtful mileage of the character I have indicated, as habitually made and allowed before its passage; and acting Attorney General Phillips, in an opinion given on the twenty-ninth of May, 1876, (15 Op. 108,) pronounced adversely to the practice; resting his opinion distinctly upon the act of 1875, and holding, virtually, that as the officer had made the journey for the purpose of serving one writ, he was, as to the other writ, entitled only to the fee for service, and not to mileage, for a journey which, as to that writ, he did not "actually and necessarily perform." This ruling does not seem to have changed the practice of charging and allowing double mileage of this sort, especially as Mr. Atty. Gen. Devens, in an official opinion dated on the tenth of October, 1878, (16 Op. 169,) reversed the ruling of Mr. Phillips, and held that the act of 1875 produced "no modification of the provisions of section 829, in so far as they fix the rate, determine the mode of computation, and limit the compensation of the marshal for the service of process;" and that the marshal "is entitled to full mileage on each writ served by him, when several issued in behalf of the government, to be served on different persons, are or might be served at the same time, though only one travel be necessary to make the service on all of said persons, where such travel is actually performed." In support of this view of the law, Judge BALLARD, of the district of Kentucky, made a similar ruling upon the accounts of Marshal R. H. Crittenden. See Ex. Doc. 1, part 3, Sp. Sess. 1881, p. 19. It was not until June

24, 1881, that this ruling of the attorney general was questioned, and it was then partially annulled by a decision of the first comptroller of the treasury, the Hon. William Lawrence, in which the comptroller held "that the marshal is entitled to but one mileage for all government witnesses served in one locality or direction at the same time, no matter how many writs of subpœna he may have, or what may be their form." Although this particular decision of the comptroller referred only to plural subpœnas for witnesses, it, in principle, embraces the disallowance 46, (cited above as an example,) and inhibits the charge for mileage in serving a subpœna in any case where, at the same time and in the same journey, mileage has been charged for serving a writ of arrest.

I am free to say that I entirely concur in the views of the honorable comptroller in the decision referred to, so far as it relates to double mileages in cases embraced by the terms of the act of 1875; and if the charges for double mileage now under consideration had been for services rendered since June, 1881, I should, without hesitation, disallow all duplicate charges of mileage for the same journey. But the comptroller, in his circular of August 10, 1881, based on his decision of the twenty-fourth of June, 1881, himself limited its enforcement to "accounts of marshals, clerks, and commissioners for services performed after June 30, 1881;" and I think, as he himself implies, that it would be unjust to give it an *ex post facto* operation.

The late marshal paid these double mileages on the faith of the previous practice in regard to them. It would be unjust to call upon him to refund them if he were alive. It would be doubly unjust to require his sureties to refund them, now that he is dead. These mileages were all paid before the end of 1878, three years before the decision was made which has now been applied to them. Looking at these disallowances as a jury would regard them, I find myself unable to concur with the department in applying to them its new ruling, and will credit them in this suit to the defendants. They amount to $674.14.

The aggregate of the several classes of disallowances which I have described, and which, I think, on the explanations and proofs submitted at the trial of this case, ought to be credited to the defendants, is $1,976. As this aggregate exceeds by several hundred dollars the sum sued for by the government, it follows that judgment must be entered for the defendants; which is done accordingly.

NOTE. Having, in the foregoing judgment, expressed my concurrence in the decision of the honorable comptroller of the treasury, of June 24, 1881, in the particular specified, I feel called upon to dissent from the construction which that officer puts, in another respect, upon section 877 of the Revised Statutes. That statute provides that "witnesses who are required to attend any term of a circuit or district court on the part of the United States, shall

be subpœnaed to attend generally on their behalf, * * * and under such process they shall appear before the grand or petit jury, or both, as they may be required by the court or district attorney."

Section 829 had provided, as before quoted, that "to save unnecessary expense it shall be the duty of the clerk to insert the names of as many witnesses *in a cause* in each subpœna as convenience in serving the same will permit."

The comptroller construes section 877 as "commanding the clerk, when witnesses on behalf of the United States, who reside in the same locality or direction of travel from the court, are required to attend at any term thereof, to issue for them one general subpœna, whether their testimony be needed before the grand jury or in a cause to be tried either by the court or the jury;" and as forbidding the clerk, in any case of the United States, "to elect between this statutory form of subpœna and the form which issues *as in a cause* pending in court."

I believe many of the courts give a similar construction to section 877, but not so strenuous a one as the comptroller; yet I think this construction is of very doubtful constitutionality and economy. The constitution of the United States (article 6 of the amendments) gives to every accused person the right, at the trial of the offense with which he is charged, to be confronted with the witnesses who testify against him in behalf of the government; and the English bill of rights of 1688, which is a part of our constitutional law, entitles every accused person to a list of the leading witnesses against him upon trial. But this constitutional guaranty would be a mockery if the prisoner and his counsel were deprived, by any novel or ingenious contrivance heretofore unknown to criminal procedure, of the means of knowing before the day of trial who the leading witnesses are whom he is to confront. This knowledge can only be derived with certainty from the subpœnas issued *in the cause*. It is true that the name or names of the witness or witnesses on whose testimony the indictment was found by the grand jury are written at the foot of the indictment. But it is rarely safe for the prosecution to go to trial with no other than the witnesses on whose testimony a *prima facie* case was made in the *ex parte* proceeding before the grand jury; and it is, moreover, the right of the prisoner to show from the record, before the trial, whether the witnesses who testified before the grand jury have been actually summoned. He can be certain as to the witnesses whom he is to confront only from the subpœnas issued, served, returned, and filed in the record of his particular case.

If section 877 is to be construed by the courts as it is construed by the comptroller,—and I admit some of them do act upon such construction,—it will be impossible for an indicted person to know beforehand, from the record which ought to show him, what witnesses are to testify against him.

He looks at the foot of the indictment for the names there, and then at the subpœna to see if those witnesses and what others have been actually summoned. If he finds that no subpœna at all has issued in the cause, he has a right to conclude that the case will not be tried at the coming term, and to avoid incurring the needless expense of summoning witnesses on his own behalf. At the term, however, when his case is called he finds that, under the new practice, witnesses are to appear against him of whom he knew and could have known nothing, and who have been summoned in an omnibus subpœna, containing all the names of witnesses who are to appear in any case, criminal or civil, for the government, in every cause on the docket, and who live in an entire county or tier of counties lying in any direction from the court. He is completely surprised, and his constitutional privilege of confronting witnesses whose testimony and character he might have successfully impeached, is reduced to a mockery. Suppose the trial to go on, and the prisoner tried under these disadvantages to be convicted; is there a court in all the land which would not, in every such case, set aside the verdict of the

jury as obtained by surprise? I do not pretend that the prosecution is bound to disclose before trial all the witnesses whom the exigencies of the trial may render important, especially in rebuttal. But I do hold that article 6 of the amendments requires the prosecution to show before the trial, by the record, who the leading witnesses are on whom it relies.

I do not consider, I cannot believe, that congress intended in section 877 to set aside the time-honored practice of issuing subpœnas in criminal prosecutions as in particular causes in which the witnesses summoned are to testify. It certainly does not in terms abrogate the ancient practice; and, inasmuch as section 877 does not do so expressly, and stands by the side of section 829, which requires as many witnesses *in a cause* to be put in the same subpœna as practicable, I do not think that, under the established canons of statutory construction, it can be construed to have that meaning.

I am convinced congress could have intended no more in section 877 than to require that, in all subpœnas issued on the part of the government, as many witnesses in the same cause as can conveniently be served with the same process shall be included; and that these witnesses shall be summoned to testify, not only in the cause in which the subpœna is entitled, but to testify generally for the United States, as well before the grand jury as the petit. Section 877 I conceive to mean no more than to require in the subpœna, the usual form of which is here given, the addition of the words which are in the following form added in italics:

"[Indorsement.] *United States* v. *Paul Jones.*

"SUBPŒNA—RETURNABLE FALL TERM, 1883.

"B—— G——, Clerk.

"[Face of the writ.]

"WESTERN DISTRICT OF VIRGINIA.

"*The United States of America to the Marshal of the Western District of Virginia, Greeting:*

"We command you to summon A., B., C., D., and E., if they shall be found in your district, to appear before our honorable judge of our district court of the United States, for the western district of Virginia, at the fall term thereof, to be holden at Abingdon, in the district aforesaid, on the twenty-third day of October, 1883, to testify, on behalf of the plaintiff, in a cause wherein the United States is plaintiff and Paul Jones is defendant, *and to testify generally for the United States before the grand or petit jury, or both;* and this you shall in no wise omit, under penalty of the law in that case made and provided; and have you then and there this writ.

"Witness the Hon. ALEXANDER RIVES, Judge," etc.

If the long-established practice of entitling each subpœna in a cause be not adhered to, and if all witnesses are summoned under general writs of subpœna, entitled in no cause,—writs heretofore unknown in criminal procedure,—then the courts will have to adopt new rules of practice to prevent surprise to accused persons, or else, in many cases of criminal trial, the work of courts, juries, and witnesses will go for nothing.

On the score of economy these general subpœnas are still more objectionable, especially in the western district of Virginia. The largest criminal docket in this district is at Abingdon, where offenses are prosecuted which are committed in that exceedingly mountainous region of the state which is wedged in between the four states of North Carolina, Tennessee, Kentucky, and West Virginia. Most of the offenses are committed by men who practice counterfeiting, or locate their illicit distilleries, or make illicit sales of liquor, close along the boundary lines of these states, where they can easily elude arrest by passing out of the jurisdiction of the court at the approach of

an officer. In a large proportion of the indictments, arrests of the accused persons cannot be made with any degree of certainty, and, consequently, when the terms of the court come on the docket is found to contain many cases in which the accused has not yet been found. My experience at the Abingdon court justifies the statement that in about one-fourth of the docketed cases arrests have not been made when the court is held, and I found the docket to contain in the fall term of 1882 about 375 criminal cases, and in the spring term of 1883 about 290 of such cases. There are, therefore, between 70 and 100 cases on the docket at each term in which the accused have not been arrested. There are also necessarily a good many other cases, in so large a docket, which, for one cause or other, require to be continued or are dismissed. It may well be imagined how many hundred witnesses attend at each stated term of the court when such dockets are to be dealt with. Suppose, therefore, at the beginning of the term the district attorney is engaged with the grand jury for the whole or greater part of the first week. All witnesses for the government, as well those to appear before the grand jury as those who are to appear before the court, have been summoned to the first day of the term; whereas, if the subpœnas had been issued in each case, the witnesses named in them could have been summoned for the second week of the term, and only those who had been recognized for the grand jury would appear on the first day. Summoned generally, as they are under the new practice, there is no way of ascertaining what witnesses of the dense cloud of those incumbering the court-room and the streets (many of them dependent on charity for their temporary support) are for the grand jury and what are for the court. They must all remain until the district attorney is released from attendance upon the grand jury, and has disposed before that body of the 50 or 100 cases sent up for presentment. When this officer is finally released from the grand jury and comes into court, the judge naturally goes rapidly through the docket in the first instance, for the purpose of continuing the hundred or more cases in which no arrests have been made, or which cannot be tried for other reasons. I did this last fall and repeated the expedient in the spring, in the hope of getting rid of the numerous witnesses who were to testify in the continued cases. But I found, to my disappointment, that but few if any witnesses could be identified for discharge in the cases continued after thus sounding and reducing the docket. No witness could tell the cause in which he was summoned, for he had not been summoned in any cause. Not a single subpœna could be produced to show that any particular witness was wanted in any particular case. The clerk had it not in his power to give certificates of attendance and discharge to any witness. They had been summoned in blocks or droves, by whole counties or tiers of counties, and the whole matter was, by deliberate contrivance, in a condition similar to that which printers' types are sometimes knocked into by accident, and which they call *pi*. There were but comparatively few cases in which witnesses did not have to remain in attendance until the docket had been gone through with; not only the witnesses who were actually examined, but those who would have been examined if the cases which were continued had been tried.

To save the six cents mileage of the marshal which would have been due if each subpœna had been issued in the cause for which the witnesses named in it were wanted, and a great number of whom would not have been summoned at all, where the writs of arrest had not been essential, an immense mass of witnesses, summoned in crowds for all cases, civil and criminal, in which the government was party, had to be paid their ten cents mileage and the *per diems* for their protracted attendance upon the court. It presented a signal example of the policy of "saving at the spigot and wasting at the bung-hole."

It will not do to say that the clerk should have inserted no names in the subpœnas, when they were issued, but of witnesses in cases which were cer-

tainly to be tried. How could that officer foresee what indicted persons would or would not be arrested? How could he foresee what cases would or would not be continued under the rules of criminal practice governing continuances? He can know nothing of these contingences when making out the omnibus subpœnas. The deputy marshals live at distances from the court, and cannot be advised with as to the accused persons who are or are not likely or certainly to be arrested. Reflection will teach that the evil is as completely beyond the district attorney's cure as the clerk's.

It is plain to me that the new practice is ill-advised and enormously expensive. I conceive that the ancient practice was far better and more economical, and that every subpœna should be entitled in the particular cause in which the witnesses named in it are wanted; that all the witnesses in that cause who reside in the same locality should be included in the same subpœna; that the subpœna or subpœnas in the same cause should be placed in the hands of the deputy marshal with instructions to first serve the writ of arrest, and not until after doing so to serve the subpœnas in that cause; and that each subpœna should run in the ancient and customary form, as in that cause, and should also contain, as required by section 877, a clause requiring the witnesses to testify generally for the United States "before the grand or petit jury, or both."

I believe with the great author of the Essay on Innovation, at least in matters of legal procedure, that it is better to stand upon the ancient ways—*stare antiquas vias*—than to depart rashly and radically from them.

RINTOUL and others *v.* NEW YORK CENT. & H. R. R. CO.

(*Circuit Court, S. D. New York.* August 24, 1883.)

1. COMMON CARRIER—CONTRACTING FOR EXEMPTION FROM NEGLIGENCE.
   A common carrier cannot lawfully stipulate for exemption from responsibility for the negligence of himself or his servants.
2. SAME—PRESUMPTION OF WANT OF CARE.
   When a thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.
3. SAME—BILL OF LADING—BENEFIT OF INSURANCE.
   A clause in a bill of lading which provides that the carrier who is legally liable for any damage shall have the benefit of any insurance that may have been effected upon the damaged goods, is not an unreasonable and unjust exemption from liability for negligence, and may be enforced.

At Law.

George W. Wingate, for plaintiffs.

Frank Loomis, for defendants.

SHIPMAN, J. This is an action at law, which was tried by the court upon an agreed statement of facts, a trial by jury having been waived, by written stipulation of the parties. The facts which were agreed by the parties, and which were found by the court to be true, are as follows:

"The following facts are agreed upon for the purposes of the trial of the above-entitled action:

"(1) The plaintiffs are partners in business at Glasgow, Scotland, under the firm name of P. Rintoul & Sons, and are citizens and residents of Great Britain.

"(2) The defendants are a corporation formed pursuant to the laws of the state of New York, and own and operate the railroads known as the New York Central Railroad and the Hudson River Railroad, together extending from the city of Buffalo to the city of New York, in said state.

"(3) That on the thirtieth day of July, 1880, the Yeager Milling Company of St. Louis, Missouri, at said St. Louis, having previously obtained from the Merchants' Dispatch Transportation Company a rate for the carriage of 1,400 sacks of flour, the property of the plaintiffs, from St. Louis to Glasgow, and delivered said flour to one of the railroad companies, connections of the Merchants' Dispatch Transportation Company, operating a railroad eastward from St. Louis, and designated by said company, and obtained a memorandum receipt for said flour from said railroad company, surrendered said receipt to one Eugene Field, the several agent at St. Louis of the Merchants' Dispatch Transportation Company and the Allan Line Steam-ship Company, and obtained from him a certain bill of lading numbered '145,' (to be produced by the plaintiffs.) That thereafter said milling company indorsed said bill of lading to the plaintiffs.

