"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes in the circuit and district courts, shall conform as near as may be to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

The purpose of this provision, as was said in *Nudd* v. *Burrows*, 91 U. S. 426, 441, was to bring about uniformity in the law of procedure in the federal and state courts of the same locality, having reference to the Code enactments of many of the states; yet, as was said in *Indianapolis & St. L. R. Co.* v. *Horst*, 93 U. S. 291, 300, "the conformity is required to be" as near as may be, "not as near as may be possible, or as near as may be practicable. This indefiniteness may have been suggested by a purpose; it devolved upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as congress doubtless expected they would do, any subordinate provisions in such state statutes which, in their judgment, would unwisely incumber the administration of the law, or tend to defeat the ends of justice, in their tribunals. While the act of congress is to a large extent mandatory, it is also to some extent only directory and advisory." The act of congress, at any rate, does not require the adoption, with the local statutes, of the local interpretation which may have been put upon them, or which may from time to time be enforced. It must be held that the body of the local law thus adopted in the general must be construed in the courts of the United States in the light of their own system of jurisprudence, as defined by their own constitution as tribunals, and of other acts of congress on the same subject. It can hardly be supposed that it was the intent of this legislation to place the courts of the United States in each state, in reference to their own practice and procedure, upon the footing merely of subordinate state courts, required to look from time to time to the supreme court of the state for authoritative rules for their guidance in those details. To do so would be, in many cases, to trench in important particulars, not easy to foresee, upon substantial rights, protected by the peculiar constitution of the federal judiciary, and which might seriously affect, in cases easily supposed, the proper correlation and independence of the two systems of federal and state judicial tribunals. This is illustrated in the very case now under consideration, and in reference to attachments in general, as to which section 915, Rev. St., makes special provision. It enacts as follows:

"In common-law causes in the circuit and district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held for the courts thereof; and such circuit or district courts may from time to time, by general rules, adopt such state laws as may be in force in the states where they are held, in relation to attachment and other process; provided, that similar preliminary affidavits or proofs, and sim-

ilar security, as required by such state law, shall be first furnished by the party seeking such attachment or other remedy."

It is to be noted, in respect to this enactment, in the first place, that although its terms cover the case of a foreign attachment, properly so called, being process *in rem* against the goods and lands of a non-resident or absconding debtor, yet no such process can, in fact, issue, unless the defendant can be personally served with summons in the district in which the suit is brought; for by section 739, Rev. St., no suit can be brought against an inhabitant of the United States in any other district than that of which he is an inhabitant or in which he is found at the time of serving the writ, except in the case of absent defendants, under section 738, when suit is brought to enforce a lien upon real or personal property, and the cases specified in sections 740, 741, and 742, when defendants reside in separate districts, though in the same state, or the suit is of a local nature, and the subject, or the subject and the defendant, are in different districts contained in the same state. The attachment proceeding, therefore, in the courts of the United States has altogether a different character from that proceeding *in rem* in common use in the states, the object of which is either to enforce the appearance of the absent defendant or to subject his property to the payment of his debts. In the federal courts there must be jurisdiction over the person of the defendant and of a subject-matter, independent of the proceeding in attachment, and without which no attachment can be effectual. Everything pertaining to the attachment, therefore, arises and occurs in the course and progress of a pending suit, and is mere matter of procedure in the exercise of a jurisdiction otherwise acquired. Any irregularity, omission, or defect, therefore, in that proceeding is mere error, and does not and cannot affect the jurisdiction of the court; for that is acquired over his person by process served upon the defendant, and over his property attached by the actual seizure under the writ of attachment.

In the next place, it is to be observed that the federal courts are expressly authorized by this section to exercise their discretion in adopting any state legislation on the subject passed after the date of the Revised Statutes. It would seem to be a paradox if, nevertheless, they were bound by judicial interpretations, which, perchance, it may be the very object of subsequent legislation to annul. And, finally, it must be observed that the procedure in attachment contemplated by section 915, although adopted from the states, becomes by adoption incorporated into the system of pleading and practice of the courts of the United States, and must be construed as affected by other parts of the same system, and subject to any general and positive provisions which properly apply to and govern it. Among such provisions is that contained in section 948, Rev. St., which provides that "any circuit or district court may at any time, in its discretion and upon such terms as it may deem just, allow an

amendment of any process returnable to or before it, when the defect has not prejudiced, and the amendment will not injure, the party against whom such process issues." That this power of amendment would extend to the affidavit, as well as to the writ which is based on it, we have already seen from *Tilton* v. *Cofield*, 93 U. S. 163, and no reason can be assigned why it should not apply in cases of attachment. It is not a sufficient reason that the courts of Michigan do not so apply a similar statutory provision for amendments, because the reasons on which these courts proceed do not apply to attachment suits in the courts of the United States. Those reasons are that the act of 1839 was a special statute of amendment, covering the case, and has been repealed, and that the affidavit in attachment, in the view of those courts, is a matter of jurisdiction and not of procedure. The power to amend conferred by section 948 is unconditional and positive, and cannot be limited by arbitrary qualifications. It applies, beyond doubt, to the distinctive and special proceedings in attachment authorized in favor of the United States against defaulting and delinquent post-masters, contractors, and other officers, agents, and employes of the post-office, as regulated by section 924, Rev. St. at Large. It would be a curious anomaly if it should not be held to apply in other cases of attachment under section 915. There seems to be no sufficient reason for making any difference between them. It is not necessary to say that the power to permit amendments in such cases is to be exercised according to the sound discretion of the court to whom the application is addressed; and it is not open to the observation that it will be authorized in any cases or circumstances except in those where right and justice require it. It results from these views that the leave heretofore granted to amend as prayed for is confirmed, and the motion to quash the writ of attachment is overruled.

WALLACE *v.* THAMES & MERSEY INS. CO. (TWO CASES.)

CUNNINGHAM *v.* MECHANICS' & TRADERS' INS. CO.

WALLACE *v.* BRITISH AMERICAN ASSUR. CO.

(*Circuit Court, E. D. Michigan.* 1884.)

1. MARINE INSURANCE—ABANDONMENT OF VESSEL.
   The right of abandonment does not depend on the high probability of a total loss either of the property or of the voyage, or both. The insured is to act, not upon certainties, but upon probabilities; and if the facts present a case of extreme hazard, and of probable expense exceeding half the value of the ship, the insured may abandon, though it should happen that she was afterwards recovered at a less expense.