"(4) That the Merchants' Dispatch Transportation Company, on said thirtieth day of July, 1880, was a joint-stock association, neither owning nor operating any railroad or railroads, but engaged in the business of contracting for the carriage of goods between points on many of the railroads of the United States, and in procuring the execution by the companies owning or operating said railroads of said contracts, and having contracts with said railroad companies for the execution of contracts for the transportation of goods made by them, the said Merchants' Dispatch Transportation Company, all which facts were, at and before said thirtieth day of July, 1880, well known to said the Yeager Milling Company.

"(5) That in the course of the transportation of said flour by the connections of the said the Merchants' Dispatch Transportation Company from St. Louis eastward, the defendants, one of said connections, received said flour at Buffalo to transport the same to Albany, and there to deliver the same to the Boston & Albany Railroad Company, another of said connections, to be thence transported to East Boston.

"(6) That during the transportation of said flour by the defendants, the same, on the fourth of August, 1880, was in a car of one of defendants' trains which had stopped at Palmyra, New York, for water for the engine, when the rear of said train was run into by another train of the defendants, and the car containing said flour, and said flour, were destroyed by fire caused by such collision.

"(7) That the value of said flour was $1,016.

"(8) That prior to the destruction of said flour as aforesaid an insurance had been effected by the plaintiffs on said flour with the Phœnix Insurance Company of New York to the full value of said flour.

"(9) That after the destruction of said flour, and before the commencement of this action, the plaintiffs received from said insurance company the said insurance on said flour to the full amount of the value of said flour.

"*New York, April* 23, 1883.

"WINGATE & CULLEN, Plaintiffs' Attorneys.
"FRANK LOOMIS, Defendants' Attorney."

The bill of lading contained the following terms and conditions, which are material to the case:

"That the said Merchants' Dispatch Transportation Company, and its connections, which receives said property, shall not be liable * * * for loss or damage by wet, dirt, fire, * * * nor for loss or damage of any article or property whatever, by fire or other casualty, while in transit, * * * nor for loss or damage by fire, collision, or the dangers of navigation while on seas, rivers, lakes, or canals. * * *

"It is further stipulated and agreed that, in case of any loss, detriment, or damage done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment, or damage, and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods. * * *

"NOTICE. In accepting this bill of lading, the shipper or the agent of the owner of the property carried expressly accepts and agrees to all its stipulations, exceptions, and conditions, whether written or printed."

1. The fundamental principle which is applicable to the foregoing facts is stated in the conclusions of the supreme court in *Railroad Co.* v. *Lockwood*, 17 Wall. 357, as follows:

"*First*, that a common carrier cannot lawfully stipulate for exemption from responsibility, when such exemption is not just and reasonable in the eye of the law; *second*, that it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants."

The exemption in the bill of lading from the liability of the land carrier for fire or other casualty does not include exemption from liability for a casualty which was caused by the negligence or want of care of the carrier in whose custody the property was at the time of the happening of the damage.

2. The presumption from the facts which are contained in the agreed statement is that the fire and injury were caused by the negligence of the defendants, and this presumption was not rebutted. "When the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." *Scott* v. *Dock Co.* 3 Hurl. & C. 596; *Transp. Co.* v. *Downer*, 11 Wall. 129; *Rose* v. *Stephens & Condit Transp. Co.* 11 FED. REP. 438. The defendant was, therefore, liable to the plaintiff for the damage occasioned by such negligence.

3. The remaining question is whether the clause in the bill of lading which provides that the carrier who is legally liable for any damage shall have the benefit of any insurance that may have been effected upon the damaged goods, shall be so construed as to give the benefit of the insurance to a carrier whose negligence caused the injury, or whether such a contract, so construed, is not an unjust and unreasonable exemption from liability for negligence.

The argument of the plaintiff is to the effect that such a contract

virtually protects the carrier from liability arising from his negligence, because the owner of property in transit is compelled, as a prudent business man, to insure against the accidental injuries for which the carrier is not liable, and therefore if the contract is valid the carrier has indirectly and covertly, but securely, protected himself against the injurious consequences of his want of care by an insurance for which he did not pay, and on account of which there is no evidence of a reduction of the rates for freight. It does not seem to me that such a contract is unreasonable, because:

(1) It is not one of exemption from liability. The owner is under no obligation to insure; he is not compelled to furnish indemnity to the carrier; and, if he insures, can make a limited contract of insurance which does not cover losses through the carrier's negligence. There is, therefore, no contract of exemption against liability for loss by negligence, no agreement that the carrier shall be protected or be indemnified, but the contract simply is that, in the contingency of insurance, a consequent benefit will, in case of loss, result to the carrier.

(2) It is not unfair to the owner. The carrier is at liberty to insure his interest in the property intrusted to his care, and the fact that he may obtain an indemnity from a third person by means of the owner's policy is not unfair to the owner, unless the obtaining such indemnity is, in reality, made compulsory upon him, because the owner "can equitably receive but one satisfaction" for the loss of his goods. *Hart* v. *Railroad Corp.* 13 Metc. 99. If it was a part of the bill of lading that the owner must insure for the benefit of the carrier, such condition would be unfair.

(3) The contract is not necessarily unfair to the insurers.

At common law, the owner who has been paid in full or in part for his loss by the insurance company, may sue the carrier upon the contract of bailment, and as to so much of the amount recovered from the carrier as is in excess of a full satisfaction of the loss, the owner will be a trustee for the insurance company. It seems that the effect of the clause in the bill of lading which is now under consideration is to provide that the owner in such circumstances is not a trustee for the insurance company, but a trustee for the carrier. If such a contract is entered into, without fraudulent concealment of the facts from the insurers, of which there is no evidence in this case, it cannot properly be considered unjust or unreasonable, because the insurance company obtains its remedy, not by virtue of a contract of its own with the carrier, but through the owner's contract, and its right depends upon or is subject to the agreement made by the owner with the carrier, which he is at liberty to make to suit his own interest, provided there is no fraudulent concealment from the insurers. They can, in view of this provision in bills of lading, modify the contract which they have heretofore customarily made with the insured, and the result will probably be that the insurers

will also make provisions in their policies, by virtue of which insurance on property in transit will have a limited character.

In the absence of any contract on the subject, if the insured owner accepts payment from the insurers, they "may use the name of the assured in an action to obtain redress from the carrier, whose failure of duty caused the loss." The right rests upon "the doctrine of subrogation, dependent, not all upon privity of contract, but worked out through the right of the creditor or owner." The suit cannot be in the name of the insurers. *Hall* v. *Railroad Cos.* 13 Wall. 367; *Hart* v. *Railroad Corp.* 13 Metc. 99; *Mercantile Mut. Ins. Co.* v. *Calebs*, 20 N. Y. 173; *Conn. Mut. Life Ins. Co.* v. *Railroad Co.* 25 Conn. 265. By the contract in question the owner agrees that, as between him and the carrier, the latter, when he has paid for the loss, may have the benefit of the insurance. This contract will probably interfere with the benefit which the insurer would otherwise obtain by virtue of being subrogated to the rights of the owner, or of having an equitable assignment of the owner's interest in the policy; but the mere fact, in the absence of fraud, that the insurers may not occupy the same position which they would have had if the provision had not been inserted, is not sufficient to justify an opinion that the provision is unreasonable.

The amount of the premium and the amount received by the plaintiffs from the insurance are not given in the agreed statement. I am inclined to the opinion that the owner is only bound to account to the carrier for the net avails of the insurance, and if those avails were less than the value of the goods, a balance would still be due from the defendant. But as the finding simply says that the plaintiffs received from the insurers the full value of the flour, I cannot assume that the net avails were not a full indemnity for the loss.

The defendant is liable for the amount of the loss, deducting the sum which the plaintiff has already received by way of indemnity, and as the entire amount of the loss has been paid, the plaintiff is entitled, under the contract, to receive nothing more.

Judgment is to be entered for the defendant.

SHELLEY v. ST. CHARLES COUNTY.[1]

(Circuit Court, E. D. Missouri. October 5, 1883.)

1. CONSTITUTIONAL LAW—ARTICLE 14, § 11, OF THE CONSTITUTION OF MISSOURI —SWAMP-LAND ACTS OF 1869 AND 1870.

Where a statute authorized a county to improve swamp lands situated within its limits, upon being petitioned by a majority in interest of the owners of such lands to do so, and upon being shown by such owners that the improve-

[1] Reported by Benj. F. Rex, Esq., of the St. Louis bar.

ment is practicable and their declaring themselves willing to pay their just proportion of the expenses; and, provided that the benefit to the county should be estimated and be paid by the county, and that funds to pay the balance of the expenses should be raised by the county by issuing county bonds, and that funds to pay the bonds should be raised by taxes assessed exclusively on the lands benefited: *held*, that the statute was valid and did not authorize the county "to loan its credit to any company, association, or corporation" within the meaning of the provision of article 14, § 11, of the constitution of Missouri.

2. MUNICIPAL BONDS—PRESUMPTION IN FAVOR OF LEGALITY.

Semble, that where the constitutionality of a law under which county bonds have been issued is doubtful, federal courts will, in advance of any consideration of the subject by the supreme court of the United States, resolve all doubts in favor of the validity of the act.

On Demurrer to Petition.

This is a suit brought to recover judgment upon bonds issued by the defendant under the provisions of certain statutes mentioned in the opinion, authorizing the county to issue such obligations to facilitate the reclamation of swamp lands, and to be known as "land improvement bonds."

E. B. Sherzer, for plaintiff.

W. A. Alexander and *Dyer, Lee & Ellis*, for defendant.

MCCRARY, J. The demurrer raises the question of the constitutionality of the act of the general assembly of Missouri of March 3, 1869, as amended by that of March 14, 1870, under which the bonds sued on were issued. It is said that this legislation is in violation of the provision of article 14, § 11, of the constitution of 1865, which was in force when the acts above mentioned were passed, and which is as follows:

"The general assembly shall not authorize any county, city, or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto."

The act of 1869 provided for the reclamation and protection of swamp and overflowed land by means of drainage, diking, or otherwise. The expense of such improvement, it was provided, should be paid by an assessment upon the county at large, to the extent of the benefits accruing to the whole county by reason of the improvement; the amount to be so assessed to be determined by the county commissioners after investigation, and the remainder by an assessment against the individuals benefited thereby, in proportion to the number of acres reclaimed or improved for them respectively. The act of 1870 provided for the issue of bonds, in lieu of immediate taxation, as the mode of raising the funds necessary for paying the expense of such improvement; and, for the raising of funds to pay such bonds, principal and interest, by taxes assessed exclusively on the lands improved, benefited, or protected by such improvements, except such portion as may be deemed by the commissioners to be justly chargeable to the county at large, according to the provisions of said act of 1869, which portion the county is to pay out of money collected for general purposes.

An examination of these statutes shows that they do not attempt to authorize a county either to become a stockholder in, or to loan its credit to, any company, association, or corporation. The owners of the swamp lands to be reclaimed, and who join in a petition to the county authorities for the purpose of invoking action to that end, and agreeing to pay their just proportion of the expense, can scarcely be regarded as an "association," within the meaning of the constitutional provision above quoted. They are clearly not a body of which the county could by possibility become a stockholder. They are not incorporated, nor in any manner organized or associated together, so as to be capable of issuing stock. But it is said they constitute an association to which the county has attempted to loan its credit. Not so. The county has made no loan of credit to any one. It has issued its own bonds, agreeing to raise money for their liquidation by a levy of taxes upon certain property. The bonds do not constitute a loan of credit to any association of swamp owners. By the statute the county contracts for the improvement, paying therefor with the bonds. The county does not engage in a purely private enterprise, nor does it undertake to aid a corporation, company, or association in carrying forward such an enterprise. It is the common case of a statute authorizing the construction of drains or of levees in order to protect or relieve swamp, marshes, and other low lands, and for the payment of the expenses thereof by special assessments.

Such statutes are very generally held valid, sometimes upon the ground that such improvements are important to the public wealth, sometimes as a proper public regulation, and sometimes upon the ground that the general public are interested in reclaiming such lands for use, and thus adding to the value of the taxable property of the county or state. It is competent for the legislature to require the owners of property to be permitted to make the improvements, and to enact that, in case of their default, the county may do so at their expense, and charge the sum to the property benefited through a special assessment of taxes thereon; and there seems to be no reason to doubt that the legislature may provide for an apportionment of the expense between the county at large and the owners of the property especially benefited. The statutes under consideration here authorize the county authorities to determine what proportion of the expense shall be borne by the county at large, and what by the property reclaimed. The general principles by which we are guided in holding this legislation to be valid and constitutional, will be found set forth in Cooley, Tax'n, *c.* 20, under the head of "Taxation by Special Assessment." We are clearly of the opinion that the legislature of Missouri, in enacting the statutes in question, was acting within the principles there enunciated, and not attempting, in violation of the constitution, to authorize a loan of county credit to a corporation, company, or association.

It is proper to add that, if the question were doubtful, this court

would feel constrained, especially when dealing with it in advance of any consideration of the subject by the supreme court of the United States, to resolve all doubts in favor of the validity of the act in question. *Gilchrist* v. *Little Rock*, 1 Dill. 261.

Demurrer to petition overruled.

BROWN *v.* EVANS.[1]

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

1. EXEMPLARY DAMAGES.
   In vindictive actions, such as assault and battery, slander, libel, seduction, etc., where fraud, malice, cruelty, oppression, brutality, or wantonness is shown, on the part of the defendant, exemplary damages may be recovered.
2. WEALTH OF DEFENDANT.
   In the above class of actions evidence may be given of defendant's wealth.
3. CRIMINAL LIABILITY OF DEFENDANT.
   Exemplary damages may be recovered in a civil action, although the act complained of may be a crime or misdemeanor, and subject the defendant to criminal prosecution therefor.
4. GOOD CHARACTER.
   In actions for damages for assault and battery, evidence of defendant's former good character is not admissible.
5. NEW TRIAL—CUMULATIVE EVIDENCE.
   A new trial will not be granted on the ground of newly-discovered evidence, when such evidence is merely cumulative, or is upon unimportant matters in the case, or where, in the opinion of the court, such evidence, if produced, would not affect the action or verdict of a jury.
6. EXCESSIVE DAMAGES.
   A new trial will not be granted on the ground of excessive damages, in an action of personal tort, unless it appear that the jury were influenced by passion, prejudice, corruption, or willful disregard of law, in assessing such damages.

This is an action brought by plaintiff to recover from defendant the sum of $20,000 damages alleged to have been sustained by plaintiff by reason of an assault and battery committed by defendant upon plaintiff on or about the thirtieth day of March, A. D. 1881, at the town of Reno, county of Washoe, state of Nevada. The cause was duly tried in this court at the November term thereof, 1882; Hon. LORENZO SAWYER, circuit judge, and Hon. G. M. SABIN, district judge, presiding. The jury returned a verdict for plaintiff in the sum of $8,150.87, and judgment was thereupon duly entered for said sum and costs in favor of plaintiff. Thereafter counsel for defendant duly moved the court to set aside said verdict and judgment, and to grant a new trial herein. The motion was argued orally by counsel for the respective parties before SABIN, J., presiding, and was submitted on briefs filed. The grounds of defendant's motion for a new trial are stated in the

[1] From 8th Sawyer.

opinion of the court, pronounced February 5, 1883, when said motion was denied.

R. M. Clarke, for the motion.

R. H. Lindsey and *W. E. F. Deal, contra.*

SABIN, J. This action was brought by plaintiff in the proper state court (and afterwards removed to this court) to recover from defendant the sum of $20,000 damages alleged to have been sustained by plaintiff by reason of a most brutal, unprovoked, and wanton assult and battery committed by defendant upon plaintiff, March 30, 1881, at the town of Reno, in the county of Washoe, state of Nevada, accompanied by acts of great atrocity, and nearly culminating in the death of plaintiff.

The defendant pleaded a qualified denial and justification of the assault, but it is very difficult, in fact impossible, to reconcile the verified answer of the defendant with his testimony given in his own behalf upon the trial of the case. The jury found for the plaintiff in the sum of $8,150.87, and judgment was duly entered upon the verdict for said sum and costs. Defendant now moves the court to set aside that verdict and judgment, and that a new trial of the action be granted. I have carefully examined the authorities attainable, cited by counsel on either side, and many not cited in their briefs or in this opinion.

The first question that meets us in the discussion of this motion is this: Was and is this a case wherein exemplary, punitive, or vindictive damages can be allowed or assessed by the jury against the defendant? The terms "exemplary, punitive, or vindictive damages" are synonymous in their legal signification. This question was held in the affirmative by the court upon the trial of the case. If the court was in error on this point, a new trial might be granted, since, in that case, the action was tried upon a wrong theory of the law applicable thereto, and thus improper evidence may have been submitted to the jury.

It may be laid down as a general proposition of law, elementary in character, that in all this class of cases of personal torts, "vindictive actions," such as assault and battery, slander, libel, seduction, *crim. con.*, malicious arrests and prosecutions, seizure of goods, etc., where the elements of fraud, malice, gross negligence, cruelty, oppression, brutality, or wantonness intervene, exemplary or punitive damages may be recovered from the defendant.

The authorities supporting this position are too numerous to cite or review here. An examination of a few of the authorities will establish the fact that this has been the settled law of this country for more than 100 years, and that such is now the law in nearly all the states of the Union. Nebraska, I believe, is a solitary exception to the rule. The supreme court of that state holds that under no circumstances can exemplary damages be recovered. The English

cases run much further back in point of time, and the American cases are generally in harmony with them.

I am able to refer to only a few of the cases examined on this point, but it is believed that the following cases fully establish the doctrine of exemplary damages in proper cases, and are fair exponents of the great body of American law on this subject: See 1 Sedg. Dam. 53, 174; 2 Sedg. Dam. 323, and note; also pp. 335–344; 13 How. 371; 91 U. S. 493; 3 McLean, C. C. 23; 21 Iowa, 379; 4 Duer, 247; 5 Watts, 375; 13 Iowa, 92; 27 Amer. Dec. 685, and notes; 1 Head, 336; 43 Me. 163; 64 N. Y. 440; 24 Wis. 292; 81 Ill. 70; 2 Metc. (Ky.) 146; 6 Tex. 266; 27 Miss. 68; 39 N. H. 576; 43 Miss. 598; 51 Miss. 103; 44 Wis. 282; 3 Scam. 372; 4 Wis. 67; 99 Mass. 552; 114 Mass. 518; 2 Cal. 54; 40 Cal. 578; 45 Cal. 337; 10 Ohio St. 292; 27 Ohio St. 277; 48 Mo. 152; Field, Dam. 70; 2 Greenl. Ev. § 267.

In 3 Scam. 373, the court says: "In vindictive actions * * * the jury are always permitted to give damages, for the double purpose of setting an example and of punishing the wrong-doer." And such is the doctrine of the cases above cited, and of many more examined and not cited.

There was no error in the ruling of the court that this was a case in which exemplary damages might be recovered and should be allowed.

I now proceed to consider the grounds urged for a new trial *seriatim*, as stated by defendant's counsel in his brief.

1. That the court erred in admitting evidence of defendant's wealth.

In this ruling there was no error, this being a vindictive action, in which exemplary damages might be recovered. See 49 N. H. 358–370; Field, Dam. 78, 127, 128, 479, 554, and note; 2 Greenl. Ev. § 269; 27 Miss. 68, 85, 86; 52 Me. 502; 15 Wis. 240; 5 Watts, 375; 44 Wis. 282, 291–294; 4 Duer, 247, 262; 13 Iowa, 92; 4 Wis. 67; 3 Scam. 372; 6 Conn. 24, 27; 48 Mo. 152; 27 Ohio St. 292; 2 Sedg. Dam. 323, and note, 331; 20 Ill. 115.

The reason of the rule is obvious. If exemplary damages may be given by way of punishment for an outrageous act, the jury must know something, at least, of the defendant's ability to respond in damages, since what would be a severe verdict to one with limited means might be but a trifle to one of large means, and the rule utterly fail.

2. "The act complained of, and out of which the damages arose, is a misdemeanor, punishable by fine and imprisonment, and punitive damages cannot be recovered."

This point is not well taken. The fact that a party committing a flagrant wrong upon another subjects himself to criminal prosecution and punishment, is no ground for withholding exemplary damages in a civil action for the same act. See 6 Tex. 266; 21 Iowa, 385. 388–391; 26 Iowa, 185; 44 Wis. 282; 1 Head, 336; 27 Amer. Dec.

685, and note, 687; 4 Duer, 247, 265; 2 Sedg. Dam. 330, and note, 332; 2 Cal. 54; 2 Metc. (Ky.) 152; 18 Mo. 71; 6 Hill, 466; 1 Bish. Crim. Law, §§ 264, 265, and cases cited; Id. §§ 265, 266, and cases cited, 980–988; 14 How. 17–20. The clause of the constitution of this state which is invoked to shield defendant from the penalty of exemplary damages reads as follows: "No person shall be subject to be twice put in jeopardy for the same offense."

The constitution of the United States contains a similar provision. Now, the term "jeopardy," as used in the constitution, has a fixed legal signification, and is always used in connection with criminal proceedings. 1 Abb. Law Dict. 650; 3 Greenl. Ev. § 37; 1 Bish. Crim. Law, § 1012, and as above cited.

In 44 Wis. 287, the court, in discussing this point in a case very similar to the one at bar, by RYAN, C. J., says:

"It would have been no subject of regret to the court if the obligation of the constitution called upon it to abridge the application of the rule. But the court is unable to hold that the constitutional provision has any controlling bearing on the question.

"The constitution only re-enacts what was the general if not literally universal rule at common law. * * * The word 'jeopardy' is therefore used in the constitution in its defined technical sense at the common law; and in this use it is applied only to strictly criminal prosecutions by indictment, information, or otherwise. * * *

"The cases generally hold that the rule in criminal cases, that one shall not twice be put in jeopardy, implies more than the bar of a judgment to an action for the same cause. But no case is known where a conviction upon an indictment has been held a bar to a civil action for damages growing out of the same act; *a fortiori*, none in which a recovery in a civil action has been held a bar to an indictment for the same act. * * * It is manifest that judgment for the one is not a bar to the other."

If this objection has any weight or force, it has it by virtue of this constitutional provision above cited. It has no other support. Tested by the rules of law applicable to this matter of jeopardy, the objection will be found to be without merit or support. A person may, by one act, commit two offenses: one, against the civil law, by the invasion of a private personal right; the other, against the state, in the violation of its criminal law; and he may be prosecuted for each offense, and yet not twice criminally punished for the same offense. In the one case the offending party makes reparation in damages for the civil wrong done to the person injured thereby; in the other, the party is punished by the state for an offense against it in the violation of its law; and a judgment in the one case is no bar to a prosecution in the other. In like manner a person may, by one act, offend against two sovereignties. His act may be an offense against the laws of a state and also against the laws of the United States, and he may be prosecuted and punished either by the state whose laws he has violated, or by the United States, or by both, for his offense against each. 5 How. 432; 14 How. 20; 1 Bish. Crim. Law, §§ 986, 1060.

I am aware that it has been held in a few cases that exemplary damages cannot be recovered in cases of personal torts, where the defendant is liable to a criminal prosecution for the same act. See 5 Ind. 332; 14 Ind. 479; 20 Ind. 192; 4 Cush. 273. In 53 N. H. 342, the subject is discussed, but not decided.

Defendant further insists that the court erred in admitting evidence of plaintiff's health prior to the assault and subsequent thereto, and of defendant's great and superior strength. There was no error in this. The jury was entitled to know the whole transaction. It could not do justice in any case without such knowledge. 2 Sedg. Dam. 330, note 1; Field, Dam. 474. It was necessary that the jury should know the condition of plaintiff's health prior to the assault as well as subsequent thereto.

3. "The court erred in excluding evidence of defendant's good character." There was no error in this ruling of the court. The *character* of defendant was not in issue, directly or indirectly. The issue was, did he or not beat and wound the plaintiff as charged in the complaint? See 1 Greenl. Ev. §§ 54, 55; 2 Greenl. Ev. § 269; Field, Dam. 473; 15 Cent. Law J. 428.

4 and 5. For the sake of brevity I consider the fourth and fifth grounds of defendant's motion together. They are based upon newly-discovered evidence, and surprise at the time of the trial. The surprise seems to have been at the proof of the extent of plaintiff's injuries inflicted by defendant. Now, defendant and all persons are held to intend the natural consequences of their acts. They are at least liable therefor. Says TINDAL, C. J., 7 Bing. 211: "Every person must be taken to be answerable for the necessary consequences of his own wrongful acts." See 2 Greenl. Ev. §§ 89, 224.

As stated by Greenleaf, "the defendant must be presumed to be aware of the necessary consequences of his conduct, and therefore cannot be taken by surprise in the proof of them." This assault was committed more than 18 months prior to the trial, and issue was joined in this action August 3, 1881. The plaintiff and defendant reside in the same village. Defendant knew or could have known plaintiff's condition from the day of the assault to the day of trial. He knew that the nature, extent, and probable duration of any injuries inflicted upon plaintiff would and must be fully investigated, and he should have been prepared to meet this investigation with his witnesses. His witnesses were all within easy attendance upon court. There was in the trial of the case no surprise of which defendant can complain.

The newly-discovered evidence, as disclosed by the affidavits filed, is not of the character to warrant a new trial. See 1 Grah. & W. N. T. 464.

I do not think the evidence of the new witnesses, as disclosed by their affidavits, would in the slightest degree affect the action or verdict of a jury. To a great extent this newly-discovered evidence is

merely cumulative, and upon unimportant matters in the case, and defendant shows no diligence in procuring, or endeavoring to procure, at the trial, the attendance of the witnesses whom he now insists are material and necessary. See 24 Cal. 513; 45 Cal. 337.

Defendant fails to bring himself within the well-established rules of law relative to new trials on the ground of newly-discovered evidence.

6. Counsel for defendant further insists that a new trial should be granted because of the doubt, raised at the trial, as to whether or not plaintiff's upper jaw-bone—the superior maxillary bone—was broken. This is quite immaterial to the real issue in the case, to-wit, did defendant assault plaintiff as charged in the complaint, and was such assault justifiable? All of the medical testimony offered in the case established this fact: that the "alveolar process," in which the teeth are set, and which unites with and blends into the superior maxillary bone, was broken down, carrying with it the five front teeth in place.

Whatever injuries plaintiff received were caused by the acts of defendant. The jury heard all of the evidence on this point, and it was fully competent to determine what bones were or were not broken, and generally what injuries plaintiff received. Whether or not the upper jaw-bone proper was broken, or whether the alveolar process alone was broken down, or whether any bones were broken, was merely an incidental matter in the case, and cannot be permitted to supplant the real issues presented.

7. Upon the argument of this motion it was stated by defendant's counsel that the fifth and sixth grounds of error, as specified in the notice of motion for a new trial, were waived, and no argument was submitted thereon. The third ground of error, however, as specified in the notice of motion, to-wit, "excessive damages, appearing to have been given under the influence of passion or prejudice," was not waived, though counsel for defendant does not notice it in his brief. It therefore remains to be considered, which I will do as briefly as possible.

While it is true that courts reserve and sometimes exercise the power to set aside verdicts, on the grounds herein specified, yet it is a power always to be cautiously used, and which is rarely exercised in cases like the one at bar—cases of personal torts, where no certain rule for assessing damages can be laid down for the guidance of the jury. It is the peculiar and exclusive province of the jury in such cases to assess the damages.

In 12 Johns. 236, SPENCER, J., in passing upon a motion for a new trial based upon the ground of excessive damages, in an action of personal tort, says: "To justify the granting a new trial, the damages must be flagrantly outrageous and extravagant, evincing intemperance, passion, partiality, or corruption on the part of the jury." And this is generally the language of courts on this subject.

As stated in 7 Pick. 81, the damages must be so excessive "that all mankind would be struck at first blush with the enormity of the sum." And so, however it may be expressed by a court, the idea and principle always is that a court will not set aside a verdict, in an action of this character, except in extreme and exceptional cases.

Measured by this standard, this case does not come within the rule. I am not prepared, in this case, to say that the damages awarded by the jury are "flagrantly outrageous and extravagant, evincing intemperance, passion, partiality, or corruption on the part of the jury;" or that "all mankind" (or even a small portion thereof) "would be struck at the first blush with the enormity of the sum" awarded in this case. See Field, Dam. 555, 683, 702; 1 Grah. & W. N. T. 425, 452; 2 Sedg. Dam. 652 and note, 657 and note, 346 and notes; 7 Pick. 81; 24 Cal. 513; 42 Cal. 215; 45 Cal. 337; 48 Cal. 409.

It would be an almost endless task to review the authorities on this subject—and they are uniform upon this question—that in all cases of personal torts it remains with the jury to fix the just amount of damages which shall be assessed against the defendant. And courts seldom interfere with this duty and prerogative of the jury.

How can I say in this case that the verdict is excessive?

The defendant's own testimony in this case showed that he was the aggressor; that he spoke the first insulting words; that he made the first hostile advances; that he struck the first blow; that plaintiff made no demonstration against him, except to throw up his arm to ward off another coming blow; that he knocked plaintiff down, and then struck him two heavy blows upon the face after he was down, plaintiff offering no resistance; that, seeing him lying senseless on the ground, he told some of plaintiff's employes, who were near, that they "had better go and take care of their boss;" that he informed other parties that "he had licked the d—d old Englishman." The evidence, wholly uncontradicted, further showed that after this assault plaintiff remained insensible from one to two hours; that the nasal bones were broken and crushed "flat upon his face;" that the alveolar process of the upper jaw was broken down, with the five front teeth in place; that his face was horribly bruised and disfigured; that for 10 days, at least, after the assault his life was in imminent peril; that during these 10 days of struggle between life and death plaintiff suffered indescribable agony; that for six weeks he was closely confined to his room, under the care of nurses; that for three months he could eat only liquid and soft food; that the senses of sight, smell, and hearing were injured, and may never again regain their natural condition; that he still suffers pain from the effect of his wounds; that his general health is impaired and may never be fully restored.

I do not know how the jury arrived at the result returned in their verdict. There are no scales in which we can weigh and determine

the price and value of mental agony; no balances by which we may fix the solace for human suffering, wantonly inflicted; no standard by which we can measure the just compensation for wounded feelings, personal indignity, and public humiliation. The jury has passed upon this whole question, and with their verdict it must rest. Under the circumstances of this case, I have no legal right to set that verdict aside, and cannot do so.

It is probable that the jury allowed the sum of $400.87, the amount expended by plaintiff for physicians, nurses, and medicines during his recovery, and the further sum of $750 claimed by plaintiff for loss of time and expenses in hiring persons to attend to his business during his illness, and gave the further sum of $7,000 as general damages.

It was further urged that the court erred in not withdrawing from the jury all evidence relative to defendant's wealth; plaintiff having, during the trial, waived all claim for exemplary damages. Had defendant's counsel, at the time of the trial, asked that this be done, the court would undoubtedly have withdrawn such evidence from the jury, and instructed them to disregard it. But no such request was made, and it is too late now to urge it as error. If it was technically error, it was waived, and was wholly cured by the charge of the court to the jury.

The charge of the court was full, clear, and distinct. The jury was expressly instructed that all claim for exemplary damages was waived by plaintiff, and that they should only find, if they found for plaintiff, such sum as would compensate him for the expenses incurred by him during his illness, loss of time, and for the injuries sustained, including his physical suffering, mental anguish, and the indignity inflicted.

The charge, I believe, was in all respects correct.

The motion for a new trial is denied.

SUN MUT. INS. CO. and others *v.* MISSISSIPPI VALLEY TRANSP. CO.[1]

(*Circuit Court, E. D. Missouri.* September 24, 1883.)

1. COMMON CARRIER—LIABILITY FOR AGENT'S NEGLIGENCE.
   Where A. employs B., a common carrier, to transport goods to C., and B. employs D. to transport them part of the way, and they are lost *in transitu*, while in D.'s possession and through his negligence, B. is liable for the loss to A., or any one who may become subrogated to his rights.
2. SAME—LIABILITY TO INSURER WHO HAS BECOME SUBROGATED TO SHIPPER'S RIGHTS.
   Where a carrier becomes liable to a shipper for the loss of goods, and an insurer pays the shipper the amount of the loss, becomes subrogated to his rights, and sues the carrier for the damages sustained, the carrier cannot avail himself of defenses which might have been interposed by the insurer in an action at law against it.

[1] Reported by Benj. F. Rex, Esq., of the St. Louis bar.

3. INSURANCE "FROM ST. LOUIS TO NEW ORLEANS"—LOSS IN HARBOR.
Where goods insured "from St. Louis to New Orleans" are lost while being transported from East St. Louis to St. Louis, preparatory to a final start, by the carrier which has undertaken to transport them to New Orleans, the loss is within the terms of the policy, for the purposes of such a case, the harbor of St. Louis ought to be regarded as extending to the opposite shore.

4. SAME—EVIDENCE.
In this suit the policies of insurance were not introduced in evidence, and secondary evidence in lieu thereof was admitted without objection, except in one instance, and the fact of insurance was apparently taken for granted. At the hearing in this court it was for the first time objected that the libelants were not entitled to recover because they had failed to show that the goods lost were insured. *Held* that, under the circumstances of the case, the objection should be overruled.

Admiralty Appeal from District Court.[1]

The libelants are insurance companies, and as such insured certain goods shipped from St. Louis to New Orleans upon the boats of defendant, and the said goods having been lost in part, and in part damaged by a collision, they paid the losses to the shippers, and sued the defendant in admiralty. Decree below for libelants, and defendant appeals. The other facts sufficiently appear in the opinion.

O. B. Sansum, for libelants.

Given Campbell, for defendant.

MCCRARY, J. The defendant, as a common carrier, agreed to transport certain goods described in the libel from St. Louis to New Orleans. The goods were laden on defendant's barge New Orleans. The defendant employed a tug-boat to tow said barge from its moorings at East St. Louis to the levee in St. Louis, there to be taken in tow by a tow-boat belonging to the defendant, and carried on its way to its destination. It was while the barge New Orleans was being towed by the tug-boat, thus hired for the purpose by the defendant, that a collision occurred, resulting in a loss of part, and in damage to the remainder, of the goods in question. Libelants having insured the goods, and paid the losses to the shippers, sued to recover their damages by right of subrogation, and as to some of the goods by right, also, of an assignment from the shippers. The evidence shows that the collision and consequent loss were the result of negligence on the part of the persons in charge of the tug-boat employed by defendant to tow the barge containing the goods from East St. Louis to St. Louis.

Anticipating this finding, the counsel for defendant has argued very fully and ably the question whether this fact fixes a liability upon the defendant for damages. The contention of counsel is that the relation of master and servant did not exist between defendant and the master and crew of said tug-boat, and that, therefore, defendant is not liable. Conceding that defendant would have been liable as principal if the tug-boat had been manned or officered and controlled by it, or had been used by defendant in its regular business, the defend-

[1] See 14 FED. REP. 699, and 16 FED. REP. 800.

ant's counsel argues that inasmuch as the tug was an independent vessel, and operated by its owners for towing vessels about the harbor, it is alone responsible to the shippers for the losses in question.

It appears that the use of tugs for such purposes is customary in the harbor of St. Louis, and it is insisted that the shippers must be held to have employed the defendant with the knowledge that it might, and the expectation that it would, employ that means of moving its barges to the St. Louis landing.

It is no doubt true that no one can, in the absence of contract, be made liable for a breach of duty, unless it be traceable to himself, or to some person who holds the relation to him of agent or servant. And this doctrine has often been applied to cases of collision between vessels where one of the colliding vessels is being towed by another vessel, and is wholly under the control of the officers and crew of the latter. It is held that the owner of the tow, in such case, cannot be held responsible for the negligence of the officers and crew of the vessel by which it is being towed. *Sproul* v. *Hemmingway*, 14 Pick. 1; *Sturgis* v. *Boyer*, 24 How. 110. But these, and other like cases relied upon by defendant's counsel, were actions of tort, brought by the owners of a vessel destroyed or damaged by collision, and do not apply to such a case as the one now before us, where a shipper, or another standing in his place, sues a common carrier to recover damages for the breach of a contract of affreightment. The two classes of cases are altogether different. In the former, the suit is brought by a stranger against a master to recover for the negligence of his servant, and the rule of law applicable, as stated by SHAW, C. J., in *Sproul* v. *Hemmingway*, is "that where a stranger suffers by the negligence or unskillfulness of another's agent or servant, the owner or employer shall stand chargeable for the damage." In the latter, the suit is brought, not by a stranger, but by a party to a contract, and is governed by the well-known rules respecting the duties and liabilities of common carriers.

When a common carrier receives goods into his possession for transportation he becomes a bailee for the shipper, and is responsible for the safe transmission of the goods to their place of destination, whether he keeps them in his own possession or intrusts them to an intermediate carrier on the way. The carrier is employed to transport the goods over the entire route, from the place of shipment to the place of destination, and the measure of his responsibility does not depend upon the question whether the persons who have charge of the goods *en route* are servants or not. If the carrier permits the goods to pass into the hands of another over whom he has no control, and that other shall embezzle or lose them, or permit them to be injured without lawful excuse, the carrier cannot defend upon the ground that such person was an independent carrier, not subject to his direction, having control of his own vehicles.

The character of the carrier as an insurer of the goods carried is

totally inconsistent with the idea that his liability is to be measured by the law of master and servant. To fix the responsibility of a common carrier for goods lost *in transitu*, it is not necessary to prove negligence either on the part of the carrier or his servants, except in cases where the carrier's liability is limited by contract. In those cases the negligence may be shown, and the carrier held liable, notwithstanding such a limitation, upon the ground that he will not be permitted to contract for exemption from the consequences of his own negligence or that of his servants. The duties which the common carrier undertakes to perform, and not the instrumentalities employed, must be regarded as the criterion of his liability. It is upon this principle that express companies are held to the responsibilities of common carriers, although they have no interest in or control over the conveyances by which the goods are transported.

"It certainly never was supposed that a person who agreed to carry goods from one place to another, by means of wagons or stages, could escape liability for the safe carriage of the property over any part of the designated route by showing that the loss had happened at a time when the goods were placed by him in vehicles which he did not own, or which were under the charge of agents whom he did not control. The truth is that the particular mode or agency by which the service is to be performed does not enter into the contract of carriage with the owner or consignor." *Buckland* v. *Adams Exp. Co.* 97 Mass. 124; Lawson, Carr. § 233, and numerous cases cited.

My conclusion upon this subject is that, as between the carrier and the shipper or insurer, the carrier is liable for the loss of the goods while *in transitu*, though at the time of the loss they were in the possession of a third party, who was transporting them at the request of the carrier; and that, in so far as it is necessary to apply the doctrine of agency, such third party is the agent of the carrier, for whose defaults he is responsible. This case is stronger than those in which the carrier agrees to transport goods beyond the terminus of his line, and in those cases he is held liable for the acts of others to whom he delivers the goods, unless he contracts specially against such liability. Lawson, Carr. § 235, and cases cited.

As to a portion of the goods lost, the defense is interposed that they were not within the contract of insurance, and that, therefore, although the carrier may have been liable to the shipper, the insurer has no right to recover. This branch of the case arises upon the following facts: The goods were insured "from St. Louis to New Orleans." A part of the goods were in St. Louis, and another part in East St. Louis, on the opposite side of the river. The defendant placed those that were in St. Louis upon the barge in which they were to be transported, and then employed the tug above mentioned to carry the barge, with those goods in it, over to East St. Louis, there to place on board the portion of the cargo in store there, and to return to the St. Louis levee for the final start to New Orleans. After taking on board the barge the goods at East St. Louis, and

starting back across the river, the collision complained of occurred as above stated.

Upon these facts it is insisted that as to so much of the cargo as was taken on board at East St. Louis the insurance company was not liable, because that property was not *en route* from St. Louis to New Orleans at the time of its loss, and it was said that, inasmuch as the insurance company was not liable on its policy, it could not, by paying the loss, acquire any right of subrogation. As to this particular portion of the cargo, there is no assignment from the shipper to the insurance company.

The question whether the voyage from St. Louis to New Orleans had been commenced, within the meaning of the policy of insurance, so as to make the insurer legally liable, may admit of some doubt, though I am, as will presently appear, strongly inclined to the opinion that it had. Waiving, however, this question for the present, I hold that since the insurance company in this case saw fit to waive the objection and treat the loss as within the policy by paying it, the carrier cannot be heard to object, for the reason that its liability to the shipper is clear, and it is in nowise injured by being called upon to make payment to the insurer. Such was the conclusion reached by WOODS, circuit judge, in *Ins. Co.* v. *The C. D., Jr.*, 1 Woods, 72, and the doctrine seems to be entirely consonant with justice and equity. It would be contrary to the spirit of the admiralty law, which proceeds upon principles of the broadest equity, to permit the carrier, who is shown to be clearly liable to the shipper, to avail himself of all the defenses which might have been interposed by the insurance company if sued in an action at law upon the policy.

It has been held, upon very analogous principles, that the owner of a vessel upon which he is carrying a cargo for the shippers may, in case his vessel is run into and sunk by another vessel, maintain a suit in admiralty against the offending vessel and her owners for the loss, both of vessel and cargo, *even after an abandonment to the underwriters.*

"The respondent is not presumed to know or bound to inquire as to the relative equities of parties claiming damages. He is bound to make satisfaction for the injury he has done." *Newell* v. *Norton*, 3 Wall. 257; *Monticello* v. *Mollison*, 17 How. 152.

If, therefore, it were conceded in the present case that the voyage insured against had not commenced when the loss occurred, I should hold that the carrier by whose negligence the loss occurred has no interest in raising that question, and it is not one which in any way concerns him. The insurers here are clearly not mere volunteers. It is, however, manifest, I think, that the voyage insured against had commenced at the time of the loss. The harbor of St. Louis may well be regarded, for the purposes of such a case, as extending to the opposite shore of the Mississippi river, and an insurance against loss upon a voyage "from St. Louis to New Orleans" may well be held to

cover a loss occurring, as this did, while the cargo was being brought by the carrier from East St. Louis to St. Louis under the circumstances above stated. The carrier had assumed the control and taken possession of the goods for the purposes of the voyage, and the fact that some were on one side of the river and some on the other is of no consequence.

It is also contended by defendant's counsel that the proof fails to show that the property lost or injured was insured by the libelants. The evidence touching this point is certainly secondary, the policies of insurance not having been introduced in evidence; but, with the exception of the statements made by a single witness, no objection has been raised on this ground until the present hearing. The point is purely technical, for the fact of the insurance seems to have been taken for granted throughout the litigation. If the objection now for the first time made should be sustained, a proper regard for the substantial rights and equities of the parties would require the court to permit the policies to be now introduced, and that the court can do this at any time before final decree is very clear. As there is no room for doubt as to the fact, the defendant would gain nothing by now insisting upon the best evidence, and I therefore, without a very careful consideration of the merits of the objection, overrule it. The decree of the district court is affirmed.

THE EXCELSIOR.

(*District Court, S. D. New York.* July 5, 1883.)

1. COLLISION—DAMAGES—DEMURRAGE.
   In collision cases, damages in the nature of demurrage for detention of the vessel while repairing, which are plainly out of all proportion to the value of the vessel, should be disallowed. Only the market value for chartering, or fair net earnings as ordinarily employed, over all expenses, should be awarded for demurrage.
2. SAME—DEPRECIATION—REPAIRS.
   Nothing should be allowed for permanent depreciation of the vessel repaired, when, after being repaired, the vessel is, on the whole, worth as much as before the injury.

In Admiralty.

Benedict, Taft & Benedict, for libelants.

James McKeen, for claimant.

BROWN, J. The testimony on the part of the libelants, as to the various items of damage, shows to my apprehension such palpable efforts at exaggeration as to disentitle it to such weight or confidence as it would otherwise receive. The claim that this small schooner of only 70 tons, and six years old, was worth $7,500, and that her daily use or demurrage, without crew or expenses, was worth $15

per day, net, or upwards of $5,000 a year, must be deemed gross exaggerations.

I am satisfied from the evidence that $5 per day is ample, and, in fact, more than her net market value for chartering, or her ordinary and fair net earnings, as ordinarily employed. *The Potomac*, 105 U. S. 630; *Sturgis* v. *Clough*, 1 Wall. 269.

As to permanent depreciation, I am also satisfied that the additions of new masts and sails in place of the old ones fully compensate for any other depreciation, which must have been slight. As in the case of *The Isaac Newton*, 4 Blatchf. 21, I am satisfied that, after all the repairs made on her, she was "in as good condition as before the injury." *Petty* v. *Merrill*, 9 Blatchf. 447. I cannot sustain any of the libelant's exceptions. Deducting, therefore, from $1,790.48, the amount reported, one-half of the allowance for permanent depreciation, viz., $125, and $77 on account of demurrage, making $202, which, with interest to June 20, 1883, amounts to $256.54, there remains $1,533.94, for which a decree may be entered.

THE VENUS.

(*District Court, S. D. New York.* September 10, 1883.)

1. COLLISION—DAMAGES—TOTAL LOSS.
   Damages allowed for injuries to a vessel by collision cannot ordinarily exceed her value at the time of collision, *i. e.*, as for a total loss, with cost of raising, to determine her condition, or to remove her as an obstruction, where that is necessary. To recover more, where the vessel has been repaired instead of being abandoned, special circumstances must be shown proving that the excess accrued notwithstanding the exercise of good faith and ordinary prudence and good judgment in repairing.
2. SAME—DEMURRAGE.
   Compensation as for demurrage while the vessel is undergoing repairs cannot exceed the clear net value of the use of the vessel, excluding all charges and expenses; and, when charged for a long and continuous period, it must bear some reasonable proportion to the value of the vessel. For a canal-boat worth $1,350, an allowance was made of $3 per day for 59 days.
3. SAME—EXPENSE OF RAISING—REPAIRS.
   Where the owner was advised to abandon as a total loss, but repaired the vessel and claimed, besides expense of raising, $1,028 for repairs, $584 for demurrage, and $300 difference between new and old, and got no estimates before repairing, nor contracted for any limit of the time for repairing, and claimed $8 per day for a detention of 73 days, *held*, that he had not shown ordinary prudence or good judgment in repairing, and the excess of the above three items, being $562 over the value of the boat, as a total loss, at the time of the collision, was at his own risk and charge, and should not be allowed.
4. SAME—CHARGES FOR BENEFIT OF INSURER.
   Charges made for the benefit of the insurer only cannot be allowed.

Exceptions to Commissioner's Report.

Edward D. McCarthy, for libelant.

Beebe, Wilcox & Hobbs, for claimants.

BROWN, J. The Venus having been found solely in fault for the sinking of the canal-boat Midland, (16 FED. REP. 792,) the commissioner, to whom it was referred to ascertain and compute the damages to the libelant, has reported the following items:

1.	Cost of raising the boat,	$ 260 00
2.	Repairs of the Midland,	1,028 00
3.	Amount paid Preston by the underwriters for traveling expenses while caring for the submerged property,	43 75
4.	Captain's furniture, etc.,	75 00
5.	Gross freight, $420; less tolls and towing, $146.28; net,	273 72
6.	Demurrage, 73 days @ $8 per day,	584 00
7.	Difference between old and new,	300 00
	Amounting, with interest, to	$2,895 85

Exceptions have been filed to all of the above items except 1, 2, and 4, and also for the allowance of interest on demurrage. The testimony before the commissioner showed that the highest estimated value of the Midland, at the time she was sunk, by the libelant's witnesses, was $1,500. The claimants' witnesses, who testified from a description of the boat, and not from personal acquaintance with her, estimated her value at from $800 to $1,000, only. The amount reported by the commissioner as damages under items 2, 6, and 7,—that is, for the cost of repairs, demurrage, and difference between the former and present value,—is $1,912; that is, $412 in excess of the highest estimate of the value of the Midland just before she was sunk, exclusive of $260, cost of raising.

The ordinary rule would not admit of a recovery beyond the amount of a total loss, *i. e.*, the full value of the vessel at the time she was sunk. To this, however, may plainly be added the cost of raising the boat when that is necessary in order to ascertain whether she should be abandoned as a total loss or repaired; and, also, whenever the owner is required, as in this case, to remove her as an obstruction to the canal. When, in addition to this, however, the final claim of damage exceeds the full value of the vessel at the time of the loss, the claim should be carefully scrutinized, and the libelant held bound to show special circumstances to justify any such excess, and that good faith and reasonable prudence and good judgment have been exercised in making the repairs.

In the present case, as in that of *The Glaucus*, 1 Low. 366, a considerable part of the amount allowed is for demurrage during the repair of the vessel. In that case, however, special circumstances, which could not be foreseen, were shown to have occasioned the excessive amount of damage.

Restitution for the loss, and no more, is the rule in these cases. *The Baltimore*, 8 Wall. 386; *The Bristol*, 10 Blatchf. 538; *Swift* v. *Brownell*, 1 Holmes, 470. Payment of the full value of the vessel, with interest from the time of the loss, together with the expenses of removal, where that is required or is necessary for the purpose of

determining whether to abandon her or not, is full restitution; and a special and exceptional case must be made, showing that the excess accrued notwithstanding the exercise of good faith, prudence, and good judgment, in order to justify any claims beyond these.

In the present case the libelant was advised by one of his own witnesses, after raising the boat, to abandon her as a total loss. In proceeding to repair her he took no precaution to obtain previous estimates of the cost, or to limit the period of making the repairs by any contract which might restrict the loss through demurrage. Any prudent owner proposing to repair a boat at his own cost, with charges for every day's detention, would not neglect such precautions in a case of so doubtful expediency in repairing. I see nothing in the circumstances to excuse the libelant for neglecting this duty; and the excess should, therefore, be charged to his own risk and cost.

The general features of the case, moreover, do not give a favorable impression of the amount of the claim. By sinking, the boat's seams were swollen and bulged, and on this account, partly, a considerable item—$300—is claimed as the difference between new and old. Whatever foundation there is for this claim could have been foreseen from the beginning. The long period of 73 days, also, for demurrage, is not satisfactorily accounted for; and the extraordinary demand of $8 per day for this long period, net and clear of all charges, risks, and expenses, for a boat not claimed to have been worth more than $1,500,—*i. e.*, demurrage at the rate of nearly $3,000 per year, or nearly $1,500 if during half the year she was laid up and could not be used at all,—is so obviously out of all proportion to the value of the boat that it cannot be seriously entertained, and it necessarily detracts from the credit to be given to other parts of the libelant's claim. Upon all the evidence of the libelant and the claimants as to the value of the Midland, I think $1,350 as much as ought to be allowed for her value as a total loss.

Upon this view, the sum of $562, on account of the hull, should be deducted from the report.

If the last two items reported, however, were regarded independently, about the same deduction should be made. Of the 73 days for which demurrage is charged, 14 are entirely unaccounted for, leaving 59 days—a long period, certainly—for raising the boat and doing repairs of the value of only $1,028. I am satisfied that $3 per day is ample, if not more than ample, allowance by way of demurrage for this long and continuous period. Grossly exaggerated claims on this ground seem to be the rule in such cases. See opinion in *The Excelsior* on damages, July, 1883, *ante*, 924. Nothing should be allowed as demurrage beyond the clear net value of the boat's use free of all charges and expenses. The claimant's evidence states a fair rate to be $3 to $5 a day; the libelant's witnesses say $8. If the canal-boat could get employment only six months in the year,—which is not the fact,—the demurrage would amount at the

latter rate to nearly $1,500 a year, *i. e.*, to her whole value or over. Such a claim appears to me to be inadmissible upon its face for a long and continuous period. It was claimed that at this particular time of the year boats were in demand and rates high. Such grounds for excessive rates, if not required to be specially pleaded, as in the nature of special damage, should at least be closely scrutinized. In this case, however, the bill of lading, upon the very trip when the Midland was sunk, shows that, deducting the expenses stated upon its face, and $25 additional river towage, the boat would have cleared on the most profitable part of her trip, viz., the down trip, only about $3 a day; and it is not clear that even this does not include the captain's wages.

At three dollars per day, for 59 days, the demurrage would amount to $177, or $407 less than the amount reported; and for the difference between the new and old value I should not be satisfied, upon the whole evidence, to allow more than $150. The result of these is about the same as allowing the value of the vessel at $1,350 as a total loss, excluding items 6 and 7. The third item, of $43.75, was an item for the benefit of the insurers, and, so far as I can perceive, was in no way obligatory upon the claimant to pay.

In arriving at the net freight,—that is, the net amount which would have been earned by the Midland had she finished her trip,—all the expenses, tolls, and towing, which she must pay in order to finish her trip, must be deducted from gross freight. These are mostly stated in the bill of lading, and reduce the amount to $99.98, from which, as I understand from the evidence, a further amount of $25 for river towage is also to be deducted, which would leave $74.98. To this, however, should be added such expenses and other charges as had already accrued up to the time the Midland was sunk; and these, apportioned as nearly as I can make them out, with the net freight last stated, amount to $201.98, which should be allowed for this item, instead of $273.72.

I allow, therefore, the following items:

Cost of raising the boat,		$260 00
Captain's furniture, etc.,		75 00
Net freight, etc.,		201 98
Value of vessel when sunk; or repairs, with demurrage, and $150 difference in value, corrected as above,		1,350 00
		$1,886 98
Interest from August 13, 1880, to this date,		348 10
Twenty-two hundred and thirty-five 8-100 dollars. Total,		$2,235 08

END OF VOLUME 17.

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ACCOUNT.

1. Rents and Profits.—In ascertaining the rents and profits of real estate, where the disseizin and possession have been in bad faith, the account must include not only the rents, revenues, and values for use actually received, but also those which the evidence shows would have been received with ordinary good management. Since the law requires the court in such a case to decide from evidence extrinsic to the actual receipts, satisfactory evidence may be found in the rents for the very period in question actually derived from numerous other lots, adjacent, similarly situated, and no better capacitated, and from ground rents during and for the same period. *Pontchartrain R. R.* v. *Carrollton R. R.* 11 La. Ann. 258, 259; *McGary* v. *City of Lafayette*, 12 Rob. (La.) 668; 4 La. Ann. 440. *Gaines* v. *City of New Orleans*, 16.
2. Same—Burden of Proof.—The burden which bad faith places upon the defendant, according to the civil law and the jurisprudence of Louisiana, while it should lead to the assessment of no damages or compensation beyond those actually suffered, requires the court to adopt conclusions fully warranted by evidence, though, through the fault of the defendant, it be derived in part from the rents and profits of other property adjacent and similarly situated, and no better capacitated. *Id.*
3. Same—Statement of Account.—An account for rents and profits should be taken and stated as follows: The rent or income should be ascertained for each year separately, and upon the amount so ascertained for each year interest should be computed down to the time when the account closes, so that there may be interest upon each yearly sum falling due, but no interest upon interest. *Gaines* v. *New Orleans*, 15 Wall. 634. *Id.*

See United States Marshal, 895.

ACTION.

Corporation—Action for Money Had and Received—Charter.—A corporation, like a natural person, may be compelled to account for the benefits received from a transaction, even if it be one not enforceable by reason of the fact that its agents have no right to make it, unless it be in its nature illegal or immoral; and if the agreement under which the corporation has received and appropriated money or property cannot be enforced, it cannot be heard to refuse to account on the ground that it had no power under its charter to take it, and action may be sustained, without reference to the agreement, to recover whatever money may be justly due for the value received. *Manville* v. *Belden Mining Co.*, 425.

See Death Caused by Negligence at Sea, 456; In Personam for Seaman's Wages, 703; In Rem Defined, 609; Merchandise Forfeited for Fraudulent Entry, 497; On Judgment, 414; Receiver of National Bank, 506; Rents and Profits of Real Estate, 16; Stockholders, 46.

ADMIRALTY.

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Practice.

9. ACTION FOR DAMAGES—FORMER SUIT A BAR.—The owner of a vessel, in case of injury to the vessel and cargo, may maintain an action for damage to both against another vessel causing the injury; and after the latter has been once arrested, and given bail for the whole damage, if the owner of the cargo afterwards cause all claim on his account to be withdrawn from the suit, he cannot, ordinarily, again maintain an action against the same vessel *in rem*, and arrest her a second time for the same damage. *The Wm. Murtagh*, 259.

10. AGREEMENT NOT TO SUE—SECOND SUIT IN REM.—But where an agreement was made with the owner of the cargo that he would not bring suit, but that his claim should be settled according to the event of a suit of the owner of the vessel injured, and pursuant thereto he withdrew his claim as soon as he discovered that it was embraced in the other suit, *held*, that he might afterwards maintain a second suit *in rem* pursuant to the agreement. *Id.*

11. ASSAULT AND BATTERY—SIXTEENTH ADMIRALTY RULE.—An assault and battery is where one intentionally inflicts unlawful violence upon another. There may be such gross negligence that an intent to injure may be inferred therefrom, but where the case made by the libel does not show such negligence, nor bring any such negligence home to any particular individual, it is very far from a case of "assaulting and beating" within the sixteenth admiralty rule. *The Lord Derby*, 265.

12. STIPULATION BY CLAIMANT FOR THE DISCHARGE OF A VESSEL.—The clerk is not authorized to take a stipulation for the discharge of a vessel, but the same must be done in court or at chambers, or before a commissioner; and in the former case notice thereof is given to the marshal by a writ of *supersedeas* issued by the clerk, and in the latter case by an order to the same effect issued by the commissioner; and in neither case is the marshal entitled to any fee or mileage for "serving" such writ or order, but he may charge any necessary expense incurred by him in consequence of such writ or order, as a part of the expense incurred under the process for the arrest and custody of the vessel. *The Jeanie Landles*, 91.

13. APPEAL.—When no additional testimony is taken the circuit court will not hastily disturb a decree on the point of damages, nor unless it shows manifest injustice. *Cushman* v. *Ryan*, 1 Story, 91, followed. *The Lord Derby*, 265.

See COLLISION, 87, 253, 397, 554, 606, 704; CONSTRUCTION OF VESSEL, 400; DELIVERY OF PERISHABLE CARGO, 695; DEMURRAGE, 87; LIEN FOR SUPPLIES, 816; MASTER'S WAGES, 95; PLEA OF LIS ALIBI PENDENS IN FOREIGN COURT, 627; SALVAGE, 353, 359, 548; SEAMEN, 96, 390; SEAMEN'S WAGES, 703; STRANDING OF VESSEL, 377; SUPPLIES FOR VESSEL, 91; TOWAGE, 259, 548; VIOLATION OF NEUTRALITY LAWS, 813.

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ADVERSE TITLE.

1. PURCHASE OF ADVERSE TITLE BY CO-TENANT.—In the case of a co-tenancy arising by descent, devise, or one conveyance, the purchase of an adverse title by one of the co-tenants will generally inure to the benefit of the other tenants; but in the case of a mere tenancy in common, this depends upon the circumstances of the case, as that the co-tenant used the co-tenancy, or the title, right, or claim under which it exists, or is claimed to exist, to acquire such adverse title. *Myers* v. *Reed*, 401.

2. BY TENANT FOR LIFE.—A purchase by a tenant for life of an adverse title will inure to the benefit of the remainder-man. *Id.*

See EJECTMENT, 16.

ALIENS.

STATUTE OF COLORADO.—Under the statute of Colorado, non-resident aliens may own, inherit, and convey property, real or personal, the same as citizens and residents. *McConville* v. *Howell*, 104.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. DESCRIPTION OF PROPERTY.—By the law of Connecticut, where the only description of property conveyed by a deed of mortgage is all the property of the grantors, real and personal, in certain towns in that state, named in such conveyance, the description is insufficient, and the deed conveys no title to the Connecticut lands. *Stafford Nat. Bank* v. *Sprague*, 784.
2. TRUSTEE TO CARRY ON BUSINESS—NON-ASSENTING CREDITORS—FRAUD.—By the law of Connecticut, where assignments, intended for the benefit of all the creditors, place the entire estate of the debtor beyond the reach of non-assenting creditors, in the hands of a trustee, who is empowered and directed to carry on an extensive and hazardous manufacturing business for an indefinite period, and thus subject the property of the non-assenting creditors to the hazards and uncertainties of such business, the conveyances will be held fraudulent in law, so far as they attempt to convey lands in Connecticut as against non-assenting creditors. *Id.*

ATTACHMENT.

1. UNITED STATES COURTS—ATTACHMENT PROCEEDINGS—REV. ST. § 915—PRIORITY.—Under the provision of section 915 of the Revised Statutes of the United States, a circuit court administers the law of the state in which such court is held, regarding attachments; and when property has been attached in a suit in the United States court by the marshal, and the sheriff has levied an attachment issued from a state court on the goods in the hands of the marshal, the priority of the lien of the attaching creditors is to be determined by the state law. *Bates* v. *Days*, 167.
2. SAME—PROPERTY IN HANDS OF MARSHAL—ATTACHMENT FROM STATE COURTS.—When writs issue from state and federal courts against the same property, the officer first obtaining possession, on being notified that a state court officer has a writ against the same property, should be offered all reasonable facilities to make a full return, and the officer holding the property should show in his return whatever was done by such state officer. *Id.*

ATTORNEY AND CLIENT.

1. ATTORNEY'S LIEN FOR FEES—JUDGMENT—LACHES.—Where an attorney at law has obtained a judgment for his client, on which he is entitled by law to a lien for his fees, and has perfected his lien in accordance with the provisions of the law, he may enforce it, notwithstanding a compromise and settlement made by his client with the other party, although he has not made himself a party to the record. *Patrick* v. *Leach*, 476.
2. SAME—ATTORNEY INTERVENING.—Where it is necessary, in a suit to set aside such a judgment, to protect the attorney's lien, that he may be made a party to the suit, the court will allow him to intervene therein. *Id.*

See BANKRUPTCY, 328; SETTING ASIDE JUDGMENT, 667.

BANKS AND BANKING.

1. INSOLVENCY OF BANK.—A bank is solvent, within the meaning of the constitution and statutes of Missouri, when it possesses sufficient assets to pay, within a reasonable time, all its liabilities through its own agencies; and is insolvent when, from the uncertainty of being able to realize on its assets in a reasona-

BANKRUPTCY.

See CORPORATIONS, 324; LIMITATION IN SUIT TO REMOVE CLOUD ON TITLE, 614; NATIONAL BANKS, 308.

BENEFICIAL SOCIETY.

BOOMING CORPORATIONS.

CHATTEL MORTGAGE.

CHINESE LABORERS.

CIRCUIT COURT.

COMMON CARRIER.

Carrier of Passengers.

pons had been tested by a court proceeding defined, and thereupon receive back from the treasurer the amount of money which had been collected from him, the tax-collector. This last act is identical, in principle and provisions, with the act of the state of Tennessee; which was reviewed by the United States supreme court in *Tennessee* v. *Sneed*, 96 U. S. 69, and pronounced constitutional, and to be an ample remedy for the coupon-holder. The Baltimore & Ohio Railroad Company, a corporation of Maryland, operating certain roads in Virginia, disregarding the acts of January 14, 1882, and of January 26, 1882, tendered the amount of taxes due to the state of Virginia in coupons of the bonds of the state, issued under the act of March 30, 1871, "receivable at and after maturity for all taxes and debts, dues and demands, due the state," which the authorities refused to receive; and having assessed 30 per cent. in addition after 60 days, and seized the property of the railroad company, threatened to sell the same for the amount of taxes and penalty, whereupon the company applied to the circuit court of the United States for an injunction. *Held*, that the coupons tendered must be received in payment of the taxes; that the penalty was improperly assessed; and that the railroad company were entitled to an injunction to restrain the state authorities from selling their property. *Baltimore & O. R. Co.* v. *Allen*, 171.

10. CONSTITUTIONALITY OF STATUTE—WHEN COURT WILL DECLARE VOID.—The court should hesitate long, and be convinced beyond a reasonable doubt, before pronouncing an act of congress invalid. The argument should amount almost to a demonstration. If doubt exists, the act should be sustained,—the presumption is in favor of its validity. *Sarony* v. *Burrow-Giles Lith. Co.*, 591.

11. COPYRIGHT—REV. ST. § 4952—PHOTOGRAPHS AND NEGATIVES.—The act of congress (Rev. St. § 4952) granting copyright protection to photographs, and negatives thereof, is not so clearly unconstitutional as to authorize the court at *nisi prius* to declare it invalid. *Id.*

12. POWER OF CONGRESS TO SECURE COPYRIGHT TO PROPRIETOR OF A PHOTOGRAPH.—The act of congress (Rev. St. §§ 4952, 4965) securing a copyright to the proprietor of a photograph, and imposing a penalty for the infringement of such copyright, is constitutional. *Schreiber* v. *Thornton*, 603.

13. RETROACTIVE LAWS—LA. CIVIL CODE, 8.—"A law can prescribe only for the future; it can have no retrospective operation." La. Civil Code, 8. This article has the paramount force of a constitutional provision; it is a regulation of the power of all subsequent laws, whether they be found in future constitutions or future statutes; it is a statutory declaration and covenant on the part of the state incapacitating subsequent laws from disturbing any obligations. When these three provisions are put together, it results that the state placed the wrong-doer under an obligation; for the fulfillment of that obligation subjected all his present and future property to a pledge; and contracted that the law-making power should pass no law which should affect that obligation or that pledge. It follows, then, that at whatever time the obligation of the defendant to the relator was incurred, at that time there was, by operation of the statute, an inviolable pledge created, which should operate as well upon the future as upon the present, and should give her payment by taxation. *United States* v. *City of New Orleans*, 483.

14. CONDITIONAL OBLIGATIONS.—The jurisprudence of Louisiana is settled that in conditional obligations the law which exists at the time the obligation was contracted, and not that which exists when the condition takes place, governs the rights of the parties. *Id.*

15. LA. CONSTITUTION, ART. 209; ACT 93 OF LA. OF 1856, P. 68.—The article 209 of the present constitution of Louisiana, and the act No. 93 of 1856, p. 68, had no reference to already existing obligations of any sort. *Id.*

16. LA. CONSTITUTION, ART. 11.—"All courts shall be open, and every person, for injury done him in his rights, lands, goods, person, or reputation, shall have adequate remedy by due process of law, and justice administered without denial or unreasonable delay." La. Const. art. 11. This provision is applicable to the redress for all wrongs done to person or property, and to that extent gives, for the redress for wrongs, a remedy completely adequate; *i. e.*, a satisfaction limited only by the property of the debtor. *Id.*

See MUNICIPAL CORPORATIONS, 909.

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Of United States.

STATE CONSTITUTIONS.

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Colorado.

Louisiana.

Missouri.

Nevada.

North Carolina.

Oregon.

Vermont.

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1. ABILITY OF PARTY—FORM OF CONTRACT—WHAT LAW GOVERNS.—The ability of a party to contract depends upon the law of the domicile, when the question is one of personal ability or disability; as to the form of entering into the contract, the law of the place where the contract is made must control. *Matthews* v. *Murcheson*, 760.
2. CONSTRUCTION ADOPTED BY PARTIES.—Where the meaning of a contract is doubtful, the fact that the parties thereto at once adopted a particular construction, and for many years acquiesced in and acted upon it, should lead a court without hesitation to adopt that construction as the proper one. *Nickerson* v. *Atchison, T. & S. F. R. Co.*, 408.
3. PAROL EVIDENCE TO EXPLAIN WRITTEN CONTRACT.—While parol evidence is not admissible to vary or change the terms of a written contract, it is frequently admissible for the purpose of ascertaining what was the intention of the parties, or the meaning which they intended to attach to the expressions used in the contract. *Rhodes* v. *Cleveland Rolling-mill Co.*, 426.

COPYRIGHT.

CORPORATIONS.

DAMAGES.

GENERAL RULE OF DAMAGES.—The general rule is that no damages can be recovered until they shall have actually accrued; and that an action cannot be maintained on a mere liability to a third party to which a plaintiff has been subjected by the act of the defendant. The plaintiff, in such a case, must allege and prove that he has incurred actual damage, by showing the payment or other satisfaction of such liability. *California Dry-dock Co.* v. *Armstrong*, 216.

See BREACH OF CONTRACT OF SALE, 426; CONTRACT FOR FUTURE PARTNERSHIP, 726; EXEMPLARY DAMAGES, 912; INSUFFICIENT LEVY BY SHERIFF, 133; SALE AND DELIVERY, 584; TORT, LA. CIVIL CODE, 843.

DEBTOR AND CREDITOR.

1. UNRECORDED DEED—ATTACHING CREDITOR—CONNECTICUT STATUTE.—By the law of Connecticut an unrecorded deed is ineffectual, as against attaching creditors of the grantor, unless they had notice of such conveyance. *Stafford Nat. Bank* v. *Sprague*, 784.

2. POSSESSION OF GRANTEE—NOTICE.—As a general rule, open, notorious, and exclusive possession by the grantee, under an unrecorded deed, is sufficient to raise a legal presumption of notice, to an attaching creditor of the grantor, of the existence of such conveyance; but the testimony in regard to the notorious possession must be clear and certain, and such as to make the inference of notice to the creditor beyond serious question. *Id.*

3. NOTICE OF TENANCY.—In such a case notice of a tenancy will not, it seems, amount to constructive notice of the lessor's title. *Id.*

4. DEBTOR'S PROPERTY PLEDGED TO CREDITORS—LA. CIVIL CODE, 3183.—"The property of the debtor is the common pledge of his creditors." La. Civil Code, 3183. The meaning of this is that the property of the debtor is pledged so that it might be subjected to that process of the creditor which may be suitable to the case; the property of an individual debtor may be reached by seizure under a writ of *fieri facias;* the property of a debtor which is a municipal corporation may be reached by taxation. *United States* v. *City of New Orleans*, 843.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 784; FRAUDULENT PREFERENCE, 705.

DEED.

1. FALSA DEMONSTRATIO.—Where the description in a deed appears to be true in part and false in part, and it can be ascertained from references in the deed to other contemporary documents, and extrinsic attending facts, which part is false, so much of the description as is false must be rejected. *Hamm* v. *City of San Francisco*, 119.
2. CONSTRUCTION BY ACTS OF PARTIES.—Where the parties to a deed, by their subsequent acts, have given a practical construction to a deed, having in some particulars a false or indefinite description, such practical construction by the parties themselves will be considered by the court in construing the doubtful clause. *Id.*
3. CASE IN JUDGMENT.—A conveyance described the land conveyed by reference to a deed, bearing a particular date, recorded on a particular page of a public record. Upon reference to the page of the record, a deed between the parties was found, but bearing a *different date* from the one described; so that either the date, or the page of the record, was false. On the preceding page, facing the page mentioned in the description, was found the record of a deed between the same parties for the proper amount of land, bearing the proper date, and in all other particulars correct; and by reference to the deed bearing the proper date, and to other transactions surrounding the one in question, referred to in the deed to be construed, it appeared that the false particular in the deed was the *number of the page* of the record referred to. *Held*, that the page mentioned in the description should be rejected as false, and the premises conveyed ascertained from the remaining portions of the description. *Id.*

See COMPROMISE AS CONSIDERATION, 668; LATENT AMBIGUITY, 614.

DEFENSE IN EQUITY. LAPSE OF TIME, 36.

DEMURRAGE.

DETENTION.—Where the bark A., while discharging petroleum barrels before reaching her berth, gave notice of readiness to discharge the iron rails, and was at a dock where the privilege of landing the rails was refused, even for the necessary purpose of weighing them in the course of discharge, and negotiations in respect to the discharge from the vessel upon lighters were not completed through the mate's not giving unqualified permission to weigh the iron on the ship's deck, *held*, that the defendant was not legally in default, and was not liable for demurrage for the vessel's delay at the dock where she was not allowed to land the rails. *Teilman* v. *Plock*, 268.

See COLLISION, 87, 925; DELAY IN COMING TO PORT, 540.

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DOMICILE. ABILITY OF PARTY TO CONTRACT, 760.

DOWER.

1. EQUITABLE DOWER.—Under the Revised Statutes of New York a widow is not entitled to equitable dower except in lands of which the husband was equita-

brought until the complainant had recovered possession. *Gaines* v. *New Orleans*, 15 Wall. 633. *Id.*

6. EJECTMENT—TRUST.—In an ejectment bill against a party holding by an adverse title, there could be no trust raised up as to the price received by him in case of sale. *Id.*

7. POSSESSOR IN BAD FAITH.—The possessor in bad faith is bound to surrender the thing immediately; and the seller and warrantor, who took and conveyed in bad faith, is bound forthwith to restore the price to his vendee, and to acquit, *i. e.*, discharge for him his liability to the owner for fruits, without suit or condemnation. *Id.*

8. SAME.—He who, with a motive to deprive another of that which he knows is justly that other's, employs the process and machinery of the courts, is under obligation to satisfy all damages which that other thereby suffers. The damages springing from the legitimate exercise of legal rights, even when there is an absence of malice, and there is good faith, must, according to the settled law of Louisiana, at least place the injured party in the situation in which he would have been if the disturbance had not taken place. *Id.*

9. WARRANTY AND WARRANTOR.—The warrantor is, by the settled jurisprudence of Louisiana, the real defendant. The judgment is binding upon the warrantor if he has been called in warranty, or he is apprised of suit having been brought. *Id.*

10. SAME—BAD FAITH.—Where a party had, in bad faith, entered upon the property of another and for an enormous price ($500,000) sold and conveyed it with warranty, and to avoid his liability as vendor and warrantor, *i. e.*, to escape being compelled to return to his vendee the price, and repay the fruits which the evicted vendee would be required to pay to the owner, in bad faith, hinders the restitution of the land and its fruits to the owner, and keeps the owner from recovering possession for a period of 50 years, the owner can recover for the rents and profits from the party hindering as a constructive possessor. *Id.*

11. CLOUD ON TITLE.—In 1871 sundry persons who were owners in common of a tract of land, laid out thereon a Carter's addition to Portland, and partitioned the same among themselves by deed, designating therein the blocks and lots allotted to each, among which was block 67, allotted to Charles M. Carter. The deed of partition was recorded, but the plat was not. Shortly after, L. F. Grover and wife, who were parties to this partition deed, laid out an addition to this Carter's addition, on a tract of land belonging to said wife, and lying immediately south of said first survey, and numbered one of the blocks therein 67; said Charles M. Carter having, in the mean time, changed the designation of the first block 67 to that of park block, and set it apart for public use as such; and thereupon the parties to both surveys united in executing a common plat of them as Carter's addition to Portland, in which the first block 67 was designated as a park block, and the second one by that number. In 1875 Grover and wife conveyed block 67 in the second survey to the plaintiff, and on February 19, 1878, the defendant was appointed by this court assignee in bankruptcy of the estate of said Carter, and within less than a year before the commencement of this suit set up a claim to the property, as such assignee, under the deed to Carter, and was proceeding to sell the same. The bankrupt never claimed the property, and the plaintiff and his grantors have always paid the taxes thereon. *Held*, (1) that it was a case of latent ambiguity in the deed to Carter arising out of the subsequent circumstances, which the plaintiff was entitled to explain by showing that it was not the intention of the parties thereto to convey the second block 67, and that it appeared from the facts that the plaintiff had the legal title to the property, and was not precluded by the circumstances from asserting it in this suit; (2) that the defendant, under the circumstances, has color of title to the property, and if he were allowed to sell it, he would thereby cast a cloud upon the plaintiff's title, and therefore equity will restrain him by injunction from so doing; (3) that if section 5057 of the Revised Statutes is applicable to the case, this suit is not barred by it, because it is only brought to prevent the threatened wrongful sale, and therefore the right to sue did not accrue until the defendant undertook to sell the premises, and did some act in pursuance of such purpose. *West Portland Homestead Ass'n* v. *Lownsdale*, 614.

12. SPECIFIC PERFORMANCE—CONTRACT OF SALE.—A contract for the purchase and sale of an interest in mining property, at a price named therein, in which

ESTATES OF DECEDENTS.

ESTOPPEL.

EVIDENCE.

EXCESSIVE FEE IN PENSION CASE.

INDICTMENT—PENALTY.—Section 31 of the act of March 3, 1873, declared—*First*, that no agent, attorney, or other person should receive as a fee in any pension case any greater compensation than might be allowed by the commissioner of pensions, not exceeding $25; and, *secondly*, prescribed the punishment for so doing. The first part of the act was made section 4785 of the Revised Statutes, and the second part section 5485. By act of June 20, 1878, congress expressly repealed Rev. St. § 4785, and limited the fee in all cases to $10; but left Rev. St. § 5485, prescribing the penalty, still in force. On March 3, 1881, congress enacted that the provisions of Rev. St. § 5485, should be applicable to any person who should violate the provisions of the act of June 20, 1878. *Held*, that there was no statute in force during the period between June 20, 1878, when Rev. St. § 4785, was repealed, and March 3, 1881, on which the penalty prescribed by Rev. St. § 5485, could operate, and an indictment charging an offense in receiving a greater fee than allowed by the title of the Revised Statutes relating to pensions, during such period, could not be sustained. *United States* v. *Starn*, 435.

EXECUTION. AGAINST BODIES OF DEFENDANTS, 497.

EXEMPLARY DAMAGES.

1. VINDICTIVE ACTIONS.—In vindictive actions, such as assault and battery, slander, libel, seduction, etc., where fraud, malice, cruelty, oppression, brutality, or wantonness is shown, on the part of the defendant, exemplary damages may be recovered. *Brown* v. *Evans*, 912.
2. WEALTH OF DEFENDANT.—In the above class of actions evidence may be given of defendant's wealth. *Id.*
3. CRIMINAL LIABILITY OF DEFENDANT.—Exemplary damages may be recovered in a civil action, although the act complained of may be a crime or misdemeanor, and subject the defendant to criminal prosecution therefor. *Id.*

See GENERAL RULE OF DAMAGES, 216.

FALSE REPRESENTATIONS. SALE OF REAL ESTATE, 408.

FEDERAL COURTS. DECISIONS OF STATE COURTS, 109; STATE COURTS NOT HOSTILE, 167.

FENCING. RAILROAD, 136.

FIRE INSURANCE.

1. SOLE OWNERSHIP OF PROPERTY — OUTSTANDING INTEREST — BOND FOR CONVEYANCE.—A policy of fire insurance described the property insured as "his two-story dwelling-house," etc., and it appeared that he had purchased the fee and taken a bond for a conveyance, but that the vendor had only a life estate in the property, with a remainder in six-sevenths thereof; that a suit had been instituted to perfect the title, to which the insured was a party; and that there was an outstanding purchase note, which he owned at the time of the insurance and the loss. *Held*, that the outstanding note, and the fact that the insured only held under a title bond, was not material to the risk, and that the fact of the outstanding seventh interest or remainder did not prevent him from being "the sole and unconditional owner," within the meaning of the policy. *Williams* v. *Buffalo German Ins. Co.*, 63.
2. MATERIALITY OF DEFECT IN TITLE—QUESTION FOR JURY.—In such a case the question whether the defect in the title or interest of the insured was material to the risk should have been submitted to the jury, and the peremptory instruction to the jury to find for him was error. *Id.*

GRAIN GAMBLING.

HOMESTEAD.

HUSBAND AND WIFE.

See MORTGAGE TO SECURE WIFE'S MONEY, 198.

INDIANS.

1. WHEN UNDER CHARGE OF AN AGENT.—When a tribe of Indians is placed under the charge of an Indian agent by treaty or otherwise, each member of such tribe is under the charge of such agent, within the purview of section 2139 of the Revised Statutes, and no member thereof can dissolve his tribal relation or escape from such charge by absenting himself from such reservation, or otherwise, without the consent of the United States. *United States* v. *Earl*, 75.
2. SAME.—An Indian boy in Oregon, who left the locality of his tribe and lived with a white family until his tribe had entered into treaty relations with the United States, and gone upon a reservation in pursuance of such treaty, and until he was 23 years of age, and then went to live upon such reservation as a member of his tribe, could not thereafter, by simply absenting himself from the reservation, dissolve his tribal relation or cease to be under the charge of the agent of such reservation. *Id.*
3. INTERCOURSE WITH INDIANS.—It is the duty of congress to regulate the intercourse with the Indians, and to that end they may provide for punishing the giving of spirituous liquors to them on or off a reservation within or without a state. *Id.*
4. BOND OF INDIAN AGENT—CONDITION OF.—B. was appointed agent for the Indians in Washington territory, and as such gave a bond conditioned to faithfully account for all money and property that might come into his hands, and was thereupon assigned to duty on the Umatilla reservation, in Oregon, where he acted as agent to the Indians settled thereon, under the treaty of June 9, 1855, (12 St. 945,) some of whom had previously resided in Washington territory. *Held*, (1) the condition of the bond did not include or apply to money or property not received by the obligor as agent of the Indians in Washington territory; and (2) that he was not liable on said bond for money received by him while he was acting as agent to the Indians on the Umatilla reservation. *United States* v. *Barnhart*, 597.
5. PENALTY PROVIDED IN SECTION 2148 OF THE REVISED STATUTES.—Section 2148 of the Revised Statutes, section 2 of the act of August 18, 1856, (11 St. 80,) is in legal effect a prohibition against any person who has been removed from the Indian country returning thereto, and the penalty therein provided for its violation may be enforced by indictment or information. *United States* v. *Howard*, 639.
6. REMEDY GIVEN BY SECTION 2124 OF THE REVISED STATUTES.—Section 2124 of the Revised Statutes ought to be construed as only applicable to penalties imposed by the act of June 30, 1834, (4 St. 729,) of which it is a part; but if considered applicable at all to section 2148, *supra*, as being included in title 28 of the Revised Statutes, the remedy therein provided for the enforcement of the penalty for returning to an Indian reservation is not exclusive of the common-law remedy by indictment or information, but only cumulative. *Id.*

INSOLVENCY.

1. OBTAINING CREDIT—PROMISE TO SECURE CREDITOR.—The mere fact that a borrower, at the time of procuring a loan or credit, makes an oral statement or promise that if he should become insolvent he will secure or prefer the one who gives such credit over others, will not disqualify him from giving, and the creditor from receiving, the promised favor; and a transfer of property made in pursuance of such promise will not be set aside as fraudulent, at the

LANDLORD AND TENANT.

1. LEASE—FORFEITURE—RE-ENTRY.—The right of a lessor to determine, without recourse to the courts, a lease of real estate as forfeited, and re-enter upon the premises, is a harsh power, and it is the duty of the court to restrain it to the most technical limits of the terms and conditions upon which the right is to be exercised, and a court of equity, when necessary, when this power has been exercised, will come in and afford relief. *Kansas City Elevator Co.* v. *Union Pac. Ry. Co.*, 200.
2. SAME—CONDITION PRECEDENT—TAXES AND RENTS.—Where a lease provides for re-entry upon failure to pay taxes and rents, a demand for the payment of such taxes and rents is necessary as a condition precedent to the right of re-entry. *Id.*
3. SAME—SUBLEASE.—Where a lease contains a provision that the lessee shall "not sublet, nor assign or transfer this agreement, without the written consent thereto of the superintendent" of the lessor, the lessee may either sublet or assign, with the assent of the officer named; and where, during two or three months of the term, the property was turned over to another without the assent of the lessor, by acquiescing, and failing to object for a considerable period of time, the breach of the agreement will be considered as waived by him. *Id.*
4. SAME—RECEIVER—SUPERINTENDENT.—Under such a lease, the superintendent appointed by the receiver, into whose hands the railroad company, the lessor, has passed, is to be regarded as the superintendent, and his assent to a sublease will be sufficient. *Id.*
5. SAME—POOLING ARRANGEMENTS.—When a party seeks to declare a contract forfeited by an act of his own, he must point out specifically some clear act, in violation of the terms thereof, which authorize said forfeiture, and in this case the alleged pooling arrangements on the part of the lessees are not sufficient to constitute a breach of the agreement that it "will use the premises for no other purpose than a legitimate business," and will charge only reasonable and compensatory commissions. *Id.*
6. EFFECT OF EXPRESS UPON IMPLIED COVENANTS IN A LEASE.—Where the parties to a lease of real property have expressly covenanted to repair, it seems that the express covenant takes the place of the implied covenant, and becomes the measure of the tenant's liability. *California Dry-dock Co.* v. *Armstrong*, 216.
7. RIGHT OF TENANT AGAINST TRESPASSER WHERE TENANT HAS COVENANTED TO REPAIR.—It being admitted that in a case in which the tenant has expressly covenanted to repair, such tenant has a right to maintain an action against a stranger committing waste, for injuries done to the freehold, *held*, that such right of action does not accrue in favor of a tenant until he has paid or satisfied his landlord, or repaired the premises. *Id.*
8. COMPLAINT FAILING TO STATE SATISFACTION OR REPAIRS MADE, IS DEMURRABLE.—A complaint setting forth the fact of a lease containing a covenant by the tenant to repair, and an injury to the freehold by a trespasser, (defendant in the action,) and further alleging that, by reason of the tortious act of the trespasser, the tenant (plaintiff in the action) has become, and is, absolutely liable and indebted to the landlord for the damages resulting from the trespass, viz., the necessary cost of repair, but which fails to aver that the landlord's claim has been satisfied, or that any expenditures in repair have been made by the tenant, does not state facts sufficient to constitute a cause of action. *Id.*

MARINE INSURANCE.

1. REPRESENTATIONS—REPAIRS TO VESSEL—SEAWORTHINESS—BURDEN OF PROOF. Where a vessel had put into Shelburne, Nova Scotia, leaking and in distress, and repairs were recommended after a survey, and the vessel sailed for Yarmouth for repairs, and a memorandum of insurance was effected upon the cargo before her arrival at Yarmouth, the application for the insurance containing a statement that the vessel was to be repaired at Yarmouth, *held*, in an action on the contract of insurance, that the requirement was only that such repairs as were necessary should be made, and if none were necessary none need be made; and that, although in ordinary cases the burden of proof in cases of defense of unseaworthiness of the vessel rests upon the defendant, in this case, with the statement that the vessel was to be repaired at Yarmouth, in the application, the burden rested upon the plaintiff. *Lunt* v. *Boston Marine Ins. Co.* 6 FED. REP. 562, followed. *Lunt* v. *Boston Marine Ins. Co.*, 411.
2. INSURANCE "FROM ST LOUIS TO NEW ORLEANS"—LOSS IN HARBOR.—Where goods insured "from St. Louis to New Orleans" are lost while being transported from East St. Louis to St. Louis, preparatory to a final start, by the carrier which has undertaken to transport them to New Orleans, the loss is within the terms of the policy, for the purposes of such a case, the harbor of St. Louis ought to be regarded as extending to the opposite shore. *Sun Mut. Ins. Co.* v. *Mississippi Valley Transp. Co.*, 919.
3. SAME—EVIDENCE.—In this suit the policies of insurance were not introduced in evidence, and secondary evidence in lieu thereof was admitted without objection, except in one instance, and the fact of insurance was apparently taken for granted. At the hearing in this court it was for the first time objected that the libelants were not entitled to recover because they had failed to show that the goods lost were insured. *Held* that, under the circumstances of the case, the objection should be overruled. *Id.*

MARRIED WOMEN.

See CONVEYANCE TO HUSBAND AND WIFE, 401.

MASTER.

LIEN FOR WAGES, 95.

MASTER AND SERVANT.

MINES AND MINING.

1. MEXICAN GRANT—LEGAL AND EQUITABLE TITLE.—The holder of a Mexican grant containing a quicksilver mine conveyed the mine, together with 1,000 acres of land surrounding the mine, to A., who went into possession, and he and his grantees continued in possession, working the mine for 25 years. After such conveyance the holder of the grant executed a second conveyance to B., also embracing the mine and the land before conveyed to A. The grantees of B. presented the grant for confirmation, which was duly confirmed, and a patent in due form was issued to the confirmees. *Held*, that the legal title derived under the patent would be controlled for the benefit of the grantees of A., who held the better title under the first conveyance. *Santa Clara Mining Ass'n* v. *Quicksilver Mining Co.*, 657.
2. LOCATION OF LAND INDEFINITELY DESCRIBED.—Where a mine, together with 1,000 acres of land, "around, circumjacent, and adjoining said mine," is conveyed by the owner of a larger tract, the land will be located as nearly as practicable in a square form around the mine, taking the mine as the center of the location, and the grantor, by subsequent conveyances of the larger tract in two parts to other parties, cannot affect this right of location by the prior grantee. *Id.*
3. MINING PARTNERS—TENANTS IN COMMON.—Where a mine, together with the surrounding lands, is conveyed to, and the mine is worked by, an unincorporated association of individuals in the usual mode, as in the case of mining partnerships in California, the members of the association are tenants in common of the mine and the land so held. *Id.*
4. SALE UNDER DECREE OF PROPERTY OF MINING PARTNERSHIP.—Where a bill is filed by a member of a mining partnership to wind up the affairs of the association, some of the members being omitted from the bill because of the impracticability of bringing them all before the court, and a decree is made dissolving the association, directing the mines and lands of the company to be sold, the debts to be paid, etc., and a sale of the mines and lands of the association is made in pursuance of the decree, the title to the undivided interests in the mine and lands of those not parties to the suit will not be affected by the decree and sale. *Id.*
5. LOCATOR DISPOSING OF PART.—After a mining claim has been properly located, the owner of it may sell any part without prejudice to his right to hold the remainder. He may dispose of it by gift or grant in any way that seems proper to him, and the mere fact that a part of it is transferred to another will not defeat the right of the locator to other portions which were not sold, disposed of, or surrendered. *Little Pittsburgh Consolidated Mining Co.* v. *Amie Mining Co.*, 57.
6. PREVIOUS LOCATION.—A location of a mining claim cannot be made by a discovery shaft upon another claim which has been previously located, and which is a valid location. *Id.*

See SPECIFIC PERFORMANCE OF CONTRACT OF SALE, 104.

MORAL OBLIGATION.

AGENCY—PROMISE OF COMPENSATION.—Where the owner of property is induced to believe that another, who has been trying to sell such property on specula-

NATIONAL BANKS.

NAVIGABLE STREAMS.

NEGLIGENCE.

NEGOTIABLE PAPER.

NEUTRALITY LAWS.

NEW TRIAL.

2. EXCESSIVE DAMAGES.—A new trial will not be granted on the ground of excessive damages, in an action of personal tort, unless it appear that the jury were influenced by passion, prejudice, corruption, or willful disregard of law, in assessing such damages. *Id.*

See CIRCUIT COURT, 133; EVIDENCE IN CRIMINAL CASE, 793; POWER OF CHANCERY COURT, 283.

NON-RESIDENT. SERVICE BY PUBLICATION, 873.

NORTH-WESTERN TERRITORY.

ORIGINAL ACT—EFFECT OF ADMISSION OF STATE.—The original ordinance concerning the north-western territory ceased to be of any force when congress, and a state organized out of such territory, chose to organize and admit such state into the Union. *Duluth Lumber Co.* v. *St. Louis Boom & Imp. Co.*, 419.

OFFICER OF THE UNITED STATES.

DEPUTY MARSHAL—JAILER.—A deputy marshal is an officer of the United States, within the purview of section 5398 of the Revised Statutes, and so is the keeper of a state jail to whose custody a person is committed by legal process issued by a United States court or judicial officer, with the consent of the state. *United States* v. *Martin*, 150.

PAROL EVIDENCE. WRITTEN CONTRACT, 426.

PARTNERSHIP.

1. CONTRACT FOR FUTURE PARTNERSHIP.—Where several parties agree to enter into partnership on a future day, but a part refuse to enter upon the business in pursuance of the terms agreed upon, and the partnership is never launched, whereby the others are injured, the only remedy is an action at law for the breach. *Goldsmith* v. *Sachs*, 726.
2. SAME PARTIES.—Where *seven* parties agree to enter into a partnership at a future day, the language being, "they have agreed to become partners," and four out of the seven, afterwards, jointly refuse to enter into the partnership, and thereby commit a breach, by reason of which each of the others sustains several, but no joint, damages, each party so sustaining several damages may maintain an action against the parties jointly committing the breach, without joining, either as plaintiffs or defendants, the others who have committed no breach. *Id.*
3. SAME—VOID FOR UNCERTAINTY.—Where the contract provides that "the business of the partnership shall be buying, selling, and dealing in dry goods and furnishing goods, and such other merchandise as may be convenient and profitable to all parties concerned," the description of the business is not so vague and indefinite as to render the contract void for uncertainty. *Id.*
4. SAME—DAMAGES.—Where the complaint presents a case for some damages, even if only nominal, it is not necessary, on demurrer, to determine the rule of damages. *Id.*

See BANKRUPT'S DISCHARGE, 71; DOWER, 331; EQUITY, 710; MINING, 657.

PARTITION. JURISDICTION OF CIRCUIT COURT, 466.

PASSENGERS. DUTY OF CARRIER, 671; GRATUITOUS CARRIAGE, 671.

PATENTS FOR INVENTIONS.

Foreign Patents.

1. ACT OF 1870—FOREIGN PATENTS—EXPIRATION.—Under the act of 1870 a patent takes effect from the time when it is granted, and cannot be antedated. The

meaning of section 25 of the act is that a United States patent shall expire at the same time with the foreign patent having the shortest time to run, which was granted before the United States patent was granted, and not that it shall expire at the same time with the foreign patent having the shortest time to run, which was granted before the time when the applicatinn for the United States patent was made. *Gramme Electrical Co.* v. *Arnoux & Hochhausen Electric Co.*, 838.

2. DURATION—EXPIRATION.—A capacity of being prolonged so as to have a duration of 15 years is not equivalent to having a term of 15 years, when the patent is granted for one year, and then is prolonged so as to expire at the end of 10 years. *Id.*

3. SECRET AUSTRIAN PATENT.—The question of secrecy or publicity in an Austrian patent cannot, under section 25 of the act of 1870, affect the question of the duration of the foreign patent in this country. *Id.*

4. EXPIRATION OF PATENT NO. 120,057—MAGNETO-ELECTRIC MACHINE.—As the foreign patent has expired in this case, patent No. 120,057, granted to Zenobe Theophile Gramme and Eardley Louis Charles D'Ivernois, October 17, 1871, for an improvement in magneto-electric machines, no longer continues to exist. *Id.*

5. PRIOR FOREIGN PATENT AS EVIDENCE—FOREIGN USE.—An inventor can obtain a patent in this country by proving that he is the original and first inventor in this country, and complying with the laws of this country in making his application for it; and foreign use would have no effect upon it at all, and a prior foreign patent would have no effect but to limit the term from the date. *Cornely* v. *Marckwald*, 83.

6. ACTS OF 1836, 1839, AND 1861.—Under section 8 of the act of 1836, the inventor was not entitled to a patent here if the invention had been patented in a foreign country more than six months next preceding the filing of the application; but this restriction was removed by section 6 of the act of 1839, provided the invention should not have been introduced into public and common use in the United States prior to the application, and that the patent should be limited to 14 years from the date or publication of the foreign patent; and by section 7 the public use to defeat a patent was required to extend to two years before the application; and finally, by section 16 of the act of 1861, the term was extended to 17 years, and extensions prohibited. *Id.*

7. USE IN FOREIGN COUNTRY.—A simple use of an invention in a foreign country, if not patented or described in any printed publication, is not a bar to the obtaining of a valid patent in this country. *Worswick Manuf'g Co.* v. *Steiger*, 250.

Patentability.

8. COMBINATION OF OLD ELEMENTS.—To constitute a valid combination, where the elements are old, all the component parts thereof must so enter into the combination that each qualifies the other, and a new result is produced by the combined action of all the component parts. *Clark Pomace-holder Co.* v. *Ferguson*, 79.

9. INVENTION OF NEW PLACE FOR OLD THING NOT PATENTABLE.—To authorize a patent the law requires the invention of a new thing. It is not satisfied by inventing a new place for an old thing without change of result. *Id.*

10. PATENTABILITY OF COMBIMATION OF OLD ELEMENTS.—A mere aggregation of old things is not patentable, and, in the sense of the patent law, is not a combination. In a combination the elementary parts must be so united that they will dependently co-operate and produce some new and useful result, and such result must be a product of the combination and not a mere aggregate of several results, each the complete product of the combined elements. *Wood* v. *Packer*, 650.

11. NOVELTY—RESULT.—The subject-matter of a supposed invention is new, in the sense of the patent law, when it is substantially different from what has gone before it, and this is determined by the character of the result, and not the amount of skill, ingenuity, or thought exercised; and if the result has been substantially different from what had been effected before, the invention is patentable. *Id.*

Infringement.

Sale of Patented Article.

License to Use or Sell Patent.

Practice.

PATENT FOR LAND.

PRACTICE AND PROCEDURE.

See COSTS IN EQUITY, 2; MOTION IN ARREST OF JUDGMENT, 579; NEW TRIAL, 133, 597; SERVICE OF PROCESS, 873; VERDICT, 582, 793.

PRINCIPAL AND AGENT.

FIRE INSURANCE, 630.

PROMISSORY NOTE.

CORPORATION, 130.

PROPRIETARY RIGHT.

LIEN OF GOVERNMENT FOR INTERNAL REVENUE TAX, 498.

PUBLICATION.

SERVICE BY, 873.

PUBLIC LANDS.

RAILROAD BONDS.

SALE AND DELIVERY.

See PATENTED MACHINE, 536.

SALVAGE.

granted if there had been no deposit. *Held, further*, that as every salvage award consists (1) of the *compensation* due for the labor and material actually expended by the salvor, and (2) of the *bounty* allowed for enterprise, risk, and success in the service, this latter ingredient should be larger for salvage services on the long and dangerous sea-board stretching from the Delaware capes to Key West, than on other coasts; especially in cases like the present, where the salvor went 157 miles along a dangerous coast, in rough winter weather, to the rescue of a vessel in distress. *The Mary E. Dana*, 353.

SEAMEN.

1. PERSONAL INJURIES.—A seaman cannot recover for injuries resulting from his own carelessness in executing a proper order of the master. *The Montauk*, 96.
2. PERSONAL INJURIES—MARITIME LAW.—A claim by a seaman to recover damages for personal injuries from a fall on board ship upon the high seas, through the negligence of others of the ship's company, is governed by the rules of the maritime law, rather than of the municipal law, and the analogies of the latter are not necessarily applicable to the former. *The City of Alexandria*, 390.
3. NAVIGATION OF SHIP.—The navigation of a ship constitutes one common employment, for which all the ship's company are employed. Neither the vessel nor her owners, therefore, would be liable, according to the principles of the municipal law, for injuries happening to a seaman through the negligence of any of his associates in the performance of their ordinary duties. *Id.*
4. SHIP LIABLE FOR EXPENSE OF NURSING AND MEDICAL ATTENDANCE.—By the maritime law, ancient and modern, a seaman, in case of any accident received in the service of the ship, is entitled to medical care, nursing, and attendance, and to cure, so far as cure is possible, at the expense of the ship, and to wages to the end of the voyage, and no more. *Id.*
5. EFFECT OF NEGLIGENCE.—This right of the seaman is without reference to any question of ordinary negligence of himself or his associates, and is neither increased nor diminished by the one or the other. *Id.*
6. GROSS MISCONDUCT.—The only qualification arises from the willful and gross misconduct of himself or associates, in which case the expense may be charged against the wages of the wrong-doer. *Id.*
7. CONSEQUENTIAL INJURIES.—If after the seaman is wounded the officers of the vessel neglect to furnish proper treatment, *semble*, the vessel may be held for consequential injuries. *Id.*
8. CLAIM OF EXCESSIVE DAMAGES — LIBEL DISMISSED.— Where the libelant, the cook, went down the fore-hatch in the morning before light, by the direction of the steward, and was not sufficiently notified of the half-open hatch below, and in consequence fell through and was injured, and was subsequently treated and cared for at the ship's expense, and received his wages to the end of the voyage, and thereafter filed this libel to recover $10,000 for permanent injuries, *held*, that the libel should be dismissed. *Id.*

SEAMEN'S WAGES.

1. SUIT IN ADMIRALTY—ATTACHMENT FROM STATE COURT.—The right of a seaman to sue in admiralty *in personam* for his wages is not taken away or suspended by an attachment of his wages by trustee process from a state court in an action at law. *Ross* v. *Bourne*, 14 FED. REP. 858, affirmed. *Bourne* v. *Ross*, 703.
2. WAGES OF MASTER.—The master of a vessel has no lien on the cargo of the vessel for his wages beyond the amount of the freight thereof, and where, for any reason, he does not unload the cargo, he is only entitled to a lien upon such of the freight as the vessel has actually earned, that being the freight less what it costs to unload. *The Arcturus*, 95.

SERVICE OF PROCESS.

1. SERVICE ON DEFENDANTS—PRESUMPTION—ENTRY OF JUDGMENT OR DECREE.—The entry of a judgment or decree by a court, of necessity presupposes the fact

does not arrive for several weeks after the appointed time, the only damages that can be recovered on account of the delay, when the vessel is accepted and the cattle shipped, is such expense as may have been incurred for keeping the cattle during the period of delay, and the additional insurance the shipper may have had to pay by reason of the increased risk caused thereby. *Id.*

13. DAMAGES A LIEN ON VESSEL.—Where the cattle were actually laden on board under the contract, and reference being specially made to it in the libel, and the ship has obtained the benefit of the contract, it seems that the shipper would have a lien on the vessel for such damages. *Id.*

14. STRANDING OF VESSEL — JURISDICTION — COMMON CARRIER — EXEMPTION IN BILL OF LADING FROM LIABILITY FOR NEGLIGENCE.—The British steam-ship M. was stranded in Church bay, on the coast of Wales, while on a voyage from New York to Liverpool. Insurers, who had paid losses on goods which were on board, filed libels against the owners of the steam-ship *in personam*, to recover the amount so paid by them, averring that the steamer was stranded by negligence of the master of the steamer. The bills of lading contained a clause exempting the owners of the steamer from a loss by stranding, even though caused by negligence of the master. *Held*, that the liability of the respondents must be determined by the law of the United States; that, under the case of *Railroad Co.* v. *Lockwood*, 17 Wall. 357, in the supreme court of the United States, as well as other cases in the circuit and district courts, the provison in the bills of lading exempting the ship-owners from the consequences of the negligence of the master was null and void; that the libelants were entitled by subrogation to the rights of the owners of the goods; and that the case, therefore, must be determined by the question whether there was negligence which caused the stranding. *The Montana*, 377.

15. NEGLIGENCE IN NAVIGATION—BURDEN OF PROOF—SUBROGATION OF INSURERS.—The facts on which the question of negligence turned were substantially as follows: The steamer went ashore about 2:45 A.M. in a dense fog, and the shore was not seen in time to stop the vessel. The master and his officers, who were on the bridge, averred that the fog was a fog on the land only, and that, till within a few minutes before the vessel struck, it had been a fine, clear night, and they had no idea of there being a fog. The master claimed that he had passed Tuskar light, on the coast of Ireland, the evening before, about four miles off, as usual, with a flood tide; that the vessel was kept on the usual course of N. 42 deg. E. up the channel; that he next made South Arklow light, on the coast of Ireland, which showed him that the flood tide was carrying his vessel more than usual over towards the Irish coast; that the next light to be made was the South Stack light, on the coast of Wales; that instead of making that light bearing E. N. E., he made it S. E. by E., a point forward of his vessel's beam; that he judged the flood tide had carried her so far over towards the Irish coast that she was 15 miles from that light; that he had that light in sight an hour, and then lost sight of it a point off his vessel's beam; that as the light on the Skerries (which is a light about 8 miles N. 42 deg. E. from the South Stack) was not then visible, he changed his course to E. ¾ S., and ran on that course for five minutes, when he heard a gun, which he knew to be the fog-gun on the North Stack, about two miles from the South Stack, and he thought it sounded from four to six points abaft his starboard beam, whereupon he resumed his original course of N. 42 deg. E., and 15 minutes thereafter the vessel went ashore. *Held*, that inasmuch as the bills of lading contained an exemption from loss caused by stranding, the burden was on the libelants to prove that the stranding was caused by negligence of the master; that although doubt was thrown upon the master's evidence that he had no suspicion of fog, by the fact proved that the lookouts on his vessel were doubled and the whistle blown; also upon his statement that he ran his vessel at half speed, by the evidence of the engineer in charge that the engines were run at full speed until just as the steamer struck,—still the case would be determined on the story told by the master himself; that from the place where the steamer struck it was manifest that the steamer could not have been run upon her course of E. ¾ S. for only five minutes, as the master said, for in order to do that she would have had to run over the land; that if the master did not note the time of his running on that course, directly towards a dangerous coast, under the circumstances he was guilty of gross negligence, and if he did note it, it was incum-

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STOCKHOLDERS.

1. SUIT BY—PREREQUISITES.—Before a stockholder can sue in his own name he must show to the satisfaction of the court that he has exhausted all the means within his reach to obtain within the corporation itself the redress of his grievances, or action in conformity to his wishes. *Foote* v. *Cunard Mining Co.*, 46.

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TORT.

DAMAGES FOR A TORT—LA. CIVIL CODE, 2315.—"Every act whatever of man that causes damage to another, *obliges* him through whose fault it happened to repair it." La. Civil Code, 2315. The meaning of this is that under Louisiana law the wrong done by one human being to another, or to his estate, creates an obligation; *i. e.*, brings at once into existence the relation of debtor and creditor between the wrong-doer and the injured party. This provision includes municipal corporations as among those who are subject to this obligation. *United States* v. *City of New Orleans*, 843.

TOWAGE.

1. CONTRACT—EXCEPTED PERILS.—Where the owner of a tow-boat agrees to tow a barge containing a cargo from St. Louis to New Orleans, and to deliver the barge and cargo to a consignee at the latter place, "the dangers of navigation and other known or unknown obstacles excepted," and said tow-boat ran said barge against a tree, which had recently fallen into the channel, and was entirely submerged and hidden from view, and the presence of which in the channel was unknown, and not discoverable by care and skill on the pilot's part, and said barge and cargo were greatly damaged, *held*, that the accident arose from an excepted peril, and that the owner of the tow-boat was not liable. *Hibernia Ins. Co.* v. *St. Louis & N. O. Transp. Co.*, 478.
2. TUG AND TOW—NEGLIGENCE—UNSEAWORTHY BOATS.—Where boats in a tow, by their condition and their loading, are obviously unfit to encounter the perils of a proposed trip, the owners of the tow and of the tug, both concurring in the trip, should be held liable in case of loss or damage. *The Wm. Murtagh*, 259.
3. TRIPS OF EXTRA HAZARD.—The above rule does not necessarily apply to all trips, about New York bay, of open-deck coal-barges, but only to trips under circumstances of evident hazard. *Id.*

See COLLISION, 87; DOCKAGE, 87; SALVAGE, 359.

TRADE-MARK.

1. DEFINITION.—A trade-mark consists of a word, mark, or device adopted by a manufacturer or vendor to distinguish his production from other productions of the same article. *Hostetter* v. *Fries*, 620.
2. NAME INDICATING KIND OR DESCRIPTION OF THING.—A name alone is not a trade-mark when it is understood to signify, not the particular manufacture of a certain proprietor, but the kind or description of thing which is manufactured. *Id.*
3. MARK DESCRIPTIVE OF QUALITY OR STYLE.—Anything descriptive of the properties, style, or quality of an article merely, is open to all. *Wilcox & Gibbs Sewing-machine Co.* v. *The Gibbens Frame*, 623.
4. NAME OF NEW ARTICLE—RIGHT TO USE OF.—When a new article is made, a name must be given to it, and this name becomes, by common acceptation, the appropriate descriptive term by which it is known, and therefore becomes public property, so that all who have the right to manufacture and sell the preparation have the right to designate and sell it by the name by which alone it is known, provided care is observed to sell the preparation as the manufacture of the seller, and not the preparation made by another. *Hostetter* v. *Fries*, 620.
5. FORM OR SHAPE OF PATENTED MACHINE—EXPIRATION OF PATENT.—While no one has the right to make and sell his own wares as the wares of another, every one has the right to make and sell any wares not protected by patents; and a manufacturer of a patented article, after the expiration of the patent, has a right to represent that it was made according to the patent, and to use the name of the patentee for that purpose. *Wilcox & Gibbs Sewing-machine Co.* v. *The Gibbens Frame*, 623.

VENDOR AND VENDEE.

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